JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

9 September 2010 *

In Case T-319/05,

Swiss Confederation, represented by S. Hirsbrunner, U. Soltész and P. Melcher, lawyers,

applicant,

v

European Commission, represented by F. Benyon, M. Huttunen and M. Niejahr, acting as Agents,

defendant,

supported by

* Language of the case: German.

Federal Republic of Germany, represented by C.-D. Quassowski and A. Tiemann, acting as Agents, and by T. Masing, lawyer,

and by

Landkreis Waldshut, represented by M. Núñez-Müller, lawyer,

interveners,

ACTION for annulment of Commission Decision 2004/12/EC of 5 December 2003 on a procedure relating to the application of Article 18(2), first sentence, of the Agreement between the European Community and the Swiss Confederation on Air Transport and Council Regulation (EEC) No 2408/92 (Case TREN/AMA/11/03 — German measures relating to the approaches to Zurich airport) (OJ 2004 L 4, p. 13),

THE GENERAL COURT (Fifth Chamber),

composed of M. Vilaras, President, M. Prek and V.M. Ciucă (Rapporteur), Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 9 September 2009,

gives the following

Judgment

Legal context

Agreement between the European Community and the Swiss Confederation on Air Transport

1 Articles 1 to 3, 17, 18, 20 and 21 of the Agreement between the European Community and the Swiss Confederation on Air Transport, signed in Luxembourg on 21 June 1999 (OJ 2002 L 114, p. 73) ('the Agreement'), 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), provide as follows:

'CHAPTER 1

Objectives

Article 1

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. In so far 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 [the Swiss Confederation]. 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.

Article 2

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.

CHAPTER 2

General provisions

Article 3

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

…

CHAPTER 4

Enforcement of the Agreement

Article 17

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

Article 18

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 Council Regulation (EEC) 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.

…

Article 20

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.

CHAPTER 5

Joint Committee

Article 21

1. A committee composed of representatives of the Contracting Parties, to be known as the "Community/Switzerland Air Transport Committee" (hereinafter referred to as the Joint Committee), is hereby established which shall be responsible for the administration of this Agreement and shall ensure its proper implementation. For this purpose it shall make recommendations and take decisions in the cases provided for in this Agreement. The decisions of the Joint Committee shall be put into effect by the Contracting Parties in accordance with their own rules. The Joint Committee shall act by mutual agreement.

…'

2 The annex to the Agreement states, inter alia, that, 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.

3 That annex refers to, inter alia, 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).

Regulation No 2408/92

4 Articles 2, 3, 8 and 9 of Regulation No 2408/92 provide:

'*Article 2*

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;

…

Article 3

1. 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.

…

Article 8

...

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.

...

Article 9

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 [of] 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.

...'

Directive 2002/30/EC

5 According to recital 7 in the preamble to Directive 2002/30/EC of the European Parliament and of the Council of 26 March 2002 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports (OJ 2002 L 85, p. 40):

'A common framework of rules and procedures for the introduction of operating restrictions at Community airports, as part of a balanced approach on noise management, will help safeguard internal market requirements by introducing similar operating restrictions at airports with broadly comparable noise problems. This includes

assessment of the noise impact at an airport and evaluation of the measures available to alleviate that impact, and selection of the appropriate mitigation measures with the goal of achieving the maximum environmental benefit most cost effectively.'

6 Articles 2 and 4 of Directive 2002/30 provide:

'*Article 2*

Definitions

For the purpose of this Directive:

…

(g) "Balanced approach" shall mean an approach under which Member States shall consider the available measures to address the noise problem at an airport in their territory, namely the foreseeable effect of a reduction of aircraft noise at source, land-use planning and management, noise abatement operational procedures and operating restrictions.

…

Article 4

General rules on aircraft noise management

1. Member States shall adopt a balanced approach in dealing with noise problems at airports in their territory. They may also consider economic incentives as a noise management measure.

…'

Background to the dispute

7 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.

8 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. The Federal Republic of Germany and the Swiss Confederation subsequently signed a new agreement on 18 October 2001, which has not, however, been ratified. In Switzerland, the Nationalrat (National Council) voted against ratification on 19 June 2002, while the Ständerat (Council of States) sent the text back to the transport commission on 12 December 2002. In Germany, the Bundestag (lower house of Parliament) approved the new bilateral agreement on 17 May 2002, but the Bundesrat (upper house of Parliament) opposed it on 12 July 2002. As of 5 December 2003, that bilateral agreement had still not been ratified.

9 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'). The 213th Regulation set out a number of limitations governing the approach to Zurich airport as of 18 January 2003.

10 On 4 April 2003, the German federal aviation authorities published the first regulation amending the 213th Regulation. That amendment came into force on 17 April 2003.

11 The German measures 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.

12 In addition, the 213th Regulation contained two other measures designed to reduce noise pollution in the vicinity of the border between Germany and Switzerland.

13 First, with regard to the eastern approach to the airport, the second indent of Paragraph 2(6) of the 213th Regulation laid down minimum altitudes to be maintained during the aforementioned periods.

14 Secondly, Paragraph 3 of the 213th Regulation 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.

15 On 10 June 2003, the Swiss Confederation submitted to the Commission of the European Communities a request that it take a decision ('the complaint') to the effect that:

— the Federal Republic of Germany could not continue to apply the 213th Regulation, as amended by the first amending regulation of 4 April 2003,

— the Federal Republic of Germany was required to suspend the application of the 213th Regulation until the Commission had adopted a decision.

16 On 26 June 2003, the German and Swiss authorities reached agreement on a number of issues concerning the implementation of the 213th Regulation ('the agreement of 26 June 2003').

17 Under the agreement of 26 June 2003, the Federal Republic of Germany agreed to suspend, until 30 October 2003, implementation of the provisions of the first regulation amending the 213th Regulation which were to come into force on 10 July 2003. It stated that amendments to the agreement of 26 June 2003 were possible when weather conditions for allowing landings on runways 14 and 16 were reviewed. Moreover, the Federal Republic of Germany stated that it would be abolishing the waiting procedures EKRIT and SAFFA. For its part, the Swiss Confederation undertook to create corresponding waiting procedures before February 2005.

18 On 20 June 2003, the Commission requested the German authorities to comment on the complaint. By letter of the same day, the Commission requested the Swiss authorities to provide additional information. By letter of 30 June 2003, the Federal Republic of Germany notified the Commission of the agreement of 26 June 2003. The Federal Republic of Germany stated in that letter that it inferred from the agreement of 26 June 2003 that the complaint was void and that it expected the Commission to terminate the procedure which had been initiated. On 27 June 2003, the Swiss authorities also notified the Commission of the agreement of 26 June 2003 but stated that it did not affect the complaint.

19 By letter of 4 July 2003, the Swiss Confederation announced that it was collecting the additional information requested by the Commission and that it was evaluating the impact of the agreement of 26 June 2003 on the request for interim measures made in its complaint. On 14 July 2003, the Commission asked the Swiss authorities to state whether alterations could be made to the complaint in view of the fact that the measures on the basis of which the Swiss Confederation had justified the request for interim measures had been suspended until 30 October 2003. On 24 July 2003,

the Swiss authorities provided additional information in response to the Commission's request of 20 June 2003. They also pointed out that they wished to maintain the request for interim measures. The Commission requested further complementary information by letter of 12 August 2003, and this information was provided by letter of 17 September 2003.

20 On 16 July 2003, the Commission wrote to the German authorities, informing them that the Swiss Confederation wished to maintain the complaint, and renewing the request for comments on the Swiss authorities' allegations. By letter of 28 August 2003, the German authorities submitted the requested comments. On 6 October 2003, the German authorities also submitted their comments on the Swiss authorities' letter of 17 September 2003 and notified the second regulation amending the 213th Regulation.

21 A statement of objections was sent to the Swiss and German authorities for their observations on 14 October 2003. The Federal Republic of Germany submitted its observations on 20 October 2003 and maintained its reservation as to the applicability of Regulation No 2408/92. The Swiss Confederation responded on 21 October 2003 with observations on the statement of objections as well as on the letter of the German authorities of 28 August 2003.

22 On 27 October 2003, the Commission transmitted, by letter, 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)' held on 4 November 2003.

The contested decision

23 On 5 December 2003, the Commission adopted Decision 2004/12/EC on a procedure relating to the application of Article 18(2), first sentence, of the Agreement between the European Community and the Swiss Confederation on Air Transport and Council Regulation (EEC) No 2408/92 (Case TREN/AMA/11/03 — German measures relating to the approaches to Zurich airport) (OJ 2004 L 4, p. 13) ('the contested decision'), the operative part of which reads as follows:

'*Article 1*

[The Federal Republic of] Germany may continue to apply the 213th Regulation … as amended by the first amending regulation of 4 [April] 2003.

Article 2

This Decision is addressed to the Federal Republic of Germany.'

24 In the statement of reasons for the contested decision, the Commission finds, first of all, that, according to Article 18(2) of the Agreement, the Commission enjoys the powers conferred on it under Articles 8 and 9 of Regulation No 2408/92. Given the scope of the Agreement, those powers are, however, limited to the exercise of traffic rights between the Swiss Confederation and the Community, to the exclusion of flights within the Community and within Switzerland, as well as flights between Switzerland and non-member countries and between the Community and non-member countries.

25 The Commission then states that it has already applied Article 8 several times in respect of situations entirely within the Community and that it has examined whether those situations are in keeping with, first, the general principles on the freedom to provide services, namely the principles of non-discrimination and proportionality, and, secondly, the other provisions of Community law. It states in that regard that, in order for measures which constitute restrictions on the freedom to provide services to be authorised under Regulation No 2408/92, they must be justified and, in particular, proportionate to the purpose for which they were adopted.

26 The Commission states that, in the absence of clarification of the legal basis of the complaint, it will examine the German measures in the light of, inter alia, Article 8(2) to (4) and Article 9 of Regulation No 2408/92. It points out that the 213th Regulation is a published national operational rule relating to safety and to protection of the environment and that, as such, it comes within the scope of Article 8(2) of Regulation No 2408/92. The Commission adds that application of Article 8(2) to (4) of Regulation No 2408/92 must be seen within the context of the scope and purpose of the Agreement and Regulation No 2408/92. This has the consequence that the powers conferred on the Commission in Article 8(3) of Regulation No 2408/92 are limited to measures which affect the air carrier's operations, that is to say, in 'cases which may affect air services', within the meaning of Article 18(2) of the Agreement.

27 The Commission goes on to state that, according to Article 9(3) of Regulation No 2408/92, a Member State may implement an action under paragraph 1 of that article only if no other Member State concerned or the Commission has contested that action within one month of receipt of the notification thereof from the first Member State. Such notification must take place at least three months prior to the entry into force of the proposed action. Since the German authorities did not make any notification, the Commission concludes that it cannot apply Article 9 for the purpose of examining the German operational rules. Consequently, the Commission

indicates that it will therefore examine the German measures on the basis of Article 8(2) and (3) of Regulation No 2408/92.

28 The Commission states that, by virtue of Article 3 of the Agreement, the principle of non-discrimination is clearly applicable to the present case.

29 In that regard, the Commission notes that the operation of hub-and-spoke networks has become widespread among air carriers. The hub-and-spoke system allows them to achieve a comprehensive coverage of the air transport market by providing services between any two airports served from the hub airport without supporting the investments required by direct services. Air carriers which use a given airport as a hub usually have a very high traffic share at that airport. As a consequence, in the Commission's view, any restriction is bound automatically to affect the dominant carrier of the airport more than its competitors. This in itself does not appear to amount to discrimination.

30 The Commission reaches the same conclusion with regard to indirect discrimination. In order for indirect discrimination to exist, the German measures would have to affect, among the flights coming within the scope of the Agreement, that is to say, only those between the Community and Switzerland, predominantly the flights operated by Swiss air carriers. That would clearly not be the case in so far as flights during the hours covered by the German measures are concerned, since Swiss carriers and Community carriers are affected in exact proportion to their share of flights coming within the scope of the Agreement, because all flights between the Community and Switzerland are affected equally irrespective of the nationality of the carrier. Therefore, the German measures cannot be considered discriminatory.

31 Even if one were to suppose that there was potential discrimination between Zurich airport and German airports, or between the population in the Swiss areas concerned and the population in the German areas concerned, that discrimination would fall outside the scope of the analysis which the Commission is required to perform in the present case.

32 Moreover, the Commission notes that, unlike the principle of non-discrimination, the principle of proportionality is not specifically mentioned in the Agreement. According to the Commission, the Agreement merely provides for an exchange of traffic rights, with the effect that freedom to provide services, within the meaning of Articles 49 EC and 51 EC, does not exist under the Agreement. However, given the application of the principle of proportionality in previous cases and the ambiguous nature of the provisions of the Agreement, the Commission examines the principle of proportionality as a subsidiary point in order to determine whether the German measures would be in breach of it, if it were applicable.

33 The Commission begins its analysis in that regard by pointing out that the principle of proportionality is not a criterion which it is bound to use within the context of the Agreement and that the judgment of the Court of Justice in Case C-361/98 *Italy* v *Commission* [2001] ECR I-385 ('the *Malpensa* judgment') was not notified to and considered within the Community/Switzerland Air Transport Committee ('the Joint Committee'), provided for in Article 21(1) of the Agreement, and cannot therefore provide any guidance for the interpretation of the Agreement.

34 The Commission takes the view that the German measures are not disproportionate. The protracted negotiations between the Federal Republic of Germany and the Swiss Confederation provide proof that measures are indeed necessary, although the Swiss Confederation argues that noise levels in Germany do not exceed valid noise limits. Member States are in principle free to take measures to lower noise levels below these limits depending on local circumstances. The Commission also points out that the

German area overflown by planes approaching Zurich is an important tourist destination and as such particularly vulnerable to noise emissions.

35 The Commission adds that the Federal Republic of Germany does not have any authority over Zurich airport, since it is on Swiss territory. Only the Swiss Confederation has the authority to impose such measures, including the installation of the necessary equipment. The Commission states that one of the purposes of the negotiations between the Federal Republic of Germany and the Swiss Confederation was to ensure that the latter would take the appropriate measures within its powers, which it had not done during the previous 20 years.

36 The Commission takes issue with the Swiss Confederation's assertion that the capacity of Zurich airport has been significantly reduced from the maximum number of movements prior to the application of the German measures. However, even without the German measures, the system used for flights between 21.00 and 07.00 would have only an average capacity of 25 landings and take-offs. The Commission takes the view that the impact, if any, would be limited to three hours on weekends and public holidays.

37 With regard to the existence of less onerous measures to achieve the desired noise reduction, the Commission states that the Federal Republic of Germany did not have any other means at its disposal.

38 In the light of the information available to it, the Commission concludes that, even if the principle of proportionality were applicable in the present context, which it considers not to be the case, that principle was not infringed by the German measures at issue.

39 As far as compliance of those measures with the other provisions of the Agreement is concerned, the Commission states that it does not have the power to address potential breaches of the Agreement outside the confines of the first sentence of Article 18(2) of the Agreement.

40 The Commission adds that the Swiss Confederation's allegation that the 213th Regulation infringes Article 17 of the Agreement is ineffective inasmuch as the Federal Republic of Germany is not a contracting party to the Agreement and is therefore not covered by that provision.

41 Furthermore, the Commission considers that the argument concerning Directive 2002/30 is also irrelevant. Since that directive was adopted after the Agreement had been concluded, the Joint Committee would have had to express its opinion on it, in accordance with Article 23 of the Agreement, in order for it to apply for the purposes of the latter. This has not yet been done, contrary to what the Swiss Confederation asserts in its letter of 21 October 2003. However, even if it had been incorporated into the Agreement, the Commission emphasises that, according to Article 4 of Directive 2002/30, Member States are required to adopt a balanced approach in dealing with noise problems at airports in their territory.

Procedure and forms of order sought

42 By application lodged at the Registry of the Court of Justice on 13 February 2004 and registered as Case C-70/04, the Swiss Confederation brought the present action.

43 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.

44 By order of 14 July 2005 in Case C-70/04 *Switzerland* v *Commission*, not published in the ECR, the Court of Justice referred that case to the General Court. In that order, the Court of Justice stated in paragraph 21 that, even if the Swiss Confederation were to be treated in the same way as the Member States, the fact remained that actions brought by Member States against a Commission decision now came at first instance within the jurisdiction of the General Court in the case of actions referred to in Article 230 EC which, within the terms of Article 225 EC, are not assigned to a judicial panel and are also no longer reserved to the Court of Justice pursuant to Article 51 of its Statute, as amended by Council Decision 2004/407/EC, Euratom of 26 April 2004 amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice (OJ 2004 L 132, p. 5, and corrigendum at OJ 2004 L 194, p. 3).

45 The Court of Justice added in paragraph 22 that, if the Swiss Confederation were to be treated, in particular in the light of the specific context of the Agreement, not as a Member State, but as a legal person, as provided for in the fourth paragraph of Article 230 EC, the action would also come at first instance within the jurisdiction of the General Court under the conditions laid down by that Treaty provision and, therefore, should be referred to the General Court pursuant to the second paragraph of Article 54 of the Statute of the Court of Justice.

46 In those circumstances, the Court of Justice decided that, in any event, the action was to be brought at first instance before the General Court pursuant to either Decision 2004/407 or the second paragraph of Article 54 of the Statute of the Court of Justice.

47 By order of 7 July 2006, the present Court granted Landkreis Waldshut leave to intervene in support of the form of order sought by the Commission. Landkreis Waldshut is the area of Germany situated near the Swiss border over which aircraft approaching Zurich airport fly and which the German measures forming the subject-matter of the contested decision seek to protect against noise pollution.

48 Following a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Fifth Chamber, to which the present case was, consequently, allocated.

49 On hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure. The parties presented oral argument and replied to the questions put by the Court at the hearing on 9 September 2009.

50 The Swiss Confederation claims that the Court should:

— declare the contested decision null and void;

— order the Commission and Landkreis Waldshut to pay the costs.

51 The Commission contends that the Court should:

— dismiss the application;

— order the Swiss Confederation to pay the costs.

52 The Federal Republic of Germany claims that the Court should dismiss the action.

53 Landkreis Waldshut claims that the Court should:

— dismiss the application;

— order the Swiss Confederation to pay the costs, including its extrajudicial costs.

Law

54 First of all, it must be pointed out that, in its statement in intervention, Landkreis Waldshut asked the Court to consider, of its own motion, whether the action was admissible and to declare it inadmissible on the ground, inter alia, that the Swiss Confederation cannot be treated in the same way as a Member State of the Community and that it is also not directly and individually concerned by the contested decision.

55 However, given the circumstances of the present case, it is not necessary to rule on the admissibility of the present action since it must in any event be dismissed as unfounded (see, to that effect, Case C-23/00 P *Council* v *Boehringer* [2002] ECR I-1873, paragraph 52, and Case C-233/02 *France* v *Commission* [2004] ECR I-2759, paragraph 26).

56 It must be pointed out in that regard that the Swiss Confederation relies, essentially, on three pleas in law in support of its action. The first alleges an infringement of its rights of defence. The second alleges a breach of Article 9 of Regulation No 2408/92. The third alleges, first, an infringement of the principles of equal treatment, proportionality and freedom to provide services in the air transport sector and, secondly, a breach of the obligation of genuine cooperation laid down in Article 17 of the Agreement.

The first plea in law: infringement of the Swiss Confederation's rights of defence

Arguments of the parties

57 The Swiss Confederation argues that the Commission infringed its right to be heard prior to the adoption of the contested decision inasmuch as it was given only five working days in which to submit its observations on the statement of objections addressed to the Federal Republic of Germany. It was not possible, within that short period, for the Swiss Confederation to make a detailed examination of the Commission's arguments and to defend effectively its point of view. Moreover, the Swiss Confederation, in its observations on the statement of objections, invoked an infringement of its rights of defence. That the Swiss Confederation was given such a short period of time within which to submit its observations on the statement of objections is all the more incomprehensible in the light of the fact that the Commission manifestly did not consider the matter to be particularly urgent.

58 The Commission and the interveners refute the arguments put forward by the Swiss Confederation.

Findings of the Court

59 It must be pointed out that the Swiss Confederation is the author of the complaint which gave rise to the statement of objections and, subsequently, to the contested decision, and that that decision is addressed, not to it, but to the Federal Republic of Germany.

60 Even if one were to assume that, solely because it is the author of the complaint in question, the Swiss Confederation could claim a right to be heard on the statement of objections, the fact remains that, in the circumstances of the present case, that right was not infringed.

61 It is true that the period of five working days which the Commission gave the Swiss Confederation within which to submit its observations seems relatively short.

62 The fact remains, however, that the Swiss Confederation was able, before that period expired, to submit observations on the statement of objections running to 11 pages, accompanied by a second statement of 13 pages, containing its observations on the German authorities' letter of 28 August 2003, referred to in paragraph 20 above.

63 It is true that, in the introduction to its observations on the statement of objections, the Swiss Confederation alleges that the Commission infringed its rights of defence on the ground that the Commission provided it with too short a period. It added that it was unable to address all the questions raised by the statement of objections but that it would limit itself to certain matters which were of crucial importance to it.

64 In its action, however, the Swiss Confederation merely referred, in a general manner, to an infringement of its rights of defence, without identifying any issue which had not been raised in its observations on the statement of objections by reason of the brevity of the period fixed for submission of those observations.

65 In addition, it must be pointed out that the Swiss Confederation also had an opportunity to present its point of view on the statement of objections at the meeting of the Advisory Committee on 'market access (air transport)' held on 4 November 2003.

66 Finally, there is nothing in the case-file to suggest, and, indeed, the Swiss Confederation does not claim, that it asked the Commission to extend the period in question.

67 Under those circumstances, the present plea must be rejected.

The second plea in law: breach of Article 9 of Regulation No 2408/92

Arguments of the parties

68 The Swiss Confederation argues that, in the contested decision, the Commission took the view that the German measures at issue had to be examined only from the point

of view of compliance with Article 8(2) and (3) of Regulation No 2408/92. It therefore excluded application of Article 9(3) of that regulation on the ground that the German authorities had not informed it of the implementation of those measures.

69 The Swiss Confederation argues, however, that, to the extent to which the Commission makes application of Article 9 of Regulation No 2408/92 dependent on notification by a State of the measures which it has adopted, it permits that State to choose, itself, the criteria by which its conduct is to be assessed. Moreover, it is apparent from recital 12 in the preamble to the contested decision that, in the present case, the Federal Republic of Germany, contrary to what is stated in recital 32 in the preamble to that decision, notified the Commission of the second regulation amending the 213th Regulation.

70 The Swiss Confederation takes the view that Article 9 of Regulation No 2408/92 constitutes a *lex specialis* vis-à-vis Article 8 of that regulation. In its opinion, the German measures at issue definitely come within the scope of Article 9 inasmuch as they constitute a deliberate restriction on the possibility of approaching Zurich airport via German airspace and in practice, therefore, are equivalent to a limitation of traffic rights.

71 The conditions laid down in Article 9(1) and (2) of Regulation No 2408/92 for the adoption of such measures are, it argues, not met and, furthermore, the Federal Republic of Germany failed to comply with the procedure laid down in Article 9(3) for notification of the measures which it had adopted. In addition, the measures in question have a disproportionate effect on the Swiss national airline 'Swiss' and thus amount to discrimination to its detriment. Consequently, in so far as it provides that the Federal Republic of Germany can continue to apply the measures in question, the contested decision was adopted in breach of Article 9 of Regulation No 2408/92.

72 In its reply, the Swiss Confederation adds that, instead of defending the proposition underlying the contested decision, namely that Article 9 of Regulation No 2408/92 does not apply to the German measures at issue by reason of the fact that the German authorities did not notify those measures, the Commission puts forward a different proposition, namely that that provision applies only to restrictions which are designed to resolve serious problems affecting not only conditions governing market access. According to the Swiss Confederation, this is a new ground which did not appear in the contested decision. However, grounds different from those put forward in the contested decision may not be substituted in the course of the proceedings. Furthermore, such substitution of grounds demonstrates that the grounds put forward in the contested decision were inadequate to justify the non-application of Article 9 of Regulation No 2408/92 to the German measures at issue.

73 The Commission and the interveners take issue with the Swiss Confederation's arguments.

Findings of the Court

74 It must be recalled that, as provided for in Article 8(2) of Regulation No 2408/92, the exercise of traffic rights, within the meaning of Article 2(f) of that regulation, is subject to, inter alia, national operational rules relating to safety, the protection of the environment and the allocation of slots. According to Article 8(3) of Regulation No 2408/92, the Commission is required to examine, on its own initiative or at the request of a Member State, the application of, inter alia, paragraph 2 of that article in regard to a specific measure applied by a Member State and to decide whether the Member State may continue to apply that measure.

75 Article 9 of Regulation No 2408/92 covers a more specific category of operational rules applicable to the exercise of the traffic rights specified above, namely, according to Article 9(1), operational rules which impose conditions on, limit or refuse the exercise of traffic rights. It follows from that definition of the measures covered by Article 9 of Regulation No 2408/92 that these contain, essentially, a prohibition of the exercise of traffic rights which is at least conditional or partial.

76 Thus, as the Swiss Confederation correctly points out, Article 9 of Regulation No 2408/92 constitutes a *lex specialis* vis-à-vis Article 8 of that regulation in the sense that Article 9 covers only part of the measures covered by Article 8 and makes application of the measures concerned subject to additional conditions, not laid down in Article 8.

77 The measures covered by Article 9(1) of Regulation No 2408/92 may be applied by a Member State only if the conditions laid down in paragraphs 1 and 2 of that article are met and if, in addition, the Member State in question fulfils its obligation, laid down in Article 9(3), to inform the other Member States and the Commission, at least three months before the application of the measures, of the need to apply those measures.

78 It is only in the case where the Member State which intends to apply the measures at issue provides such information to the other Member States and the Commission that Article 9(4) of Regulation No 2408/92 becomes applicable. That provision provides for examination by the Commission, on its own initiative or at the request of another Member State, as to whether the measures in question comply both with Regulation No 2408/92 and, more generally, with Community law.

79 By contrast, in the absence of such information, the measures in question cannot be applied by the State concerned even if the conditions governing their adoption laid down in Article 9(1) and (2) are met.

80 If the Member State concerned none the less applies such measures, the Commission is entitled to examine them, not under Article 9(4) of Regulation No 2408/92, the conditions for the application of which are not met, but under Article 8(3) of that regulation. As has been pointed out in paragraph 76 above, since the measures covered by Article 9 of Regulation No 2408/92 constitute a specific category of the measures covered by Article 8(2) of that regulation, the latter article is also applicable to them.

81 It must also be pointed out that where a Member State applies measures covered by Article 9(1) of Regulation No 2408/92 without following the procedure laid down in Article 9(3) thereof, examination of those measures under Article 8(3) of Regulation No 2408/92 can lead only to the conclusion that the Member State concerned cannot continue to apply them (see paragraph 80 above).

82 First, it must be stated that the measures which are the subject of the contested decision were not notified to the Commission. Furthermore, it follows from Article 1 of the contested decision that the Federal Republic of Germany may continue to apply the 213th Regulation, as amended by the first amending regulation of 4 April 2003, and that that decision in no way covers the second regulation amending the 213th Regulation, dated 1 October 2003.

83 It follows that, although the notification to the Commission of this second amending regulation by the Federal Republic of Germany, referred to in recital 12 in the preamble to the contested decision, had the purpose of informing the Commission, within the meaning of Article 9(3) of Regulation No 2408/92, that application of that

second regulation was necessary, that cannot bring into question the finding, in recital 32 in the preamble to the contested decision, that the measures which were the subject of that decision, that is to say, the 213th Regulation, as amended by the first amending regulation, had not been notified to the Commission pursuant to Article 9 of Regulation No 2408/92.

84 With regard to the Swiss Confederation's allegation that new grounds were substituted in the course of the proceedings for those in the contested decision and that such substitution, in its view, demonstrates that the grounds put forward in the contested decision were inadequate (see paragraph 72 above), suffice it to note that, as follows from the foregoing considerations, the finding in the contested decision that the German measures at issue were not notified under Article 9(3) of Regulation No 2408/92 is an adequate statement of reasons justifying non-examination of those measures under Article 9(4). Furthermore, the explanations put forward in the Commission's statement of defence concerning the nature of the measures coming within the scope of that article are intended merely to address the allegation to that effect set out in the application and do not therefore amount to a substitution of the grounds of the decision made in the course of the proceedings.

85 Secondly, it is necessary to reject the Swiss Confederation's argument that the Commission erred in law in not concluding that the German measures at issue came within the category of measures covered by Article 9(1) of Regulation No 2408/92 and that, consequently, the Federal Republic of Germany could not continue to apply them, inasmuch as the procedure laid down in Article 9(3) had not been followed.

86 As is clear from a combined reading of recitals 1 to 6 and 44 in the preamble to the contested decision, the German measures at issue in no way involve, during their period of application, any prohibition of passage through German airspace for flights leaving or arriving at Zurich airport.

87 Essentially, those measures are limited to preventing, during the period of their application, low-altitude overflight of that part of German territory close to the Swiss border (recital 6 in the preamble to the contested decision), while overflight of that territory at a higher altitude still remains possible. Essentially, therefore, they involve, as the Commission pointed out in recital 44 in the preamble to the contested decision, without being challenged by the Swiss Confederation, a mere change in the flight path of the flights concerned after take-off from or prior to landing at Zurich airport.

88 Even though those measures may lead to a reduction in capacity at Zurich airport and could therefore be regarded as restrictions, they do not, contrary to what the Swiss Confederation asserts, come within the scope of Article 9(1) of Regulation No 2408/92. As has already been pointed out (see paragraph 75 above), the measures concerned by that latter provision are characterised by the fact that they involve a prohibition of flights, even if only conditional or partial.

89 It must be stated in that regard that, if a State insists on compliance with its published national, regional or local operational rules, in particular those relating to protection of the environment, in order to authorise the exercise of traffic rights within the meaning of Regulation No 2408/92, that does not amount to the imposition of a condition, within the terms of Article 9(1) of that regulation, governing the exercise of those rights. If that were the case, Article 8(2) of the regulation would be rendered completely meaningless. The conditions referred to in Article 9(1) of Regulation No 2408/92 are, rather, those which make the exercise of traffic rights dependent on circumstances other than mere compliance with published national, regional or local operational rules. Thus, the requirement that evidence be provided that a proposed new route will be commercially viable or that there are no other satisfactory modes of transport available for that route constitute examples of conditions which are liable to come within the scope of Article 9(1) of Regulation No 2408/92.

90 Consequently, the Commission did not commit any error of law in taking the view that the German measures at issue did not come within the scope of Article 9(1) of Regulation No 2408/92.

91 It follows that the present plea is unfounded and must be rejected.

The third plea in law: first, infringement of the principles of equal treatment, proportionality and freedom to provide services in the air transport sector and, secondly, breach of the obligation of genuine cooperation laid down in Article 17 of the Agreement

Arguments of the parties

92 First, the Swiss Confederation complains that the Commission is in breach of the principle of equal treatment. It claims first, in that regard, that the Commission was wrong to take the view, in recital 40 in the preamble to the contested decision, that a hypothetical discrimination against Zurich airport or against those who live near it is outside the scope of the Agreement. The interests of Zurich airport and of those who live near it constitute, according to the Swiss Confederation, 'matters directly related' to air transport and therefore come within the scope of the Agreement, according to Article 2 thereof. Furthermore, the role of the Commission in the enforcement of the Agreement is not limited to exercising the powers flowing from Article 18(2) thereof. According to Article 18(1), the Commission is responsible in Community territory for the enforcement of the Agreement.

93 The Swiss Confederation adds that the adoption, on the basis of Regulation No 2408/92, of a measure designed to ensure access to the air transport market requires that account be taken not only of the interests of airlines but also of the rights and interests of other groups affected by that measure. The fact that the Commission itself justifies the German measures at issue by reference to the interests of the tourist sector in the German region adjoining Zurich airport confirms that argument.

94 According to the Swiss Confederation, it follows that the Commission ought to have made a comparison between the German measures at issue concerning Zurich airport and those adopted by the Federal Republic of Germany in regard to its own airports, particularly those in Munich (Germany) and Frankfurt am Main (Germany), all the more so as free access to an airport is an indispensable condition for implementation of the traffic rights of airlines.

95 Such a comparison, it argues, would show that the measures adopted by the Federal Republic of Germany in regard to Zurich airport were much more restrictive than those adopted in regard to German airports, in particular those in Munich and Frankfurt am Main. Indeed, adoption of similar measures in regard to German airports would be prohibited by German law.

96 Secondly, the Swiss Confederation challenges the conclusion in the contested decision that the German measures at issue do not give rise to indirect discrimination against the Swiss airline company 'Swiss'. It argues, in this connection, that the German measures at issue work to the disadvantage, principally and in a disproportionate fashion, of that airline, which, as the contested decision acknowledges, uses Zurich airport as the hub of its hub-and-spoke network. The fact that no similar measure was adopted in regard to Munich and Frankfurt am Main airports, which are used by the

German airline Lufthansa as hubs of its own hub-and-spoke network, confirms the discriminatory nature of the measures at issue.

97 Thirdly, the Swiss Confederation challenges the finding in the contested decision (recital 42) that the German noise impact measures at issue are necessary to protect an important tourist destination. It argues, in that regard, that the mere fact that it negotiated with the Federal Republic of Germany does not prove that the measures at issue were legally necessary. The Swiss Confederation states that it took part in those negotiations for political, not legal, reasons.

98 In addition, the Commission did not verify whether the noise impact in the area of German territory concerned by the measures at issue was so serious as to justify the adoption of such measures. The Swiss Confederation argues that it had produced, in support of its complaint, detailed calculations made by the Swiss Federal Laboratory for Materials Science and Technology (EMPA) which prove the contrary. It also pointed out in the complaint that most of the flights above the area concerned by the German measures at issue are landings, with engines at reduced power, which diminishes the noise impact. Moreover, those flights cross the area in question at a relatively high altitude. The final landing approach begins only over the Rhine border between Germany and Switzerland at an altitude of approximately 800 metres.

99 Furthermore, the contested decision overlooks the fact that the noise level in the German territory concerned by the measures at issue is already below the Swiss limits, which are more stringent than the corresponding German limits. In addition, certain minimum flight altitudes imposed by the German measures at issue are in no way justified as measures of protection against noise since flights at much lower altitudes do not cause any noise.

100 The Swiss Confederation adds that, when the German measures at issue were examined, the Commission ought to have been guided by Directive 2002/30. That directive not merely refers to Regulation No 2408/92, but it also reflects a political consensus concerning a balanced approach to the management of aircraft noise.

101 The Swiss Confederation challenges, in that regard, the reasons stated in recital 53 in the preamble to the contested decision to justify the failure to take Directive 2002/30 into account. On 3 December 2003, the Joint Committee adopted a decision to integrate, in principle, that directive into the annex to the Agreement. It is true that Directive 2002/30 still has to be transposed into national law. However, by virtue of the obligation of genuine cooperation flowing from Article 17 of the Agreement, the Commission, as the representative of the Community, should have taken account of that directive, which, according to recital 7 in the preamble thereto, gives priority to noise mitigation measures which achieve the maximum environmental benefit at the lowest cost. That is not the case with regard to the German measures at issue, which generate very high costs and, in addition, lead to a decline in the environmental situation in the areas of Switzerland adjoining Zurich airport, while the improvement provided by the measures in the situation in the German border area is minimal.

102 The claim in the contested decision that Article 4(1) of Directive 2002/30 requires Member States to adopt a balanced approach in dealing with noise problems only at airports in their territory also cannot be accepted. According to the Swiss Confederation, it is justified, in a European law perspective, to require a Member State to adopt the same approach when it adopts measures concerning an airport located in another Member State.

103 The Swiss Confederation adds that the statement in the contested decision that the area concerned by the German measures at issue is an important tourist destination is too general. In reality, only a few German border communities are overflown by aircraft leaving or arriving at Zurich airport and, even then, at high altitude. In addition,

the German tourist sector in the region concerned derives significant benefit from the proximity of Zurich airport. Furthermore, the German measures at issue involve much more serious consequences for several Swiss communities, some of which have a substantial population, located near Zurich airport.

104 Secondly, the Swiss Confederation challenges the conclusion drawn in the contested decision (recital 43) that the German measures at issue are not disproportionate. The Swiss Confederation argues in that regard that, although the Commission states that the Federal Republic of Germany could not adopt a less radical measure, it is in breach of its obligation to state reasons by failing to set out the other measures which it considered.

105 The Swiss Confederation adds that there are measures other than the German measures at issue, such as, inter alia, a noise quota which must not be exceeded by aircraft when overflying the German territory concerned during certain time periods. Such a noise quota during night hours was imposed from summer 2002 for Frankfurt am Main airport.

106 The statement in the contested decision that the Federal Republic of Germany has no authority over Zurich airport is irrelevant in that regard. By the measures at issue, the Federal Republic of Germany is attempting to impose a reorganisation of its operational system on that airport and has taken unto itself precisely such authority. The statement that the Swiss Confederation has failed to take appropriate measures over the last 20 years is both irrelevant and incorrect. The fact of the matter is that the Swiss Confederation has always permitted the German communities and their inhabitants to take part in inquiries concerning amendments to the airport operating licence.

107 Furthermore, the contested decision incorrectly minimises the impact of the German measures at issue on the capacity of Zurich airport. On the one hand, the contested decision overlooks the fact that significant reasons relating to the topography of the airport make it necessary for landings to be made from the north. Since that is no longer possible during the period when the German measures at issue are in application, the capacity of the airport is thereby substantially reduced, with the result that there are still bottlenecks hindering the smooth flow of landings scheduled between 06.00 and 06.30 in the morning, after 21.00 and after 08.30 on public holidays.

108 On the other hand, with regard to both the landing and take-off capacity of Zurich airport, the decision erroneously takes account of the maximum capacity, which is a merely theoretical figure. According to the Swiss Confederation, the contested decision ought to have taken account of the foreseeable capacity, which is always less than the maximum possible capacity. If that capacity is taken into account for take-offs, it will be seen that, between 07.00 and 08.00 and between 20.00 and 21.00 at weekends, more take-offs are scheduled than the capacity of Zurich airport permits, that capacity being reduced by reason of the application of the German measures at issue.

109 The contested decision erroneously concludes that the installation of new landing systems would increase the capacity of Zurich airport. Installing such systems would merely permit the implementation of modified approach procedures, including in cases of reduced visibility, but would not have any meaningful impact on the operational capacity of the airport. With regard to the finding in the contested decision (recital 47) that there is significant capacity available in the hours preceding and following the period of application of the German measures at issue, the Swiss Confederation argues that that finding fails to take account of the constraints to which airlines and the airport are subject. Those constraints require that the waves of landings and take-offs be optimised and prevent flights being rescheduled to times outside the busy periods.

110 The Swiss Confederation adds that the contested decision wrongly analyses the situation in regard to capacity solely on the basis of the flight plans of the airline 'Swiss'. Such an approach, it argues, fails to take account of the fact that the German measures at issue force Zurich airport to adopt a much less efficient method of operating, with negative practical effects on the airport's capacity to deal with exceptional circumstances, such as unfavourable weather conditions or the beginning of the holiday season, on the one hand, and, more generally, with probable future increases in air traffic, on the other.

111 Thirdly, the Swiss Confederation claims that the Commission erred in law in failing to take account of the fact that the negative effects of the German measures at issue on Zurich airport and the airline 'Swiss' constitute a restriction on the freedom to provide services in the air transport sector.

112 In that regard, the Swiss Confederation challenges the Commission's argument, set out in recital 35(b) in the preamble to the contested decision, that the Swiss Confederation is not participating in the internal market for air services and that 'currently the Agreement merely provides for an exchange of traffic rights' between Switzerland and the Community. That argument, it is submitted, contradicts the impression given to the Swiss Confederation during the negotiations which led to the conclusion of the Agreement. It also fails to take account of the fact that the Agreement pursues the same objectives as the EC Treaty and the European Economic Area (EEA) Agreement. Moreover, as follows from the *Malpensa* judgment, cited in paragraph 33 above, Regulation No 2408/92 definitively introduces the freedom to provide services in the air transport sector.

113 In that regard, the Swiss Confederation challenges the Commission's argument, also set out in recital 35(b) in the preamble to the contested decision, that the *Malpensa* judgment, cited in paragraph 33 above, cannot be taken into account inasmuch as it was handed down after the Agreement had been concluded and was neither communicated to the Swiss Confederation nor examined by the Joint Committee,

as provided for in Article 1(2) of the Agreement. According to the Swiss Confederation, the failure to communicate that judgment does not exclude its being taken into account, a fortiori as the omission was on the part of the Commission itself. Furthermore, the contested decision is contradictory on that point inasmuch as, on the one hand, it invokes the *Malpensa* judgment, cited in paragraph 33 above, in support of the argument that the principle of proportionality can be implemented only in conjunction with the freedom to provide services and, on the other hand, it states that that judgment cannot be taken into account.

114 Finally, the Swiss Confederation points out that, in its complaint rejected by the contested decision, it had complained that the Federal Republic of Germany was in breach of the obligation of genuine cooperation laid down in Article 17 of the Agreement. That obligation has the same scope as the one flowing from Article 10 EC, and the case-law relating to that latter article is also relevant. By refusing, in the contested decision, to take account of the Federal Republic of Germany's obligation in that regard, the Commission infringed the principle of good faith.

115 The fact that the Community alone is party to the Agreement does not prevent the latter from also producing effects in regard to the Federal Republic of Germany. By virtue of Article 300(7) EC, the Federal Republic of Germany is bound by the Agreement and must, according to the case-law, ensure compliance with the obligations which flow from it.

116 The non-ratification of the agreement between the Federal Republic of Germany and the Swiss Confederation, signed on 18 October 2001, cannot justify adoption of the German measures at issue. The agreement in question is not the fruit of free negotiations but of pressure put on the Swiss Confederation by the Federal Republic of Germany. Furthermore, the German measures at issue go not merely beyond what was provided for in the said bilateral agreement but also beyond the unilateral measures which the Federal Republic of Germany threatened to adopt if negotiations with the

Swiss Confederation failed. In addition, the Federal Republic of Germany did not give the Swiss Confederation sufficient time to adapt to the new German measures.

117 The Commission, supported by the interveners, takes issue with the Swiss Confederation's arguments.

Findings of the Court

— The Commission's failure to take account of the rights of the operator of Zurich airport and of the rights of persons living near the airport

118 The Swiss Confederation complains that the Commission did not take account, when examining the German measures at issue under Article 8(3) of Regulation No 2408/92, of the rights of the operator of Zurich airport, on the one hand, and of those of persons living near the airport who are exposed to aircraft noise, on the other.

119 In that regard, it must be recalled that, according to Article 3(1) of Regulation No 2408/92, Community air carriers are to be permitted by the Member State or States concerned to exercise traffic rights within the meaning of Article 2(f) of that regulation on routes within the Community.

120 However, as is stated in the 14th recital in the preamble to Regulation No 2408/92, 'the exercise of traffic rights has to be consistent with operational rules relating to safety, protection of the environment and conditions concerning airport access and has to be treated without discrimination'.

121 Thus, the legislature, on the one hand, provided, in Article 8(2) of Regulation No 2408/92, that the exercise of traffic rights was subject to Community, national, regional or local operational rules relating to safety, the protection of the environment and the allocation of slots and, on the other hand, authorised the Commission to examine, under Article 8(3) of that regulation, the application of, inter alia, paragraph 2 thereof and to decide whether the Member State concerned could continue to apply the measure under consideration.

122 It follows from the foregoing provisions and considerations that, as the Commission points out, essentially, in recital 40 in the preamble to the contested decision, examination of a measure under Article 8(3) of Regulation No 2408/92 deals with its implications for the exercise of traffic rights on routes within the Community. However, any rights which airport operators or persons living near airports may have cannot be taken into account in such an examination.

123 The Commission thus did not err in law by not taking account of any rights which the operator of Zurich airport or persons living near Zurich airport who are exposed to aircraft noise might have when it examined the German measures at issue under Article 8(3) of Regulation No 2408/92.

124 The Swiss Confederation's other arguments cannot cast doubt on that conclusion.

125 First, with regard to the Swiss Confederation's argument derived from Article 2 of the Agreement, it must be recalled that, according to that article, the provisions, inter alia, of the annex to that agreement apply to the extent that they concern air transport or matters directly related to air transport.

126 As is clear from its wording and, more particularly, from the expression 'to the extent that they concern' used therein, Article 2 of the Agreement delimits the scope of the provisions set out in the annex to the Agreement by excluding the application of those provisions to cases which do not concern air transport or matters directly related to air transport. It follows that neither the purpose nor effect of that article is to extend the application of the provisions in question to situations which do not come within their scope.

127 With regard, more particularly, to Regulation No 2408/92, the only extension of its scope in the context of the Agreement is that resulting from the assimilation, pursuant to the annex to the Agreement, of the Swiss Confederation and air carriers having their principal centre of activities in Switzerland to the Member States of the Community and Community air carriers respectively.

128 Subject to that extension of its scope, Regulation No 2408/92 does not apply, in the context of the Agreement, to situations to which it would not apply in a Community context.

129 It follows that, even though the rights of airport operators or persons living near airports constitute purposes directly related to air transport, as the Swiss Confederation claims, neither Article 2 nor any other provision of the Agreement permits the Commission to take account of such rights when applying Article 8(3) of Regulation No 2408/92 in the context of the Agreement.

130 Secondly, the Swiss Confederation's argument based on Article 18(1) of the Agreement also cannot succeed.

131 That provision merely provides that the Community, as a contracting party to the Agreement, is responsible for proper enforcement of the Agreement in its own territory, which includes German territory. It therefore does not confer on the Commission any additional power not provided for in the regulations and directives listed in the annex to the Agreement or, where appropriate, by another provision of Community law.

132 It follows that Article 18(1) of the Agreement is entirely irrelevant to the present case.

— Infringement of the principle of equal treatment

133 The Swiss Confederation complains that, in the contested decision, the Commission infringed the principle of equal treatment.

134 The Swiss Confederation's argument alleging an infringement of the principle of equal treatment in regard to the Swiss population living near Zurich airport and to the airport operator must be rejected from the outset. As was pointed out in paragraph 127 above, the Commission was not required to take account of such interests in its examination of the German measures at issue.

135 With regard to the Swiss Confederation's argument alleging discrimination to the detriment of Swiss carriers, including the airline company 'Swiss', it must be pointed out that, in the light of Article 3 of the Agreement, the contested decision correctly stated, in recital 35(a), that the prohibition of discrimination is 'clearly applicable' when a measure is being examined under Article 8(3) of Regulation No 2408/92 in the context of the Agreement and that, consequently, the German measures at issue had to examined from that angle.

136 In the framework of that examination, the Commission first found, correctly, that the German measures at issue did not make any distinction on the basis of the nationality or identity of carriers (recital 36 in the preamble to the contested decision). The Swiss Confederation does not dispute that finding.

137 In recitals 37 to 39 in the preamble to the contested decision, the Commission also examined whether there might have been indirect discrimination against Swiss carriers. In that context, it accepted, in recital 38, that the operation of hub-and-spoke networks had become widespread among air carriers. Those networks are based on hub airports which are almost always located in the State where the carriers have their principal place of business. The role of the hub airports in the hub-and-spoke networks of the carrier in question is to serve as a connection point, permitting the carrier to provide indirect flights between all the airports served from the hub airport, with a change of plane at the hub airport. That carrier is thus able to extend its network of flights without supporting the investments required by direct services.

138 In the same recital in the preamble to the contested decision, the Commission also accepted that carriers which use an airport as the hub of their hub-and-spoke network usually have, for that reason, a very high share of the take-offs and landings at that airport and that, as a consequence, any restriction of operations at that airport is bound to affect that carrier much more significantly than its competitors. However, in

the Commission's view, that difference in treatment does not, as such, constitute discrimination because, if that were the case, any restriction would automatically have to be considered discriminatory, and the ability of Member States to impose operational rules in the sense of Article 8(2) of Regulation No 2408/92 would be negated.

139 According to the Commission (recital 39 in the preamble to the contested decision), the German measures at issue could constitute indirect discrimination only if they affected solely or predominantly the flights operated by Swiss carriers. The Commission took the view that that was not the case as Swiss and Community carriers were affected by those measures in exact proportion to the number of flights which they operated between Switzerland and the Community.

140 It must be pointed out in that regard that, according to settled case-law concerning the principle of prohibition of any discrimination on grounds of nationality within the scope of application of Community law, the rules relating to equality of treatment between nationals and non-nationals forbid not only overt discrimination on grounds of nationality or, in the case of a company, its headquarters, but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead, in fact, to the same result (Case C-330/91 *Commerzbank* [1993] ECR I-4017, paragraph 14; Case C-224/00 *Commission* v *Italy* [2002] ECR I-2965, paragraph 15; and Case C-115/08 *ČEZ* [2009] ECR I-10265, paragraph 92).

141 In the light of Article 1(2) of the Agreement, that case-law is also relevant to the application of Regulation No 2408/92 in the context of the Agreement, since Article 3 of the Agreement is essentially identical to the first paragraph of Article 12 EC.

142 In the present case, the Swiss Confederation argues, essentially, that the Federal Republic of Germany has applied different treatment to Zurich airport, and thereby to the airline company 'Swiss', which uses it as the hub of its hub-and-spoke network, from that applied to German airports, in particular, Munich and Frankfurt am Main, which are used by the German airline Lufthansa as hubs for its hub-and-spoke network.

143 It is certainly true that such a difference in treatment, even if proved, would not be directly based on the nationality or the headquarters of the carriers concerned. However, it could, in fact, lead to the same result inasmuch as, as stated in the contested decision, Swiss carriers, such as 'Swiss', normally use airports located in Switzerland, and, in particular, Zurich airport, as the hubs of their hub-and-spoke networks and that, consequently, any restrictions on flights to or from that airport will affect those carriers much more than airlines using another airport as the hub of their hub-and-spoke network.

144 It follows, in the light of the case-law mentioned in paragraph 140 above, that the matters set out in recitals 38 and 39 in the preamble to the contested decision are not in themselves sufficient to exclude the possibility that the German measures at issue are discriminatory in regard to Swiss carriers and, in particular, the carrier 'Swiss'.

145 It must, however, be borne in mind that, according to that same case-law, the finding that a measure in fact leads to the same result as discrimination on grounds of nationality does not suffice for a conclusion that it is incompatible with Article 12 EC or, in the present case, with Article 3 of the Agreement. It is further necessary to ascertain whether that measure is justified by objective considerations and whether it is proportionate to the objective being pursued. It is only if that is not the case that the measure at issue must be regarded as being prohibited by Article 12 EC or, in the

present case, by Article 3 of the Agreement (see, to that effect, *Commission* v *Italy*, cited in paragraph 140 above, paragraph 20, and *ČEZ*, cited in paragraph 140 above, paragraph 108 and the case-law cited).

146 In the present case, with regard, first, to the possible existence of an objective justification for the adoption of the measures at issue in regard solely to Zurich airport, it must be recalled that, according to recital 42 in the preamble to the contested decision, 'the German area overflown by planes approaching Zurich is an important tourist destination and as such particularly vulnerable to noise emissions'.

147 The Swiss Confederation challenges that claim, arguing that the number of inhabitants likely to be affected by aircraft noise in the area concerned is not very high. However, even if that were the case, that fact would in no way cast doubt on the tourist nature of the German area concerned.

148 The same is true of the Swiss Confederation's argument that the German tourist sector in the region bordering Zurich airport derives substantial benefit from that airport.

149 That argument in fact confirms the tourist nature of the area of German territory concerned by the measures at issue. Moreover, it is sufficient to point out that the Federal Republic of Germany is entitled to adopt the measures which it considers necessary in order to reduce noise pollution.

150 It must be stated, therefore, that the proximity of Zurich airport to a tourist area, referred to in recital 42 in the preamble to the contested decision and not called into question by the Swiss Confederation's arguments, constitutes an objective consideration within the meaning of the case-law cited in paragraph 145 above which justifies the adoption of the German measures at issue in regard solely to Zurich airport.

151 It does not appear from the case-file, and the Swiss Confederation has not claimed, that Munich and Frankfurt am Main airports are also situated close to important tourist areas.

152 It must also be pointed out that, unlike the situation in regard to Munich and Frankfurt am Main airports, the Federal Republic of Germany has no authority over Zurich airport and cannot impose any modification of its method of operation on it for the purpose of reducing noise above German territory. That difference, referred to in recital 43 in the preamble to the contested decision, constitutes a second objective consideration capable of justifying the adoption of the measures at issue in regard solely to Zurich airport.

153 It follows from all the foregoing that, in the present case, as is clear from the contested decision, there are objective considerations, within the meaning of the case-law referred to in paragraph 145 above, which justify the adoption of the German measures at issue.

154 Secondly, according to that same case-law, it is necessary to consider whether the measures in question are proportionate to the objective which they pursue, namely a reduction in the impact of aircraft noise in that part of German territory to which they apply. The Commission addressed that question in recitals 41 to 49 in the preamble to the contested decision and concluded that that was indeed the case.

155 That conclusion is challenged by the Swiss Confederation, which argues, first, that the level of aircraft noise in the area covered by the German measures at issue does not justify the adoption of those measures.

156 However, the EMPA report, on which the Swiss Confederation relies in support of that part of its argument (see paragraph 98 above), does not in any way show that noise is not a problem in the region of Germany adjoining Zurich airport. On the contrary, it is clear from that report that the level of aircraft noise in that region can vary from 45 dB at points relatively far from the airport to 70 dB at the closest points. Such noise levels could indeed constitute a problem in a tourist area, particularly during the night and at weekends, during which the German measures at issue apply.

157 With regard to the Swiss Confederation's argument that the level of aircraft noise in the relevant part of German territory does not exceed the noise limits, the contested decision correctly pointed out, in recital 42, that those limits are maximum acceptable thresholds, not comfort levels, and that, consequently, Member States are free to take measures to lower noise levels below these limits, in particular with regard, as in the present case, to a tourist area.

158 The Swiss Confederation's argument that certain minimum altitudes imposed by the German measures at issue are too high and that the fixing of lower altitudes would not increase noise levels in the relevant German area must be rejected inasmuch as the Swiss Confederation has neither specified the lower altitudes which could have been fixed nor, even less, claimed that such a reduction in minimum flight altitudes would have a positive influence on landing or take-off capacity at Zurich airport.

159 The Swiss Confederation's argument derived from Directive 2002/30 also cannot succeed. It must be stated in that regard that the Swiss Confederation has specified neither the provisions of that directive which ought to have been applied to the present case nor what the result of such application would have been. It must be pointed out in that regard that Directive 2002/30 does not fix noise levels which must be compulsorily tolerated, just as it does not prohibit the adoption of measures such as those adopted by the Federal Republic of Germany in the present case.

160 In addition, as is rightly pointed out in recital 53 in the preamble to the contested decision, Article 4 of Directive 2002/30 requires Member States to adopt a 'balanced approach' only in dealing with noise problems at airports in their territory.

161 In that regard, the Swiss Confederation's argument that such an approach must also be adopted when Member States are dealing with those problems at airports outside their territory cannot succeed. It is clear from the definition of the expression 'balanced approach' in Article 2(g) of Directive 2002/30 that that approach requires consideration of the 'foreseeable effect', inter alia, of measures relating to 'land-use planning and management, noise abatement operational procedures and operating restrictions'. Those are measures which a Member State can impose only in respect of its own territory.

162 The Swiss Confederation further argues that there are less onerous measures which would allow the Federal Republic of Germany to attain the objective pursued by the measures at issue, namely a reduction of aircraft noise in the area of German territory in question.

163 It must be pointed out, at the outset, that the statement in recital 49 in the preamble to the contested decision that the Federal Republic of Germany did not have any other means at its disposal to obtain the desired noise reduction must be read in conjunction with recital 43. In the latter recital, the Commission states, essentially, that the other means of reducing noise over German territory, such as, in particular, a different utilisation of Zurich airport, are matters within the competence of the Swiss authorities and could not be adopted by the Federal Republic of Germany.

164 Before the Court, the Swiss Confederation mentioned only one replacement measure, namely the fixing of a noise quota. Such a measure, while less onerous, would, it submits, permit the Federal Republic of Germany to attain the same objective as the measures at issue, namely a reduction of aircraft noise at night and during weekends, in a part of German territory bordering Switzerland.

165 It must, in that regard, be pointed out, first, that, at the hearing, the Swiss Confederation claimed that it had already raised that measure during the administrative procedure, without, however, referring to any specific document in the case-file in support of that claim. By contrast, the Commission stated that the idea of a noise quota had not been discussed during the administrative procedure. Moreover, the Court has been unable to find any reference to such a measure either in the complaint or in the Swiss Confederation's observations in reply to the statement of objections, which are in the case-file.

166 Under those circumstances, since the Swiss Confederation's assertion that it mentioned the fixing of a noise quota as a possible replacement measure is not supported by any evidence, it cannot be held that the Commission infringed its obligation to give

reasons by failing to set out specifically, in the contested decision, the reasons why such a measure could not validly replace the German measures at issue.

167 With regard, next, to consideration of whether the Swiss Confederation's argument based on the possibility of fixing a noise quota in order to attain the same objective as the measures at issue is well founded, it must be pointed out that, at the hearing, the Commission and the interveners explained that a noise quota is the maximum amount of noise which must not be exceeded by the average noise produced by all aircraft using a given airport. That average noise is calculated on the basis of the noise levels registered during a specified period, most frequently on an annual basis.

168 According to the Commission and the interveners, it follows that the fixing of a noise quota would not make it possible to attain the same objective as the German measures at issue, namely a reduction of aircraft noise in a part of German territory at night and during weekends, inasmuch as it cannot be ruled out that, when the average noise level is calculated for the purpose of verifying compliance with the quota laid down, any excessive noise registered at night or during weekends will be compensated for by lower levels registered at other times or on other days.

169 The Swiss Confederation replied, at the hearing, that there was nothing to prevent a noise quota from being fixed for specific times or days, in the present case, the hours of darkness and weekends.

170 That argument cannot, however, succeed.

171 First, the Swiss Confederation has not pointed to any precedent for a noise quota covering only certain hours of the day or certain days of the week which functioned satisfactorily in practice.

172 Secondly, it must be pointed out that fixing a noise quota only for nights and weekends is not necessarily less onerous than the German measures at issue, all the more so as the Swiss Confederation has in no respect specified what the level of that quota could be.

173 If a very low figure was fixed for that quota, such a measure would, in practice, lead to the same result as the German measures at issue, that is to say, it would make it impossible for aircraft departing from or arriving at Zurich airport to overfly German territory at low altitude.

174 Thirdly, unlike the fixing of minimum flight altitudes, compliance with which could easily be verified by the competent air traffic control authorities, verification of compliance with a noise quota such as that proposed by the Swiss Confederation appears to be very difficult, if not impossible.

175 The German authorities could not merely lay down such a quota, but would also have to establish a system of verification, with regular measurements of the level of aircraft noise over the German territory concerned.

176 Moreover, since the measures imposed by the Federal Republic of Germany could be applied only while the aircraft were overflying German territory, it would be

necessary to distinguish, when measuring noise levels, between noise produced by aircraft which, at the time of the measurement, were over German territory and the noise produced by aircraft which had already crossed the border with Switzerland. Such a distinction appears impossible, or at the very least, extremely difficult.

177 Fourth, and finally, even if one were to suppose that it was possible to carry out the measurements necessary to verify compliance with a noise quota, it is hard to imagine what sanctions the Federal Republic of Germany could impose in order to ensure compliance with that quota.

178 If an aircraft infringes the minimum flight altitudes laid down by the German measures at issue, the air traffic control authorities can immediately intervene to ensure compliance with those measures.

179 On the other hand, if compliance with a noise quota is verified during a specific period, most often a year, any exceeding of the quota would be registered only *ex post facto* and could not, by definition, be attributed to any specific aircraft or airline. It is therefore impossible for the Federal Republic of Germany to impose sanctions, such as a fine, on those who have exceeded the quota.

180 Compliance with such a quota can, in reality, be ensured only in cooperation with the airport concerned, which can make the necessary changes to the take-off and landing plan so as to reduce the average noise level below the quota. In the present case, as the Commission rightly pointed out in recital 43 in the preamble to the contested

decision, the Federal Republic of Germany has no authority over Zurich airport and cannot impose such cooperation on it.

181 In the light of all the foregoing considerations, it must be held that the contested decision correctly concluded that the proportionality of the German measures at issue are not amenable to challenge since the Federal Republic of Germany had no other means at its disposal to obtain the desired reduction in noise levels.

182 Finally, the Swiss Confederation's argument that the contested decision incorrectly minimises the impact of the German measures at issue on Zurich airport also cannot be accepted.

183 As has been pointed out above, since the Federal Republic of Germany could not adopt any measure other than the measures at issue in order to attain the objective of reducing noise, any reduction in the capacity of Zurich airport following the adoption of those measures could not, of itself, be sufficient to lead to the conclusion that the measures are disproportionate.

184 The measures would be disproportionate only if there was major inconvenience to Zurich airport, such as a significant reduction in its capacity, leading to permanent cancellation of flights.

185 However, it must be stated that the Swiss Confederation did not allege, much less prove, the existence or even the possibility of any such major inconvenience.

186 Except for general statements concerning the difference between the maximum possible capacity and the foreseeable capacity of Zurich airport and the importance of optimisation of the waves of landings and take-offs, the Swiss Confederation referred only to landing and take-off bottlenecks at Zurich airport during short periods of the day. However, such bottlenecks, annoying as they may be for the passengers and the airlines concerned, cannot be regarded as major inconveniences.

187 With regard to the Swiss Confederation's claim that the contested decision referred incorrectly to the flight plan of the Swiss airline company 'Swiss', it must be pointed out that, on the one hand, in recital 46 in the preamble to the contested decision, the Commission referred in a general way to the summer 2003 and winter 2003/04 timetables, which included all flights from or to Zurich airport, and not just those operated by 'Swiss'.

188 On the other hand, it must be pointed out that the Swiss Confederation has produced no evidence, such as a list of the flights which had to be cancelled as a result of the application of the German measures at issue, to challenge the conclusion in recital 47 in the preamble to the contested decision that, having regard to the timetables referred to in recital 46, any possible impact of the German measures at issue would be limited.

189 It follows that the Swiss Confederation's argument based on the impact of the German measures at issue on the capacity of Zurich airport must be rejected. It must therefore be concluded that the contested decision was correct in finding that those measures did not infringe the principle of proportionality.

190 Since it thus follows from the foregoing that the German measures at issue are justified by objective considerations and are proportionate to the objective which they pursue, the necessary conclusion, in the light of the case-law referred to in paragraphs 140 and 145 above, is that they do not discriminate against Swiss air carriers and in particular the airline 'Swiss'.

191 Moreover, even supposing that, contrary to what was stated in paragraph 123 above, the Commission ought also to have taken account, in its analysis of the German measures at issue, of the rights of persons living near airports and airport operators and, in particular, the rights of persons living near Zurich airport and of the company which operates that airport, it must be concluded, for the same reasons, that the measures in question also do not discriminate against those persons.

192 It follows that the contested decision was correct in finding that the German measures at issue did not infringe the principle of equal treatment laid down in Article 3 of the Agreement.

— Infringement of the principle of freedom to provide services in the air transport sector

193 It must be recalled that the Swiss Confederation claims that the contested decision is vitiated by an error of law inasmuch as it stated, in recital 35(b), that the freedom to provide services '[did] not exist' in the framework of the Agreement and that that decision therefore refused to take account of the fact that the German measures at issue involved restrictions on the freedom to provide services in the air transport sector.

194 It must, however, be recalled that the stated objective of the German measures at issue is the reduction of noise levels in a tourist area of Germany, which is a specific aspect of environmental protection.

195 According to settled case-law, environmental protection is one of the overriding reasons in the public interest capable of justifying restrictions on the fundamental freedoms guaranteed by the EC Treaty, including, inter alia, the freedom to provide services (see, to that effect, Case 302/86 *Commission* v *Denmark* [1988] ECR 4607, paragraph 9, and Case C-309/02 *Radlberger Getränkegesellschaft and S. Spitz* [2004] ECR I-11763, paragraph 75).

196 It is true that, irrespective of the existence of a legitimate objective, a restriction on the fundamental freedoms enshrined in the EC Treaty may be justified only if the measure in question is appropriate for ensuring the attainment of the objective in question and does not go beyond what is necessary to attain that objective (see Case C-527/06 *Renneberg* [2008] ECR I-7735, paragraph 81 and the case-law cited).

197 However, it must be pointed out that, in the contested decision, the Commission examined, in the alternative, whether the German measures at issue were proportionate, and concluded, correctly, that they were indeed proportionate in relation to the objective being pursued.

198 Under those circumstances, it must be held that the Swiss Confederation's complaint alleging an infringement, by the contested decision, of the principle of freedom to provide services is ineffective. Even if the conclusion reached in recital 35(b) in the preamble to the contested decision and recalled in paragraph 193 above were wrong,

such an error could not lead to annulment of the contested decision inasmuch as, as has already been pointed out, that decision correctly found that the German measures at issue pursued an objective which was related to environmental protection and were proportionate to that objective.

199 The same is true of the complaint alleging failure to take account of the *Malpensa* judgment, cited in paragraph 33 above. As the Swiss Confederation itself states, taking that judgment into account should have led the Commission to examine the German measures at issue also from the point of view of their implications for the freedom to provide services in the air transport sector. However, as has just been pointed out, such an examination could not have led to a conclusion different from that which was drawn in the contested decision.

— Breach by the Federal Republic of Germany of the obligation of genuine cooperation

200 The Swiss Confederation's complaint that the Commission failed to take account of an alleged breach by the Federal Republic of Germany of the obligation of genuine cooperation under Article 17 of the Agreement must also be rejected.

201 It must be recalled, in that regard, that it has already been found that the German measures at issue were not contrary to the principle of equal treatment laid down in Article 3 of the Agreement.

202 Moreover, it has also been found that, even supposing that the principle of freedom to provide services was applicable to the matters covered by the Agreement, any possible restrictions of that freedom resulting from the German measures at issue would have been justified by the environmental-protection objective, with the result that the freedom to provide services could not obstruct the application of those measures.

203 Finally, the Swiss Confederation has not identified any other provision of the Agreement which could prevent the application of the German measures here at issue. Consequently, even if the Agreement involved an obligation of genuine cooperation on the part of the Federal Republic of Germany, which is not a party to the Agreement, the contested decision correctly found that there had been no infringement of that hypothetical obligation.

204 It follows from all the foregoing that the third plea in law must be rejected, and the action dismissed in its entirety.

Costs

205 Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Commission has applied for costs and the Swiss Confederation has been unsuccessful, the latter must be ordered to bear its own costs and to pay those incurred by the Commission.

206 Furthermore, the first subparagraph of Article 87(4) of the Rules of Procedure provides that the Member States which have intervened in the proceedings are to bear their own costs. Accordingly, the Federal Republic of Germany, as intervener, must bear its own costs.

207 Under the third subparagraph of Article 87(4) of the Rules of Procedure, the Court may order an intervener to bear its own costs. In the present case, Landkreis Waldshut, which has intervened in support of the Commission, must bear its own costs.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. Dismisses the action;

2. Orders the Swiss Confederation to bear its own costs and to pay those incurred by the European Commission;

3. Orders the Federal Republic of Germany and Landkreis Waldshut to bear their own respective costs.

Vilaras Prek Ciucă

Delivered in open court in Luxembourg on 9 September 2010.

[Signatures]