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I

(Acts whose publication is obligatory)

COMMISSION REGULATION (EC) No 15/2004
of 7 January 2004
establishing the standard import values for determining the entry price of certain fruit and vegetables

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EC) No 3223/94 of 21 December 1994 on detailed rules for the application of the import arrangements for fruit and vegetables ⁽¹⁾, as last amended by Regulation (EC) No 1947/2002 ⁽²⁾, and in particular Article 4(1) thereof,

Whereas:

- (1) Regulation (EC) No 3223/94 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commission fixes the standard values for imports from third countries, in respect of the products and periods stipulated in the Annex thereto.

- (2) In compliance with the above criteria, the standard import values must be fixed at the levels set out in the Annex to this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 4 of Regulation (EC) No 3223/94 shall be fixed as indicated in the Annex hereto.

Article 2

This Regulation shall enter into force on 8 January 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 7 January 2004.

For the Commission
J. M. SILVA RODRÍGUEZ
Agriculture Director-General

⁽¹⁾ OJ L 337, 24.12.1994, p. 66.

⁽²⁾ OJ L 299, 1.11.2002, p. 17.

ANNEX

to the Commission Regulation of 7 January 2004 establishing the standard import values for determining the entry price of certain fruit and vegetables

(EUR/100 kg)

CN code	Third country code ⁽¹⁾	Standard import value
0702 00 00	052	74,3
	204	48,6
	624	193,8
	999	105,6
0707 00 05	052	120,2
	999	120,2
0709 90 70	052	106,4
	204	54,6
	999	80,5
0805 10 10, 0805 10 30, 0805 10 50	052	45,4
	204	42,9
	388	30,9
	999	39,7
0805 20 10	052	78,8
	204	91,0
	999	84,9
0805 20 30, 0805 20 50, 0805 20 70, 0805 20 90	052	89,5
	999	89,5
0805 50 10	052	52,8
	400	38,7
	600	71,9
	999	54,5
0808 10 20, 0808 10 50, 0808 10 90	060	39,4
	400	75,5
	404	87,4
	720	62,0
	999	66,1
0808 20 50	052	51,1
	060	56,8
	064	63,6
	400	88,2
	720	76,9
	999	67,3

⁽¹⁾ Country nomenclature as fixed by Commission Regulation (EC) No 2020/2001 (OJ L 273, 16.10.2001, p. 6). Code '999' stands for 'of other origin'.

COMMISSION REGULATION (EC) No 16/2004**of 6 January 2004****implementing Regulation (EC) No 1177/2003 of the European Parliament and of the Council concerning Community statistics on income and living conditions (EU-SILC) as regards the list of target secondary variables relating to the 'intergenerational transmission of poverty'**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Regulation (EC) No 1177/2003 of the European Parliament and of the Council of 16 June 2003 concerning Community statistics on income and living conditions (EU-SILC) ⁽¹⁾, and in particular Article 15(2)(f) thereof,

Whereas:

- (1) Regulation (EC) No 1177/2003 established a common framework for the systematic production of Community statistics on income and living conditions, encompassing comparable and timely cross-sectional and longitudinal data on income and on the level and composition of poverty and social exclusion at national and European Union levels.
- (2) Pursuant to Article 15(2)(f) of Regulation (EC) No 1177/2003, implementing measures are necessary concerning the list of target secondary areas and variables that shall be included every year in the cross-sectional component of EU-SILC. For the year 2005, the list of target secondary variables included in the module 'Intergenerational transmission of poverty' (particularly on parental education and occupation background and on childhood

family environment as key domains of influence on adult social exclusion impacting on poverty risk during adulthood) including the specification of variables codes and definitions is to be defined.

- (3) The measures provided for in this Regulation are in accordance with the opinion of the Statistical Programme Committee,

HAS ADOPTED THIS REGULATION:

Article 1

The list of secondary target variables, the variables codes, and the definitions for the Module 2005 relating to the 'Intergenerational transmission of poverty' to be included in the cross-sectional component of Community statistics on income and living conditions (EU-SILC) shall be as laid down in the Annex.

Article 2

This Regulation shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 6 January 2004.

For the Commission

Pedro SOLBES MIRA

Member of the Commission

⁽¹⁾ OJ L 165, 3.7.2003, p. 1.

ANNEX

For the purposes of this Regulation, the following unit, mode of data collection, reference period and definitions shall apply.

1. Unit

Information shall be provided for all current household members or if applicable for all selected respondents, aged over 24 and under 66.

2. Mode of data collection

Owing to the characteristics of the information to be collected, only personal interviews (proxy interviews as an exception for persons temporarily away or incapacitated) or information extracted from registers are allowed.

3. Reference period

The reference period shall be when the interviewee was a young teenager, between the ages of 12 and 16. If the respondent hesitates or asks for a specific age, the age 14 should be used.

4. Definitions

- (a) Father: the male person the interviewee considered to be his/her father when the interviewee was a young teenager.
- (b) Mother: the female person the interviewee considered to be his/her mother when the interviewee was a young teenager.
- (c) Siblings: brothers and sisters who lived in the same household as the interviewee, when the interviewee was a young teenager.
- (d) Main: (in main family composition, main number of siblings, main activity status and main occupation) refers to the situation that lasted for the longest time when the interviewee was a young teenager. If uncertain which situation lasted for the longest time, the situation which made the most impression.

AREAS AND LIST OF TARGET VARIABLES

Variable name	Module 2005	Intergenerational transmission of poverty
	Code	Target variable
Basic data		
RB030	ID number	Personal ID Personal identification number (PID)
PM005	0 + (Format 2.5)	Personal intergenerational cross-sectional weight Weight
Family data		
PM010	1	Main family composition Lived with both parents
	2	Lived with single mother (single-parent family)
	3	Lived with single father (single-parent family)
	4	Lived with mother and mother's new partner/husband
	5	Lived with father and father's new partner/wife
	6	Lived in another private household, foster home
	7	Lived in a collective household or institution
PM010_F	– 1	Missing
	1	Variable is filled

Variable name	Module 2005	Intergenerational transmission of poverty
	Code	Target variable
PM020	Year	<i>Year of birth of father</i> Four digits of year
PM020_F	– 2 – 1 1	N.a. (no father) Missing Variable is filled
PM030	Year	<i>Year of birth of mother</i> Four digits of year
PM030_F	– 2 – 1 1	N.a. (no mother) Missing Variable is filled
PM035	Number	<i>Main number of siblings</i> Two digits of number
PM035_F	– 1 1	Missing Variable is filled
Educational data		
PM040	0 1 2 3 4 5 6	<i>Highest ISCED ⁽¹⁾ level of education attained by father</i> Less than primary education Primary education Lower secondary education Upper secondary education Post-secondary non-tertiary education First stage of tertiary education Second stage of tertiary education
PM040_F	– 2 – 1 1	N.a. (no father) Missing Variable is filled
PM050	0 1 2 3 4 5 6	<i>Highest ISCED ⁽¹⁾ level of education attained by mother</i> Less than primary education Primary education Lower secondary education Upper secondary education Post-secondary non-tertiary education First stage of tertiary education Second stage of tertiary education
PM050_F	– 2 – 1 1	N.a. (no mother) Missing Variable is filled

Variable name	Module 2005	Intergenerational transmission of poverty
	Code	Target variable
Occupational data		
PM060		Main activity status of father
	1	Employee
	2	Self-employed
	3	Unpaid family-worker
	4	Unemployed
	5	Retired, early-retired
	6	Full time housework
	7	Other
PM060_F	– 2	N.a. (no father)
	– 1	Missing
	1	Variable is filled
PM070		Main occupation of father ⁽²⁾
	ISCO Code	ISCO-88(COM) ⁽³⁾ two digits
PM070_F	– 2	N.a. (father never had a job, no father)
	– 1	Missing
	1	Variable is filled
PM080		Main activity status of mother
	1	Employee
	2	Self-employed
	3	Unpaid family-worker
	4	Unemployed
	5	Retired, early-retired
	6	Full time housework
	7	Other
PM080_F	– 2	N.a. (no mother)
	– 1	Missing
	1	Variable is filled
PM090		Main occupation of mother ⁽²⁾
	ISCO Code	ISCO-88(COM) ⁽³⁾ two digits
PM090_F	– 2	N.a. (mother never had a job, no mother)
	– 1	Missing
	1	Variable is filled

⁽¹⁾ ISCED 1997: International Standard Classification of Education 1997.

⁽²⁾ If PM060 or PM080 = 4, 5, 6 or 7, this refers to the last occupation.

⁽³⁾ ISCO-88(COM): International Standard Classification of Occupations (for European purposes), 1988 version.

COMMISSION REGULATION (EC) No 17/2004**of 7 January 2004****laying down the reduction coefficient to be applied under the Community tariff quota for barley provided for by Regulation (EC) No 2305/2003**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1766/92 of 30 June 1992 on the common organisation of the market in cereals ⁽¹⁾, as last amended by Regulation (EC) No 1104/2003 ⁽²⁾,

Having regard to Commission Regulation (EC) No 2305/2003 of 29 December 2003 opening and providing for the administration of a Community tariff quota for barley from third countries ⁽³⁾, and in particular Article 3(3) thereof,

Whereas:

- (1) Regulation (EC) No 2305/2003 opened an annual tariff quota for the import of 300 000 tonnes of barley falling within CN code 1003 00.

- (2) The quantities applied for on 5 January 2004 in accordance with Article 3(1) of Regulation (EC) No 2305/2003 exceed the quantities available. The extent to which licences may be issued should therefore be determined and a reduction coefficient laid down to be applied to the quantities applied for,

HAS ADOPTED THIS REGULATION:

Article 1

Each application for import licences for the tariff quota for barley lodged and forwarded to the Commission on 5 January 2004 in accordance with Article 3(1) and (2) of Regulation (EC) No 2305/2003 shall be accepted at a rate of 0,015590 of the quantity applied for.

Article 2

This Regulation shall enter into force on 8 January 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 7 January 2004.

For the Commission

J. M. SILVA RODRÍGUEZ

Agriculture Director-General

⁽¹⁾ OJ L 181, 1.7.1992, p. 21.

⁽²⁾ OJ L 158, 27.6.2003, p. 1.

⁽³⁾ OJ L 342, 30.12.2003, p. 7.

COMMISSION REGULATION (EC) No 18/2004
of 7 January 2004
fixing the import duties in the rice sector

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 3072/95 of 22 December 1995 on the common organisation of the market in rice ⁽¹⁾, as last amended by Commission Regulation (EC) No 411/2002 ⁽²⁾,

Having regard to Commission Regulation (EC) No 1503/96 of 29 July 1996 laying down detailed rules for the application of Council Regulation (EC) No 3072/95 as regards import duties in the rice sector ⁽³⁾, as last amended by Regulation (EC) No 1298/2002 ⁽⁴⁾, and in particular Article 4(1) thereof,

Whereas:

- (1) Article 11 of Regulation (EC) No 3072/95 provides that the rates of duty in the Common Customs Tariff are to be charged on import of the products referred to in Article 1 of that Regulation. However, in the case of the products referred to in paragraph 2 of that Article, the import duty is to be equal to the intervention price valid for such products on importation and increased by a certain percentage according to whether it is husked or milled rice, minus the cif import price provided that duty does not exceed the rate of the Common Customs Tariff duties.
- (2) Pursuant to Article 12(3) of Regulation (EC) No 3072/95, the cif import prices are calculated on the basis of the representative prices for the product in question on the world market or on the Community import market for the product.
- (3) Regulation (EC) No 1503/96 lays down detailed rules for the application of Regulation (EC) No 3072/95 as regards import duties in the rice sector.

- (4) The import duties are applicable until new duties are fixed and enter into force. They also remain in force in cases where no quotation is available from the source referred to in Article 5 of Regulation (EC) No 1503/96 during the two weeks preceding the next periodical fixing.
- (5) In order to allow the import duty system to function normally, the market rates recorded during a reference period should be used for calculating the duties.
- (6) Application of the second subparagraph of Article 4(1) of Regulation (EC) No 1503/96 results in an adjustment of the import duties that have been fixed as from 15 May 2003 by Commission Regulation (EC) No 832/2003 ⁽⁵⁾ as set out in the Annexes to this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

The import duties in the rice sector referred to in Article 11(1) and (2) of Regulation (EC) No 3072/95 shall be adjusted in compliance with Article 4 of Regulation (EC) No 1503/96 and fixed in Annex I to this Regulation on the basis of the information given in Annex II.

Article 2

This Regulation shall enter into force on 8 January 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 7 January 2004.

For the Commission
J. M. SILVA RODRÍGUEZ
Agriculture Director-General

⁽¹⁾ OJ L 329, 30.12.1995, p. 18.

⁽²⁾ OJ L 62, 5.3.2002, p. 27.

⁽³⁾ OJ L 189, 30.7.1996, p. 71.

⁽⁴⁾ OJ L 189, 18.7.2002, p. 8.

⁽⁵⁾ OJ L 120, 15.5.2003, p. 15.

ANNEX I

Import duties on rice and broken rice

(EUR/t)

CN code	Duties ⁽⁵⁾				
	Third countries (except ACP and Bangla- desh) ⁽⁷⁾	ACP ⁽¹⁾ ⁽²⁾ ⁽³⁾	Bangladesh ⁽⁴⁾	Basmati India and Pakistan ⁽⁶⁾	Egypt ⁽⁸⁾
1006 10 21	⁽⁷⁾	69,51	101,16		158,25
1006 10 23	⁽⁷⁾	69,51	101,16		158,25
1006 10 25	⁽⁷⁾	69,51	101,16		158,25
1006 10 27	⁽⁷⁾	69,51	101,16		158,25
1006 10 92	⁽⁷⁾	69,51	101,16		158,25
1006 10 94	⁽⁷⁾	69,51	101,16		158,25
1006 10 96	⁽⁷⁾	69,51	101,16		158,25
1006 10 98	⁽⁷⁾	69,51	101,16		158,25
1006 20 11	204,21	67,13	97,77		153,16
1006 20 13	204,21	67,13	97,77		153,16
1006 20 15	204,21	67,13	97,77		153,16
1006 20 17	264,00	88,06	127,66	14,00	198,00
1006 20 92	204,21	67,13	97,77		153,16
1006 20 94	204,21	67,13	97,77		153,16
1006 20 96	204,21	67,13	97,77		153,16
1006 20 98	264,00	88,06	127,66	14,00	198,00
1006 30 21	373,26	118,25	171,72		279,95
1006 30 23	373,26	118,25	171,72		279,95
1006 30 25	373,26	118,25	171,72		279,95
1006 30 27	⁽⁷⁾	133,21	193,09		312,00
1006 30 42	373,26	118,25	171,72		279,95
1006 30 44	373,26	118,25	171,72		279,95
1006 30 46	373,26	118,25	171,72		279,95
1006 30 48	⁽⁷⁾	133,21	193,09		312,00
1006 30 61	373,26	118,25	171,72		279,95
1006 30 63	373,26	118,25	171,72		279,95
1006 30 65	373,26	118,25	171,72		279,95
1006 30 67	⁽⁷⁾	133,21	193,09		312,00
1006 30 92	373,26	118,25	171,72		279,95
1006 30 94	373,26	118,25	171,72		279,95
1006 30 96	373,26	118,25	171,72		279,95
1006 30 98	⁽⁷⁾	133,21	193,09		312,00
1006 40 00	⁽⁷⁾	41,18	⁽⁷⁾		96,00

⁽¹⁾ The duty on imports of rice originating in the ACP States is applicable, under the arrangements laid down in Council Regulation (EC) No 2286/2002 (OJ L 348, 21.12.2002, p. 5) and amended Commission Regulation (EC) No 638/2003 (OJ L 93, 10.4.2003, p. 3).

⁽²⁾ In accordance with Regulation (EC) No 1706/98, the duties are not applied to products originating in the African, Caribbean and Pacific States and imported directly into the overseas department of Réunion.

⁽³⁾ The import levy on rice entering the overseas department of Réunion is specified in Article 11(3) of Regulation (EC) No 3072/95.

⁽⁴⁾ The duty on imports of rice not including broken rice (CN code 1006 40 00), originating in Bangladesh is applicable under the arrangements laid down in Council Regulation (EEC) No 3491/90 (OJ L 337, 4.12.1990, p. 1) and amended Commission Regulation (EEC) No 862/91 (OJ L 88, 9.4.1991, p. 7).

⁽⁵⁾ No import duty applies to products originating in the OCT pursuant to Article 101(1) of amended Council Decision 91/482/EEC (OJ L 263, 19.9.1991, p. 1).

⁽⁶⁾ For husked rice of the Basmati variety originating in India and Pakistan, a reduction of EUR/t 250 applies (Article 4a of amended Regulation (EC) No 1503/96).

⁽⁷⁾ Duties fixed in the Common Customs Tariff.

⁽⁸⁾ The duty on imports of rice originating in and coming from Egypt is applicable under the arrangements laid down in Council Regulation (EC) No 2184/96 (OJ L 292, 15.11.1996, p. 1) and Commission Regulation (EC) No 196/97 (OJ L 31, 1.2.1997, p. 53).

ANNEX II

Calculation of import duties for rice

	Paddy	Indica rice		Japonica rice		Broken rice
		Husked	Milled	Husked	Milled	
1. Import duty (EUR/tonne)	(¹)	264,00	416,00	204,21	373,26	(¹)
2. Elements of calculation:						
(a) Arag cif price (EUR/tonne)	—	264,46	191,53	356,69	423,33	—
(b) fob price (EUR/tonne)	—	—	—	333,17	399,81	—
(c) Sea freight (EUR/tonne)	—	—	—	23,52	23,52	—
(d) Source	—	USDA and operators	USDA and operators	Operators	Operators	—

(¹) Duties fixed in the Common Customs Tariff.

**COMMISSION REGULATION (EC) No 19/2004
of 7 January 2004**

amending for the 27th time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan ⁽¹⁾, as last amended by Commission Regulation (EC) No 2157/2003 ⁽²⁾, and in particular Article 7(1), first indent, thereof,

Whereas:

- (1) Annex I to Regulation (EC) No 881/2002 lists the persons, groups and entities covered by the freezing of funds and economic resources under that Regulation.

- (2) On 26 December 2003, the Sanctions Committee of the United Nations Security Council decided to amend the list of persons, groups and entities to whom the freezing of funds and economic resources should apply. Annex I should therefore be amended accordingly.

- (3) In order to ensure that the measures provided for in this Regulation are effective, this Regulation must enter into force immediately,

HAS ADOPTED THIS REGULATION:

Article 1

Annex I to Regulation (EC) No 881/2002 is hereby amended in accordance with the Annex to this Regulation.

Article 2

This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 7 January 2004.

For the Commission
Christopher PATTEN
Member of the Commission

⁽¹⁾ OJ L 139, 29.5.2002, p. 9.

⁽²⁾ OJ L 324, 11.12.2003, p. 17.

ANNEX

Annex I to Regulation (EC) No 881/2002 is amended as follows:

1. The following entry is added under the heading 'Natural persons':
Safet DURGUTI. Date of birth: 10 May 1967. Place of birth: Orahovac, Kosovo (Serbia and Montenegro).
 2. The entry 'AL-HARAMAIN Islamic Foundation, Bosnia-Herzegovina' under the heading 'Legal persons, groups and entities' is replaced by the following:
Al-Haramain Islamic Foundation (*alias* (a) Vazir, (b) Vezir), 64 Poturmahala, Travnik, Bosnia and Herzegovina.
 3. The entry 'BA TAQWA FOR COMMERCE AND REAL ESTATE COMPANY LIMITED, Vaduz, Liechtenstein; (formerly c/o Asat Trust reg.)' under the heading 'Legal persons, groups and entities' is replaced by the following:
BA Taqwa for Commerce and Real Estate Company Limited (*alias* Hochburg AG), Vaduz, Liechtenstein (formerly c/o Astat Trust reg.).
-

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 5 December 2003

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

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

(notified under document number C(2003) 4472)

(Only the German text is authentic)

(2004/12/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

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

BACKGROUND

I

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

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

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

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

⁽¹⁾ OJ L 114, 30.4.2002, p. 73.

⁽²⁾ OJ L 240, 24.8.1992, p. 8.

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

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

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

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

II

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

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

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

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

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

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

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

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

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

- (c) *The German rules are discriminatory*

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

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

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

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

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

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

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

III

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

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

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

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

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

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

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

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

B. The German rules are neither discriminatory nor disproportionate

(a) *The German measures are not discriminatory*

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

(b) *The German measures are proportionate*

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

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

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

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

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

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

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

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

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

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

LEGAL ASSESSMENT

IV — THE RELEVANT LEGAL FRAMEWORK

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

- (16) The relations between the European Community and the Swiss Confederation concerning air transport, are governed by a bilateral agreement of 21 June 1999 (hereafter the 'Agreement') which entered into force on 1 June 2002.
- (17) According to its Article 1 the Agreement 'sets out rules for the Contracting Parties in the field of civil aviation'. In so far as the provisions of the Agreement 'are identical in substance to corresponding rules of the EC Treaty and to acts adopted in application of that Treaty, those provisions shall, in their implementation and application, be interpreted in conformity with the relevant rulings and decisions of the Court of Justice and the Commission of the European Communities given prior to the date of signature of this Agreement.' However, those concerning 'rulings and decisions given after the date of signature of this Agreement' shall merely be 'communicated to Switzerland'. In such cases, and at the request of one of the Contracting Parties, 'the implications of such latter rulings and decisions shall be determined by the Joint Committee in view of ensuring the proper functioning of this Agreement.'
- (18) Article 3 of the Agreement specifically forbids discrimination: 'Within the scope of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'
- (19) However, although Article 15 stipulates that: 'Subject to the provisions of Council Regulation (EEC) No 2408/92, as included in the Annex to this Agreement, Community and Swiss air carriers shall be granted traffic rights between any point in Switzerland and any point in the Community', it also limits the scope of reciprocal rights by providing that: 'two years after the entry into force of this Agreement, Swiss air carriers shall be granted traffic rights between points in different EC Member States' and that: 'The Contracting Parties shall undertake negotiations on the possible extension of the scope of this Article to cover traffic rights between points within Switzerland and between points within the EC Member States five years after the entry into force of this Agreement.'
- (20) Concerning the application of the Agreement, Article 18(2), first sentence, provides that in 'cases which may affect air services to be authorised under Chapter 3, the Community institutions shall enjoy the powers granted to them under the provisions of the regulations and directives whose application is explicitly confirmed in the Annex.' According to Article 20, the exercise of

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

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

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

Relevant Commission powers

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

Application of Article 8 in a purely Community context

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

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

⁽²⁾ Now Articles 49 and 51.

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

V — ANALYSIS

Legal base

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

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

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

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

Applicable criteria

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

(a) Non-discrimination

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

(b) Proportionality

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

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

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

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

(c) Compliance with other provisions of the agreement

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

Non-discrimination

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

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

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

⁽³⁾ Now Articles 49 and 51.

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

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

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

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

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

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

Proportionality

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

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

⁽¹⁾ OJ L 162, 13.7.1995, p. 25.

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

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

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

⁽⁵⁾ ECJ: Case C-361/98 *Malpensa*.

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

(51) Article 17 stipulates that:

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

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

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

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

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 5 December 2003.

For the Commission
Loyola DE PALACIO
Vice-President

⁽¹⁾ OJ L 85, 28.3.2002, p. 40.

COMMISSION DECISION

of 6 January 2004

terminating the examination procedure concerning the Brazilian Export Financing programme 'PROEX' as applied in the regional aircraft sector

(2004/13/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation ⁽¹⁾, and in particular Article 11(1) thereof,

Whereas:

(1) On 27 January 1999 the German manufacturer of regional aircraft Dornier Luftfahrt GmbH (hereafter referred to as 'Dornier'), lodged a complaint with the Commission pursuant to Articles 3 and 4 of the trade barriers Regulation. The complaint related to the Brazilian export financing programme 'Programa de Financiamento às Exportações' (PROEX), which, for exports of aircraft, operates as an interest rate equalisation system.

(2) The complainant alleged that the application of PROEX to the Brazilian aircraft industry, and in particular to the regional jet manufacturer Embraer, allowed the latter to compete unfairly with Dornier on the 30-seat jet market. In particular, that PROEX allowed purchasers of Embraer aircraft to reduce their financing costs to levels below those offered in the financial markets, which led to a significant reduction of the aircraft price. The complainant contended that PROEX constituted a prohibited export subsidy under Article 3.1(a) of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). Dornier further claimed that Embraer's abuse of the PROEX programme caused material injury to it on the Community market as well as adverse trade effects on non EC markets and most notably the US and Switzerland.

(3) The Commission found that the complaint contained sufficient prima facie evidence of a trade barrier and announced the initiation of an examination procedure in a notice published on 17 April 1999 in the Official Journal ⁽²⁾. The Commission's main findings are summarised below.

(4) PROEX acts as an interest rate equalisation system by virtue of which the Brazilian Government reimburses part of the interest rate which foreign purchasers of Embraer aircraft have to pay to finance their purchase. The reimbursement amounted to 3,8 percentage points per annum over a period of 15 years. PROEX allowed airlines to acquire aircraft at financing conditions that were far more favourable than those available on the market place, resulting in a net present value benefit in the range of 15 % of the aircraft's purchase price. As a result, Embraer was in a position to systematically undercut the price of Dornier's 30-seat jet and gain the lion's share of the Community and US 30-seat jet markets. In most fleet deals the PROEX financing terms were by far the most decisive factor for airlines to opt for the Brazilian jet.

(5) Under these circumstances the Commission considered that the complainant's allegations on the existence of an obstacle to trade were well founded and that PROEX resulted in adverse trade effects and injury within the meaning of Article 2(3) and (4) of the TBR.

(6) In the course of the TBR examination, a panel established, upon Canadian request by the Dispute Settlement Body (the DSB) of the World Trade Organisation (the WTO), concluded that PROEX payments constituted prohibited export subsidies inconsistent with Article 3 of the WTO Agreement on Subsidies and Countervailing Measures (the SCM Agreement). The conclusions and recommendations of the panel were upheld by the WTO Appellate Body and both reports were adopted by the DSB on 20 August 1999.

(7) On 19 November 1999, Brazil informed the DSB of changes introduced to PROEX (PROEX II) in order to implement the DSB recommendations. However, Canada considered that PROEX II continued to provide export subsidies contrary to the SCM Agreement and initiated a compliance procedure under Article 21.5 of the Dispute Settlement Understanding (DSU). The compliance panel and the Appellate Body upheld Canada's position and found PROEX II also to constitute an illegal export subsidy.

⁽¹⁾ OJ L 349, 31.12.1994, p. 71, as last amended by Regulation (EC) No 356/95 (OJ L 41, 23.2.1995, p. 3).

⁽²⁾ OJ C 108, 17.4.1999, p. 33.

- (8) On 6 December 2000, Brazil adopted a further revised version of PROEX (PROEX III) and Canada initiated a further compliance panel under Article 21.5 DSU to examine its WTO compatibility. This time, the panel report (adopted by the DSB on 23 August 2001) concluded that, unlike its previous versions, PROEX III as such was not in violation of Article 3.1(a) of the SCM Agreement as it did not require Brazil to provide export credits in such terms and conditions that they would constitute subsidies. The panel conclusions referred only to PROEX III as a law on its face and independently of its application and it was clearly stated that it would not necessarily follow that future applications of PROEX III would be consistent with the SCM Agreement.
- (9) After the adoption of the Panel by the DSB the European Communities stated that it would remain vigilant to ensure that Brazil would respect its WTO obligations in its application of PROEX III to individual transactions. However, during the last two years of monitoring no further allegations have been made or evidence submitted against Brazil in that respect.
- (10) In the absence of any evidence concerning unfair trade practices by Brazil after the adoption of the WTO Panel report on PROEX III, the European Communities

considers that no action is required and that, therefore, in accordance with Article 11(1) of the Regulation, the procedure should be terminated.

- (11) The Advisory Committee has been consulted on the measures provided for in this Decision,

HAS ADOPTED THIS DECISION:

Sole Article

The examination procedure concerning the Brazilian Export Financing programme 'PROEX' as applied in the regional aircraft sector initiated on 17 April 1999 is hereby terminated.

Done at Brussels, 6 January 2004.

For the Commission

Pascal LAMY

Member of the Commission
