JUDGMENT OF THE COURT (Fourth Chamber)
21 December 2016 (1)

(Reference for a preliminary ruling — Directive 2003/87/EC — Scheme for greenhouse gas emission allowance trading — Obligation to surrender emission allowances in respect of flights between EU Member States and most third countries — Decision No 377/2013/EU — Article 1 — Temporary derogation — Exclusion of flights to and from airports situated in Switzerland — Difference of treatment of third countries — General principle of equal treatment — Inapplicable)

In Case C-272/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom), made by decision of 6 May 2015, received at the Court on 8 June 2015, in the proceedings

**Swiss International Air Lines AG**

v

**The Secretary of State for Energy and Climate Change,**
**Environment Agency,**

THE COURT (Fourth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, E. Juhász, C. Vajda, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 4 May 2016,

after considering the observations submitted on behalf of:

Swiss International Air Lines AG, by J. Robinson and M. Croft, Solicitors, D. Piccinin, Barrister, and M. Chamberlain QC,

The Secretary of State for Energy and Climate Change, by N. Cohen, Barrister,

the Environment Agency, by J. Welsh, Solicitor,

the United Kingdom Government, by M. Holt, acting as Agent, and by R. Palmer and J. Holmes, Barristers,

the Italian Government, by G. Palmieri, acting as Agent, assisted by P. Grasso, avvocato dello Stato,

the European Parliament, by J. Rodrigues, R. van de Westelaken and A. Tamás, acting as Agents,

the Council of the European Union, by M. Simm and K. Michoel, acting as Agents,

the European Commission, by K. Mifsud-Bonnici and E. White, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 July 2016,

gives the following

**Judgment**

This request for a preliminary ruling concerns the validity of Decision No 377/2013/EU of the European Parliament and of the Council of 24 April 2013 derogating temporarily from Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community (OJ 2013 L 113, p. 1) in the light of the general principle of equal treatment and the interpretation of Article 340 TFEU.

This request has been made in proceedings between Swiss International Air Lines AG ('Swiss International'), on the one hand, and the Secretary of State for Energy and Climate Change (United Kingdom) and the Environment Agency (United Kingdom), on the other, concerning the validity of Decision No 377/2013 and compensation with respect to greenhouse gas emission allowances surrendered by Swiss International in respect of flights to and from Switzerland operated in 2012.

**Legal Context**

*EU law*

Directive 2003/87/EC

Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), as amended by Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 (OJ 2009 L 8, p. 3) ('Directive 2003/87'), provides in Article 12(2a):

'Administering Member States shall ensure that, by 30 April each year, each aircraft operator surrenders a number of allowances equal to the total emissions during the preceding calendar year from aviation activities listed in Annex I for which it is the aircraft operator, as verified in accordance with Article 15. Member States shall ensure that allowances surrendered in accordance with this paragraph are subsequently cancelled.'

Article 16 of that directive, headed 'Penalties', is worded as follows:

‘1. Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that such rules are implemented. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify these provisions to the Commission and shall notify it without delay of any subsequent amendment affecting them.

2. Member States shall ensure publication of the names of operators and aircraft operators who are in breach of requirements to surrender sufficient allowances under this Directive.

3. Member States shall ensure that any operator or aircraft operator who does not surrender sufficient allowances by 30 April of each year to cover its emissions during the preceding year shall be held liable for the payment of an excess emissions penalty. The excess emissions penalty shall be EUR 100 for each tonne of carbon dioxide equivalent emitted for which the operator or aircraft operator has not surrendered allowances. Payment of the excess emissions penalty shall not release the operator or aircraft operator from the obligation to surrender an amount of allowances equal to those excess emissions when surrendering allowances in relation to the following calendar year.

...’

Decision No 377/2013

Recitals 4 to 6 and 9 of Decision No 377/2013 are worded as follows:

‘(4) The negotiation of all Union aviation agreements with third countries should be aimed at safeguarding the Union’s flexibility to take action in respect of environmental issues, including with regard to measures to mitigate the impact of aviation on climate change.

(5) Progress has been made in the International Civil Aviation Organisation (ICAO) towards the adoption, at the 38th session of the ICAO Assembly which will be held from 24 September to 4 October 2013, of a global framework for emissions reduction policy which facilitates the application of market-based measures to emissions from international aviation, and on the development of a global market-based measure (MBM). Such a framework could make a significant contribution to the reduction of national, regional and global CO2 emissions.

(6) In order to facilitate this progress and provide momentum, it is desirable to defer the enforcement of requirements arising prior to the 38th session of the ICAO Assembly and relating to flights to and from aerodromes in countries outside the Union that are not members of the European Free Trade Association (EFTA), dependencies and territories of States in the European Economic Area (EEA) or countries having signed a Treaty of Accession with the Union. Action should therefore not be taken against aircraft operators in respect of the requirements resulting from [Directive 2003/87] for the reporting of verified emissions for the calendar years 2010, 2011 and 2012 and for the corresponding surrender of allowances for 2012 from flights to and from such aerodromes. Aircraft operators who wish to continue to comply with those requirements should be able to do so.

...

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

Article 1 of that decision provides:

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

Article 6 of Decision No 377/2013 provides that it is to enter into force on the date of its publication in the *Official Journal of the European Union*, namely 25 April 2013, and is to apply from 24 April 2013.

*United Kingdom law*

By the Greenhouse Gas Emissions Trading Scheme (Amendment) Regulations 2013 the Secretary of State for Energy and Climate Change amended the national legislation relating to the greenhouse gas emissions trading scheme, with the aim of implementing Decision No 377/2013.

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

Swiss International is an airline established in Switzerland.

For the year 2012, Swiss International acquired a number of greenhouse gas emission allowances both for free and for consideration. It surrendered the allowances corresponding to emissions linked to flights operated in that year between Member States of the EEA and Switzerland.

Swiss International brought an action before the High Court of Justice (England & Wales), Queen’s Bench Division (Administrative Court), seeking, first, the annulment of the national legislation at issue in the main proceedings, on the ground that the exclusion of flights to and from Switzerland from the derogation, from the rules of Directive 2003/87, provided for by that legislation, implementing Decision No 377/2013, is in breach of the general principle of equal treatment.

Second, Swiss International sought the annulment of the surrender of allowances which it had made for flights operated in 2012 between Member States of the EEA and Switzerland. In the alternative, Swiss International requested

financial compensation for the value of surrendered allowances that it had purchased for consideration or any other form of appropriate relief.

That action having been dismissed, Swiss International brought an appeal before the Court of Appeal (England & Wales) (Civil Division). Before that court, the parties to the main proceedings stated their position on, inter alia, the request for the annulment of the national legislation at issue in the main proceedings. In that regard, Swiss International claimed that Decision No 377/2013 is in breach of the principle of equal treatment in that it excludes flights operated between the Member States of the EEA and Switzerland from the derogation, from the provisions of Directive 2003/87, introduced for flights to and from almost all other third countries.

While the Court has held, in the judgments of 22 January 1976, *Balkan-Import-Export*, 55/75, EU:C:1976:8; of 28 October 1982 *Faust* v *Commissio*n, 52/81, EU:C:1982:369, and of 10 March 1988 *Germany* v *Council*, C-122/95, EU:C:1998:94, that the principle of equal treatment does not apply in all respects when the European Union discriminates between third countries in its external relations, that case-law is, in the view of Swiss International, a limited exception to the principle of equal treatment that covers solely situations where the European Union has exercised its external action competences, in particular, by entering into an international agreement justifying a difference in treatment among third countries. As regards however the different treatment of flights to and from Switzerland that is at issue in the main proceedings, there is no such international agreement or any other Union act concerning external relations.

According to Swiss International, nor can that difference in treatment be justified for other reasons. It cannot, for instance, be justified by the geographical proximity of Switzerland to the European Union. Since the derogation provided for by Decision No 377/2013 covers only flights operated in 2012 before the adoption of that decision, its application also to flights to and from Switzerland could not distort competition. As regards the objective stated in that decision of not weakening the European Union's independent commitment to reduce greenhouse gas emissions by 2020, Swiss International stated that the Swiss Confederation is not a party to that independent commitment.

The Secretary of State for Energy and Climate Change and the Environment Agency contested those arguments. They contended that the principle of equal treatment does not apply to the difference in treatment that Decision No 377/2013 effects between third countries in order to facilitate international negotiations at the level of the ICAO. Further, even if the principle of equal treatment were applicable, the EU legislature has not exceeded the bounds of its discretion in deciding not to extend the temporary derogation provided for by that decision to third countries that are closely connected or associated with the European Union, such as the Swiss Confederation.

In those circumstances, the Court of Appeal (England & Wales) (Civil Division) decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

Does Decision No 377/2013/EU of the European Parliament and of the Council of 24 April 2013 infringe the general EU principle of equal treatment insofar as it establishes a moratorium on the requirements to surrender emissions allowances imposed by [Directive 2003/87] in respect of flights between [the EEA] and almost all non-EEA states, but does not extend that moratorium to flights between EEA states and Switzerland?

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

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

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

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

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

**Consideration of the questions referred for a preliminary ruling**

*The first question*

By its first question, the referring court, in essence, asks the Court to examine the validity of Decision No 377/2013 in the light of the principle of equal treatment, since the temporary derogation provided for by Article 1 of that decision from the requirements imposed by Article 12(2a) and Article 16 of Directive 2003/87, with respect to the surrender of greenhouse gas emission allowances for flights operated in 2012 between EU Member States and the majority of third countries, does not apply to, in particular, flights to and from airports situated in Switzerland.

Article 1 of Decision No 377/2013 establishes a distinction between different flights to and from third countries, a distinction that is exclusively based on the country, outside the European Union, to and from which those flights are made. Such a distinction implies, as the Advocate General observed in point 36 of his Opinion, a difference in treatment of third countries.

Since the issue referred to the Court concerns the validity of Decision No 377/2013 in the light of the principle of equal treatment, now enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union, the question arises whether a difference in treatment of third countries falls within the scope of that principle.

In that regard, it must be observed that the external aspects of the internal polices of the European Union are within the competences of the EU in the area of its external relations (see, by analogy, with respect to an act in relation to the internal market and the common agricultural policy, judgment of 22 January 1976, *Balkan-Import-Export*, 55/75, EU:C:1976:8, paragraph 14).

Decision No 377/2013 is a measure adopted within the competences of the European Union in the area of external relations. The aim of that decision, as is apparent from recital 5 and 6 thereof, is to facilitate the adoption of an international agreement within the ICAO on the application of market-based measures to emissions from international aviation, and that decision was adopted on the basis of the external competence in relation to the environment deriving from Article 192(1) TFEU, read together with the fourth indent of Article 191(1) TFEU.

External relations are conducted by means of a wide range of measures which are not confined to measures adopted with respect to all third countries, and may therefore also concern one or several third countries.

The institutions and agencies of the Union have available to them, in the conduct of external relations, a broad discretion in policy decisions. As the United Kingdom, the Parliament and the Council have stated in the procedure before the Court, the conduct of external relations necessarily implies policy choices. The Union must, therefore, be in a position to choose its policies and to apply, according to the objectives that it pursues, a distinction between third countries, without being obliged to grant equal treatment to all third countries. The effect of the exercise of external policy prerogatives by the institutions and agencies of the Union may therefore be that the treatment of one third country differs from that of other third countries.

In that regard, it must be stated that EU law imposes no express obligation on the Union to the effect that all third countries must be treated equally. As the Advocate General observed in point 65 of his Opinion, public international law contains no general principle of equal treatment of third countries. Accordingly, since an application of the principle of equal treatment of third countries would unilaterally restrict the Union's freedom of action internationally, it cannot be held that the Union could have accepted such a requirement unless the equal treatment of third countries was expressly laid down in the treaties.

In accordance with the Court's settled case-law, there is in the FEU Treaty no general principle obliging the Union, in its external relations, to accord in all respects equal treatment to different third countries and traders do not in any event have the right to rely on the existence of such a principle (see, inter alia, judgments of 22 January 1976, *Balkan-Import-Export*, 55/75, EU:C:1976:8, paragraph 14 ; of 28 October 1982, *Faust* v *Commission*, 52/81, EU:C:1982:369, paragraph 25; of 10 March 1998, *Germany* v *Council*, C-122/95, EU:C:1998:94, paragraph 56, and of 10 March 1998, *T. Port*, C-364/95 and C-365/95, EU:C:1998:95, paragraph 76).

Swiss International maintains however that case-law does no more than establish a limited exception to the principle of equal treatment. Swiss International claim that that exception applies solely in situations where the Union has exercised its external action competences, for instance by the conclusion of an international agreement justifying a difference in the treatment of third countries. With respect to Decision No 377/2013 adopted in order to promote the conclusion of an international agreement within the ICAO, such external action is however lacking, and consequently the difference in treatment resulting from that decision cannot be objectively justified.

In that regard, it must be observed that, contrary to what is claimed by Swiss International, that case-law cannot be understood as meaning that, as a general rule, the relations of the Union with third countries are subject to the requirement of compliance with the principle of equal treatment.

On the contrary, the effect of the case-law cited in paragraph 25 of this judgment is that the institutions and agencies of the Union are relieved of any obligation to apply the principle of equal treatment to third countries, in order to maintain their internal freedom of action in terms of policy. Accordingly, the Court has stated, in general terms, that a difference in treatment of third countries is not contrary to EU law, emphasising that there is no obligation to treat third countries equally (see, to that effect, judgments of 28 October 1982, *Faust* v *Commission*, 52/81, EU:C:1982:369, paragraphs 25 and 27; of 10 March 1998, *Germany* v *Council*, C-122/95, EU:C:1998:94, paragraph 56, and of 10 March 1998, *T. Port*, C-364/95 and C-365/95, EU:C:1998:95, paragraph 76).

The non-application of the principle of equal treatment to the Union's relations with third countries is confirmed by the manner in which the Court has given effect to the principle, enshrined in the case-law, referred to in paragraph 26 of this judgment. Accordingly, in the judgment of 28 October 1982, *Faust* v *Commission* (52/81, EU:C:1982:369, paragraph 25) the Court confined itself to finding that the difference in treatment of certain imports was due to a difference in treatment of third countries, in order to conclude that that difference in treatment was not contrary to EU law. Likewise, the Court has held that different treatment of traders marketing goods from third countries, which was the automatic consequence of a difference in treatment of third countries, was not contrary to the general principle of equal treatment (see judgments of 10 March 1998, *Germany* v *Council*, C-122/95, EU:C:1998:94, paragraphs 56 to 58, and of 10 March 1998, *T. Port*, C-364/95 and C-365/95, EU:C:1998:95, paragraphs 76 and 77).

While the Court undertook, in paragraph 15 of the judgment of 22 January 1976, *Balkan-Import-Export* (55/75, EU:C:1976:8), an examination of the comparability of Swiss and Bulgarian cheeses, it is clear, as the Parliament observed in its observations submitted to the Court, that that examination was undertaken for the sake of completeness and cannot therefore detract from the finding in paragraph 14 of this judgment that the principle of equal treatment does not apply to the relations of the Union with third countries.

It follows that, contrary to what is claimed by Swiss International, the case-law cited in paragraph 26 of this judgment did not establish any 'exception' to the principle of equal treatment that would have to be interpreted strictly.

Moreover, that case-law is not confined to situations that presuppose the Union having first exercised its external competences by means of external action, such as an international agreement; the subject of that case-law is a difference in treatment of third countries, a difference which is also applicable to unilateral Union measures designed to promote the conclusion of an international agreement, such as Decision No 377/2013.

Contrary to what is maintained by Swiss International, the Court has also applied that case-law in situations where the difference in treatment of third countries was not a consequence of the Union's prior exercise of its external

competences, for instance by means of the Union concluding an international agreement. Thus, in the case that gave rise to the judgment of 28 October 1982, *Faust* v *Commission* (52/81, EU:C:1982:369), the difference in treatment of third countries at issue was not a consequence of an international agreement concluded by the Union, but of Union legislation that unilaterally suspended the issue of import licences for certain products imported from all third countries, with the exception of third countries capable of ensuring that the exports of those products to the Union did not exceed a certain level.

It follows that the difference in treatment of third countries in the context of the Union's external relations established in Article 1 of Decision No 377/2013 does not fall within the scope of the principle of equal treatment.

That being the case, there is no need, in order to answer the first question, to examine whether such a difference in treatment can be objectively justified.

In the light of all the foregoing, the answer to the first question is that examination of Decision No 377/2013 in the light of the principle of equal treatment has disclosed nothing to affect the validity of that decision, in so far as the temporary derogation provided for in Article 1 of that decision from the requirements laid down in Article 12(2a) and Article 16 of Directive 2003/87, with respect to the surrender of greenhouse gas emission allowances in respect of flights operated in 2012 between EU Member States and most third countries, does not apply to, inter alia, flights to and from airports situated in Switzerland.

*The second question*

Given the answer to the first question, there is no need to examine the second question.

**Costs**

Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

**Examination in the light of the principle of equal treatment of Decision No 377/2013/EU of the European Parliament and of the Council of 24 April 2013 derogating temporarily from Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community has disclosed nothing to affect the validity of that decision in so far as the temporary derogation provided for in Article 1 of that decision from the requirements laid down in Article 12(2a) and Article 16 of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, as amended by Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008, with respect to the surrender of greenhouse gas emission allowances in respect of flights operated in 2012 between Member States of the European Union and most third countries, does not apply to, inter alia, flights to and from airports situated in Switzerland.**

von Danwitz Juhász Vajda

Jürimäe Lycourgos

Delivered in open court in Luxembourg on 21 December 2016.

A. Calot Escobar T. von Danwitz

Registrar President of the Fourth Chamber

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1* Language of the case: English.