The New 2014 Regulation on Noise-Related Restrictions at EU Airports : Help or Hurdle to Noise Management ?

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The new EU Regulation on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Union airports in deeply embedded in concerns which have recently grown at international level, in the framework of the Chicago Convention on International Civil Aviation. There is a growing fear that the local measures adopted for reducing noise nuisances due to aviation could, in the long run, limit airport capacity and development. The Regulation, as a consequence, propose a peculiar approach to noise management. Shall it help or hurdle the action of public authorities, when in charge of protecting the environment ?

1. Introduction

Noise and airports, this is a long story already, especially in Europe. A story about how to reconcile the general interest linked to the use of air space with the rights of those who suffer the consequences of the noise emissions that are generated during take-off and landing. Aircrafts are noisy vehicles indeed and they often create nuisances when flying at low heights. Member States have for long been faced with that issue, which is particularly critical when airports are not ideally located, by being much too close to heavily populated urban areas. As a consequence, many States have already developed substantial mandatory measures aimed at avoiding or mitigating noise due to airport activities, with more or less success. Due to an

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ever-increasing public sensitivity, case-law has grown and grown, both internally and internationally, around issues of human rights, of home protection and of the protection of a healthy environment, in relation to day- and night- flights.

To a point that, from another point of view, noise-related measures have turned out to be seen as a threat to airport development and even as the possible cause of capacity shortage in Europe. A very topical subject in 2014 in that regard is the adoption of a new Regulation aimed at revising the rules on restricting operations at an EU airport because of noise, Regulation (EU) No 598/2014 of the European Parliament and of the Council of 16 April 2014 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Union airports within a Balanced Approach[2]. The new regulation shall enter into force on June 13, 2016.

This contribution proposes an insight into that Regulation, which nicely fits the general theme of the present book on 'Environmental and Planning Law Aspects of Large Scale Projects'. It explains first where the initiative of a new Regulation comes from, its context and its rationale. It analyses some of the key concepts of the new Regulation, such as the notions of 'noise-related operating restriction' and 'balance approach'. It proceeds further by deciphering some of the main implications of the new regulation, as to the possibility left to Member States to adopt restrictions that could help improve the accoustic environnement around large airports and the protection of citizens, while taking air transport needs and economic development into consideration. The implicit question is indeed whether the new Regulation offers a potential to contribute to a better protection of citizens against noise due to airport activities, an issue that has turned out to be very sensitive in the European Union. Or shall it, on the contrary and quite paradoxically at first sight, rather upset and complicate the task of public authorities in balancing conflicting interests, would they wish to give an appropriate weight to their positive obligations regarding the protection of human rights against excessive acoustic nuisances?

2. Context

[2] Regulation (EU) No 598/2014 of the European Parliament and of the Council of 16 April 2014 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Union airports within a Balanced Approach and repealing Directive 2002/30/EC, OJ L 173, 12.6.2014, p. 65–78

The regulation does not pop up in a vacuum. It repeals, with effects from 13 June 2016, a 2002 Directive on precisely the same issue (the introduction of noise-related operating restrictions at Community airports), which did itself repeal a former Regulation, the so-called 1999 'Hushkit Regulation', which did also found its roots in another frame.[3] The mainspring of that evolution is to be found in the rules promoted at international level, within the International Civil Aviation Organization (ICAO), a UN specialized agency founded by the Chicago Convention of 1944[4], due to the fact noise by aircraft has in the last two decades turned out to be quite a contentious issue, due to the impact noise-related restrictions could have on economic activities.

The trend is clear but not smooth. The 1999 'Hushkit Regulation'[5] was done away with under pressure from ICAO members. The Regulation, because it systematically banned the registration of 'recertificated aircrafts', those aircrafts meeting noise-limitation requirements only through 'hushkitting'[6], was fiercely criticized abroad. US carriers, often flying quite noisy aircrafts fitted with these mufflers, saw it as a clear threat of protectionism... Actions were soon brought before the ICAO[7]. And also before the European Court of Justice, through a preliminary ruling. The Regulation did not resist the heavy pressure[8]. It was replaced, in 2002, by a new Directive, Directive 2002/30 of the European Parliament and of the Council of 26 March 2002 on the establishment of rules and procedures with regard to the introduction

[3] Before the Regulation came into effect, the Community had adopted three directives imposing limits on aircraft noise emissions: Council Directive 80/51/EEC of 20 December 1979 on the limitation of noise emissions from subsonic aircraft (OJ 1980 L 18, p. 26), as amended in particular by Council Directive 83/206/EEC of 21 April 1983 (OJ 1983 L 117, p. 15); Council Directive 89/629/EEC of 4 December 1989 on the limitation of noise emission from civil subsonic jet aeroplanes (OJ 1989 L 363, p. 27); and Council Directive 92/14/EEC of 2 March 1992 on the limitation of the operation of aeroplanes covered by Part II, Chapter 2, Volume 1 of Annex 16 to the Convention on International Civil Aviation, second edition (1988) (OJ 1992 L 76, p. 21), as amended by Council Directive 98/20/EC of 30 March 1998 (OJ 1998 L 107, p. 4).

[4] See http://www.icao.int

[5] Council Regulation (EC) No 925/1999 of 29 April 1999 on the registration and operation within the Community of certain types of civil subsonic jet aeroplanes which have been modified and recertificated as meeting the standards of volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993) (OJ 1999 L 115, p. 1).

[6] Specific technical devices, the so-called hushkits, are added to airplanes in order to allow them to change categories, among those established by the Chicago Convention, from the noisiest to the less noisy, while still being quite polluting.

[7] The United States filed a complaint at the ICAO under Article 84 of the Chicago Convention. See Archives of the US Department of State, available on http://2001-2009.state.gov/r/pa/prs/ps/2002/9006.htm

[8] *A. Knorr & A. Arndt*, 'Noise wars' : the EU's 'Hushkit Regulation', Bremen Universität, Globaliesierung der Weltwirtschaft, 2002

of noise-related operating restrictions at Community airports[9]. This without waiting for the Judgement of the European Court, which confirmed the legality of the Hushkit approach…[10].

The uproar caused by the 1999 EU Regulation forced the ICAO to clarify its position on noise reduction policies. States were developping very different approaches to the issue, from the moste flexible to the most restricting. It is the reason why the international agency came out, quite at the same moment, with its new 'balanced approach' concept, which immediately rooted in the fresh 2002 Directive.

3. The balanced approach

The 'balanced approach' is a jargon that sounds like having something to hide and it does indeed. It sounds nice and harmless but it pursues a very specific agenda : discourage the adoption of constraining noise-related restrictions, that could heavily bear or air transport companies. Before adopting such measures, one should assess all possible alternatives. Priority must be given to cost-effective measures, which are not necessarily identical for all airports. This should all be decided and verified on a case-by-case basis.

Officially, the concept emanates from Resolution A33-7, adopted by the 33rd ICAO Assembly, in 2001, which calls upon all ICAO Contracting States and International Organizations 'to recognize the leading role of ICAO in dealing with the problem of aircraft noise' and, implicitly, to be more open to global standards. It is in that package on environmental protection that a reference to the need to adhere to a 'balanced approach', with not many details in there yet, is made[11]. Details were provided a bit later, in 2004, in a Guidance Document[12].

The balanced approach concept of aircraft noise management comprises four principal elements and requires a careful assessment of all different options to mitigate noise, including reduction of aeroplane noise at source, land-use planning and management measures, noise abatement operational procedures and operating restrictions, without prejudice to relevant

[9] OJ L 85, 28.3.2002, p. 40–46.
[10] Case C-27/00 and C-122/00, 12 March 2002, *Omega Air Ltd.*
[11] See all documents on http://www.icao.int/Meetings/AMC/MA/Assembly%2033rd%20Session/plugin-resolutions_a33.pdf
[12] ICAO, Guidance on the Balanced Approach to Aircraft Management, Doc. 9829AN/451, revised in 2007.

legal obligations, existing agreements, current laws and established policies.

One of the key features of the approach is that noise policy should not target single solutions but use any combinations of solutions as the most appropriate option to solve the cause of problems[13]. The approach is described as a process, which needs to be complied with. That process requires careful assessment of four elements, which are not proposed in a hierarchy but horizontally, apparently equal.

Apparently equal? Still, according to some commentators, operating restrictions should not be applied as a first resort, but only after considerations of the benefits to be gained from other elements in a manner 'that is consistent with the balanced approach, even if all elements are to be considered equally'[14]. If quiet aircraft technology can significantly reduce the noise footprint of aircraft, the severity of noise problems would actually mostly depends on individual airport's locations and markets and should be assessed distinctly, on a case-by-case basis[15].

4. A new avenue for litigation

The 2002 Directive imposed Member States to adopt a balanced approach in dealing with noise problems at airports in their territory, the 'balanced approach' meaning 'an approach under which Member States shall consider the available measures to address the noise problem at an airport in their territory, namely the foreseeable effect of a reduction of aircraft noise at source, land-use planning and management, noise abatement operational procedures and operating restrictions'[16]. It also required that, when considering operating restrictions (understood as noise related action that limits or reduces access of civil subsonic jet aeroplanes to an airport), 'the competent authorities shall take into account the likely costs and benefits of the various measures available as well as airport-specific characteristics[17]'.

[13] *F.Netjasov*, 'Contemporary measures for noise reduction in airport surroundings', Applied accoustics, 2012, n°73, 1076-1085.
[14] Id.
[15] *R. Girvin*, Aircfat noise-abatement and mitigation strategies, Journal of Air Transport Management, 2009, vol.15, pp.14-22.
[16] Art.2.
[17] Art.2 & 3.

These new provisions clearly fuelled new litigation, at the initiative of air transport operators, showing first hints about how the new balanced approach, besides helpfully guiding public authorities, could perhaps also hinder them in their environmental protection tasks, when trying to adopt measures that could reduce the noise impact of airport activities.

In Belgium, a 2002 Royal decree imposed strict bans on nightlights above the Brussels area, in order to damper the nuisances resulting from the activity of a large airport located in the close vicinity, whose awkward position up North imposes aircrafts to take off above the densely populated city centre. The European Commission immediately questioned the ban before the European Court of Justice, on the very basis of a breach of the 'balanced approach'[18]. In support of its action, the Commission relied on a single plea alleging that, during the period granted to the Member States for transposition of the Directive and while the latter was already in force, the Kingdom of Belgium adopted the Royal Decree of 14 April 2002, which, as regards the operating restrictions imposed on certain types of aeroplanes, follows the approach adopted by Regulation No 925/1999, which had already been repealed, and not that chosen by the Directive, which takes the 'balanced approach' on board. The Court explains that, although it is true that, in adopting the new Directive, the Community legislature was pursuing the objective of reducing noise pollution generated by aeroplanes, as with the adoption of Regulation No 925/1999, the fact remains that the implementing measures envisaged by those two pieces of legislation are 'radically different'. Under the Directive, the reduction of noise emissions is the result of a balanced approach on noise management in each airport, whereas the provisions of Regulation No 925/1999 aim to prevent deteriorations of the overall noise impact by imposing operating restrictions on civil subsonic jet aeroplanes according to another criterion. As a consequence, it declared that Belgium was in breach of the new 2002 Directive and of the duty to cooperate in good faith[19].

Later on, it is also on basis on the same 'balanced approach' that the legality of fines, that had been imposed on air companies which did not comply with noise quality standards, was tested before the European Court, via a preliminary ruling. The question was whether the concept of 'operating restriction' in the 2002 Directive 2002/30/EC must be interpreted as including rules imposing limits on noise levels, as measured on the ground, to be complied with by

[18] Case C-422/05, *Commission v Belgium* [2007] ECR I-4749.
[19] Refering to former Article 10 EC Treaty.

aircraft overflying areas located near the airport and providing that any person responsible for exceeding those limits may incur a penalty. Could environmental quality standards, specific to noise, be assimilated to operating restrictions? With the consequence that these restrictions would need to comply with the specific consultation and cost-benefit requirements that are imposed under Annex II of the Directive? The Court, interestingly, declares that the 'balanced approach' concept functions on basis of a hierarchy: 'Recital 10 in the preamble to that Directive states that the balanced approach constitutes a policy approach to address aeroplane noise, including international guidance for the introduction of operating restrictions on an airport-by-airport basis. The 'balanced approach' to aircraft noise management (…) comprises four principal elements and requires careful assessment of all different options to mitigate noise, including reduction of aeroplane noise at source, land-use planning and management measures, noise abatement operational procedures and operating restrictions, without prejudice to relevant legal obligations, existing agreements, current laws and established policies[20]. It follows that operating restrictions are applicable only when any other noise management measures have failed to achieve the aims of Directive 2002/30, as laid down in Article 1'[21].

According to the Court, environmental legislation, such as that at issue in the main proceedings, imposing limits on maximum noise levels, as measured on the ground, to be complied with by aircraft overflying areas located near the airport, does not itself constitute a prohibition on access to the airport in question and that, in any event, the adoption of a method consisting of measuring on the ground the noise produced by an aircraft in flight constitutes an element of a balanced approach in that it is capable of providing more data to help reconcile the competing interests of people affected by noise nuisance, of economic undertakings that operate aircraft and of society as a whole. But the judge also considers that it cannot, however, be ruled out that such legislation, in view of the relevant economic, technical and legal contexts to which it belongs, can have the same effect as a prohibition on access. If, indeed, the limits imposed by that legislation are so restrictive as to oblige aircraft operators to forgo their business operation, such legislation would amount to prohibitions of access and would constitute, therefore, 'operating restrictions' within the meaning of that

[20] With note : '(see, in particular, Case C-442/05 Commission v Belgium [2007] ECR I-4749, paragraph 38)'.
[21] Case C-120/10, 8 September 2011, *European Air Transport v. College d'environnement de la Région de Bruxelles-Capitale,* para.34, para 24 & 25.

directive. As a consequence, it found that national environmental legislation imposing limits on maximum noise levels, as measured on the ground, to be complied with by aircraft overflying areas located near the airport, does not itself constitute an 'operating restriction' within the meaning of that provision, 'unless, in view of the relevant economic, technical and legal contexts, it can have the same effect as prohibitions of access to the airport in question', and let the referring court with the task to determine whether the measures adopted by the local authorities have such effects…[22].

5. Towards a new Regulation

When asked in an interim assessment about how happy they were with the 2002 Directive and its balanced approach, Airport authorities were actually dubitative. According to a 2008 report[23], the majority of airports operators indicated that the Directive did not help them much. They indicated that the Directive had not directly influenced the noise management around their airport. Some airports mentioned that what the Directive enabled was already possible under national law. By contrast, several airports said that the Directive made the process of noise management around the airport more onerous due to the requirements of its Annex 2. This annex, as already mentioned, requires a consultation and an assessment of the costs and benefits of alternative means of reducing noise around the airport. They even indicated the fear that airlines might sue them easily, under the argument that the annexe 2 measures would not have completely been adhered to. Not less importantly, the Directive did not help reducing the number of people affected by noise, particularly at night. That number did not even stabilize ; it increased since the Directive came into force [24].

In such a puzzling context, why bother about adopting a new Regulation on noise-related restrictions?

The initiative emanates from a Decembner 2011 European Commission 'Better airports' package initiative. The package was clearly focussed on addressing capacity shortage at

[22] Case C-120/10, 8 September 2011, *European Air Transport v. College d'environnement de la Région de Bruxelles-Capitale,* para.34.
[23] Report from the Commission to the Council and the European Parliament of 15 February 2008 - Noise Operation Restrictions at EU Airports - (Report on the application of Directive 2002/30/EC) (COM(2008) 66 final).
[24] §11, Conclusions of the report.

Europe's airports and contained three legislative proposals: one on slots, one on groundhandling and one on noise[25]. Again, the main focus of this noise initiative is not environmental protection but the facilitation of air transport[26]. The tone is set: 'the introduction of operating restrictions may have a substantial impact on business and operations, as it restricts access to an airport. Hence, the process leading to a decision on noise-related operating restrictions should be consistent, evidence-based and robust to be acceptable for all stakeholders'[27]. The wish to avoid conflicts with ICAO is confirmed: 'this regulation aims to apply noise-related operating restrictions of the Balanced Approach in the EU in a consistent manner which should greatly reduce the risk of international disputes in the event that third country carriers are impacted by noise abatement measures at airports in the Union. In addition, competent authorities will be in a better position to phase-out the noisiest aircraft in the fleet. The proposed regulation will repeal Directive 2002/30/EC which was instrumental in bringing an international dispute to an end and set the first steps in the harmonization of noise management policies, including tackling the noisiest aircraft of that time. However, the instrument needs to be adapted to the current requirements of the aviation system and the growing noise problem'. The new motto is 'robust'. All steps in the assessment process will be clarified in order to ensure a more consistent application of the balanced approach across the Union. The new proposal 'aims to strengthen the basic logic of the ICAO Balanced Approach by making a stronger link between its pillars and by clarifying the different steps of the decision-making process when considering operating restrictions'.

The new Regulation is more focused on detail and process, indeed. About what to assess and who to consult. Far beyond the general requirement for Member States to adopt the Balanced Approach in dealing with noise problems that characterized the former Directive, the new Regulation fixes the procedural steps that have to be followed in order to adopt noise-related restrictions. It imposes a heavy consultation process that shall ban any possibility of a rush in

[25] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Union airports within a Balanced Approach and repealing Directive 2002/30/EC of the European Parliament and of the Council COM/2011/0828 final

[26] This explains the legal base of the Regulation : Article 100(2) TFEU.

[27] Proposal for a Regulation of the European Parliament and of the Council on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Union airports within a Balanced Approach and repealing Directive 2002/30/EC of the European Parliament and of the Council, COM/2011/0828 final - 2011/0398 (COD), explanatory memorandum, §2.

the future, for the adoption of noise-related measures having a possible impact on the access to an airport.

In that regard, the legislation still bears the marks of very tense discussions between the European Commission and the Member States, as to who should have the last say on choosing the most appropriate restricting measures.

6. Operating restrictions

The Regulation only applies to Member States in which an airport with more than 50 000 civil aircraft movements per calendar year is located and when the introduction of noise-related operating restrictions is being considered at such an airport.

The adoption of 'operating restrictions' clearly remains the central issue under the new Regulation.

An operating restriction is, according to the new Regulation, a *noise-related action* that *limits access to or reduces the operational capacity* of an airport, including operating restrictions aimed at the withdrawal from operations of marginally compliant aircraft at specific airports as well as operating restrictions of a partial nature, which for example apply for an identified period of time during the day or only for certain runways at the airport. A 'noise-related action' means 'any measure that affects the noise climate around airports, for which the principles of the Balanced Approach apply, including other non-operational actions that can affect the number of people exposed to aircraft noise'. This means in clear that any measure that affects the noise climate around airports, from the moment it limits access to or reduces the operational capacity of an airport, can potentially qualify as an 'operating restriction'.

The scope is consequently quite large. This even if the definition slightly changed, by comparison to Directive 2002/30/EC[28], 'in order not to delay the implementation of operational measures which could immediately alleviate the noise impact without

[28] 'Operating restrictions" shall mean noise related action that limits or reduces access of civil subsonic jet aeroplanes to an airport. It includes operating restrictions aimed at the withdrawal from operations of marginally compliant aircraft at specific airports as well as operating restrictions of a partial nature, affecting the operation of civil subsonic aeroplanes according to time period', Art.2, e).

substantially affecting the operational capacity of an airport. Such measures should therefore not be considered to constitute new operating restrictions'[29].

A nighttime flight ban, this is a clear and classical illustration of what is meant by an operating restriction. But also a runway that is not be used any more, due to the noise nuisance it generates. Or a quantitative limitation in the yearly maximum of take-off and landing movements at the airport. There are quite a few possibilities. Would a change in air routes planning also fall within than definition (turn sooner to the left, or more to the right…) ? Not necessarily. It all depends if it does limit access to the airport or reduce its operational capacity.

7. A process under close supervision

Under the new Regulation, the process of adopting operating restrictions is made extremely heavy. In other circles, one would no doubt raise the issues of simplification and unnecessary red tape. Here, the trend is in the reverse order: towards a more and more burdensome regime, at least for the public authorities.

The Regulation's main impact could be summed up as such:

- it shall slow down the process of adoption of operating restrictions ;
- it shall make local authorities accountable to the European Commission for the adoption of such restrictions, even if only through the need to answer its objections ;
- it shall impose cost-benefit analyses and intense consultation processes that, if not complied with, could lead to judicial review.

7.1. The notifications

According to Article 8 of the new Regulation, before introducing an operating restriction, a night ban for instance, the competent authorities shall give six months' notice to the Member States, the Commission and the relevant interested parties. They must explain, in their notification, the reasons for introducing the operating restriction, the noise abatement

[29] According to the preamble.

objective established for the airport, the measures that were considered to meet that objective, and the evaluation of the likely cost-effectiveness of the various measures considered, including, where relevant, their cross-border impact. At the request of a Member State or on its own initiative, the Commission may, within a period of three months after the day on which it receives notice, review the process for the introduction of an operating restriction. Where the Commission finds that the introduction of a noise-related operating restriction does not follow the process set out in this Regulation, it may notify the relevant competent authority accordingly. The relevant competent authority shall examine the Commission notification and inform the Commission of its intentions before introducing the operating restriction.

This was the result of a fierce negotiation. Initially, the proposal gave a plain veto right to the Commission: 'at the request of a Member State or on its own initiative, and without prejudice to a pending appeal procedure, the Commission may scrutinise the decision on an operating restriction, prior to its implementation. Where the Commission finds that the decision does not respect the requirements set out in this Regulation, or is otherwise contrary to Union law, it may suspend the decision'[30]. 'Excessive and against the subsidiarity principle' was the answer, at the occasion of the national parliament's scrutiny of the compliance with the subsidiarity principle. Such a veto would clearly lead to a deterioration of the protection of the citizens. As expressed by the Austrian authorities[31], 'the primary objective pursued by the Commission is to overcome the perceived capacity shortages at European airports. The issue of noise abatement is of secondary importance in this context, as reflected in the overriding importance attributed to cost efficiency in the proposal. Hence, there is cause for concern that the proposed version would lead to a deterioration of the noise situation for people living in the surroundings of airports. In return for an increase in capacity, the Commission is willing to accept a reduction in the level of protection for the resident population, which is not acceptable'. What more, 'noise-related operating restrictions are often agreed upon after protracted negotiations among all stakeholders, representing a delicate compromise between the groups concerned. If the Commission had the right to interfere with such arrangements, this would unnecessarily contribute to a further alienation between the EU bodies and the citizens, and violate the autonomy of local decision-making, a principle recognised by Union

[30] Former version of Art.10.
[31] European Affairs Committee of the Federal Council of 12 April 2012 to the European Parliament and the Council pursuant to Article 23f (4) of the Austrian Constitution, disponible sur ipex.eu

law'. The German Bundestag did also call on the Federal Government to work towards the withdrawal of the proposal.

The Commission has been denied the possibility of a veto.

Still, it keeps the possibility to review the process for the introduction of an operating restriction and, where it finds that the introduction of a noise-related operating restriction does not follow the process set out in the Regulation, to ask for explanation.

This intrusion of the European Commission into a dynamic that was so far left to local authorities and domestic arrangements is a very new requisite, that shall turn out to be one of the cornerstones of the new regime. When one knows how politically sensitive at domestic level these airport-related noise issues are already, it remains to be seen how constructive the intervention of that new actor shall be, when re-examining the agreements obtained between local authorities, sometimes with much efforts, in the light of the new Regulation.

The process is also submitted to a sort of standstill obligation, during six months. Six months. This is very long, if without any possible nuance, without any consideration of possible pending judgments or other legal constraints. What shall happen when public authorities are required, by judgment, to find a very convincing and quick political solution to an airport-linked noise nuisance at local level ? How shall it be possible to conciliate such opposite requests ? The future shall not be made of rushed decisions. React slowly, a first step towards wiser solutions?

7.2. Mediation and extensive consultations

Dialogue is often profitable for finding balanced solutions. Understanding each other's concerns, discovering possible win-win options, … who would oppose the idea of large consultation processes, when facing the need to solve sensitive issues?

The Regulation goes very far in that direction. It even mentions the possibility of a mediation process, 'organised in a timely and substantive manner', between a very broad range of possible stakeholders, offering the promise of intense brainstorming sessions. Interested

parties are, in that regard, according to Article 6 : local residents living in the vicinity of the airport and affected by air traffic noise, or their representatives, and the relevant local authorities; representatives of local businesses based in the vicinity of the airport, whose activities are affected by air traffic and the operation of the airport; relevant airport operators; representatives of those aircraft operators which may be affected by noise-related actions; the relevant air navigation service providers; the Network Manager, as defined in Commission Regulation (EU) No 677/2011 ; where applicable, the slot coordinator. A nice bouquet of people and competences indeed.

These stakeholders must also be given the possibility to submit comments, three months before the possible adoption of new operating restrictions[32]. Cumulated with the other notification processes mentioned under Article 8, this means that the competent authority shall have a most important charge in networking and communication, which shall necessarily be placed at the hearth of its activity.

8. Cost-effective balanced approach

If there is a noise problem, that noise problem must be identified in accordance with Directive 2002/49/EC. This is how the new Regulation draws a clear and necessary link to the pre-existing 'environmental noise Directive'[33], which, even if it does not impose any emissions limits, is a key instrument in guiding Member States in their assessment of the acoustic quality of the environment. The noise directive is helpful in assessing the noise problems, but the choice of solutions is now locked to the application of the new Regulation: measures that could lighten the noise burden must be proposed according to the balanced approach.

That balanced approach is redefined as 'the *proces*s developed by the International Civil Aviation Organization under which the range of available measures, namely the reduction of aircraft noise at source, land-use planning and management, noise abatement operational

[32] Art.6, d.
[33] Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise - Declaration by the Commission in the Conciliation Committee on the Directive relating to the assessment and management of environmental noise, OJ L 189 , 18/07/2002 P. 0012 - 0026

procedures and operating restrictions, is considered *in a consistent way* with a view to addressing the noise problem in the *most cost-effective* way on an *airport-by-airport basis'*[34]. It is also complemented by an explicit division in two categories: on the one hand, the usual measures. On the other hand, the measures that cannot be applied as a first resort.

> 'Member States must ensure that, when noise-related action is taken, the following combination of available measures is considered, with a view to determining the most cost-effective measure or combination of measures:
> (a) the foreseeable effect of a reduction of aircraft noise at source;
> (b) land-use planning and management;
> (c) noise abatement operational procedures;
> (d) *not applying operating restrictions as a first resort,* but only after consideration of the other measures of the Balanced Approach.[35]'

The available measures may, if necessary, include the withdrawal of marginally compliant aircraft[36]. Member States, or airport managing bodies, as appropriate, may offer economic incentives to encourage aircraft operators to use less noisy aircraft during the transitional period referred to in point (4) of Article 2. Those economic incentives shall comply with the applicable rules on State aid.

Moreover, a necessity test is imposed. Needless to stay but still said, measures or a combination of measures taken in accordance with this Regulation for a given airport shall not be more restrictive than is necessary in order to achieve the environmental noise abatement objectives set for that airport. Operating restrictions shall be non-discriminatory, in particular on grounds of nationality or identity, and shall not be arbitrary.

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[34] Art.2.3, emphasis added.
[35] Art.5,3, emphasis added.
[36] This definition is not simple. As specified by Art.2.4 : ''marginally compliant aircraft' means aircraft which are certified in accordance with limits laid down in Volume 1, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation signed on 7 December 1944 (the Chicago Convention) by a cumulative margin of less than 8 EPNdB (Effective Perceived Noise in Decibels) during a transitional period ending on 14 June 2020, and by a cumulative margin of less than 10 EPNdB following the end of that transitional period, whereby the cumulative margin is the figure expressed in EPNdB obtained by adding the individual margins (i.e. the differences between the certificated noise level and the maximum permitted noise level) at each of the three reference noise measurement points defined in Volume 1, Part II, Chapter 3 of Annex 16 to the Chicago Convention;

What is a cost-effective measure ?

According to the requirements of Annexe II, the only elements that must be taken into consideration for assessing the cost-effectiveness of envisaged noise-related operating restrictions are, to the extent possible, in quantifiable terms:

- the anticipated noise benefit of the envisaged measures, now and in the future;
- the safety of aviation operations, including third-party risks;
- the capacity of the airport;
- *any effects* on the European aviation network.

It is only 'in addition' and if they wish to do so that competent authorities *may take due account of the following factors*:

- the health and safety of local residents living in the vicinity of the airport;
- environmental sustainability, including interdependencies between noise and emissions;
- any direct, indirect or catalytic employment and economic effects.

The exercice can hardly be described as fairly balanced. The semantic demonstrates a clear bias against a due and fair taking into consideration of the societal benefits that can flow from a healthier and less noisy environment, even through transport policy.

In the same vein, the order in which provisions are presented in the legislative text do also give indications about how the operating restrictions should somehow be perceived. It is noticeable that, even before presenting the process leading to the adoption of possible operating restrictions, the Regulation first impose to the Member States the creation of a specific right of appeal against these measures : 'Member States shall ensure the right to appeal against operating restrictions adopted pursuant to this Regulation before an appeal body other than the authority that adopted the contested restriction, in accordance with national legislation and procedures'. This could be interpreted as the indication of a prejudice. Those measures are not welcome and are potentially highly contentious. Is it a sort of diplomatic language, meant to reassure foreign trade partners and the ICAO ?

9. Independent authorities

The adoption of the true operating restrictions falls within the remit of a specific competent authority which shall be 'independent of any organisation which could be affected by noise-related action. That independence may be achieved through a functional separation'. This is a new requirement. What does it mean ? According to the preamble, 'the competent authority responsible for adopting noise-related operating restrictions should be independent of any organisation involved in the airport's operation, air transport or air navigation service provision, or representing the interests thereof and of the residents living in the vicinity of the airport'. From now on, that quite logic requirement of objectivity shall be made judiciable and accountable for. Does it entail the creation of new autonomous agencies ? Not necessarily, at least according to the preamble, as it declares that 'this should not be understood as requiring Member States to modify their administrative structures or decision-making procedures'.

10. Conclusion

The adoption of noise-related restrictions shall be a heavy test to pass in the future, once the new Regulation shall enter into force. There is a clear wish to place them under control, but not only under the control of competent local authorities. The EU Commission, on the one hand, the representants of aircrafts operators, on the other hand, shall all intensively be heard. Together with many other interested parties. Much ado, about allowing people to sleep correctly at night…

The logic of the Regulation is specific: seduce the ICAO and its partners. Make sure that public authorities understand that noise insulation can also be a solution, that airports are better located if they are not too close to cities, to understand that heavy airplanes are noisier than ligter ones? They did know that already, for long. The keypoint in the Regulation is to make the process of adopting true restrictions on access and capacity much trickier.

On the positive side, the heavy processual requirements and consultations might help re-technicalize the debate, on issues where the margin of appreciation of public authorities is so large. It has for long been recognized that processes and studies, in these highly sensitive

matters, are important. Governmental decision-making process concerning complex issues of environmental and economic policy such as in the case of night bans must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake. However, this does not mean that decisions can only be taken if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided. This has been settled in another context, by the European Court of Human Rights, in the case *Hatton*[37]. But it sheds light on a crucial question : could an operating restriction be considered as illegal, by the mere fact that a stakeholder was not consulted or if some elements are missing in the cost-effectiveness exercice ?

The Regulation is not balanced. This explains the serious concern that new rules on aviation noise could fall short of what is needed to protect people living near airports[38]. The cost-effectiveness exercise does not take the health and environmental concerns very seriously on board. Nothing is provided for framing the possible deletion of a preexisting operating restrictions, the suppression of a night ban for instance. The introduction of restricting measures is submitted to a heavy consultation process and to cost-benefit assessment, but their deletion? This is a potentially detrimental gap, as the revision of noise-related operating restrictions which were already introduced before 13 June 2016 is foreseen; 'they shall remain in force until the competent authorities decide to revise them in accordance with this Regulation'[39]. These elements demonstrate a narrow-minded approach of the protection of the environment and of citizen's health against noise, an issue that ranks high among the environmental causes of ill-death today in the European Union[40].

Another puzzling element is that stress on the importance of an airport-by-airport approach, a reduction in scope that looks quite awkward when one knows how competitive airports can be with each other and how relevant it could be to enlarge the scale of the debate in order to propose solutions. 'Consistent application of the balanced approach should identify the most cost-effective solutions, tailor made to the specific airport situation'. The message is that a general ban on noisy aircrafts at national scale is not the way forward, for sure. But where

[37] European Court of Human Rights, *Hatton,* Grand Chamber, 8 July 2003.
[38] http://www.airportwatch.org.uk/2014/07/new-eu-rules-on-airports-seen-as-too-timid-to-reduce-extent-of-aircraft-noise/
[39] Art.14.
[40] Noise in Europe, European Environmental Agency, 2014.

shall then discussions take place, between close regions or neighbouring States, on how to best organize the air traffic between their competing airports? Was it not also worth looking at that larger scale, in order to better promote aviation network efficiency?

Rather a hurdle, is the conclusion. The price of compliance with global international standards?