



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 20.7.2005
COM(2005) 326 final

2005/0132 (ACC)

Proposal for a

COUNCIL REGULATION

on the negotiation of agreements on trade in services other than transport

(presented by the Commission)

EXPLANATORY MEMORANDUM

In its Communication on relations between the Community and third countries in the field of air transport of 26 February 2003¹, the Commission has highlighted certain basic principles for the negotiation and implementation of air service agreements between Member States and third countries, which are drawn from the case law of the Court of Justice of the European Communities².

Member States can indeed reduce the risk of conflict with their Treaty obligations and with Community law by following a number of basic principles:

1. Under Article 10 of the Treaty, Member States shall take all appropriate measures to ensure fulfilment of obligations that arise from the Treaty, i.e. to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. Member States must conduct their relations with third countries accordingly.
2. Member States' actions must support the Community's initiatives, negotiations, policies and objectives.
3. Member States must not enter into negotiations on matters of Community exclusive competence or which are the subject of Community negotiations under a specific authorisation.
4. With regard to bilateral agreements Member States must inform the Commission of all planned international negotiations and the outcome of such negotiations in order that it may monitor and coordinate approaches to third countries as well as ensure that Community law is respected.

In the field of air transport, those obligations have been articulated through the establishment of an information exchange system in Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries³.

In the field of trade in services other than transport there are good reasons not only for establishing an information exchange system but also for reinforcing it. The underlying considerations for the establishment of the information exchange system⁴ in the field of air

¹ COM (2003) 94 final.

² See in this respect the judgments in the following cases: C-62/98 *Commission v Portugal* [2000] ECR I-5171), C-466/98 *Commission v the United Kingdom* [2002] ECR I-9427, C-467/98 *Commission v Denmark* [2002] ECR, I-9519, C-468/98 *Commission v Sweden* [2002] ECR I-9575, C-469/98 *Commission v Finland* [2002] ECR, I-9627, C-471/98 *Commission v Belgium* [2002] ECR I-9681, C-472/98 *Commission v Luxembourg* [2002] ECR, I-9741, C-475/98 *Commission v Austria* [2002] ECR I-9797 and C-476/98 *Commission v Germany* [2002] ECR, I-9855, and the opinions 1/78([1978] ECR 2151), 2/91([1993] ECR I-1061) and 1/94([1994] ECR I-5267)

³ OJ L157, 30.4.2004, p. 7. Regulation as corrected and republished in OJ L195, 2.6.2004, p. 3.

⁴ With the development of EC law, several matters now fall within the exclusive external competence of the Community by application of the AETR case-law (case 22/70 AETR[1971] ECR 263). Member States might therefore be prevented from contracting on their own new international obligations. Member States might also be prevented from keeping such obligations in force in existing agreements if they fail to take account of Community law. In addition, where it is apparent that the subject-matter of

services apply *mutatis mutandis* to the negotiation and conclusion of all international agreements. Furthermore, since the entry into force of the Treaty of Nice, the Community has a full-fledged competence, based on Article 133(5) EC to negotiate international agreements on trade in services, subject to the provisions of paragraph 6 of that same Article. This competence is not dependent on the previous exercise of existing internal powers, as this aspect only plays a role in determining the extent to which the Community external powers would be exclusive and in triggering or not unanimity voting.

In a context of parallelism between this full-fledged competence and a right for Member States to maintain and conclude agreements in so far as these comply with Community law and other relevant international agreements, it is essential that the Commission, as the guardian of the Treaty, keep under constant surveillance all existing agreements concluded by Member States with third countries in the field of services other than transport. It is also essential that the Commission be informed about any planned negotiation of new services agreements. The fulfilment of the obligation to inform the Commission about any planned negotiation of services agreements does not only serve the purpose of correcting inconsistencies with EC law, if any, but also the overriding objective of developing a balanced and effective way of working at Community level that makes full use of the weight of the Community to further the interests of European industry and consumers. Even if the planned agreement does not encroach on areas of exclusive Community competence and does not include provisions contrary to EC law, the attainment of the common interest might require an agreement between the Community and the third country concerned. In this regard, it is proposed that Member States planning to negotiate agreements with third countries in the field of trade in services other than transport observe a standstill obligation for a certain period of time in which the Commission might decide to propose a recommendation to the Council to negotiate such an agreement as a Community agreement. This would mirror similar provisions contained in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations⁵.

an agreement or convention falls partly within the exclusive competence of the Community and partly within that of its Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community. The Community institutions and the Member States must take all necessary steps to ensure the best possible cooperation in that regard

⁵ OJ L 204, 21.7.1998, p. 37. Directive as last amended by the 2003 Act of Accession

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 133 thereof,

Having regard to the proposal from the Commission⁶,

Having regard to the opinion of the European Parliament⁷,

Having regard to the opinion of the European Economic and Social Committee⁸,

Having regard to the opinion of the Committee of the Regions⁹,

Whereas:

- (1) All existing bilateral agreements between Member States and third countries or international organizations that contain provisions contrary to Community law should be amended or replaced by agreements that are wholly compatible with Community law.
- (2) Without prejudice to the provisions of the Treaty, and in particular Articles 133 and 226 thereof, Member States may wish to make amendments to existing agreements and make provision to manage their implementation until such time that an agreement concluded by the Community enters into force.
- (3) For that purpose, the Commission shall, in cooperation with Member States, keep under constant surveillance any agreement on trade in services other than transport services concluded by Member States with third countries or international organizations prior to the entry into force of this Regulation.
- (4) It is essential to ensure that a Member State conducting negotiations takes account of Community law, broader Community interests and ongoing or planned Community negotiations, in particular in the context of the WTO.

⁶ OJ C , , p. .

⁷ OJ C , , p. .

⁸ OJ C , , p. .

⁹ OJ C , , p. .

- (5) To that effect an efficient and transparent verification procedure should be established. Within such a procedure, as in the procedure already established in the field of air transport by Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries¹⁰, the Commission and the Member States should be allowed sufficient time to make comments regarding compliance with Community law, broader Community interests and ongoing or planned Community negotiations. The Commission should also have the option of proposing that the planned agreement be negotiated instead by the Community in accordance with the provisions of Article 133 of the Treaty. The Member State in question should, pursuant to the general obligations laid down in Article 10 of the Treaty, defer the initiation of the planned negotiations for a period sufficient to allow either a joint examination of the comments or the preparation of a Commission recommendation to negotiate a Community agreement.
- (6) In reviewing agreements concluded prior to entry into force of this Regulation and in monitoring the negotiation and conclusion of agreements after the entry into force of this Regulation, the Commission shall take any appropriate action to ensure full compliance of such agreements with Community law and policies.
- (7) Pursuant to Article 284 of the Treaty, the Commission may, within the limits and under the conditions laid down by the Council in accordance with the provisions of the Treaty, collect any information and carry out any checks required for the performance of the tasks entrusted to it.
- (8) Any Member State may invoke the confidentiality of the provisions of bilateral agreements it has negotiated and request the Commission not to share the information with other Member States.
- (9) Since the objectives of this Regulation, namely the co-ordination of negotiations with third countries with a view to concluding agreements in the field of trade in services other than transport services, the necessity to guarantee a harmonised approach in the implementation and application of those agreements and the verification of their compliance with Community law, cannot be sufficiently achieved by the Member States and can therefore, by the reason of the Community-wide scope of this Regulation, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity, as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to achieve those objectives.

HAS ADOPTED THIS REGULATION:

Article 1

Notification to the Commission of existing agreements

Member States shall inform the Commission of any agreements on trade in services other than transport services that they have negotiated with third countries or international organizations

¹⁰ OJ L 157, 30.4.2004, p. 7. Regulation as corrected and republished in OJ L 195, 2.6.2004, p. 3.

prior to the entry into force of this Regulation, except where these have already been notified to the Commission pursuant to other provisions of Community law. This information shall be provided within three months from the entry into force of this Regulation.

Article 2

Notification to the Commission of planned agreements

1. Where a Member State intends to enter into negotiations with third countries or international organizations concerning a new agreement on trade in services other than transport services or the amendment of an existing agreement on trade in services other than transport services, its Annexes or any other related bilateral or multilateral arrangement, it shall notify the Commission of its intentions in writing. This notification shall include a copy of the existing agreement, if available, other relevant documentation and an indication of the provisions to be addressed in the negotiations, the objectives of the negotiations and any other relevant information. The Commission shall make the notification and, on request, the accompanying documentation, available to other Member States, subject to the requirements of confidentiality
2. The information shall be transmitted at least four calendar months before formal negotiations are scheduled to commence with the third countries or international organizations concerned.

Article 3

Article Review of planned agreements

1. The Commission and Member States may make comments to the Member State which has notified its intention to enter into negotiations in accordance with Article 2. That Member State shall take such comments into account as far as possible in the course of the negotiations.
2. Member States shall postpone the initiation of formal negotiations with the third countries or international organizations for six months from the date of receipt of the notification referred to in Article 2, if, within three months from that date, the Commission or another Member State delivers a detailed opinion to the effect that the negotiations are likely to lead to an agreement which is incompatible with Community law and informs the Member State concerned accordingly. Detailed opinions shall also be communicated to the Committee referred to in Article 133 of the EC Treaty. The Member State concerned shall, before the expiration of the six months period, inform the Commission and the other Member States of the steps which it has taken or intends to take to comply with the detailed opinion or to communicate them a reasoned submission as to why the agreement will not be incompatible with Community law.
3. Member States shall postpone the initiation of formal negotiations with the third countries or international organizations for nine months from the date of receipt of the notification referred to in Article 2, if, within three months from that date, the

Commission gives notice to the Committee referred to in Article 133 of the EC Treaty of its intention to make a recommendation for the negotiation of a Community agreement covering the same subject with the same party or parties. If, within this nine month period, the Commission presents its proposal, Member States shall renounce to initiate negotiations with the third country.

Article 4

Article Conclusion of agreements

1. Upon signature of an agreement, the Member State concerned shall notify the Commission of the outcome of the negotiations together with any relevant documentation. The Commission shall make the notification and, on request, the accompanying documentation, available to other Member States, subject to the requirements of confidentiality.

Article 5

Confidentiality

In notifying the Commission of negotiations and their outcome as envisaged in Articles 2 and 4, Member States shall clearly inform the Commission if any information therein is to be considered confidential and whether it can be shared with other Member States. The Commission and Member States shall ensure that any information identified as confidential is treated in accordance with Article 4(1)(a) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council¹¹.

Article 6

Entry into force

This Regulation shall enter into force on the twentieth 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,

For the Council
The President

¹¹ OJ L 145, 31.5.2001, p.43.