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COMMUNICATION FROM THE COMMISSION

Developing the agenda for the Community's external aviation policy

{SEC(2005(336)}

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I. THE NEW CONTEXT

1. The so-called "open skies"¹ judgements of 5 November 2002 of the Court of Justice of the European Communities marked the start of a Community (EC) external aviation policy which this communication is seeking to develop in terms of the economic issues at stake for European industry.

This case law testifies to the Community's powers in the field of international air services. Whereas, traditionally, these services had always been governed by bilateral agreements between states, the coming into being of the EC heralded the arrival on the scene of a new heavyweight player with responsibilities for external relations in the field of aviation.

2. In order to ensure that this change is successful, a progressive approach has been adopted. In two communications² which followed the judgements, the European Commission defined guidelines and mechanisms designed to cope with this new state of affairs from both a legal and a political point of view. Since then, the institutions and the Member States have evolved modes of action and ways of cooperation in the field of international air transport.

From a legal viewpoint, the "open skies" judgements mean that Member States cannot act in isolation when negotiating international air service agreements; henceforth these services will need to be treated as a subject of common interest in an overall EC context. This means, in the first instance, that the existing 2 000 bilateral agreements will need to be adapted in order to bring them into line with Community law. To that end, a new complementarity must be developed between Member States and the Community, failing which everyone - operators in particular - will face the threat of paralysis.

From an economic and political point of view, the introduction of an external aviation policy is underpinned by a desire on the part of the EC to move towards greater flexibility and openness in the area of international civil aviation reform, based on both bilateral and multilateral actions. More specifically, this involves taking steps to ensure that agreements are no longer developed between Member States and third countries but rather between the EC and those countries, on the basis of a double and indivisible agenda aimed at:

- creating new economic opportunities by opening up markets and promoting investment opportunities as much as possible. As with the internal market, this approach should produce positive effects not only for the users, who would be the potential beneficiaries of better, more varied and cheaper services, but also for the operators, who would enjoy new opportunities and a competitive edge. Lastly,

¹ Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98, C-476/98.

² COM (2002) 649 final (19.11.02) and COM (2003) 94 final (26.02.2003)

economic opening-up would need to serve as a catalyst to innovation, thereby benefiting the sector as a whole;

- ensuring fair competition, i.e. promoting regulatory convergence, be it with regard to the economic conditions governing the operation of the markets (implementation of competition regulations, State subsidies or standards more specifically linked to aviation such as reservation systems, ground handling, etc.) or to social, environmental and safety reliability.

These two aspects reinforce each other in such a way as to form an ambitious and balanced model, which serves as a guide for the EC in its approach to international aviation relations. This does not mean that it is a purely theoretical model: indeed, each and every agreement that might be proposed would need to be modelled on a case-by-case basis in order to satisfy, in a suitable manner, the mutual interests of the parties and reveal a genuine added value, notably in keeping with:

- the importance of the partnership envisaged economically and politically,
- the level of market opening,
- the regulatory environment already developed and, in particular, the policy applied in order to guarantee fair competition.

Furthermore, this agenda will need to evolve in total synergy with the promotion of sustainable development in the aviation sector. By acting with a single voice, the Community will be best placed to counter the negative effects on the environment of the growth of the aviation sector, notably in terms of climate change.³

3. Such a policy is inspired both by the EC's aviation successes at an internal level and by its unrivalled ability to face up to external challenges; both of these aspects are key to explaining the prosperity of the EC's aviation sector.

The international context likewise constitutes a clear argument in this direction with the continuous growth of international traffic into the future, coupled with the fact that the EC already occupies a position of importance in the international aviation landscape (see SEC(2005)336). Consequently, the aviation industry - while it may have its own constraints and characteristics – can no longer remain isolated from the rest of the operators fully engaged in the global economy. Its assets must be given the opportunity to go international, its competitiveness to grow thanks to competition on a world scale and its services outside the EC to grow in number and quality, all to the maximum advantage of users.

At the internal level, a policy encompassing the full gamut of economic, social and environmental conditions in the air transport sector is currently in place. By focusing on sustainable competitiveness in the air transport sector, the policy places this sector in the direct wake of the Lisbon process. In parallel with the opening-up of the

³ Note that a number of economic instruments have been envisaged as potential tools to counteract the impact which the growth in air traffic will have on the environment. The Commission intends to publish, later in 2005, a communication examining in greater depth the principal options to be considered and avenues to be explored.

market, the EC has set up a regulatory framework, which has now been virtually finalised, for the effective and safe functioning of civil aviation. Attention may be drawn, in particular, to the first text on air safety in 2002,⁴ the creation of the European Aviation Safety Agency,⁵ or again in 2004, the ambitious air navigation initiative designed to create the Single European Sky.⁶

There remains, however, a handicap of size: whereas the common commercial policy has enabled the EC to dominate international commerce up to the present day, the aviation market, although unified through the common transport policy, does not possess an adequate external dimension. Indeed, the success of the internal market and of the aviation sector, in particular, owes as much to its internal achievements as to its external projection.⁷ Without the latter, one runs the risk not only of hampering the development of the internal policy but also of harming the competitiveness of European industry.

Whereas air transport remains one of the sectors in which the EC has not so far exercised its representational and negotiating strength to the full,⁸ one cannot ignore the fact that the EC holds certain trump cards which will enable it to:

- Secure the recognition of the regulatory framework developed over 15 years within its own institutional structures and giving it unrivalled experience in the field of civil aviation. By its very novelty as a model for regional integration, it opens up unique prospects for cooperation with other regions of the world.
- Exercise, by virtue of speaking with a single voice, considerable weight not only in external relations and commercial policy but also in other areas in which its bilateral relations with the whole world are making constant progress, based on close and balanced partnerships.
- Offer varied back-up policies to its partners, whether in terms of development cooperation, technology development partnership or technical assistance.

II. THE COMMUNITY APPROACH TO BE IMPLEMENTED

The “open skies” judgements identify three areas coming under the exclusive jurisdiction of the Community: computerised reservation systems, intra-Community tariffs and time slots, each of which is governed entirely by Community legislation. In point of fact, a much wider pool of assets is already in place. This has a tangible impact on the field of external aviation policy. For instance, the link between ‘traffic right’ and ‘time slot’ (area of Community competence) is an important factor in the

⁴ Regulation (EC) No 2320/2002 of 16 December 2002 (OJ L 355, 30.12.2002)

⁵ Regulation (EC) No 1592/2002 of 15 July 2002 (OJ L 243, 27.09.2002)

⁶ Regulations (EC) Nos 549/2004 of 10 March 2004 (framework Regulation); 550/2004 of 10 March 2004 (provision of services); 551/2004 of 10 March 2004 (airspace); 552/2004 of 10 March 2004 (interoperability) (OJ L 96, 31.03.2003)

⁷ The White Paper on the European transport policy (COM (2001) 370 final) stresses the urgent need for the Union “to develop an external dimension for air transport commensurate with the importance of the internal acquis”.

⁸ The Commission stressed the urgent need to rectify this situation on a multilateral level by proposing in 2002 that the EC should accede to the International Civil Aviation Organisation (SEC (2002) 381 final).

context of negotiations. Similarly, clauses on the safety and security of air transport in an agreement must be negotiated in a manner that is consistent with what the Community has already achieved in those areas.

Undoubtedly, the acknowledgement of the existence of this area of Community competence on an external scale has naturally caused misunderstandings and difficulties both for the Member States themselves and for third countries, accustomed as they have been for the last 50 years to dealing with these matters at a national and bilateral level. The fact remains, however, that there is a growing realisation of the inevitability of the transition from relations based on bilateral agreements to a policy managed at Community level, even if the Commission has had to uphold or initiate infringement procedures in the face of persistent situations of illegality.

The Community policy seeks, first and foremost, to draw the consequences of “open sky” case law and to ensure, in general terms, that all international air service agreements involving Member States and third countries are in compliance with Community law. The genuine tool, moreover, for achieving this long-term policy has to be the conclusion of ambitious agreements between the EC and its partners all over the world. While the negotiation of an agreement with the United States is a first essential stage, other agreements will need to follow in keeping with the interests of the European aviation industry.

1. CONTINUED STEPS TO BRING EXISTING BILATERAL AGREEMENTS INTO LINE WITH COMMUNITY LAW

This objective, attributable to “open sky” case law, is vitally important not only for the EC and its Member States but also for the third countries concerned and for the European aviation sector and the users. It is doubly essential in order to:

- guarantee the same rights to all Community operators outside, by virtue of the principle of non-discrimination enshrined in the EC Treaty, while at the same time strengthening European industry by helping to bring companies together;
- ensure that trade relations based on these agreements are not unsettled by legal uncertainties or ultimately wrecked in the event of the continuation of the status quo.

Consequently, this objective will need to be accomplished efficiently and within a reasonable time scale. To this end, complementarity must be promoted with respect to the tools available, thereby leading to greater flexibility and efficiency.

- 1.1. The first tool is bilateral negotiation by a Member State, as covered by Regulation (EC) No 847/2004,⁹ which provides for the insertion into the agreement under discussion of standard clauses reflecting Community competence.

⁹ 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 countries (OJ L 157, 30.4.2004)

In this way, existing agreements can be brought into line in the context of the regular ongoing contacts between Member States and their partners, thereby combining the continuity and development of international air services while at the same time paying due regard to the new state of affairs prevailing in the sector.

The standard clauses provided for in the Regulation were devised and drawn up jointly by the Commission and the Member States. In an effort to ensure flexibility, an examination will be conducted, in accordance with the comitology procedure, of any cases where it has not been possible to incorporate these clauses in an agreement. In such instances, it may be possible to authorise the conclusion of agreements which do not undermine the objectives of the EC's common transport policy and which do not otherwise contravene Community law. In particular, however, the fact remains that an agreement which does not include the Community designation clause (whereby all Community carriers resident in the territory of the Member State in question are allowed to operate under this agreement) would have an impact on the objectives of this common policy. Indeed, in breach of the principle of freedom of establishment laid down in Article 43 of the EC Treaty, such an agreement continues to discriminate between Community companies on the grounds of nationality, thereby perpetuating any abnormal differences in access to external markets.

Some 50 bilateral agreements between Member States and third countries have been amended. Nevertheless, there are still a large number of agreements which also need to be adapted in order to bring them into line with Community law.

- 1.2. **The second tool is bilateral negotiation at Community level in the framework of the so-called "horizontal mandate"** which, on the basis of an agreement negotiated by the Commission, permits the insertion of the necessary standard clauses in the whole range of agreements concluded between the Member States and a given third country.

By virtue of requiring just one single round of negotiations, an agreement of this kind has the advantage of enabling a third country to cut down on a series of individual negotiations with the Member States with which it has links. Thus, with legal certainty rapidly restored, trade relations can develop unhindered. Horizontal agreements do not affect traffic rights or the balance of the agreements concluded with the Member States.

With six successful negotiations already in the bag (Chile, Georgia, Lebanon, Azerbaijan, Croatia, Bulgaria), and a series of negotiations planned, conditions seem favourable for progress along these lines at a faster rate.

- 1.3. Without prejudice to the foregoing, the Commission, in its capacity as guardian of the Treaties, will be at pains to secure full and effective enforcement of Community law.

This being the case, the magnitude of the task will necessitate genuine working in tandem and the use of all the tools that are available, in a way that is both pragmatic and pro-active. All means must be exhausted in a coordinated fashion so as to avoid any premature admission of failure that could have serious legal and economic consequences for relations between Member States and third countries. In particular, in the event of difficulties in their negotiations, Member States will need to support

the Commission with a view to concluding horizontal agreements aimed at legalising their relations with a third country.

Thus, not only the progress achieved by the Member States by dint of their tenacity along with a growing number of third countries but also the advances made by the Commission in the form of horizontal or global agreements will be major potential factors in promoting the application of Regulation (EC) No 847/2004.

2. GRADUAL ADOPTION OF AMBITIOUS AGREEMENTS BETWEEN THE COMMUNITY AND THIRD COUNTRIES

Back in June 2003, the Commission was given an initial mandate to negotiate a global agreement with the United States. The conclusion of this agreement remains a top priority, in that it would seal the integration of the two largest aviation markets in the world and would send out a strong signal on the way to a new regulatory framework for international civil aviation.

The progress made in the discussions to date has not been negligible, in particular as regards the acceptance of the Community designation clause (i.e. the possibility for any European airline company to fly to the United States from any European airport) plus the definition of a framework for regulatory convergence, notably in the field of security and increased cooperation in the implementation of competition regulations.

This being the case, and whereas an initial imbalance is caused by existing bilateral agreements involving certain Member States and the United States, it has been impossible to restore a situation that is more favourable to Community interests. While American operators already enjoy access to the EC internal aviation market, the according of equivalent rights to Community carriers operating on United States routes still lies some distance away in the future.

After technical consultations during a period marked by the US elections, the Commission intends to pursue the in-depth discussions on the basis of the conclusions of the Council of Transport Ministers held in June 2004, with a view to arriving at a more balanced agreement.

The Commission was given other negotiating mandates with the aim of reaching agreements with Romania, Bulgaria, the countries of the Western Balkans and Morocco; in substance, the agreements, which are sufficiently ambitious to go beyond the usual commercial aspects, seek to achieve broad cooperation between the parties.

These initial mandates pave the way for:

- the creation of a common aviation area with neighbouring countries, and
- the conclusion of global agreements with other regions of the world which are of obvious interest to European industry.

2.1. Creation of a Common Aviation Area with neighbouring countries

By devoting its initial proposals, after the United States, to the enlarged Union's neighbouring countries, the Commission¹⁰ is making clear the obvious priority it accords to these countries: for economic reasons (with markets essentially turned towards the EC), but also for aviation policy reasons (greater operational efficiency, security and safety) and as a sectoral contribution to the Union's neighbourhood policy.

The diversity of the countries concerned makes it necessary to distinguish between various groups. All the same, the ultimate objective remains the achievement, by 2010, of a Common Aviation Area bringing together the EC and all its partners located along its southern and eastern borders. The various parties would share the same market operation rules, not only from an economic point of view but also with regard to air traffic, security or air safety.

- 2.1.1. A first group would take in the countries engaged in pan-European cooperation in the field of aviation and viewed in a pre-accession context. As far as these countries are concerned, the aim should be to achieve a full air transport agreement based on the internal aviation market. As with the previous enlargements, this attempt at upstream approximation would enable these partners to take effective action ahead of accession by promoting the necessary economic and administrative reforms. The formula based on the European Common Aviation Area (ECAA) would be replicated. While negotiations to this end have already resumed with Romania, Bulgaria and the Western Balkans, steps should be taken to ensure that Turkey is also included.
- 2.1.2. A second group is made up of the countries bordering the Mediterranean and with which, as part of the Barcelona process, the EU has already established close links. As far as this group is concerned, the Commission recommends that Euro-Mediterranean air transport agreements be concluded with as their key objectives the opening-up of markets, fair operating conditions and also more security, safety and respect for the environment, together with the provision of support for these countries in the development of their aviation sector. With the negotiation of such an agreement with Morocco well on the way, a similar partnership with the EC's other Mediterranean neighbours should be sought without delay, to be negotiated in an overall framework, even though, where necessary, specific aspects will need to be taken into consideration in the case of certain countries.
- 2.1.3. **Russia** is a priority not only by virtue of being a neighbouring country but also for reasons peculiar to the country itself, on both an economic and a political level. Given the extent of its traffic to the outside (75% of which is directed towards the EC in the case of passenger traffic), that country should be offered a wide-ranging agreement encompassing several specific strands and seeking to promote both economic opening-up and cooperation as a means of bringing markets together and developing industrial potential. Such an agreement would be in line with the Partnership and Cooperation Agreement of 1994 and the ambition announced in 2003 to create, along with that country, four common spaces, one of which would be

¹⁰ COM(2004) 74 final, 09.02.2004

a common economic space. It would also enable a line to be drawn under a dispute that is potentially harmful to European industry by laying down the procedures for abolishing payments for Siberian overflight rights, the underlying principle of which was adopted in the framework of the negotiations on Russian admission to the World Trade Organisation.

If the Commission were now to present a recommendation seeking authorisation to conduct negotiations with Russia, proposals relating to other countries could follow, when the time came, on the basis of specific analyses.

2.1.4. The continuing development of the aviation sector in other neighbouring countries (Ukraine, Moldavia, Belarus, Georgia, Azerbaijan, Armenia) is also breaking new ground when it comes to their gradual integration in the Common Aviation Area, alongside the reform of their civil aviation sector. The agreements could eventually evolve into a model based on the ECAA. The possibilities for technical and industrial cooperation, coupled with the benefits accruing from the adoption by these countries of higher standards based on Community rules would give added strength to such a prospect.

2.1.5. In parallel, aviation relations will need to be strengthened with Central Asia (Uzbekistan, Kazakhstan, Kirghizstan, Tajikistan, Turkmenistan), starting with horizontal relations. The degree of interest they generate in the context of the European model in this area could prompt the Commission to evaluate the advisability of proposing a more ambitious negotiating agenda. This would also provide a way of working together in order to face up to any specific problems that might confront the Member States regarding their air services with these countries.

2.2. Concluding global aviation agreements in a targeted fashion

2.2.1. The need to stimulate cooperation in the aviation sector with third countries is not limited to transatlantic relations. In this particular sector, an excessively polarised and fragmented approach to external relations inhibits the development and expansion of European industry and the internal market.

Other rapidly expanding parts of the world with reference to which a short-term global partnership would make it possible to anticipate the intensification of economic activities, as expected over the coming 20 years, deserve the EC's immediate attention. Encouraged by the prospect of more open international markets operating under fair and equitable conditions, the aviation industry endorses the importance of such agreements. A number of the third countries targeted are already looking with interest at the possibility of new aviation relations with the EC.

All future proposals will be the subject of an analysis, on a case-by-case basis, aimed at identifying the expected benefits and conditions associated with a partnership that is both advantageous and balanced as far as all the parties are concerned. Three closely linked considerations should guide choices and influence the content of the negotiations:

- the economic importance and prospects for growth and improved access for the EC with reference to specific markets;
- the need to reach agreement on what constitutes a fair competitive framework;

- The advantages of regulatory convergence based on the EC’s experience of regional economic integration, as exemplified by technical, technological and industrial cooperation, benefiting the air transport system as a whole.

2.2.2. **The Asian region** will require special efforts to be made over the coming years.

This is particularly true of China and India. These two partners have been identified by the principal European companies as target countries for the Community policy.¹¹ These pivotal Asia region players, backed by the largest populations in the world and by rapidly expanding economies, are spoken for in terms of sustained air traffic growth (about + 9% per annum for China and + 6% per annum for India between now and 2007 for passenger traffic¹²). With their considerable but largely protected markets, they are currently pressing ahead with aviation sector reforms combining greater access and modernisation, all of which could usefully be boosted by cooperation with the EC.

Leaving aside the economic aspects which could be covered by aviation agreements, various forms of technical and technological cooperation, particularly in the areas of security and air navigation, should be discussed in depth with two countries that have demonstrated their eagerness to develop modern, efficient and safe civil aviation systems.

Japan and South Korea, both with prosperous markets, should also be considered as desirable partners.

In the Asia-Pacific area, requests by third countries for more open markets with the EC (Australia, New Zealand, Singapore) should be carefully assessed in the light of their economic repercussions, the competitive situation and the long-term objective of reforming the regulative framework governing the international air transport sector.

2.2.3. There are also **other third countries** which stand to gain economically and/or politically from aviation negotiations with the EC.

On the North American continent - along with Mexico and its highly promising aviation market, as well as Canada with its mature and not insignificant market - there are opportunities in the short term for building new bridges over the Atlantic. In South America, Chile seems anxious to move quickly to deepen its relations with the EC, based on the same desire to ease international regulation of air services.

Regional cooperation, particularly with Africa, would make it possible to share the experience of the internal market and consolidate the exchanges of regulatory and operational know-how, technology transfer and technical assistance with the regional entities concerned in all areas of civil aviation.

2.2.4. In order to bring the Community aviation negotiations to a successful conclusion, there must be a high degree of cooperation between the Member States and the

¹¹ AEA, “Future developments in international air transport to and from the EU – An AEA perspective”, October 2004

¹² IATA Passenger Forecast 2003-2007

Commission with each drawing on the expertise and experience of the others. Just as important is the relationship with the European aviation industry, which the Commission hopes to consolidate through a continuous and transparent exchange of information with the various interested parties, at every stage along the way.

III. CONCLUSION

Apart from aligning the existing bilateral agreements through the promotion of more effective complementarity between the tools available and active coordination between Member States and the Commission, the roadmap for implementing the EC external aviation policy incorporates two complementary objectives:

- **Creation by 2010 of a Common Aviation Area** comprising the EC and all its partners located along its southern and eastern borders, with a view to achieving a high degree of economic and regulatory integration of aviation markets in this area.
- **Launching in the short term of targeted negotiations seeking to achieve global agreements in the major regions of the world**, with the aim of strengthening the prospects for promoting European industry and ensuring fair competition in the most dynamic world markets, while at the same time helping to reform international civil aviation.

This agenda will involve the following short-term stages:

- negotiation, at a sustained pace, of horizontal agreements finalising and accelerating the alignment of existing agreements with Community law, as secured by the Member States in their bilateral relations;
- opening of new negotiations aimed at achieving global agreements, starting with negotiations involving China and Russia;
- successful conclusion of the agreements currently being negotiated and, in particular, those involving the United States.