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COMMUNICATION FROM THE COMMISSION

on relations between the Community and third countries in the field of air transport

Proposal for a

EUROPEAN PARLIAMENT AND COUNCIL REGULATION

on the negotiation and implementation of air service agreements between Member States and third countries

(presented by the Commission)

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INTRODUCTION

1. In its Communication of 19 November 2002,[1] the Commission took stock of the Community's external relations in the field of air transport, set out the conclusions it drew from the judgements of the Court of Justice of the European Communities of 5 November 2002 in the "open skies" cases[2] and presented the broad lines and basic principles of the Community's external policy in that field.

2. Implementation of this policy will take place in stages in view of the large number of bilateral air services agreements concluded by the Member States with third countries outside of the European Union.

3. The Commission nevertheless highlights the fact that the Court's judgements have immediate legal effects which will need to be taken into account in the short term. For information, these are, as stated in the above Communication, of two kinds:

   – Several matters that are often covered by the provisions of these agreements now fall within the exclusive external competence of the Community. In addition to the specific areas of Community competence identified by the Court, the application of AETR case-law to international civil aviation means *mutatis mutandis* that the Community has competence in respect of several other matters covered by the agreements in question and by Community law.[3] It is also important to stress that, according to the Court, changes which have been made to the agreements are evidence that the agreements have been renegotiated in their entirety. It emerges from this that, while some of the provisions of the agreements have not been formally amended by having changes made to them or undergo only minor editorial changes, the obligations arising from those provisions will nonetheless have been confirmed during renegotiation. The Member States are therefore prevented not only from contracting new international obligations, but also from keeping such obligations in force if they fail to take account of Community law (see, for example, Case C-472/98, paragraph 45; see in this sense also the judgements of 4 July 2000, Commission v Portugal, C-62/98, [ECR] I-1571, and Commission v Portugal, C-94/98, [ECR] I-5215).

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1 COM(2002)649 final: Communication from the Commission on the consequences of the Court judgments of 5 November 2002 for European air transport policy.

2 Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98, Commission **v** the United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany.

3 COM(2002) 649 final, paragraphs 31 and 32.

– The nationality clauses contained in nearly all the above agreements constitute discrimination on grounds of nationality contrary to the provisions of Article 43 of the EC Treaty.[4]

4. In view of its scope, the latter point is more particularly the subject of the Commission's attention since nationality clauses deprive airlines of one of the main rights conferred on them by the EC Treaty, namely freedom of establishment. In practice, these clauses prevent carriers from fully benefiting from the Community market and consumers from gaining the benefits of increased competition.[5]

5. Since 2001, the air industry has been going through one of the most serious crises in its history. Several European airlines have implemented restructuring plans to deal with the serious difficulties and economic uncertainties of the present time. It will not be possible to carry out the necessary reorganisation of the sector if the competent authorities at national and Community level do not display the response and dynamism needed with regard to international relations in civil aviation.

6. It is therefore essential for the Community to take the measures necessary to ensure in the short term that a new regulatory framework is put in place which is in conformity with Community law and meets the needs of economic operators.

1. CONSEQUENCES OF THE INFRINGEMENT ESTABLISHED BY THE COURT OF JUSTICE AS REGARDS NATIONALITY CLAUSES

1.1. General principles

7. As indicated in the Commission's Communication of 19 November on the consequences of the Court's judgements of 5 November 2002,[6] if other bilateral air services agreements cover the same issues as the "open skies" agreements in question, they must also be regarded as incompatible with Community law. This applies in particular to the infringement established with regard to nationality clauses since these appear in nearly all the agreements.

8. In this respect, reference should be made to the wording of Article 43(1) of the EC Treaty, which states:

"Within the framework of the provisions set out below, **restrictions** on the freedom of establishment of nationals in a Member State in the territory of another Member State **shall be prohibited**. **Such prohibition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries** by nationals of any Member State established in the country of any Member State"[7].

9. According to the case-law of the Court concerning Article 43 of the EC Treaty, the Member States may not restrict the freedom of establishment of Community nationals unless such restriction is justified by the general interest and, among other things, there is compliance with the principle of non-discrimination. Paragraphs 37

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4 *Ibidem,* paragraphs 34 to 37.
5 *Ibidem* paragraphs 9 and 10.
6 *Ibidem,* paragraph 38.
7 our emphasis

and 38 of the judgement delivered on 30 November 1995 in Case C55/94 *Gebhard*[8] particularly illustrate the principles which apply:

> "It follows, however, from the Court's case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it (see Case C-19/92, Kraus, [1993] ECR I-1663, paragraph 32).
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> Likewise, in applying their national provisions, Member States may not ignore the knowledge and qualifications already acquired by the person concerned in another Member State (see Case C-340/89, Vlassopoulou, [1991] ECR I-2357, paragraph 15). Consequently they must take account of the equivalence of diplomas (see the judgement in Thieffry, paragraphs 19 and 27) and, if necessary, proceed to a comparison of the knowledge and qualifications required by their national rules and those of the person concerned (see the judgement in Vlassopoulou, paragraph 16)."

10. Council Regulation 2407/92 harmonises the requirements for the licensing of air carriers within the Community. An operating licence issued on the basis of and in accordance with the requirements laid down by Regulation 2407/92 is valid throughout the Community. Member States may not make the granting of traffic rights to third countries subject to the holding of an air operator's certificate (AOC) issued by the national administration, since that would constitute a restriction on right of establishment contrary to Community law. According to this Regulation, the holding of an AOC is a requirement for obtaining an air operator's licence and not *vice versa*.

1.2. Practical consequences as regards the designation of Community carriers in the framework of existing bilateral agreements

11. Since the conditions for the granting of air carrier's licences are harmonised at Community level in the third package, it has to be considered that any Community carrier within the meaning of Council Regulation 2407/92[9] who can show that he has a place of business (subsidiary, branch or agency) in the territory of a Member State must be able to exercise traffic rights from that State to a third country in the same manner and on the same terms as carriers which are nationals of the Member State in question.

12. Since the air transport sector is competitive and the interests of airlines are frequently contradictory, it will be necessary, where there is a ceiling on capacity and/or frequencies or the number of companies is limited, to distribute traffic rights between the Community carriers concerned in a non-discriminatory manner .

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8 [1995] ECR I-4165.

9 Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, OJ No L 240, 24.8.1992.

1.3. Consequences as regards the designation of airports

13. Where a bilateral agreement contains provisions on the designation of airports for the exercise of traffic rights, designation should, in conformity with the principle of subsidiarity, be a matter for the competent authorities of the Member State concerned.

14. However, airports may not be designated in a manner which discriminates between Community carriers on grounds of nationality or identity. In addition, where it has been decided, in accordance with Article 8 of Council Regulation 2408/92, to distribute intra-Community traffic between airports within an airport system, the method and criteria used to designate the airports must not contradict the above traffic distribution decision, failing which some Community carriers may find it impossible to operate a hub for connections at a single airport.

1.4. Practical consequences as regards the negotiation of amendments to existing agreements

15. Unlike in other sectors of economic activity when States prepare and conduct commercial negotiations, the common practice is for the competent authorities to involve air carriers very closely in (nearly) all stages of the procedure.

16. The principle of equality of treatment which naturally flows from the provisions of Article 43 of the Treaty also entitles all Community carriers who can show that they have an establishment (subsidiary, branch or agency) in the territory of the Member State concerned to be involved in the preparation and conducting of negotiations on air services agreements, either directly or through their professional organisations, in a non-discriminatory manner.

1.5. Consequences as regards monitoring of the safety of Community carriers

17. Within the Community, monitoring of the safety of Community carriers is always the responsibility of the Member State which licensed the air carrier in accordance with Council Regulation 2407/92, even where carriers operate routes between two Member States other than the Member State which issued the licence.

18. The Commission stresses that the same rule must apply where a Community carrier operates an air route from the territory of a Member State other than that which issued the air carrier's licence to the territory of a third country.

19. If a third country refused to accept this principle, it would be for the designating Member State, in collaboration with the Member State which issued the air carrier's licence,

- to explain how safety monitoring of carriers is carried out within the Community and to state which authority has responsibility for it,

- to make it clear to the third country concerned that it is required to recognise the certificates issued by the Member State which issued the Community air carrier's licence where the latter is a State which is a Contracting Party to the Chicago

Convention, and that the certificates in question are issued in accordance with the relevant Annexes to the Convention.[10]

1.6. A clear legal framework

20. The above legal analysis provides a firm legal basis for the development of Community policy. Community law place a series of firm legal obligations upon Member States and the Community as a whole. There is no scope to apply these principles selectively or to introduce them progressively. Community carriers are entitled to exercise their rights under the Treaty immediately. However, in order to give effect to these principles, the Commission believes that it is necessary to introduce measures that will enable the Community and its Member States to establish a coherent approach towards their application.

[10] The preamble to bilateral air services agreements nearly always states that these agreements apply without prejudice to the rights and obligations of signatories arising from the Chicago Convention.

2. APPLYING THE LEGAL PRINCIPLES IN PRACTICE

2.1. Assessment of the situation

21. The Commission recognises the complexity of relations between the fifteen EU Member States and their bilateral partners, the uncertainty that now clouds those relations and the problems that can arise in practice by the application of the legal principles cited above. There is concern in many quarters about the legality of the existing agreements, the changes that might be necessary and the reaction of third countries to proposals from the Community and its Member States.

22. The Commission also understands the economic importance to the aviation industry of providing a regulatory environment that is flexible enough to react to changes in economic circumstances and operational requirements, yet which is strong enough to preserve important market access rights that have been negotiated by Member States over the past fifty years. The uncertainty on how to remedy the infringements of Community law identified by the Court is hindering the management and improvement of existing agreements, yet there is a fear that taking action to remove that uncertainty may jeopardise bilateral relationships that have been built-up.

23. Accordingly, the Commission believes that it will be important to limit, as far as possible, the changes needed to the balance of rights that has been achieved under the existing framework of bilateral agreements.

24. Nonetheless, it is clear that changes must be made to the current regime in order to bring existing relations with third countries into line with the Court's rulings of 5 November 2003. Maintaining the *status quo* is not an option and, as is recognised by all concerned, action by the Community and its Member States is required.

25. However, it must also be stressed that the ambition of Community policy in this area is not merely to correct the illegalities identified by the Court, essential as this is. The changes required will also add value to the existing situation by creating additional opportunities for the European aviation industry and giving European consumers a broader choice of service.

26. The overriding objective must be to develop 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 our industry and consumers. Clear priorities and the appropriate mechanisms for Community action must be established, while ensuring that Member States can continue to deploy their existing resources and expertise to address aspects of their international relationships that are specific to their situation.

2.2. Responding to the Court Judgements

27. The European Court of Justice judgements of 5 November 2002 in the so-called "open skies" cases have implications not only for the eight specific agreements with the United States which were found to infringe Community law, but for all other bilateral air services agreements to which Member States of the European Union are party.

28. In its Communication of 19 November 2002 in response to the Court judgements, the Commission set out a number of policy priorities. It laid down guiding principles for future Community policy in this area and identified a number of key trading partners, notably Russia and Japan, with which it believes Community negotiations should be opened in the near future. However, first among its concerns was to bring the relationship between the Member States and the United States into conformity with Community law.

29. In order to do this, the Commission requested Member States to activate the procedures for terminating their agreements with the United States and asked the Council to authorise it to open Community negotiations (hereinafter 'mandate') with the United States on the creation of a new EC-US agreement in accordance with Article 300 of the Treaty. The Commission continues to believe that such action is the only way to move the EU-US relationship in air transport onto firm legal foundations.

30. The Commission welcomes the attention that the Council has devoted to discussion of the EU-US relationship and is optimistic that Community-level negotiations can begin in the near term.

31. The Commission recognises, however, that there is also an urgent need to provide a sound legal framework for the ongoing negotiation and implementation of all other air services agreements and for an appropriate division of responsibilities between the Community and its Member States in the area of international air transport relations.

32. Accordingly, with the adoption of this Communication the Commission makes two further proposals that, together with the US mandate, form a coherent package of three measures that will create this framework.

2.3. The Community Approach on "Ownership and Control"

33. In order to address the infringements of Community law in other bilateral agreements, the Commission envisages the opening of Community negotiations with third countries on the issue "Ownership and Control" and on matters of Community exclusive competence.

34. The negotiations will have the specific objective of securing non-discriminatory market access in international agreements for all Community carriers as required by the Treaty. The Commission considers that a systematic Community approach is needed to address the ownership and control issue, aiming over a period of several years, to approach all international partners.

35. Accordingly, the Commission is submitting a recommendation to the Council to authorise it to open Community negotiations with all bilateral partners on the ownership and control issue. The mandate will follow the procedures set out in Article 300 of the Treaty, creating a special committee of Member States' representatives to assist and support the Commission. The mandate will exclude negotiations with any trading partners for which a country-specific mandate has been agreed.

Why a Community approach?

36. It must be remembered that where it is apparent that the subject-matter of an agreement or convention falls partly within the 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 (Ruling 1/78 [1978] ECR 2151, paragraphs 34 to 36, Opinion 2/91 [1993] ECR I-1061, paragraph 36, and Opinion 1/94 [1994] ECR I-5267, paragraph 108). The Community institutions and the Member States must take all necessary steps to ensure the best possible cooperation in that regard (Opinion 2/91, paragraph 38).

37. The key legal issues relating to the content and negotiation of ownership and control clauses is set out in the first section of this communication: Community law has harmonised the definition of Community air carriers. In addition to these, there are also considerable practical and political advantages in common, Community negotiations.

38. In the first instance, if Member States were to be authorised to negotiate a Community clause there is scope for divergent views between different Member States on how to address the question, resulting in third countries receiving mixed messages from the Community. Member States and the Community will not make progress in this area if the timing and substance of an approach towards a third country is not properly coordinated and if the case for change is put forward in differing forms with differing amounts of political pressure.

39. In addition, individual Member States will find that a unilateral request to a third country for the introduction of "Community clause" often meets with a negative response. Such a request is unusual in nature and often carries little weight if it is transmitted in isolation by one Member State on its own. In addition, the pressure to protect the existing traffic rights of the national airline can make it difficult for an individual Member State to stand alone and insist upon the issue, even though the Court ruling imposes a legal obligation to secure such a clause.

40. If Member States were to be authorised to negotiate a Community clause, there would be a serious risk of distortion of competition between Community carriers. If each Member State requests Community clauses from third countries in a different order of priority and with differing degrees of success, Community carriers will face an incoherent patchwork of international market access opportunities. Moreover, the more successful a Member State is in securing Community clauses, the more its own industry will be exposed to competition from carriers from other Member States, without necessarily enjoying reciprocal rights across the Community. This would not be a sustainable situation.

41. To resolve these difficulties it is essential for the Community to approach third countries by exercising its competencies in accordance with Article 300 of the Treaty. This will allow the Community to argue its case with a consistent level of conviction and to avoid a situation where Member States might inadvertently agree differing terms.

The conduct of negotiations and the results

42. The Commission envisages that the negotiations would be pursued on an intensive basis. The aim would be for the Commission to agree upon and conduct a concerted programme of negotiations with trading partners, raising with them the issue of the ownership and control clauses. Criteria will be established in the mandate for the prioritisation of contacts with third countries. A draft agreement appropriate to each third country will be drafted by the Commission as it pursues these priorities.

43. The Commission would also be mandated to address other issues of Community exclusive competence with a view to incorporating these into the Community agreement. In practice, it is likely to be possible simply to incorporate standard texts currently used in bilateral agreements into the Community agreement, although given the opportunity the Community should seek to make improvements to the current provisions on these issues.

44. In this way Member States would remain free to negotiate with third countries on matters of national competence as they saw fit using their traditional negotiating structures. However they would be encouraged to use the occasion of the Community intervention on ownership and control with a trading partner to address matters of bilateral concern. This would allow all aspects of the aviation relationship between the third country and the Community and its Member States to be overhauled as a package.

45. The Commission envisages that the outcome of the negotiations could take several forms. The simplest would be a short stand alone agreement in which the parties agreed to a revised definition of the beneficiaries that would override the relevant clauses in the existing bilateral agreements. Such an agreement should also contain new provisions covering other matters of Community competence as identified by the Commission in its previous communication of 19 November 2002. This agreement would be the subject of Community signature and conclusion. Member States would maintain their own agreement with the country concerned dealing with matters of national competence. This situation would be maintained until such time as a mandate is granted for a full negotiation on a Community agreement. For most countries this is likely to remain some time in the future.

The strength of Community action over bilateral approaches

46. Failure to reach agreement is always a risk in any negotiation and, while many countries will be open to change, some might find the amendments requested difficult to accommodate. With a Community position, the Commission considers that this is much less likely than in the case of a unilateral request by a lone Member State.

47. Nonetheless, should this occur, the Commission would need to report to the Council and consideration would be given to alternative approaches. The principle at stake is of great importance and the Community must take a firm line in seeking these changes. Eventual options to make progress might include the adoption of a mandate for the negotiation of a completely new Community agreement to replace the existing bilaterals or the concerted restriction by all Member States of air services to and from the country concerned. Denunciation would be a serious matter, but it must be held in reserve and cannot be ruled out.

48. Given the importance to many countries of air transport connections to and from Europe, it is likely that bilateral partners will do everything to avoid a complete blockage in negotiations and the risk of denunciation. Most bilateral partners will not be willing to countenance a complete breakdown in air links with Europe. However, it is to be stressed that the Community will only be able to make progress in such circumstances if all Member States take the same approach. Adoption of this mandate will guarantee such an approach.

Simpler contacts with stakeholders

49. The negotiation of "Community clauses" will permit Community airlines to expand their international operations from airports in other Member States, as well as pave the way for greater commercial integration between airlines in different Member States. As mentioned above in Section 1, such companies have a right to be treated equally and accordingly should have an equal opportunity to be associated with and informed about negotiations. Pursuing the issue of ownership and control through a single Community effort will bring much transparency to the process and make the association of the industry as a whole with negotiations both simpler and more effective.

Adoption of the mandate and its implications

50. The Commission and the Council will need to address the precise objectives, the prioritisation of contacts with third countries and the working methods for the negotiations, in the course of agreeing the formal mandate within the Council. A recommendation to the Council in accordance with Article 300(1) of the Treaty is made in parallel to this communication.

51. Adoption of the mandate would require a major undertaking on the part of the Commission and the Member States in terms of staff resources and political commitment. The objective would be the creation of a cohesive, European team under the Commission's chairmanship that would work closely and intensively over the coming years. The Commission would need to establish and pursue a substantial programme of negotiations in the coming years in order to raise the issue with all the Community's trading partners in this sector. The Commission considers, however, that such an approach provides the best chance of success in furthering the Community's interests.

52. The Commission recognises that even with the deployment of the full political and technical means of the Commission and Member States, it will take a substantial amount of time to complete this task. In the meantime, the existing agreements should remain in force as they stand, subject to the proposals attached to this document.

2.4. Information Exchange and non-discrimination

53. The third element of the package, alongside the opening of US negotiations and of negotiations on the recognition of "Community carriers" and on matters of Community exclusive competence, is a draft Regulation, annexed to this Communication. This will provide a framework for ensuring that information about negotiations and agreements in this complex area flows freely within the Community

and establishes clear rules for the implementation of agreements in order to guarantee Community carriers fair and equal opportunities.

Moving to a cooperative and collaborative approach

54. At present, it is hard to obtain a precise picture of the state of aviation relations between the Community and its trading partners around the World. Each Member State holds its own set of bilateral agreements and has traditionally entered into negotiations to develop and manage those agreements entirely independent of the others. In addition, certain operational aspects of many agreements are contained in confidential annexes that are not made available beyond the parties and their airlines.

55. The situation after the Court rulings changes this situation.

56. In the first instance, there is now a clear role for the Community in international air transport relations. In a number of areas, Community competence has been recognised and, on the matter of air carrier ownership and control, it is essential that the Community exercises its competence too. Member States' ability to make international commitments in these matters is curtailed and the Commission has a need to be supplied with information about the activities of Member States. This will allow it to monitor developments in areas of interest to the Community and to fulfil its legal role as guardian of the Treaty.

57. In addition, the implication of the Court's rulings of 5 November is that, in so far as they continue to take charge of negotiating market access arrangements, Member States are no longer negotiating air transport agreements in the interests of their national airlines alone. National carriers' interests will continue to be an important factor for negotiators, but traffic rights must now be considered to be negotiated on behalf of Community carriers in a more general sense. Under the Treaty, all Community airlines with a valid operating licence and with an establishment in the Member State concerned have the right to pursue their activities without further restrictions. Hence, it will be important to ensure that information about pending negotiations is made available in order to allow Community carriers to declare any interest they might have in the outcome and be given equal access to the negotiation process.

58. Finally, in order to maximise the impact of the Community and its Member States in relations with third countries, it would be desirable to ensure that information about ongoing and future contacts with third countries is exchanged. This will allow the Commission and the Member States to identify common problems with specific trading partners and to coordinate their approaches in both substance and timing, either by developing a Community demarche, or conceivably by coordinating their bilateral negotiations in accordance with Article 10 of the Treaty.

Providing for information exchange

59. To this end, and to ensure compliance with Article 10 of the Treaty, a draft Regulation of the European Parliament and the Council is attached requiring Member States to inform the Commission of all planned negotiations. The Commission will examine all such notifications with a view to both verifying the compatibility of the proposed approach with Community law and identifying issues of broader

Community interest that might be usefully discussed with other Member States or coordinated more closely at Community level.

60. The proposal also requires Member States to notify the Commission of the outcome of the negotiation in order to permit it to verify the compliance of the outcome with Community law and to allow it to monitor the non-discriminatory implementation of the agreements provisions, in particular in the area of traffic rights.

61. Finally, the proposal obliges Member States to inform and accommodate all Community carriers with an establishment in their territory in a non-discriminatory manner. This will involve requesting expressions of interest from all Community carriers in advance of opening negotiations with third countries, in order to ensure that their interests can be taken into account in the negotiations and so that they can be present at relevant discussions.

Ensuring non-discrimination

62. However, while it should be straightforward to associate air carriers with air transport negotiations, securing a non-discriminatory outcome and providing for a non-discriminatory distribution of the traffic rights that might result from a negotiation may prove to be one of the most difficult aspects of the transition from a bilateral agreements to a Community international air transport policy.

63. To date, most agreements have been negotiated with the aim of securing traffic rights for a single national flag carrier. In some Member States there are one or two smaller international carriers, but few Member States have had to face the problem of allocating the traffic rights they have negotiated between different airlines.

64. The rulings of the European Court of Justice of 5 November 2002 change all this. As noted above, they confirm that there is an obligation on Member States not to discriminate between companies on the basis of ownership as long as they have an establishment of some form on their territory. This is a legal obligation upon Member States today. Air carriers have the right to challenge Member States where they consider that their rights under the Treaty to have been removed or undermined either by the text of a bilateral agreement or by the means in which it has been applied.

65. Under the negotiating mandate proposed above and in its future negotiations with the United States and other third countries, the Community will need to address the deficiencies in the wording of the existing bilateral agreements and give Community carriers the treatment they are due.

Designation

66. The aim in any negotiation concerning the Community and its Member States should now certainly be multiple and unlimited designation. Single Designation is simply insufficient to permit the meaningful implementation of Community law. Even if an agreement grants rights to Community carriers, if it also limits designation to one Community carrier on routes between a Member State and a third country or between individual cities in the two parties, it will completely undermine the rights of Community carriers under the Treaty. Community carriers will effectively be deprived of their market access rights.

67. Accordingly, in instances where third countries seek to maintain existing single designation clauses or request the imposition of new ones, Member States and Community negotiators must refuse them and refer the matter back to the Commission. The Commission considers that this matter would be best dealt with as part of the concerted Community renegotiation of the ownership and control clauses.

68. Severe limitations on frequencies could also be problematic for similar reasons. It will be important to ensure that all interested Community carriers can be properly accommodated. The number of frequencies necessary to ensure this will vary from country to country.

Distributing limited rights

69. In the near future it is likely that a substantial number of agreements will remain in pace that either fail to provide enough frequencies, capacity or designation rights to satisfy all interested Community carriers. There will therefore be a need for Member States to establish procedures for the non-discriminatory allocation of limited traffic rights or limited designation rights.

70. To this end, the draft Regulation attached to this Communication clarifies the obligations on Member States in this regard. It requires Member States to establish a non-discriminatory system that provides information to carriers about the traffic rights available, requests expressions of interest in those traffic rights and adjudicates between applications in a fair and transparent manner.

71. The Commission recognises that it will be important in assessing applications for designation and traffic rights for Member States to have the ability to dismiss unrealistic applications and to ensure that the rights are used to best effect. To this end clear criteria must be established for the adjudication process. Criteria that might be applied by Member States include:

- Consumer interest and the benefit to the public;
- Competition in the markets in question;
- The ability of the applicant to guarantee continuity of service;
- The ability of the applicant to meet safety requirements
- The need to apply Community law.

72. The draft Regulation imposes various requirements on Member States to ensure that the criteria used are properly communicated to carriers and that the decisions resulting from their application is made public.

73. A set of general principles and procedures for the allocation of traffic rights are set out in an annex to this document. These provide a reference point for the interim period before the proposed Regulation comes into force and will be of use in implementing the Regulation once adopted.

3. CONCLUSION

74. The Commission believes that the opening of Community negotiations with the US, taken together with the measures explained above, represent a strong package of measures that will enable the Community and its Member States to give effect to the rulings of the Court of 5 November 2002 in the so-called "open skies" cases.

75. As a first step, it is essential to move forward to open negotiations with the United States.

– **The Commission urges the Council to take the decision to authorise Community negotiations on the creation of an Open Aviation Area with the United States.**

76. Furthermore, it is of the utmost legal and economic importance to allow all Community carriers to benefit from market access rights under the existing bilateral agreements, by agreeing with third countries on the designation of Community carriers. However, it will be impossible to make rapid progress in this field unless a dynamic Community approach is taken, under Commission leadership and a clear mandate.

– **The Commission therefore recommends the Council to authorise Community negotiations on the designation of Community carriers on international routes to and from third countries and on matters within Community exclusive competence.**

77. Within the Community, it is essential to ensure that Community airlines, Member State governments and the Community institutions are properly informed of ongoing and all planned negotiations. This will permit the Commission and other Member States to identify matters of common interest and propose coordination where necessary. For airlines, greater transparency will allow them to take real advantage of their rights under the Treaty, which exist for the moment largely on paper.

78. Finally, recognising that it will not be possible to move immediately towards open air transport agreements with all bilateral partners and that traffic rights from third countries to and from Member States are likely to remain limited in some cases, it will be important to agree upon common principles for the allocation of traffic rights that will ensure that all interested Community carriers have a fair and equal chance of obtaining market access.

– **With these aims in mind, the Commission requests that the European Parliament and the Council give urgent consideration to its proposal for a Regulation on the negotiation and implementation of air service agreements between Member States and third countries.**

79. Pending the opening of the negotiations envisaged above and the entry into force of the proposed Regulation on procedures for the negotiation and implementation of air service agreements between Member States and third countries, legal uncertainty must be reduced. The Commission considers that Member States can reduce the risk of conflict with their Treaty obligations and with Community law by following a

number of basic principles, which anticipate the entry into force of the proposed regulation:

a) Under Article 10 of the Treaty, Member States are under an obligation to ensure fulfilment of obligations that arise therefrom and that they are under an obligation to facilitate the achievement of the Community's tasks and they shall abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. Member States must therefore conduct their relations with third countries accordingly.

b) Member States' actions must support the Community's initiatives, negotiations, policies and objectives.

c) Member States must not enter into negotiations on matters of Community exclusive competence or which are the subject of Community negotiations under a specific mandate.

d) 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.

e) Pending the adoption of the above-mentioned Regulation specifying Community rules in this matter, Member States must seek to distribute any traffic rights arising from their bilateral agreements in a non-discriminatory, transparent and timely manner between Community carriers with an establishment on their territory. A list of principles and procedures are set out in an annex to this document.

f) In order to give practical effect to the right of establishment as set out in Article 43 of the Treaty, Member States must use the opportunities offered by their bilateral agreements to open routes to and from third countries to all Community carriers with an establishment on their territory on a fair and equal basis.

– **The Commission requests Member States to follow these guidelines until the adoption of the mandates and until the proposed Regulation enters into force so as to avoid infringements of Community law**

ANNEX to the Communication

PRINCIPLES AND PROCEDURES FOR THE ALLOCATION OF TRAFFIC RIGHTS AMONG COMMUNITY CARRIERS UNDER A BILATERAL AGREEMENT BETWEEN A MEMBER STATE AND A THIRD COUNTRY

General principles:

- Traffic rights are negotiated on behalf of Community carriers generally and not on behalf of a single air carrier.

- All Community carriers with an establishment in the Member State shall have an equal right:

  – to be informed of the traffic rights available;

  – to apply for the use of said traffic rights;

  – to have their application duly considered.

Procedures:

- Where either the number of Community carriers that can operate a given route or series of routes is limited by an agreement, or where traffic rights are limited in terms of frequency, capacity, overflight or in some other respect, the Member State shall inform all Community carriers with an establishment on its territory of the available traffic rights and issue a call for the expression of interest for the distribution such rights. In particular, it shall indicate:

  – the number of designations and the traffic rights available;

  – the criteria according to which it will designate carriers and allocate the traffic rights;

- Member States shall arrange the dissemination of this information so as to provide carriers with at least two weeks in which to prepare their written applications.

- Where the applications received do not exceed the rights, the Member State shall allow all applicant Community carriers to operate.

- Where on the basis of the written applications, the rights available are not sufficient to meet the applications received, the Member State shall organise a public hearing, inviting all carriers having expressed an interest to substantiate their request.

- The Member State shall duly motivate its decisions in accordance with the criteria established in the call for interest.

- The Member State shall provide for an appeals procedure before a court of law or an independent arbitrator in accordance with national law.

- On completion of the exercise, the Member State shall publish the requests received, the carriers designated and any allocation of capacity and frequencies between those carriers.

Member States shall seek to establish standardised procedures, including standard deadlines, criteria and an appeals procedure, although these may vary according to the nature of the agreement and the routes concerned.

2003/0044 (COD)

Proposal for a

EUROPEAN PARLIAMENT AND COUNCIL REGULATION

on the negotiation and implementation of air service agreements between Member States and third countries

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 80(2) thereof,

Having regard to the proposal from the Commission[11], having regard to the opinion of the Economic and Social Committee[12],

Having regard to the opinion of the Committee of the Regions[13],

Acting in accordance with the procedure laid down in Article 251 of the Treaty

Whereas:

(1) International aviation relations between Member States and third countries have been traditionally governed by bilateral air services agreements between Member States and third countries, their annexes and other bilateral and multilateral arrangements;

(2) Following the judgement of the Court of Justice of the European Communities in cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98, the Community is exclusively competent to negotiate, sign and conclude various aspects of such agreements.

(3) The Court has also clarified the right of Community air carriers to benefit from the right of establishment within the Community, including their right to non-discriminatory market access to routes between all Member States and third countries;

(4) Where it is apparent that the subject-matter of an agreement or convention falls partly within the 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 should take all necessary steps to ensure the best possible cooperation in that regard.

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11 OJ C […], […], p. […].
12 OJ C […], […], p. […].
13 OJ C […], […], p. […].

(5) All existing bilateral agreements between Member States and third countries that contain provisions contrary to Community law must be replaced by agreements that are wholly compatible with Community law

(6) The Community should undertake to revise the elements in existing bilateral agreements that infringe Community law;

(7) Without prejudice to the provisions of the Treaty, and in particular Article 300 thereof, Member States may desire 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;

(8) It is essential to ensure that a Member State conducting negotiations takes account of Community law, broader Community interests and ongoing Community negotiations; To this effect an efficient and transparent verification procedure should be established;

(9) If Member States wish to associate air carriers in the process of negotiations, all air carriers with an establishment in the territory of the Member State concerned should be treated equally;

(10) In order to ensure that the rights of Community carriers are not unduly restricted, no new clauses that prevent more than one Community carrier from entering a given market or that place severe limitations on frequency or capacity or service should be introduced in bilateral air service agreements;

(11) Member States should establish non-discriminatory and transparent procedures for the distribution of traffic rights between Community carriers. In some circumstances, traffic rights granted under an agreement may be sufficient to allow all Community carriers who wish to provide service to enter the market;

(12) In accordance with Article 2 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, measures for the implementation of this Regulation should be adopted by use of the advisory procedure provided for in Article 3 of that Decision;

(13) Since the objectives of the proposed action, namely the co-ordination of negotiations with third countries with a view to concluding air services agreements, the necessity to guarantee a harmonised approach in the implementation and application of the agreements and the verification of compliance with Community law of such agreements, 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

1. In the absence of Community negotiations with a third country, or where a Community agreement exists, but addresses only a limited number of issues, a Member State may, without prejudice to the respective competencies of the Community and its Member States, wish to enter into negotiations with that country concerning a new agreement or the modification or application of an existing air service agreement, its annexes or any other related bilateral or multilateral arrangement. If a Member State so decides it shall notify the Commission and the other Member States of its intentions in writing.

2. This notification shall include a copy of the agreement concerned and an indication of the provisions to be addressed in the negotiation, the objectives of the negotiation, and any other relevant information. It shall be transmitted at least one calendar month before contact is established with the third country concerned.

3. The Commission and the Member States may make comments to the Member State which has notified its intentions in accordance with paragraph 1. That Member State shall take such comments into account as far as possible in the course of the negotiations with the third country concerned.

Article 2 - Consultation of stakeholders and participation in negotiations

In so far as air carriers are to be associated with the negotiations referred to in Article 1, Member States shall treat equally all Community carriers with an establishment on their respective territories to which the Treaty applies.

Article 3 Prohibition to introduce more restrictive arrangements

Member States shall not enter into any arrangements that eliminate the possibility for more than one Community carrier to provide service in between its territory and a third country, either in respect of the entire air transport market between the two parties or on the basis of specific city pairs.

Article 4 - Conclusion of agreements

1. Upon conclusion of the negotiations, the Member State concerned shall notify the Commission of the draft agreement and any other relevant documentation.

2. Following the notification under paragraph 1 the Commission shall examine whether the draft agreement is compatible with Community law and the objectives of the Community in this field. If the Commission intends to object to the conclusion of the agreement, it shall take a decision to this effect in accordance with the advisory

procedure laid down in Article 3 of Decision 1999/468/EC, in compliance with Article 7 and Article 8 thereof.

3. The Commission shall be assisted by the Committee established under Article 11 of Regulation 2408/92/EC.

Article 5 – Distribution of traffic rights

. Where a Member State concludes an agreement or amendments to an agreement or its annexes that provide for limitations on the number of traffic rights or the number of Community carriers eligible to be designated to take advantage of traffic rights, that Member State shall ensure a distribution of traffic rights among eligible Community carriers on the basis of a non-discriminatory and transparent procedure.

Article 6 - Notification of Procedures

The details of the procedures that Member States apply for the purposes of Articles 2 and 5 shall be notified to the Commission. Any subsequent changes to such procedures shall be notified to the Commission at least 6 weeks before they enter into force. All such notifications shall be published in the Official Journal of the European Communities.

Article 7 - Confidentiality

In notifying the Commission of negotiations and their outcome as foreseen in Articles 1 and 4, Member States shall clearly inform the Commission if any information therein is to be considered confidential. The Commission shall ensure that any information identified as confidential is treated appropriately without prejudice to regulation 1049/2001[14].

Article 8 Entry into force

This regulation shall enter into force on the thirtieth day following its publication in the *Official Journal of the European Communities.*

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

[14] OJ L 145 , 31/05/2001 P. 0043 - 0048

Done at Brussels, […]

For the European Parliament
The President
[…]

For the Council
The President