



COMMISSION OF THE EUROPEAN COMMUNITIES

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**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT**

pursuant to the second subparagraph of Article 251 (2) of the EC Treaty

concerning the

**common position of the Council on the adoption of a regulation of the European
Parliament and of the Council on the negotiation and implementation of air service
agreements between Member States and third countries**

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1- BACKGROUND

Date of transmission of the proposal to the EP and the Council (document COM(2003) 94 final – C5–2003/65/- 2003/0044(COD)):	26 February 2003
Date of the opinion of the European Economic and Social Committee:	16 July 2003
Date of the opinion of the European Parliament, first reading:	2 September 2003
Date of adoption of the common position:	5 December 2003

2- OBJECTIVE OF THE COMMISSION PROPOSAL

In November 2002, the European Court of Justice ruled that the bilateral air service agreements concluded by eight Member States with the United States infringed Community law. In particular, they conflicted with the right of establishment by reserving international traffic rights solely to airlines owned by nationals of the parties to the agreements and they covered certain areas of exclusive Community competence. These cases have implications for all air transport agreements and negotiations. All existing agreements must be modified to establish non-discriminatory treatment for Community airlines and negotiations on matters of Community competence must be conducted within an appropriate legal framework. Member States may no longer act unilaterally.

Given the number of bilateral air service agreements and the regularity with which they are renegotiated to take account of market developments, it is impractical to conduct all the necessary negotiations through standard Community-level procedures. The Community will have to concentrate on major negotiations. Accordingly, this proposal creates a system of notification and authorisation for bilateral negotiations by Member States. It also imposes some obligations on Member States to ensure that they have non-discriminatory systems in place for consulting the industry and allocating traffic rights secured in the course of negotiations.

3- COMMENTS ON THE COMMON POSITION

In its common position, the Council maintained the basic structure of the Commission's proposal, in particular notification of an intention to negotiate in Article 1 and a system for approving the outcome of negotiations in Article 4, although significant changes were made to refine and reinforce the legal framework. These changes aim at improving the workability of the Commission's proposal by making the conditions under which Member States are authorised to negotiate and conclude agreements that touch on matters of Community competence more specific.

Article 1 of the Regulation sets out the conditions under which Member States can open negotiations with third countries. A Member State can start negotiating with third countries as long as:

- a. they stick to commonly-agreed text for standard clauses in bilateral agreements on issues of Community legal competence;
- b. they duly notify the Commission before they open negotiations. This notification, as envisaged in the Commission proposal, will permit Member States and the Commission to identify where there is a common interest or problem vis-à-vis a third country.

In Article 4, Member States also require a special authorisation under Community law. The system envisaged is a simple one however. Again, on the basis of the rationale for the opening of negotiations, a notification of the outcome of negotiations to the Commission is required. As for the next step, there are three possibilities:

- a. where Member States have reached an agreement that follows commonly-agreed standard clauses on Community issues, they are allowed to conclude the final agreement. Their only obligation is to notify the result to the Commission for the sake of transparency;
- b. where Member States have not been able to reach an agreement that follows commonly-agreed standard clauses on Community issues, they can apply the agreement on a provisional basis, but must submit the agreement to the Community for final approval after an advisory procedure according to the comitology rules. If the agreement does not undermine the Community transport policy, Member States will be allowed to conclude the agreement;
- c. where the Community is actively negotiating with the same third country, a Member State may be authorised to apply an agreement on a provisional basis or to conclude only after the same advisory procedure as for b) has been completed.

This system will ensure that Community law is respected and that Community interests are upheld, while giving Member States the possibility to resume bilateral negotiations within a framework of legal certainty.

Out of the 17 amendments adopted by the European Parliament, the Council fully incorporated three of them into its common position and four of them in part or in principle. These amendments mainly correspond to those accepted in a similar fashion by the Commission.

4- DETAILED COMMENTS BY THE COMMISSION

The references below are to recitals and articles of the common position.

4.1 Amendments accepted in full by the Commission and incorporated in full in the common position

Amendments 1, 2, 3: These three amendments are fully reflected in the recitals of the common position (recitals 5 (amended accordingly), 6 (deleted accordingly), and 8 (last sentence deleted accordingly)).

4.2 Amendments accepted in part or in principle by the Commission and incorporated in part or in principle in the common position

Amendment 11: The common position integrates it in part and in principle while introducing significant changes in Articles 1 and 4 with a view to strengthening the legal framework set out by this draft regulation. It further specifies both the type of agreements or related documents which are covered by this draft regulation (Article 1, paragraph 1), and the Member States' obligations when Community negotiations are actively underway (Article 4, paragraph 4).

Amendment 12: In Article 1, paragraph 2 the common position clarifies the obligation on Member States to notify the Commission of their planned negotiations, and thus integrates this Parliament amendment in principle. Only the Commission must be notified by a Member State which intends to enter into negotiations, the other Member States having the possibility to request copy of this notification to the Commission. A special procedure is also set out in case of exceptional circumstances.

Amendment 15: The common position seeks to clarify the wording of Article 3 along the same lines as the Parliament amendment. It makes it clearer that any agreement which would reduce the number of Community carriers which may, in accordance with existing arrangements, be designated to provide air services between the territory of a Member State and a third country, is prohibited.

4.3 Amendments rejected by the Commission and incorporated in the common position

Amendment 14: The common position integrated the first part of this amendment, Article 2 now referring not only to air carriers but also to other interested parties. The Commission rejected this amendment as the substantial modification sought by the Parliament aiming at limiting the definition of air carriers and of the right of establishment (second part of amendment 14) cannot be accepted. As for the inclusion of other interested parties in this article, the Commission has no objection to the common position on this particular point.

4.4 Amendments rejected by the Commission and not incorporated in the common position

Amendments 4 and 14 (except first part of amendment 14 which is integrated in the common position): These amendments would limit the obligation on Member States to inform and consult Community carriers about their international bilateral negotiations by only imposing this obligation where airlines already have a network or where they might foreseeably have a network. In addition, amendment 14 would impose limitations on the right of establishment for airlines by imposing a requirement to obtain an operating licence from each Member State from which international routes are flown.

Amendment 5: This amendment would make the approval of bilateral agreements subject to a regulatory procedure.

Amendments 6 and 7: Amendments 6 and 7 would call into question the fact that the draft Regulation does comply with the principle of proportionality.

Amendment 8: This amendment would set out a three-point plan for Community action in the field of international air transport.

Amendments 9 and 10: Amendments 9 and 10 would introduce new recitals which seek to set specific objectives for the negotiations between the Community and the United States.

Amendment 13: This amendment would exclude Member States from the consultation process set out in Article 1, paragraph 3, regarding the opening of negotiations by a Member State.

Amendment 18: This amendment would make all information submitted by Member States in the notifications of their negotiations *de facto* confidential.

Amendment 19: This amendment would duplicate the obligation for Member States to notify the Commission of a draft agreement upon conclusion of negotiations, which is already set out in Article 4.

5- CONCLUSION

The Commission considers that the common position unanimously adopted on 5 December 2003 does not alter the aims and approach of its proposal and can therefore support it.