COMMISSION OF THE EUROPEAN COMMUNITIES

COM(90) 17 final

Brussels, 23 February 1990

Proposal for a

COUNCIL DECISION

on a consultation and authorization procedure for agreements concerning commercial aviation relations between Member States and third countries

---

(presented by the Commission)

COMMUNICATION ON
COMMUNITY RELATIONS WITH THIRD COUNTRIES IN AVIATION MATTERS

Introduction

1. International air transport is fragmented by bilateral agreements. Not only does this make life difficult for carriers and ultimately passengers, but it also means that market opportunities are very unevenly distributed. This is clearly the case for the air carriers of our Member States. It is even so that certain third countries are using this to gradually further their own interests. In this context the Member States have similar interests and must stand together. The Community must be considered as one market both internally and externally.

2. The purpose of this Communication is to give information on the development of Community relations with third countries in aviation matters. This includes an assessment of Community competence in these relations and suggestions on how the Community should exercise its competence.

3. Annex I contains a draft Council decision on relations between Member States and third countries in the field of air transport.

Background

4. Civil aviation functions at present in accordance with the international rules established by the Chicago Convention (1944) and the ensuing multilateral and bilateral agreements.

5. One of the foundations of the Chicago convention is the principle of national sovereignty. Each State has exclusive and complete sovereignty over the airspace above its territory and decides on permissions to give rights for carrying traffic originating in or destined for its territory or even crossing it. For international scheduled services this is generally done by the conclusion of bilateral air services agreements.

6. These bilateral agreements establish in general criteria and procedures, such as consultation procedures, procedures to fix the level of tariffs and in most cases the level of capacity and the designation of airlines to carry out the agreed traffic rights.

7. In Annexes to the air services agreements the operational part of the agreements is normally defined such as the different routes which are authorized, the gateways in the two countries concerned and the gateways in the countries situated between or beyond these two countries, capacity and designated airlines.

8. There are, on average, some 60 bilateral Air Services Agreements (ASAs) between each individual Member State and Third Countries. The situation for each Member State is as follows:

N° of bilateral ASAs with non-Community countries

Belgium	-	78
Denmark	-	51
Germany	-	80
Greece	-	39
Spain	-	81
France	-	85
Ireland	-	12
Italy	-	38
Luxembourg	-	no bilateral agreements
Netherlands	-	85
Portugal	-	39
United Kingdom	-	72

9. Additional to the air services agreements a wide range of additional agreements exist between bilateral partners. In Memoranda of Understanding, Agreed Records of Understanding, Exchanges of letters, etc. further particulars are agreed upon; which in fact may even change the official agreements or its annexes to a very large extent.

   The multilateral aspects of air transport are in the process of going beyond the ICAO (International Civil Aviation Organisation) in the framework of the trade negotiations on services in the Uruguguay Round (GATT).

10. It is against this background that the Community has to consider the development of a Community external relations policy in air transport.

11. In order to be able to precisely assess the situation between the Community and individual third countries it is essential not only to have knowledge of the exact contents of the ASAs, but also to have adequate information on the additional agreements adjusting the provisions of the ASAs and of the Annexes attached to them.

12. Also it will be necessary to be informed on proposed changes envisaged in the bilateral agreements as laid down in the different documents. Only then would it be possible to identify the areas where it would be most useful to concentrate action at Community level and to check the compatibility of these agreements with existing and evolving Community policy.

External effects of existing Community legislation

13. The adoption by the Council of the aviation package in December 1987 (1) was the foundation stone of the Community's air transport policy. This package does not touch as such the bilateral system of ASAs between individual Member States and third countries. Neither does it contain specific provisions on the role of the Community in international organisations. Therefore at present only the general principles of the Treaty apply directly as supplemented by the consultation procedure laid down in Council Decision 80/50/EEC (2). This Decision provides for ex post consultation on developments which have taken place in relations between Member States and third countries in air transport and on the functioning of the significant elements of bilateral or multilateral agreements concluded in this field.

14. In the framework of the implementation of the general provisions of the Treaty to the air transport policy, a letter has already been sent in September 1989 to all Member States requesting them to amend all their bilateral air services agreements according to Community law without delay. In particular, existing clauses requiring national control of the airlines designated in the ASA's will need to be replaced by a Community clause i.e.:

> "The ownership of the air carriers designated to operate the services provided for in the Annex to this Agreement on behalf of the Party that is a member of the European Communities must have its central administration and principal place of business in the Community, the majority of whose shares are owned by nationals of Member States and/or Member States and which is effectively controlled by such persons or states."

---

(1) OJ No L 374, 31.12.1987.

(2) OJ No L 18/24, 24.01.1980.

15. Nevertheless, the 1987 package does have implications for third country carriers. Council directive 87/601/EEC on fares provides that only third and fourth freedom air carriers (in this case Community air carriers) can act as price leaders. It also requires Member States which have agreements with third countries which are incompatible with the Directive to eliminate such incompatibilities at the first opportunity. In addition, Council Regulations (EEC) No 3975/87 and (EEC) No 3976/87 on competition apply to fifth freedom operators within the Community, as do the Commission Regulations made under the latter Council Regulation. The recently adopted Regulation on a code of conduct for Computerised Reservation Systems applies to all the systems whether based in the Community or elsewhere which are operated or intended to be operated within the Community.

16. The recent European Court of Justice Judgment in the Ahmed Saeed case is also of immediate interest to third country carriers since it states that Article 86 may directly apply, even in the absense of implementing rules, to the behaviour of carriers concerning routes between the Community and third countries.

17. Following the Ahmed Saeed Judgement, the Commission has proposed a number of changes to the regulations concerning the application of the competition rules to air transport (1). These proposals would give the Commission the power to apply these rules to agreements and practices on third countries routes and include a procedure for the resolution of conflicts of international law and a proposal for an enabling Regulation by the Council for block exemptions to be granted by the Commission
The proposals also contain rules which concern fifth freedom traffic rights for Community air carriers between Member States and third countries.

---

(1) COM(89) 417 final of 8 September 1989.

Community competence

18. Development of the Community's air transport policy and Community legislation in other areas, including completion of the single market, the creation of jointly owned and operated computerised reservation systems (CRS) and cross-border airline mergers or cooperations will blur national divisions and make the Community more and more the logical partner for third countries in discussions on aviation matters. Negotiations with third countries as a Community will increasingly be the appropriate course, not only for legal reasons but also for commercial, practical and tactical reasons.

19. As far as the legal framework of the external policy in aviation is concerned, the Commission considers that in certain cases the Articles of the Treaty on the common commercial policy (113) are applicable and in other cases the Articles of the Transport Chapter.

20. Indeed, in international relations it is nowadays widely recognised that trade in services forms part of the commercial policy and that aviation activities can be considered as services in this respect. Hence, their inclusion in the Uruguay Round negotiations. Within the Community, the Court of Justice has declared in its Opinion 1/78 that the notion "commercial policy", as laid down in Article 113, is of an evolutive nature and embraces all that, in an international framework, is considered to form part of such a policy.

---

(1) French Seamen Case 167/73, 4 April 1974, recueil XX,p. 359.

(2) Conclusions of the Council, 4/5 XII 1989.

21. This means that Article 113 must therefore be considered as the legal basis for every Community action that concerns trade in services. This notion has to be understood as comprising all services provided for remuneration by a national of a country to a national of another country or to a person staying on the territory of another country.

22. This has the effect of bringing all the commercial aspects of aviation relations with third countries under the legal basis of Article 113. As commercial aspects can be considered all measures directly related to market access, to capacity offered by the enterprises and to prices and all accessory measures. These matters are typically dealt with in bilateral agreements .

23. All the other aspects of aviation relations with third countries, i.e. social, environmental, technical, security problems etc. are governed by Article 84(2), as far as they are not accessory to the commercial aspects. Those aspects have only an indirect relation with the international trade in air transport services.

24. The competence given by Article 113 is an exclusive competence. Member States are therefore no longer entitled to negotiate or conclude agreements on matters falling within the ambit of the common commercial policy.

25. On the other hand, Community competence in other than commercial aspects depends on the result of the application of the case law of the Court of Justice in the AETR judgment or in the opinion 1/76.

26. According to this jurisprudence exclusive Community competence exists as well in non-commercial matters for negotiations with third countries either bilaterally or multilaterally or in international organisations where these subjects are covered by Community legislation or their conclusions are likely to affect the common rules adopted. In these instances it is the responsibility of the Commission to negotiate on behalf of the Community (1). In principle the competence of Member States remains untouched in other cases. However, even in cases where national competence exists, the Council may decide on Community action where this is considered necessary for the pursuit of the common aviation policy (2). Finally, when there are negotiations on subjects some of which are covered by national competence and some by Community competence, then a situation of mixed competence exists where the Community and Member States negotiate together and the agreements are concluded by both.

27. The exercise of Community competence in commercial matters is considered in paragraphs 28-42 while the exercise of competence in other matters is considered in paragraph 43.

---

(1) Article 228 of EEC Treaty
Case 22/70 "AETR" E.C.L., 1971; p. 274
Cases 3, 4, 6/76 "KRAMER", ECL 176, p. 1279 and following.

(2) European Court Decision 1/76.

Exercise of commercial external competence

28. Bilateral agreements between Member States and third countries, in the light of the developing Community air transport policy, cannot be considered to have a merely nationwide application, but have an influence on the Community as well. Community competence which exists on the basis of Article 113 of the EEC Treaty therefore has to be exercised.

29. In this respect certain negotiations should be of priority concern to the Community. This is for example the case for the EFTA countries. A separate proposal has been presented in this respect.

30. A specific situation is created with respect to fifth freedom services for third country air carriers inside the Community. In this instance it is necessary to exercise the Community competence and the situation is dealt with in paragraphs 38 to 43.

31. It is also clear that it is in the Community interest to avoid a situation where third countries exploit the lack of Community unity, therefore Community competence must be exercised without delay in such instances.

32. Furthermore, in a number of instances the Community dimension would be useful in order to reinforce the Community negotiating position vis-a-vis third countries.

33. Nevertheless the existence of more than 60 bilateral agreements on average between each individual Community Member State and third countries, complemented with an unknown number of additional agreements, and taking into account the delicate negotiating position of the Member States, creates a serious risk that efficiency and speed would be impaired if the Community were to take on an exhaustive negotiating role for all bilateral agreements immediately. By taking up its responsibilities gradually the Community can better prepare itself for its task both in expertise and in resources.

34. Transitional provisions, therefore, provide for an authorisation by way of exception for Member States to negotiate bilateral agreements when it appears that for compelling circumstances of an administrative or technical nature, Community negotiations prove to be not yet possible.

35. In instances where Member States are authorised to conduct certain bilateral negotiations with third countries a common framework for the negotiations will be necessary to ensure that common elements are included in such agreements. For example, a common nationality clause will be required. Steps have already been taken in this respect (see para 14).

36. The existing procedure under Article 113 as defined in Council Decision 69/494/EEC does provide a useful precedent. However, it is necessary to amend this Decision somewhat in order to provide a framework which takes into account the specific characteristics of civil aviation (Annex I).

Community cabotage area [Common aviation area]

37. A very important element covered by the commercial competence and referred to in para 30 is the relationship between the Community and third countries whose carriers are operating within the Community. The importance of this subject justifies the exercise of Community competence without delay.

38. The experience with the package so far has shown that these traffic rights interest Community air carriers and are being used. The value of these traffic rights is influenced by whether or not other airlines are present on the route or have the intention to enter the market. The possibility for airlines from third countries to enter the market on routes between Member States therefore directly influences Community legislation and trade between Member States. In these circumstances it is necessary to consider fifth freedom rights to airlines from third countries as a Community asset.

39. There are other reasons to consider fifth freedom operations of third country carriers at Community level:

    (a) The December 1987 package and the second phase proposals limit Community carriers in their capacity and in fifth freedom operations. Fifth freedom operations by non-EEC carriers are not limited by Community legislation. All it needs for these carriers is the approval of two Member States for such operations.

(b) The Community should avoid to diminish the value of the traffic rights created by the Community legislation within the internal aviation market for Community air carriers.

40. It should also be considered that the creation of the internal market has as a logical consequence for the outside world that the Community should be considered as one entity and therefore as a cabotage area.

41. A final reason to deal with these fifth freedom operation at a Community level is that individual Member States have faced the refusal of some very large partners in aviation to grant comparable traffic rights to European carriers. This has created an imbalance in market opportunities. By declaring a Community cabotage area, a level playing field is created and thereby a basis for more balanced negotiations.

42. It is for these reasons that the Commission has decided to implement the creation of a Community cabotage area. This means that all the traffic within and between Member States is considered to be equivalent to cabotage and is in principle reserved for Community carriers. This does not imply that, in the absence of equivalent market opportunities, existing fifth freedom rights are withdrawn. In practice this would mean that Member States are no longer competent to grant new fifth freedom traffic rights to third countries but that they will have to refer requests for such fifth freedom rights to the Commission for consideration under Community procedures according to Article 113.

Exercice of external competence in other areas

43. The procedure proposed in Annex I is providing a consultation and authorization procedure for agreements concerning commercial aviation relations. In the field of air transport, however, common policies are developed in many areas which fall outside the scope of this draft Council Decision unless they are included as an integral element of an agreement falling under Article 113. These areas are typically related to the harmonization and development of standards and procedures of a more technical nature i.a. facilitation, safety and security, noise, accident investigation, ATC, licences, airworthiness requirements, etc. In those cases Member States must refrain from taking an individual position in international relations and coordination is mandatory. Council Decision 80/50/EEC provides for a framework for such coordination. Exclusive Community competence exists when these subjects are covered by existing Community legislation (para 26).

    These non-commercial matters are to a large extent dealt with in international bodies such as ICAO, ECAC and Eurocontrol.

Conclusions

44. Exclusive Community Competence for the relations between Member States and third countries exists for commercial matters and existing Community legislation creates it also in many instances for non-commercial matters. The further development of the internal market for aviation will enlarge the scope of this competence.

45. Given the large number of agreements between Member States and third countries, specific exceptional transitional measures, opening the possibility of recourse to the existing skill within Member States, would be appropriate before the Commission is in a position to exercise Community competence in all cases where Community competence exists.

46. Therefore it should be envisaged that during this transitional period the Member States might be authorized to negotiate within Community guidelines. Where Community interests are directly involved and where the Community dimension could contribute to a better result of the negotiations, the Community should immediately exercise competence.

47. Not only in the areas mentioned above the Community should exercise its competence, but also with respect to fifth freedom operations of third country carriers. The establishment of the Community cabotage area is a cornerstone for this policy.

48. In International Organisations, the Commission should gradually become the spokesman for the Community.

Proposal for a

COUNCIL DECISION

on a consultation and authorization procedure for agreements concerning commercial aviation relations between Member States and third countries

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 113 thereof,

Having regard to the proposal from the Commission,

Whereas the Council Decision 69/494/EEC of 16 December 1969 on the progressive standardisation of agreements concerning commercial relations between Member States and third countries and on the negotiations of Community agreements(1) provides a consultation and authorization procedure for all commercial agreements with third countries;

Whereas it is necessary that commercial relations with third countries in the field of civil aviation are governed by special provisions replacing the provisions of Decision 69/494/EEC;

Whereas commercial aviation relations are regulated by bilateral air services agreements, their annexes and amendments thereto, and other bilateral and multilateral arrangements containing provisions on market access, capacity, tariff arrangements or related provisions;

(1) OJ No L 326, 29.12.1969, p. 39.

Whereas a procedure must be established to ensure that the replacement of national agreements by Community agreements is carried out progressively;

Whereas, while all negotiations with a view to conclusion of new treaties, agreements, or arrangements, or to amendment of those already existing, must be conducted in accordance with a Community procedure, it is nevertheless permissible for existing bilateral air services agreements, their annexes and any amendments thereto, and any other commercial bilateral or multilateral arrangement concerning aviation relations with third countries to be provisionally extended, expressly or tacitly, provided that their extension does not hinder the implementation of the common commercial aviation policy;

Whereas, in order to ascertain whether this condition is met, prior consultation should take place at Community level between the Member States and the Commission;

Whereas, however, in certain exceptional cases, where negotiation by the Community is not yet possible and an interruption in relations based on agreement might compromise the development of commercial aviation relations with the third country in question to the detriment of the Community and the Member States, provision should be made, as a temporary measure and for a limited period, for possible negotiation by Member States;

Whereas, in order to prevent such negotiations hindering the implementation of the common commercial aviation policy, they may be conducted by Member States in the framework of guidelines agreed upon beforehand in accordance with a Community procedure and covering the basic terms of the agreement to be negotiated;

Whereas, before an agreement is signed, the results of the negotiations must be checked to ensure that they conform with the joint conclusions;

HAS ADOPTED THIS DECISION:

TITLE I

Express or tacit extension of agreements already existing

Article 1

Member States shall communicate to the Commission all bilateral air services agreements, their annexes and any amendments thereto, or any other commercial bilateral or multilateral arrangements with third countries concerning aviation relations within the meaning of Article 113 of the Treaty, at the latest one year after adoption of this Decision.

However, such agreements or arrangements the extension of which, whether express or tacit, is proposed shall be notified to the Commission not later than three months before the date of express extension or of the expiry of the period during which notice of termination of the agreement or arrangement in question may be given.

The Commission shall communicate the text of the notified agreements and arrangements to the other Member States within two weeks following the notification.

Article 2

After the notification has been received, prior consultation shall take place at the request of a Member State or on the initiative of the Commission. Such a request for consultation shall be filed with the Commission by the Member State concerned within four weeks after the notification to it of the agreement or arrangement by the Commission.

Consultation shall begin within three weeks following the receipt by the Commission of the notification referred to in the second paragraph of Article 1 or of the request from a Member State.

The main purpose of the consultation shall be to establish whether a Community negotiation should be initiated or, if not, whether the agreements or arrangements to be extended expressly or tacitly contain provisions relating to the common commercial aviation policy within the meaning of Article 113. If such is the case, it shall be established whether such provisions could constitute an obstacle to that policy. The consultation shall also cover all instruments currently in force between the other Member States and the third country concerned.

Article 3

If the Commission establishes, either after consultation or on its own initiative, that even though certain provisions in the instruments to be extended expressly or tacitly come within the scope of the common commercial aviation policy within the meaning of Article 113 those provisions would not, during the period of extension envisaged, constitute an obstacle to implementation of the common commercial aviation policy, it may authorise Member States to extend, expressly or tacitly, for a period to be specified, the provisions in question of the instruments which were the subject of the consultation. This period shall not exceed one year.

If, however, the instruments in question contain either a Community reservation clause or a clause providing for annual notice of termination, express or tacit extension may be authorised by the Commission for a longer period.

Article 4

If the Commission establishes, either after consultation or on its own initiative, that provisions in the instrument to be extended expressly or tacitly could, during the period of extension envisaged, constitute an obstacle to the implementation of the common commercial aviation policy, in particular by reason of divergencies between the policies of Member States, it shall submit a detailed report to the Council. This report shall be accompanied by the necessary proposals and, where appropriate, by recommendations requesting that the Commission be authorised to open Community negotiations with the third countries in question.

TITLE II

Transitional provisions

Article 5

1. Without prejudice to Article 113 of the Treaty and until 31 December 1992, the Council acting on a proposal from the Commission and after the required prior consultation may, by way of exception, authorise bilateral negotiations between Member States and certain third countries in cases where Community negotiations prove to be not yet possible as a result of compelling circumstances of an administrative or technical nature.

2. The provisions of this Article shall apply where, for any special reason, a Member State considers that, in order to avoid any interruption in commercial relations based on agreements, negotiations must be undertaken with some third country.

3. In derogation of paragraph 1, the Commission may, until 31 December 1992, authorise Member States to enter into bilateral negotiations with third countries concerning modification and/or application of annexes of existing agreements in respect of exercise of traffic rights, designation of airlines, approval of air fares and scheduling.

Article 6

Consultation conducted in accordance with Article 5 shall be ensured by the Commission and

(i) shall involve such co-ordination as will ensure the proper functioning and the strengthening of the internal market, as will take account of the legitimate interests of the Member States, as regards safeguarding and extending their commercial aviation relations with third countries and as will contribute towards the establishment of uniform principles of common commercial aviation policy in relation to the country in question;

(ii) shall be resumed during negotiations if developments in the latter so require and particularly if the Member State concerned intends to digress from the guidelines adopted at the time of consultation;

(iii) shall -as regards point (i) and (ii)- lead to conclusions which will serve as guidelines for the Commission or for the Member State during the negotiations.

Article 7

At the end of negotiations the Member State concerned shall communicate to the Commission the results of such negotiations and shall inform the other Member States thereof.

If within five working days after communication to the Commission no Member State has raised any objection with the Commission to the proposed agreement or communicated any such objection to the Member State concerned, the Commission shall forthwith inform the Council and the other Member States of that fact, unless, for its part, the Commission has any objection to raise.

Upon receipt of this information the agreement in question may be concluded.

In all other cases, the agreement may be concluded only after authorisation by the Council, acting by a qualified majority on a proposal from the Commission.

Title III

Final provisions

Article 8

The information and consultations provided for in this Decision shall be covered by professional secrecy and shall, in particular, not involve the disclosure by the Commission of information provided by a Member State under this Decision and certified by that State as being commercially sensitive, except for the purposes of Article 1.

Article 9

The following Article 15a is inserted in Decision 69/494/EEC:

"Article 15a

This decision does not apply to agreements and arrangements concerning commercial aviation matters."

Article 10

This Decision is addressed to the Member States.

Done at Brussels, 20 February 1990 For the Council

ANNEX II

The Chicago Convention

The Communication on Community relations with third countries in aviation matters refers to cabotage in two different ways:
(1) the creation of a cabotage area in Europe and
(2) cabotage as defined in Article 7 of the Chicago Convention.

(1) Cabotage area

The notion of a cabotage area is legally not included in the Chicago Convention. The Convention refers only to cabotage as such in Article 7.

On the other hand the Chicago Convention does open the way for regional cooperation in Article 77. A number of countries are making use of this possibility. This provision refers to joint air transport operating organisations, international operating agencies, or pooling arrangements.
Living examples of pooling arrangements are SAS, Gulf Air and Air Afrique. In these cases the close cooperation and coordination on air policies have resulted in a regional flag carrier.
There are also examples of less far reaching regional coordination, e.a. in South America.

Basically the cooperation between States can have two dimensions:
1. the regulation of air services within the region
2. the regulation of air services to and from that region.

With the development of the internal market in Europe both dimensions are dealt with. The current regulations on tariffs, capacity and market access and the second phase proposals regulate air services within Europe; the proposals on the development of aviation relations with third countries are aimed at regulating the second dimension.

Fifth freedom operators from third countries fall within both categories.

1. They fall partly within the first category, because they compete directly with inter-Community services of Community carriers. These operations are therefore affected by the increased competition resulting from the 1987 package, and by the adoption of the second phase proposals.

2. These fifth freedom operations are also part of the second dimension, the air services to and from the Community, since these fifth freedom operations are exercised by third country carriers and are by definition an extention of a third/fourth freedom operation from a third country to the Community and vice-versa. Therefore they are part of the "volet externe".

The Chicago Convention does not preclude the development of a Community policy for third country relations in fact it does to a certain extent encourage regional cooperation.

Based on these elements the declaration of a Community cabotage area as a logical consequence of increasingly close cooperation in Europe is in line with the Chicago Convention.

Exchange of cabotage rights

It is argued from certain sides that the development of Community rules on cabotage may come in conflict with Article 7 of the Chicago Convention. This article creates a most favoured nation status with respect to cabotage. A country can not extend exclusive cabotage rights to another country nor is a country allowed to accept such exclusive rights. This might mean that the Community could not establish an agreement on cabotage with another country in the world nor for that

matter create cabotage rights between its own Member States. However, looking at Article 7 in the context of the exchange of market opportunities it is reasonable to consider this provision as an obligation to offer cabotage on the same or equivalent conditions to those on which cabotage is agreed with other states.
Equivalent but non-exclusive conditions might be created in another context. Looking at it in this way Article 7 leaves open many opportunities to agree with some countries in the world on a multilateral regime for market access without necessarily having to grant cabotage rights to other countries with which a similar framework can not be established.

ISSN 0254-1475

COM(90) 17 final

DOCUMENTS

EN 11 07

Catalogue number : CB-CO-90-087-EN-C

ISBN 92-77-57821-1

Office for Official Publications of the European Communities
L-2985 Luxembourg