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ECONOMIC COMMISSION

Agenda Item 27: Regulation of international air transport services, and outcome of the fifth Worldwide Air Transport Conference

IMPLICATIONS OF THE EUROPEAN COMMISSION'S MANDATE TO NEGOTIATE BILATERAL AIR SERVICES AGREEMENTS

(Presented by Saudi Arabia on behalf of the Members of the Arab Civil Aviation Commission (ACAC)²)

SUMMARY

With the establishment by the European Union (EU) of the foundations of the unified European economic area, the Member States of the European Union are preparing to amend the provisions of bilateral air services agreements with other States in compliance with the judgment of the European Court of Justice on 5 November 2002 and the decision of the Council of Transport Ministers on 5 June 2003 requiring the Member States to amend their bilateral agreements to be in line with the laws of the European Union.

Action by the Assembly is in paragraph 4.

1. INTRODUCTION

1.1 In an important development in the field of European air transport, the European Court of Justice passed a judgment in respect of “open skies” agreements, providing that the bilateral “open skies” agreements concluded by certain European Member States with the United States were contrary to Community law. As a consequence, the Council of Transport Ministers granted the European Commission a mandate to negotiate air services agreements on behalf of the EU Member States.

¹ Arabic version provided by ACAC

² Bahrain, Egypt, Iraq, Jordan, Lebanon, Libyan Arab Jamahiriya, Morocco, Oman, Qatar, Saudi Arabia, Sudan, Syrian Arab Republic, Tunisia, United Arab Emirates, Yemen and Palestine

2. DISCUSSION

2.1 The first step in amending the agreements, following rounds of bilateral negotiations, relates to designation and authorization, withdrawal, revocation and suspension of authorization and revising the applicable laws and regulations to be consistent with the laws of the European Union. This is based on the judgment by the European Court of Justice which found that the nationality clause relating to ownership and control of airlines incorporated in the bilateral agreements was contrary to the rules of the right of establishment. The latter provides that any European capital should be accorded the same treatment as a national capital in any Community State. This implies that the principle of substantial ownership and effective control of an airline by the designating States (EU Member State) is replaced by the principle of European Community Personality which is subject to the Community laws applicable to the European Community Area. The substantial ownership and effective control criteria consist of two elements: (1) the substantial ownership of an airline, i.e. the criterion of the carrier's principal place of business which provides for the establishment of a carrier in accordance with the right of establishment under community laws instead of the national laws and regulations of the European State; and (2) the effective control criterion which subjects the carrier to the Community law in respect of aviation safety and security, rather than to the laws of the State of designation. Revision of the agreements also requires that provisions related to tariffs on operations under the Fifth Freedom, as well as taxes and custom duties should also be in conformity with Community law.

2.2 **Legal, Economic and Technical Implications of the Amendment**

2.2.1 The amendment will have an impact on the negotiating weight and will create an imbalance in the maintenance of equal negotiating powers and the granting of fair and equal operating opportunities among the carriers concerned.

2.2.2 The amendment will have a direct impact on market access and traffic rights, especially under the bilateral agreements that give the right to each party to designate more than one carrier. It would give European carriers a competitive advantage to penetrate markets and win traffic from various points in European States as markets open up in the European Economic Area and as sixth freedom and cabotage rights are deregulated. Moreover, the promotion of marketing alliances among European carriers will give them more access to other markets and enable them to achieve optimal utilization of traffic rights. This in turn will have an adverse impact on the competitive position of carriers of other States as it would impose restrictions on their access to European markets and on their ability to achieve optimal utilization of traffic rights.

2.2.3 The aviation safety and security standards that are introduced under European laws may be different from ICAO's Standards and Recommended Practices (SARPs), thus undermining the principle of equal treatment.

2.3 **Developments**

2.3.1 The decision of the European Court of Justice has major economic implications in terms of modifying the negotiating weight between European States and other States; the former will negotiate as a group rather than as individual States, by giving the European Commission the right to amend the bilateral

agreement concluded between sovereign States (horizontal negotiating mandate). It will also remove the privilege that has been enjoyed by the national flag carriers in their home States since 1997. Any European airline is now entitled to operate in the domestic markets of any State within the unified Europe. In other words, it will overshadow the identity and nationality of the existing well-known airlines (BA, Swiss and Lufthansa) and other airlines in favour of a European identity. Any such airline will have the right to operate within a unified Europe and exercise all traffic rights and freedoms and to operate internationally outside Europe using the European identity.

2.3.2 As no air transport market operates under uniform regulatory conditions, the impact on other markets will differ between States and between airlines depending on the way each State approaches traffic rights with Europe.

2.3.3 Certain States have applied for membership of the European Common Market or have expressed readiness to join the single European Civil Aviation Market. On the other hand, the European Commission has expressed a desire to negotiate with certain States to include them in the single market.

2.3.4 In either case, acceding to the single European market will have direct economic implications which may be summed up as follows:

- a) Complete removal of protection from the airline/s of other States.
- b) A national airline can receive a one time support for the purpose of restructuring.
- c) Deregulating ground handling services and aviation support services (like catering and fueling,...etc).
- d) Application of laws relating to competition and consumer protection.
- e) Complete market access for any airline in Europe, including access to the domestic market.
- f) Amending bilateral air services agreements with third parties to ensure their compliance with Community law.

2.3.5 The interesting element in the new development is the application of a European air transport policy that is shifting the nature of relations from bilateral to multilateral, with all the complexities and implications involved. The States in the course of negotiating and conducting their international relations in the field of air transport have moved from seeking to service the interests of the national carrier to defending the interests of the European carriers. This will undoubtedly reduce the role and activity of carriers of the other parties.

2.3.6 As for the method of dealing with the European Union, in light of the decisions by the European Court of Justice and the European Council of Ministers, it would seem that liberalizing air transport between Member States of a regional grouping is considered an appropriate means to cope with the economic and regulatory changes that have taken place in the air transport field at the international and regional levels. It is also the appropriate formula to approach globalization and to prepare as a bloc to the effects of European integration and its implications for air transport in this bloc.

3. CONCLUSIONS

3.1 The Members of ACAC conclude that:

- a) Contracting States should not be asked to revoke the nationality criterion for their flag carriers until the required negotiating transfer is obtained;
- b) market access and exercise of traffic rights which are regulated under bilateral agreements should be recognized;
- c) the competence of other regional groups to negotiate as a bloc *vis-à-vis* the European Union should be recognized; and
- d) harmony between safety and security standards of both the European Union and ICAO should be ensured.

4. ACTION BY THE ASSEMBLY

4.1 The Assembly is invited to:

- a) reaffirm the principles and provisions of the Chicago Convention of 1944, as constituting the basis for bilateral air services agreements, including national sovereignty and equality of opportunity among the designated carriers;
- b) request ICAO to carry out a study of the economic, legal and technical implications of amending the provisions of bilateral agreements to be in line with European laws, with a view to addressing the concerns of States in respect of the negotiating mandate;
- c) request ICAO to develop guidance material for the use of States on how to deal with bloc negotiations in air transport relations; and
- d) request the EU to provide, as soon as possible, the necessary clarifications on the new mandates and their implications.

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