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ECONOMIC COMMISSION

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

OWNERSHIP AND CONTROL: RECOGNISING NEW DEVELOPMENTS

(Presented by the Netherlands on behalf of the European Community and its Member States²)

SUMMARY

This working paper reflects the recent policy developments in the European Community relating to ownership and control and designation of air carriers. Legal developments have led to a new Community approach to international air services agreements, which have practical implications for bilateral negotiations with the Community and its Member States. These developments echo the need for greater flexibility at the international level on the related issues of ownership and control, on the one hand, and the designation of air carriers, on the other, further to the process of international liberalisation of air services as analysed and promoted at the fifth Worldwide Air Transport Conference (ATConf/5).

The Assembly is requested to take note of the developments and to support their implementation. Action by the Assembly is in paragraph 6.

¹ French and Spanish versions provided by the European Community.

² The European Community comprises the following States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Spain, Slovak Republic, Slovenia, Sweden and the United Kingdom

1. INTRODUCTION

1.1 Last year at the fifth Worldwide Air Transport Conference (ATConf/5), the European Community (EC) and its Member States called for greater flexibility at the international level on the related issues of ownership and control, on the one hand, and the designation of air carriers, on the other. The EC and its Member States continue to believe that flexibility in these areas is essential to the process of international liberalisation that ICAO was aiming to analyse and promote through that Conference.

1.2 The final conclusions of ATConf/5 called upon Members to show flexibility in the field of ownership and control policy:

“States should, to the extent feasible, liberalize international air transport market access, air carrier access to international capital and air carrier freedom to conduct commercial activities.

States should give consideration to accommodating other States in their efforts to move towards expanded trans-border ownership and control of air carriers...provided that clear responsibility and control of regulatory safety and security oversight is maintained.”

1.3 The EC and its Member States attach considerable importance to these conclusions. Experience around the world shows that liberalisation of traffic rights can bring considerable benefits in terms of service quality and competition. However, the relaxation of airline ownership and control rules within a group of States can amplify these benefits by stimulating investment and allowing airlines to structure their businesses in a more efficient manner.

1.4 Within the EC, a flexible policy on ownership and control has been in place for a decade. Nationals of one EC Member State can invest in, establish and control airlines in any other EC Member State. All airlines in the EC are established and licensed under the same rules and enjoy identical status as Community carriers. These airlines can operate any route within the Community.

1.5 The EC has seen good results from this policy internally, in terms of the stimulation of new air services, the entry of innovative newcomers into the market and increased competition to the benefit of consumers. High standards are maintained and improved through common rules on key issues such as licensing, safety and security.

2. RECENT MARKET DEVELOPMENTS

2.1 Since last year's Conference, the process of growth, integration and development has continued in the European aviation market and among the air carriers that operate within it.

2.2 In late 2003, the first merger between two flag carriers was announced. Air France and KLM will combine to create Europe's largest airline group. It will operate from two main hubs at Amsterdam and Paris. Under EC law, the status of this enlarged entity is no different from that of the two airlines it succeeds, although the company will be structured in such a way that it respects existing restrictions on ownership and

control in the bilateral agreements of France and the Netherlands until such time as those restrictions can be removed and the agreements made compatible with Community law.

2.3 In addition to this activity among traditional flag-carriers, other Community carriers continue to build trans-European businesses. In particular, the largest no-frills airlines now have multinational, pan-European operations with a home base in one Member State, but operational bases throughout the EC.

2.4 The most important development in the market took place in May, when the EC expanded to include a further ten States to make a total of twenty-five. All the new Member States became part of the internal aviation market immediately and their airlines became Community carriers, entitled to the same rights and subject to the same obligations as their counterparts from the existing fifteen Member States. Already, start-up airlines in the newest EC Member States in Central Europe are taking advantage of the liberalised aviation market to start flight operations from bases outside their home States.

3. THE LEGAL SITUATION

3.1 Following the judgements of the European Court of Justice in the “open skies” cases of November 2002, every Member State is required by EC law to grant equal market access for routes to destinations outside the Community to any Community carrier with an establishment on its territory. Community carriers must be majority-owned and controlled by any EC interests, but, within this overall requirement, a Member State may not impose additional requirements that it be majority-owned and controlled by its own nationals. This must be reflected in all air services agreements between the EC and its Member States and their bilateral partners.

3.2 The EC and its Member States are now working collectively with their partners to remove any discrimination between EC nationals in this area from the bilateral agreements of EU Member States with other ICAO members, either by concluding new agreements or by amending existing ones.

3.3 In order to ensure consistency in their approaches, the EC and its Member States are coordinating their negotiations with other countries.

3.4 Negotiations conducted by the European Commission are now being undertaken at Community level with the United States with a view to establishing an open aviation area that would include reciprocal liberalisation of ownership and control. Community negotiations have also been initiated with other third countries to ensure appropriate insertion of Community designation in the existing bilateral air service agreements between the EC Member States and those third countries.

3.5 In other negotiations, Member States continue to act bilaterally, but in coordination with the European Commission and the other Member States, and on the basis of commonly agreed objectives, in particular on ownership and control.

3.6 As a result, in every negotiation with an EC Member State the issue of the nationality clause will be raised. A request will be made to allow any Community carrier with an establishment on the territory of the Member State concerned to exercise the traffic rights that are available under the agreement. Where the European Commission is acting on behalf of the community as a whole, a similar request will be made to permit all Community carriers to have the access to traffic rights from any Member State in which they have an establishment.

3.7 This does not imply an expansion of traffic rights — if there are limited traffic rights it will be a matter for the EC Member State which is party to the agreement to allocate those rights in a transparent and non-discriminatory manner between competing Community carriers. All States with competing international airlines will be familiar with such procedures.

4. **PROGRESS**

4.1 EC Member States have now concluded new agreements or revised existing bilateral agreements with over thirty other ICAO States to permit the designation of European Community carriers on routes to and from their territories.

4.2 Given that the EC has twenty-five Member States and three more States are closely associated through the European Economic Area or specific arrangements, the principle of Community designation is now accepted by around sixty ICAO states or around one-third of ICAO's membership.

4.3 In addition, there are ongoing Community negotiations with Australia, New Zealand, Singapore and the United States where the issue of Community designation appears to be acceptable in principle to these States.

4.4 The Community and its Member States welcome the positive and flexible attitude taken by these partners and they will continue to work with other partners to make their bilateral relations as a whole legally secure.

5. **CONCLUSION**

5.1 The EC and its Member States have adopted a Community policy towards ownership and control — a concept recognised by ICAO. They are now seeking recognition of this policy in their bilateral relations with other ICAO States and request partners to show flexibility in their position in line with the final conclusions of ATConf/5. Agreements that do not recognise Community ownership are incompatible with the relevant obligations of EU Member States under Community law and it is imperative either to amend or replace them.

6. **ACTION BY THE ASSEMBLY**

6.1 The Assembly is invited to:

- a) take note of this paper and lend its support to the implementation of the new policy approach undertaken by the EC;
- b) call for greater flexibility at the international level on the related issues of ownership and control; and
- c) affirm its general commitment to pursue the process of international liberalisation of air services.