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Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.



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CONFIDENTIEL

AVIATION 26

REPORT

from : the Permanent Representatives Committee
to : the Council

Subject : Negotiations between the European Community and the United States of America in the field of air transport

1. At the Council meeting in December 1999, Ms de Palacio, Vice-President of the Commission, while reporting on the results of the Chicago Conference organised by the US Administration, pointed out that the Secretary of State for Transportation of the United States - Mr Slater - reacted positively to the idea of creating a Transatlantic Common Aviation Area (TCAA).
2. In order to renew discussions at Council level which were interrupted at the end of 1998, the Presidency decided to organise several meetings of the Working Party on Aviation in order to consider the text of a draft mandate. At the Permanent Representatives Committee on 14 June 2000, a large consensus was reached on the substance of the draft mandate contained in the Annex to this report..
3. All delegations participated intensively in the technical debate on this draft mandate. However, some delegations (D,ES,F,P,A,FIN,UK) indicated that the time was not yet ripe for the Council to grant a mandate at this stage. NL pointed out that this will be dependent on the solution to be found as regards the legal action taken by the Commission against Member States which signed "Open Skies" agreements with the US. IRL, for its part, continues to maintain a fundamental reservation on the establishment of a TCAA.

4. As regards the existing bilateral agreements, it should be recalled that the Working Party recognised the need for entry of the following joint statements in the minutes of the Council at which the full mandate will be granted. However, the Commission entered a reservation on these draft statements.

«Re. existing bilateral agreements:

"The Council and the Commission jointly declare that, if any agreement on a "Transatlantic Common Aviation Area" is less favourable on certain issues than existing bilateral agreements, the more favourable provisions shall prevail under reservation of Community obligations and taking into account the Treaty. Provisions of existing bilateral agreements not covered by any agreement with the US involving the Community shall continue to apply."

"The Council and the Commission jointly declare that Member States shall not be limited in their ability to open or pursue bilateral negotiations and conclude agreements with the US, including on issues covered by this mandate provided they act consistently with their Community obligations. They will be able to do so during the present negotiations and until the possible implementation of a TCAA. In case of the conclusion of bilateral agreements with the US similar to agreements already signed by other Member States, these new agreements will be treated in a similar way by the Community"».

It should be recalled that Article 300 of the Treaty lays down that the Commission shall conduct negotiations in consultation with Special Committees appointed by the Council to assist in the task and within the framework the Council may issue it.

5. The Council is now called upon to have a political discussion on this draft mandate.

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DRAFT MANDATE

Aim

The purpose of the European Community (EC) in this area is to establish a Transatlantic Common Aviation Area (TCAA) covering initially the territories of the EU and the US where air carriers of both sides can freely establish themselves and freely provide their services on the basis of commercial principles and be able to compete on a fair and equal basis and subject to equivalent or harmonised regulatory conditions.

For this purpose, the objective shall be an Agreement which includes, from the outset :

- market access, ownership and control, leasing, convergence on the application of competition rules, safety and institutional arrangements,
- a commitment to examine other issues with a view to deciding to what extent the rules covering them should be harmonised or treated as mutually acceptable.

Issues

Ownership and Control

The firm objective is to liberalise the rules of ownership and control of air carriers by , under a TCAA, eliminating the existing restrictions, while securing overall ownership and effective control to Contracting Parties and/or their nationals.¹ The TCAA shall provide for the possibility of a limited number of air carriers established in and licensed by a Contracting Party, which do not fully meet the ownership and control conditions, for example as a consequence of the Agreements on the EEA, ECAA and Switzerland. Such air carriers shall be accepted by the other Contracting Party.

¹ The French delegation advocated a step-by-step approach for the liberalisation of rules of ownership and control, while maintaining minimum EU standards.

Market Access¹

Air carriers of the Contracting Parties shall be entitled to operate between any airports within the combined territories of the Contracting Parties.

The TCAA shall ensure that existing rules in the Contracting Parties as regards public service obligations, essential air services, and similar arrangements concerning operational conditions, environmental problems and disruptive behaviour shall not be adversely affected.

Pricing

Air carriers may freely set prices and tariffs for air transportation on routes within the TCAA.

A Party may intervene on routes within its territory in accordance with its laws and regulations. For routes between the Parties, those Parties may agree to intervene in order to address disruptive price developments.

As regards intervention, this will have to conform to the applicable competition and antitrust laws and policies.

Conditions of operation

Neither Party under a TCAA, except as may be required on a non-discriminatory basis, shall require air carriers filing for approval of:

- tariffs,
- schedules,
- programmes for non-scheduled flights, or
- operational plans.

¹ The French delegation will submit a text on freedom to provide services.

If a Party does require filing for information purposes, it shall minimise the administrative burdens of filing requirements and procedures on all commercial companies (air carriers and intermediaries) involved. Air carriers will have to provide information in case of an investigation.

Statistical Information

The TCAA shall foresee an obligation for the air carriers, on request, to provide statistical information to the Contracting Parties according to normal practices.

Commercial Opportunities

The air carriers shall be allowed in accordance with applicable and non-discriminatory procedures and administrative requirements to freely establish in the territory covered by the TCAA, offices for the promotion and sale of air transport services and ancillary services, as well as all other facilities required for the provision of air transport services and ancillary services, including, but not limited to, forwarding services, cargo service centres, warehousing and storage, agency services, marketing services, consolidation, expedition and intermodal transport. The air carriers shall be allowed to engage directly and, at their discretion, through their own agent, or any authorised agents, in the sale, marketing and promotion of air transport services and ancillary services, including, but not limited to, forwarding services, cargo service centres, warehousing and storage, agency services, marketing services, consolidation, expedition and intermodal transport.

Air carriers shall not be limited or prohibited from issuing or using their own tickets and air waybills, as well as using and issuing tickets and air waybills of other airlines operating under the TCAA and of indirect air carriers if authorised to do so under the TCAA.

Air carriers shall be entitled, in accordance with the laws and regulations of the country concerned, Party to the TCAA, relating to entry, residence, and employment, to bring in and maintain in the territory of that Party managerial, sales, technical, operational, and other specialist staff required for the provision of air transport.

Air carriers shall have the right to convert and remit to any country, on demand, funds obtained in the normal course of its operations. Conversion and remittance should be permitted promptly without restrictions or taxation in respect thereof, at the market rate of exchange applicable to current transactions and remittance on the date the air carrier concerned makes the initial application for remittance, and shall not be subject to any charges except normal service charges collected by banks for such transactions.

Co-operative Marketing Arrangements

Air carriers of the Contracting Parties shall have the right to conclude commercial arrangements such as interlining, blocked space, or code sharing for operations within that area, subject only to applicable competition and antitrust rules and requirements on information for consumers.

Consumer Protection

The Contracting Parties shall regularly consult each other in order to co-ordinate consumer policy and to achieve convergence of applicable consumer laws and policies at a very high level of protection.

Social Conditions

Convergence shall be pursued in respect of the application of social policies which specifically affect air transport.

Intermodal Operations

In order to facilitate the best use of available capacity, air carriers shall be permitted to employ, in connection with international air transport, any surface transport for passengers (under air ticket) and cargo (under airway bill) including transport to and from all airports, delivery or substitute transport.

Leasing

There shall be no economic restrictions on dry or wet leasing in the TCAA of aircraft registered in that area, subject to the contents of Regulation 2407/92. The TCAA shall set out in detail the requirements to be met when aircraft from non-Contracting Parties are brought into the market envisaged by the TCAA through leasing transactions. Any such requirements shall be as close as possible to those existing in Regulation 2407/92. The Community rules must apply for operations within the EC. A common approach, with regard to safety, should be envisaged by Parties of TCAA.

Slot Allocation

The situation of the air carriers of the Parties shall not be adversely affected.

Ground Handling

The Agreement shall ensure equal treatment *de jure* and/or *de facto* for Community air carriers, inter alia the possibility for Community air carriers to carry out handling in the US, whether on a third party basis or self-handling.

Customs, Duties and Charges¹

Standard text

Computer Reservation Systems

An alignment of existing rules shall be pursued to ensure non-discrimination, neutrality and transparency.

The laws and regulations of the Parties shall ensure that the public is informed by CRSs, travel agencies and by air carriers as appropriate in a fair, impartial and comprehensive manner.

¹ The French delegation will provide a draft text for this clause.

Safety

Provisions on air safety shall be included to encourage the further development of international standards on air safety, to ensure close co-operation between the respective organisations responsible for air safety and to promote common action to improve the application of international safety standards in developing countries and respecting at least ICAO levels.

It would be necessary to achieve, as regards operational safety issues, considerable harmonisation and to develop wherever possible a common approach on international standards. The basis would be the applicable FAA and JAA/EASA regulations (FARs and JARs/EASA rules respectively). The best possible development could be consultations and subsequent agreement on a suitable mutual recognition agreement (MRA) between the Parties.

Licensing

Standards on economic and technical fitness criteria for air carriers shall converge within the framework of responsibilities of the Community and Member States.

Security

The TCAA shall establish comparable, effective and realistic security measures. Parties shall endeavour to achieve a high level of security. Extraterritoriality shall be avoided.

Environment

Convergence of environmental standards on noise and emissions in the TCAA, in order also to ensure the consistent application of international standards, shall be ensured.

Antitrust and Competition Rules

Effective Application of Competition Rules

With a view to establishing and maintaining an open and unrestricted air transport market, and in the interests of ensuring that conditions for competition in the provision of air transport services are as equitable and harmonious as possible throughout the TCAA, the Parties shall be required to fully apply and effectively enforce their respective competition laws in accordance with their own jurisdictional and procedural rules. This implies that the Parties' basic competition rules should apply to transactions and behaviour within the TCAA with no exception other than exemptions or approvals based upon the normal competition rules.

The TCAA shall include appropriate mechanisms to promote maximum convergence in the application of the Parties' competition rules.

These mechanisms shall avoid, to the fullest extent possible, that the Parties' authorities, which are competent to enforce the competition rules, take conflicting or incoherent decisions.

The principles embodied in the "Co-operation Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws" shall also be incorporated in the TCAA with due regard to the specific characteristics of air transport.¹

Convergence

Convergence shall, in particular, be pursued through co-operation, co-ordination, and synchronisation in enforcement activities.

When dealing with individual cases, the Parties' competent authorities shall establish contacts from the outset in order to exchange views and information to the fullest extent possible. They should also, when appropriate, co-ordinate enforcement activities. The Parties' competent authorities shall in particular discuss their respective approaches on possible remedies in order to ensure that they do not conflict and are coherent with each other.

¹ The Commission representative maintained the following addition :
"or through the extension of the said agreement if the same results can be achieved".

As regards the exchange of information, Parties shall establish procedures to ensure that, confidentiality is maintained and that no such information can be used by third parties (i.e. not the competent anti-trust/competition authorities) in order to pursue punitive, exemplary or any other legal action.

Common ground

The TCAA shall aim to ensure that the Parties achieve the highest possible level of common ground for the effective application of competition/antitrust policy in the TCAA, in particular, on the criteria for the acceptability of certain restrictive practices and agreements. Each authority shall at the outset identify its position *inter alia* on the following issues, which shall be the initial focus of the discussions and the effort to achieve common ground :

1. criteria for the acceptability of alliances and of other co-operative arrangements (such as public interest, efficiencies, consumer benefits);
2. criteria for determining abusive practices (such as predation and other exclusionary practices);
3. the approach on key concepts of competition analysis (such as relevant market and market power).

The TCAA shall, from the outset, include at least a minimum level of common ground and ensure that a mechanism is in place to enable the continued development of these and other principles in a mutually compatible and consistent manner as the market changes.

State Aid, Chapter 11, and “Fly America”

The aim would be that Parties should at least inform each other prior to any decision to authorise significant State aid or bankruptcy protection. Parties should also try to find any further formal co-operation with a view to minimise any possible competitive distortion.

The TCAA shall ensure that there will be no discrimination between air carriers operating in a TCAA in respect of Section 1117 of the Federal Aviation Act (“Fly America”) and all can freely bid for government financed international traffic, whether passenger, cargo and/or mail (with the exception of military/defence transportation).

Institutional Arrangements

There shall be an appropriate consultation mechanism and speedy and efficient dispute settlement procedures to ensure good results and proper functioning of the Agreement. While the Agreement is in force, any conflict on its application shall be resolved, if possible, by exhausting all possibilities of the dispute settlement mechanism of the Agreement while renouncing the use of any unilateral measures not foreseen by the Agreement, including retaliatory measures. To deal with cases of persistent disagreement on specific technical or economic issues, procedures involving arbitration or an independent auditor shall be included as appropriate.

For the administration of a TCAA Agreement a specific Joint Committee, consisting of representatives of Parties shall be established. This Committee shall be assigned the task of ensuring the proper implementation of the Agreement, monitor the development of the market and ensure that carriers compete fairly and on equal terms. Due regard shall be reserved to the possible impact of different social regulations of Parties on the functioning of the TCAA Agreement.

Scandinavian Air Policy

A TCAA Agreement shall also refer to SAS as a Community air carrier continuing to operate covering also the interests of Norway. During the negotiations and the internal consultation procedure Norway shall be involved in the dialogue as appropriate.

Special Provisions

In the case of new legislation of either Contracting Party in respect of matters covered by TCAA, an appropriate consultation mechanism must be established in order to pursue the efforts of coherence and continued convergence and harmonization.

The TCAA shall ensure that existing approvals or exemptions are not adversely affected.

The TCAA shall not reduce the level of market access created by existing bilateral agreements.

Convergence shall aim to improve standards.

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