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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.

RESTREINT UE



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THE EUROPEAN UNION**

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NOTE

from :	the United Kingdom delegation
to :	Committee on Civil Law Matters (General Questions)
No. prev. doc. :	17312/08 AVIATION 304 JUSTCIV 267 RESTREINT UE
Subject :	Recommendation from the Commission to the Council to authorise the Commission to negotiate on behalf of the Community a multilateral agreement on compensation to third party victims for damage caused by aircraft and arising from acts of unlawful interference or from general risks - Comments by the United Kingdom delegation

1. Prior to this proposal, the Commission was not actively involved in the work of the ICAO Legal and Special Committees from which the drafts emerged. While it has more recently demonstrated some interest in the two conventions, on a practical level, the UK doubts whether the Commission is in a position at this late stage to seek to represent the views of both the Commission and the Member States and to achieve a coordinated position on all aspects of the draft conventions.

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2. The Commission is not a member of ICAO; it has observer status. Previously, normal practice has been that when ICAO has considered matters which fall within the Community's competence, the Presidency has presented the Community's position. This was the case in relation to the Montreal Convention 1999, which was ratified by the Community, and more recently at the ICAO General Assembly in 2007, where the Presidency (Portugal) presented the common EU position on various subjects, including Emissions Trading and Air Safety.
3. The UK sees no reason to adopt a different approach here. For pragmatic reasons, anticipating the views of other ICAO contracting states, it makes sense for the Presidency to speak.
4. Furthermore the UK's analysis of where competence lies in respect of the subject matter of the two proposals suggests that the draft conventions fall predominantly within areas of shared or Member State only competence (see paragraphs 5 -12) and that the extent of the Community's exclusive competence is very limited. This analysis further supports the case for the Presidency rather than the Commission conducting negotiations on matters of Community competence (either exclusive or shared with Member States).

Competence Analysis

5. The UK understands the Commission to be asserting that the Community has exclusive external competence in relation to four aspects of each draft convention:
 - a. Community-wide third party liability insurance requirements;
 - b. the responsibility of Member States to compensate crime victims;
 - c. exclusive remedy provisions affecting the approximation of laws, regulations and administrative provisions concerning liability for defective products; and
 - d. jurisdiction and recognition and enforcement of judgements.

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6. The UK's comments may be summarised as follows:

General observations

7. Even on the basis of the Commission's Recommendation (at page 3 of the proposed mandate) only five provisions of the General Risks Convention ("GRC") and six provisions of the Unlawful Interference Convention ("UIC") are supposedly within exclusive Community competence. Of these, three concern Council Regulation (EC) No. 44/2001 ("Brussels I"). The others are peripheral. So in any event, the Conventions fall predominantly within areas of shared or Member State only competence.

Regulation 785/2004 ("the Insurance Regulation")

8. The Community rules on insurance in this sector are just that. They are expressly stated to be without prejudice to rules on liability (Article 4(3) of the Insurance Regulation). Even the one Article on insurance in each Convention (Article 7 UIC and Art 9 GRC) does not conflict with the Community rules because both the internal Community rules and the provisions in the draft conventions set minimum requirements which are perfectly compatible with one another (Opinion 1/03, para 127). It follows that the Community's external competence in relation to these provisions is shared with Member States.

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Council Directive EEC 85/374 ("the Product Liability Directive")

9. There does not appear to be a conflict with the existing Community rules in the Product Liability Directive because, as the UK understands it, neither Convention is seeking to prevent a claim by a third party victim against a manufacturer if its defective product caused or contributed to the damage. Therefore the UK does not agree with the Commission's assessment that the subject matter of the exclusive remedy provisions in the proposed conventions lies within the Community's exclusive competence.

Council Directive 2004/80/EC ("the Compensation Directive")

10. Damage caused by acts of unlawful interference is outside the scope of the GRC. As the Compensation Directive does not extend to the subject matter of the GRC there can be no reason to deny Member States the right to exercise their competence. In relation to the UIC, the UK does not believe that there is any conflict between what is in the Compensation Directive (a minimum requirement for fair and appropriate compensation) and what is proposed in the UIC. It follows that in the view of the UK, competence is shared with Member States in relation to this aspect of the UIC.

Brussels I

11. The UK agrees that the three provisions of each convention on jurisdiction and recognition and enforcement of judgements affect Brussels I and therefore the Community has exclusive competence in this area. As a result, the UK is supportive of the Commission's proposal for the inclusion of Regional Economic Integration Organisation clauses in both conventions to enable the Community to participate in them in its own right in respect of matters falling within its competence.

Integrity of the single aviation market

12. Finally, the UK rejects the Commission's assertion that exclusive Community competence is established by the potential for imbalances in the internal aviation market if Member States act independently. In the UK's view, there is no legal support for this argument. There must be specific internal rules covering the area of the agreement for the Community to have external competence to act.

Amendments to the Negotiating Directives

13. It may be advisable to have separate negotiating directives for each draft convention with the flexibility to have combined or separate coordinating Special Committee meetings as circumstances may require.

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14. The negotiating remit should acknowledge that the conventions are mixed agreements and, if it is determined that the Commission should be granted a negotiating role, limit this to matters falling within the Community's exclusive competence.
15. If it is decided that the Commission should not be granted a negotiating role, then on matters of Community competence (exclusive or shared), the Presidency should be authorised to conduct the negotiations in consultation with the relevant coordinating Special Committee. Member States may speak in support of or add to the common position.
16. The remit should acknowledge that on matters falling within their competence, Member States are entitled to participate in the negotiations and speak.
17. The remit should avoid discussion of ratification matters (which are for Member States). It should not prejudice where the balance lies between the interests of third party victims and the different actors in the aviation industry. It should indicate what the Community's common position may be on matters of Community competence. For example, in relation to the choice of forum provisions in each convention the position to be taken by the Community in the negotiations should be compatible with the provisions in Brussels I unless it is assessed that the subject matter of either convention justifies a departure from the general scheme of Brussels I.