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COMMISSION DECISION

29/03/2005

on approving the standard clauses for inclusion in bilateral air service agreements between Member States and third countries jointly laid down by the Commission and the Member States

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Regulation (EC) No 847/2004 of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries, and in particular Article 1(1) thereof,

Whereas:

- (1) Standard clauses for inclusion in bilateral air service agreements between Member States and third countries should be developed and laid down jointly between Member States and the Commission in accordance with Article 1(1) of Regulation No 847/2004.
- (2) The Commission services agreed ad referendum with the Member States on certain standard clauses at the formal ad hoc meeting on 14 December 2004.
- (3) With a view to pursuing through bilateral air service negotiations the common policy goal of reducing greenhouse gas emissions, by the application of a tax on aviation fuel and other instruments of similar effect, Member States agreed at the same meeting to seek the deletion or amendment of provisions in bilateral air service agreements that exempt aviation fuel from taxation by introducing, in the latter case, a provision agreed at Community level allowing them to exercise in the future the option provided by Council Directive 2003/96/EC on taxation of energy products and electricity to tax aviation fuel used by third country carriers on intra-Community flights on the basis of agreements with other Member States.
- (4) The Commission should approve the standard clauses and the text of the provision on taxation of aviation fuel.

HAS DECIDED AS FOLLOWS:

Sole Article

The Commission hereby approves the annexed document laying down the standard clauses for inclusion in air service agreements between Member States and third countries, and the

text of the provision on taxation of aviation fuel used for intra-Community flights to be negotiated by Member States with third countries.

Done at Brussels, 29/03/2005

For the Commission

[...]

Member of the Commission

ANNEX

Community standard clauses for inclusion in bilateral air service agreements between Member States and third countries, and the agreed provision on aviation fuel taxation

Introduction

Art. 1(1) of Regulation 847/2004 on the negotiation and implementation of air service agreements between Member States and third countries stipulates that the Commission and Member States jointly develop and lay down standard clauses to be included in bilateral air services agreements (ASAs) between Member States and third countries.

Although bilateral ASAs usually cover similar subjects, quite often different (third) countries prefer, or are used to, different wordings. Therefore, it seems useful to maintain some flexibility for Member States when they negotiate with third countries the inclusion of standard clauses. To this end, alternative versions set out below may be used by Member States if necessary.

The standard clauses laid down cover the following issues:

- designation and revocation;
- references to nationals or air carriers of a Member State;
- tariffs to be charged for carriage wholly within the European Community; and
- ground handling.

The text of Community standard clauses developed and laid down jointly by the Commission and Member States are attached in Annex 1.

The standard designation and revocation clause

Where an air service agreement between a Member State and a third country contains designation and revocation provisions which breach Article 43 of the Treaty they should be replaced with a standard clause.

The standard designation and revocation clause replaces relevant provisions in the air service agreement concerned related to the designation by a Member State of a carrier, and the rights of the other party to refuse, revoke, suspend or limit the authorisation to the designated carrier. Version 1 of the clause, which was already agreed at the 2515th Transport Council on 5 June 2003, is preferred as it explicitly covers both designation as well as revocation.

Version 1, by referring to Regulation 2407/92 on licensing of air carriers, implicitly covers the issue of ownership and control of Community carriers, since that Regulation in its Article 4(2) contains provisions on ownership and control. Through the inclusion of Regulation 2407/92 in both the EEA Agreement and the Community-Switzerland Air Transport

Agreement it is clear that the right for EFTA¹ interests to own and control Community carriers is equally covered and it should be recognised also by third countries.

Nothing prevents though Member States to include an explicit reference to ownership and control of Community carriers (see Versions 2 and 4) as long as such a reference is extended to Community carriers majority-owned and controlled by EFTA interests in accordance with Article 4(2) of Regulation 2407/92.

It is important that Member States inform third countries in an appropriate manner about what implications of the incorporation in the ASAs of the standard designation and revocation clause would have on the ownership and control of Community carriers, including its extension to EFTA interests as eligible to own and control such carriers.

Standard references to nationals or air carriers of a Member State

Where an ASA includes general references to nationals or air carriers of a Member State, these should be amended to refer to nationals or air carriers of Member States respectively by introducing the relevant standard reference set out in the first and second paragraphs of Point 2 of Annex 1 respectively.

Given that an ASA may contain provisions under which a Contracting Party reserves the right to refuse the recognition of certificates and licences granted to its own nationals by other states, and that a standard reference should be introduced to extend, in general, the scope of references to nationals of the Member State concerned to nationals of other Member States, it is important to make clear in the ASA that such right to refuse the recognition of certificates and licences is restricted in this context to cover only nationals of the Member State that is a party to the ASA.

Where an ASA includes references to nationals in the context of ownership and control of air carriers (other than in the designation and revocation provisions), consistency with the standard designation and revocation clause extended to the EFTA countries should be maintained through the introduction of a standard reference set out in the last paragraph of Point 2 of Annex 1.

The standard pricing clause

Where an ASA grants rights to non-Community carriers to operate services on intra-Community routes, it should be ensured that those carriers are required to respect the limitations imposed on pricing in Regulation 2409/92 on fares and rates of air services. Where no intra-Community traffic rights have been granted to third country carriers, this is not necessary.

Version 1 of the pricing clause is preferred because Version 2 could make it more difficult to have future amendments to Regulation 2409/92, affecting the content of the pricing clause, automatically accepted by third countries. Thus Version 2 should only be used in case the third country cannot be convinced to accept a general reference to Community law reflected in Version 1.

¹ The EFTA States are Iceland, Liechtenstein, Norway and Switzerland. These countries have agreed to reciprocate in their bilateral agreements with third countries.

The standard ground handling clause

Where ground handling is addressed by an ASA, the relevant provisions must be compatible with Council Directive 96/67/EC on access to the ground handling market at Community airports taking into account the possibility for Member States to limit the number of ground handling service providers and of air carriers entitled to self-handling. A standard clause on ground handling is therefore necessary to be introduced where relevant. Version 1 is preferred as it explicitly refers to Community law.

Member States may not use Version 3 with respect to airports where they limit the right to self-handling in accordance with Article 7(2) of Council Directive 96/67/EC.

Taxation of aviation fuel used on intra-Community flights

Council Directive 2003/96/EC on taxation of energy products and electricity has given Member States the option to agree among each other to waive the exemption from taxation of aviation fuel used on intra-Community air routes. As long as Member States have not concluded such an agreement or agreements among each other, they do not seem to be legally obliged to amend provisions in ASAs that exempt aviation fuel from taxation. Therefore, at this stage, it does not seem necessary to lay down a standard clause on aviation fuel taxation.

However, with a view to pursuing the common policy goal of reducing greenhouse gas emissions, and in order to allow Member States to make use of the possibility of applying a tax on aviation fuel as foreseen by Directive 2003/96, Member States which have agreed with third countries on provisions exempting aviation fuel from taxation should seek the deletion or amendment of the relevant clauses in their ASAs by introducing, in the latter case, a provision agreed at Community level allowing them to exercise in the future the option provided by the Directive to tax aviation fuel on the basis of agreements with other Member States. Where no intra-Community traffic rights have been granted to third country carriers, this is not necessary.

Member States should apply the same approach when the aim of the negotiations with a third country is to conclude a new ASA. In this case Member States should seek to insert in the ASA the agreed provision on aviation fuel taxation, or at least to avoid the insertion of any provision that would restrict their right provided by the Directive to tax aviation fuel on the basis of agreements with other Member States.

In case it is not possible for a Member State to agree with a third country on the avoidance, deletion or amendment of the relevant clauses exempting aviation fuel from taxation the agreement would not fall under Article 4(3) of Regulation 847/2004 provided that the agreement incorporates all relevant standard clauses.

The text of the agreed provision on aviation fuel taxation is attached in Annex 2.

ANNEX 1 – Community standard clauses for inclusion in bilateral air service agreements

Below are set out the Community standard clauses (in **bold**) for inclusion in bilateral air service agreements between Member States and third countries. Titles are not part of the clauses.

1. DESIGNATION AND REVOCATION

VERSION 1 (with implicit reference to ownership and control extended to EFTA interests)

On receipt of such a designation the other Party shall grant the appropriate authorisations and permissions with minimum procedural delay, provided:

In the case of an airline designated by [name of Member State]:

- 1. it is established in the territory of [name of Member State] under the Treaty establishing the European Community and has a valid Operating Licence in accordance with European Community law; and**
- 2. effective regulatory control of the airline is exercised and maintained by the European Community Member State responsible for issuing its Air Operator's Certificate and the relevant aeronautical authority is clearly identified in the designation.**

Either party may revoke, suspend or limit the operating authorisation or technical permissions of an airline designated by the other Party where:

In the case of an airline designated by [name of Member State]:

- 1. it is not established in the territory of [name of Member State] under the Treaty establishing the European Community or does not have a valid Operating Licence in accordance with European Community law; or**
- 2. effective regulatory control of the airline is not exercised or not maintained by the European Community Member State responsible for issuing its Air Operator's Certificate or the relevant aeronautical authority is not clearly identified in the designation.**

VERSION 2 (with explicit reference to ownership and control extended to EFTA interests)

On receipt of such a designation the other Party shall grant the appropriate authorisations and permissions with minimum procedural delay, provided:

In the case of an airline designated by [name of Member State]:

- 1. it is established in the territory of [name of Member State] under the Treaty establishing the European Community and has a valid Operating Licence in accordance with European Community law; and**

2. **effective regulatory control of the airline is exercised and maintained by the European Community Member State responsible for issuing its Air Operator's Certificate and the relevant aeronautical authority is clearly identified in the designation; and**
3. **the airline is owned, directly or through majority ownership, and it is effectively controlled by Member States of the European Community or the European Free Trade Association and/or by nationals of such states.**

Either party may revoke, suspend or limit the operating authorisation or technical permissions of an airline designated by the other Party where:

In the case of an airline designated by [name of Member State]:

1. **it is not established in the territory of [name of Member State] under the Treaty establishing the European Community or does not have a valid Operating Licence in accordance with European Community law; or**
2. **effective regulatory control of the airline is not exercised or not maintained by the European Community Member State responsible for issuing its Air Operator's Certificate, or the relevant aeronautical authority is not clearly identified in the designation; or**
3. **the airline is not owned, directly or through majority ownership, or it is not effectively controlled by Member States of the European Community or the European Free Trade Association and/or by nationals of such states.**

VERSION 3 (with implicit reference to ownership and control extended to EFTA interests)

In view of the legal obligations of [name of Member State] to the European Community, the other Contracting Party is only entitled to withhold the exercise of the rights granted under Article(s) [...] of this Agreement from any airline established in and designated by [name of Member State] if such airline does not have a valid Operating Licence in accordance with European Community law or effective regulatory control is not exercised by the European Community Member State responsible for issuing its Air Operator's Certificate.

VERSION 4 (with explicit reference to ownership and control extended to EFTA interests)

In view of the legal obligations of [name of Member State] to the European Community, the other Contracting Party is only entitled to withhold the exercise of the rights granted under Article(s) [...] of this Agreement from any airline established in and designated by [name of Member State] if

1. **majority ownership and effective control of such airline are not vested in Member States of the European Community or the European Free Trade Association and/or nationals of such states ; or**
2. **such airline does not have a valid Operating Licence in accordance with European Community law or effective regulatory control is not exercised by the European Community Member State responsible for issuing its Air Operator's Certificate.**

2. REFERENCES TO NATIONALS OR AIR CARRIERS OF A MEMBER STATE

References in this Agreement to nationals of [name of Member State] shall be understood as referring to nationals of European Community Member States.

References in this Agreement to [carriers/airlines] of [name of Member State] shall be understood as referring to [carriers/airlines] designated by [name of Member State].

With regard to references to nationals in the context of ownership and control of air carriers (other than in the designation and revocation provisions), consistency with the designation clause extended to the EFTA countries should be maintained and the text of the standard reference worded accordingly:

References in this Agreement to nationals of [name of Member State] shall be understood as referring to nationals of Member States of the European Community or the European Free Trade Association.

3. PRICING PROVISIONS

VERSION 1

Notwithstanding the provisions of Article(s) [...] ², the tariffs to be charged by the designated airline(s) of [name of third country] for carriage wholly within the European Community shall be subject to European Community law.

VERSION 2

Notwithstanding the provisions of Article(s) [...] ³, the designated airline(s) of [name of third country] shall not be entitled to introduce new products or lower fares than the ones existing for identical products on air services for carriage wholly within the European Community.

4. GROUND HANDLING PROVISIONS

VERSION 1

Subject to the laws and regulations of each Contracting Party including, in the case of [name of Member State], European Community law, each designated airline shall have in the territory of the other Contracting Party the right to perform its own ground handling (“self-handling”) or, at its option, the right to select among competing suppliers that provide ground handling services in whole or in part. Where such laws and regulations limit or preclude self-handling and where there is no effective competition between suppliers that provide ground handling services, each designated airline shall be treated on a non-discriminatory basis as regards their access to self-handling and ground handling services provided by a supplier or suppliers.

² Reference to the tariffs article.

³ Reference to the tariffs article.

VERSION 2

Each designated airline shall have the right to provide their own ground handling services in the territory of the other Contracting Party or otherwise to contract these services out, in full or in part, at its option, with any of the suppliers authorized for the provision of such services. Where or as long as the laws and regulations applicable to ground handling in the territory of one Contracting Party prevent or limit either the freedom to contract these services out or self-handling, each designated airline shall be treated on a non-discriminatory basis as regards their access to self-handling and ground handling services provided by a supplier or suppliers.

VERSION 3

Each designated airline shall have the right to perform its own ground handling (“self-handling”) in the territory of the other Contracting Party or, at its option, the right to select among competing suppliers that provide ground handling services in whole or in part. This right may be subject only to restrictions justified by specific constraints of available space or capacity. Each designated airline shall be treated on a non-discriminatory basis as regards their access to self-handling and ground handling services provided by a supplier or suppliers. Ground handling activities shall be carried out in accordance with the laws and regulations of each Contracting Party, including, in the case of [name of Member State], European Community law.

ANNEX 2 – Agreed text of the provision on taxation of aviation fuel used for intra-Community flights to be negotiated by Member States with third countries

TAXATION OF AVIATION FUEL

Nothing in this Agreement shall prevent [name of Member State] from imposing, on a non-discriminatory basis, taxes, levies, duties, fees or charges on fuel supplied in its territory for use in an aircraft of a designated air carrier of [name of the third country] that operates between a point in the territory of [name of Member State] and another point in the territory of [name of Member State] or in the territory of another European Community Member State.