Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries

REGULATION (EC) NO 847/2004 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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on the negotiation and implementation of air service agreements between Member States and third countries

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 80(2) thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee[(1)]

Acting in accordance with the procedure laid down in Article 251 of the Treaty[(2)],

Whereas:

(1) International aviation relations between Member States and third countries have been traditionally governed by bilateral air service agreements between Member States and third countries, their Annexes and other related bilateral or multilateral arrangements.

(2) Following the judgments of the Court of Justice of the European Communities in cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98, the Community has exclusive competence with respect to various aspects of such agreements.

(3) The Court has also clarified the right of Community air carriers to benefit from the right of establishment within the Community, including the right to non-discriminatory market access.

(4) Where it is apparent that the subject-matter of an agreement falls partly within the competence of the Community and partly within that of its Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community. The Community institutions and the Member States should take all necessary steps to ensure the best possible cooperation in that regard.

(5) The cooperation procedure between Member States and the Commission established by this Regulation should be without prejudice to the division of competencies between the Community and Member States, in accordance with Community law as interpreted by the Court of Justice.

Changes to legislation: *Regulation (EC) No 847/2004 of the European Parliament and of the Council is up to date with all changes known to be in force on or before 25 December 2020. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(6) All existing bilateral agreements between Member States and third countries that contain provisions contrary to Community law should be amended or replaced by new agreements that are wholly compatible with Community law.

(7) Without prejudice to the Treaty, and in particular Article 300 thereof, Member States may wish to make amendments to existing agreements and make provision to manage their implementation until such time as an agreement concluded by the Community enters into force.

(8) It is essential to ensure that a Member State conducting negotiations takes account of Community law, broader Community interests and ongoing Community negotiations.

(9) If a Member State wishes to involve air carriers in the process of negotiation, all air carriers with an establishment in the territory of the Member State concerned should be treated equally.

(10) Establishment on the territory of a Member State implies the effective and real exercise of air transport activity through stable arrangements; the legal form of such an establishment, whether a branch or a subsidiary with a legal personality, should not be the determining factor in this respect. When an undertaking is established on the territory of several Member States, as defined by the Treaty, it should ensure, in order to avoid any circumvention of national law, that each of the establishments fulfils the obligations which may, in accordance with Community law, be imposed by the national law applicable to its activities.

(11) In order to ensure that the rights of Community air carriers are not unduly restricted, no new arrangements that reduce the number of Community air carriers which may be designated to provide air services in a given market should be introduced in bilateral air service agreements.

(12) Member States should establish non-discriminatory and transparent procedures for the distribution of traffic rights between Community air carriers. In applying those procedures Member States should have due regard to the need to preserve continuity of air services.

(13) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 19.99 laying down the procedures for the exercise of implementing powers conferred on the Commission[(3)].

(14) Any Member State may invoke the confidentiality of the provisions of bilateral agreements it has negotiated and request the Commission not to share the information with other Member States.

(15) Arrangements for greater cooperation over the use of Gibraltar airport were agreed in London on 2 December 1987 by the Kingdom of Spain and the United Kingdom in a joint declaration by the Ministers of Foreign Affairs of the two countries. Such arrangements have yet to enter into operation.

(16) Since the objectives of this Regulation, namely the coordination of negotiations with third countries with a view to concluding air service agreements, the necessity to

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guarantee a harmonised approach in the implementation and application of those agreements and the verification of their compliance with Community law, cannot be sufficiently achieved by the Member States and can therefore, by reason of the Community-wide scope of this Regulation, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity, as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives,

HAVE ADOPTED THIS REGULATION:

Article 1

Notification to the Commission

1 A Member State may, without prejudice to the respective competencies of the Community and its Member States, enter into negotiations with a third country concerning a new air service agreement or the modification of an existing air service agreement, its Annexes or any other related bilateral or multilateral arrangement, the subject matter of which falls partly within the competence of the Community, provided that:

— any relevant standard clauses, developed and laid down jointly between Member States and the Commission, are included in such negotiations; and

— the notification procedure set out in paragraphs 2, 3 and 4 is complied with.

Where appropriate, the Commission shall be invited to participate as an observer in any such negotiations.

2 Where a Member State intends to enter into such negotiations it shall notify the Commission of its intentions in writing. This notification shall include a copy of the existing agreement, if available, other relevant documentation and an indication of the provisions to be addressed in the negotiations, the objectives of the negotiations and any other relevant information. The Commission shall make the notification and, on request, the accompanying documentation, available to other Member States, subject to the requirements of confidentiality.

The information shall be transmitted at least one calendar month before formal negotiations are scheduled to commence with the third country concerned. If, due to exceptional circumstances, formal negotiations are scheduled at less than one month's notice, the Member State shall transmit the information as soon as possible.

3 Member States may make comments to the Member State which has notified its intention to enter into negotiations in accordance with paragraph 2. That Member State shall take such comments into account as far as possible in the course of the negotiations.

4 If, within 15 working days of receipt of the notification referred to in paragraph 2, the Commission concludes that the negotiations are likely to:

— undermine the objectives of Community negotiations underway with the third country concerned, and/or

— lead to an agreement which is incompatible with Community law

it shall inform the Member State accordingly.

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Article 2

Consultation of stakeholders and participation in negotiations

Insofar as air carriers and other interested parties are to be involved in the negotiations referred to in Article 1, Member States shall treat equally all Community air carriers with an establishment on their respective territories to which the Treaty applies.

Article 3

Prohibition on introducing more restrictive arrangements

A Member State shall not enter into any new arrangement with a third country, which reduces the number of Community air carriers which may, in accordance with existing arrangements, be designated to provide services between its territory and that country, neither in respect of the entire air transport market between the two parties nor on the basis of specific city pairs.

Article 4

Conclusion of agreements

1 Upon signature of an agreement, the Member State concerned shall notify the Commission of the outcome of the negotiations together with any relevant documentation.

2 Where the negotiations have resulted in an agreement which incorporates the relevant standard clauses referred to in Article 1(1), the Member State shall be authorised to conclude the agreement.

3 Where the negotiations have resulted in an agreement which does not incorporate the relevant standard clauses referred to in Article 1(1), the Member State shall be authorised, in accordance with the procedure referred to in Article 7(2), to conclude the agreement, provided that this does not harm the object and purpose of the Community common transport policy. The Member State may provisionally apply the agreement pending the outcome of this procedure.

4 Notwithstanding paragraphs 2 and 3, if the Commission is actively negotiating with the same third country on the basis of a country-specific mandate or on the basis of Council Decision 2004/.../EC of... authorising the Commission to open negotiations with third countries on the replacement of certain provisions in existing bilateral agreements with a Community agreement[(4)], the Member State concerned may be authorised, in accordance with the procedure referred to in Article 7(2), to apply provisionally and/or conclude the agreement.

Article 5

Distribution of traffic rights

Where a Member State concludes an agreement, or amendments to an agreement or its Annexes, that provide for limitations on the use of traffic rights or the number of Community air carriers eligible to be designated to take advantage of traffic rights, that Member State shall ensure a distribution of traffic rights among eligible Community air carriers on the basis of a non-discriminatory and transparent procedure.