External European Union relations concerning transport

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This document consists of a communication from the Commission on the consequences of the Court judgements of 5 November 2002 for European air transport policy. The document recalls within the framework of the Chicago Convention of 1944, the worldwide regulatory framework has developed on the basis of bilateral air services agreements (ASAs). These agreements regulate the market conditions under which air carriers are able to operate air services. Since the internal market was implemented in the Community. These agreements do not differ greatly in form. Their main body contains the general principles, while annexes set out more detailed provisions. Often, there are also confidential memoranda of understanding that deal with such matters as commercial arrangements between air carriers and other financial questions. The main text of most ASAs remains unchanged for years, but changes in the annexes and Memoranda of Understanding (MOUs) are more frequent to take account of market developments. The "Open Skies" agreements commonly negotiated by the United States, are traditional bilateral agreements in that they reserve traffic rights strictly to the airlines from the two parties to the agreement. Against the background, international aviation has continued to develop mostly within a framework of bilateral air services agreements (ASAs). But the nature of the system and the individual manner in which it has been pursued by Member States creates conflicts with the unified system of regulation that has been developed inside the Community. Having become increasingly concerned about these conflicts, the Commission instigated legal action against eight Member States that had signed bilateral agreements with the United States - seven of them (Belgium, Denmark, Germany, Luxembourg, Austria Finland and Sweden have signed "open skies" type agreements as described above and one of them (the United Kingdom) a more restrictive bilateral. On 5 November 2002, the European Court of Justice ruled in the cases against these eight Member States. The Court found that the eight agreements in question contain elements which deprive Community air carriers of their rights under the Treaty, the nationality clauses in the agreements being a clear violation of the right of establishment enshrined in Article 43. Therefore, although the Court could not have invalidated the agreements under international law, they constitute an infringement of Community law for which Member States are responsible towards the beneficiaries of the right of establishment. The legal clarity provided by the Court of Justice's judgements confirms the need to devise a comprehensive international policy for the aviation sector that will allow the Community to address these problems. The report concludes that the judgements of the Court of Justice of 5 November 2002 on the so-called "open skies" cases against eight Member States, not only have implications for the eight specific agreements with the United States but also for existing bilateral aviation agreements between Member States and other third countries and for any future negotiation of bilateral air services issues. According to Article 10 of the Treaty Member States shall takeall appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions of the Community. Moreover, as the Court found in the judgements of 5 November 2002, in the case of an infringement stemming from an international agreement, Member States are prevented not only from contracting new international commitments but also from maintaining such commitments in force. This argues strongly in favour of the urgent development of a Community external relations policy for air transport, which would, in any case, have considerable economic and political advantages. The Commission will come forward with any proposals that are necessary to ensure an appropriate follow-up. In the light of the foregoing considerations, the Commission has requested the eight governments directly concerned by the judgements to activate the provisions for denunciation contained in their agreements with the United States in order to ensure at the earliest possible date compliance with the judgements of the Court of Justice. The Commission has also requested the remaining seven Member States to activate the provisions for denunciation contained in their agreements with the United States in order to ensure compliance of their agreements with Community law and to avoid the necessity to pursue further infringement procedures. More generally, the Commission has asked

all Member States to refrain from taking international commitments of any kind in the field of aviation before having clarified their compatibility with Community law. Finally, in order to take the first step forward in this area, the Commission has urged the Council of the European Union to agree a mandate as soon as possible for negotiations to replace the existing bilaterals with the United States with an agreement at Community level.