EC/Malaysia agreement: air services, replacing the bilateral agreements by a Community agreement

2006/0202(CNS) - 25/10/2006 - Legislative proposal

PURPOSE: on the signature and provisional application of the Agreement between the European Community and the Government of Malaysia on certain aspects of air services, replacing bilateral agreements.

PROPOSED ACT: Council Decision.

CONTENT: following the judgments of the Court of Justice in the “Open Skies” cases, on 5 June 2003 the Council granted the Commission a mandate to open negotiations with third countries on the replacement of certain provisions in existing agreements with a Community agreement. The objectives of such agreements are to give all EU air carriers non-discriminatory access to routes between the Community and third countries, and to bring bilateral air service agreements between Member States and third countries in line with Community law.

International aviation relations between Member States and third countries have traditionally been governed by bilateral air services agreements between Member States and third countries. Traditional designation clauses in Member States’ bilateral air services agreements infringe Community law. They allow a third country to reject, withdraw or suspend the permissions or authorisations of an air carrier that has been designated by a Member State but that is not substantially owned and effectively controlled by that Member State or its nationals. This has been found to constitute discrimination against Community carriers established in the territory of a Member State but owned and controlled by nationals of other Member States. This is contrary to Article 43 of the Treaty which guarantees nationals of Member States who have exercised their freedom of establishment the same treatment in the host Member State as that accorded to nationals of that Member State. There are further issues, such as aviation fuel taxation or tariffs introduced by third country air carriers on intra-Community routes, where compliance with Community law should be ensured through amending or complementing existing provisions in bilateral air services agreements between Member States and third countries.

In accordance with the horizontal mandate, the Commission has negotiated an agreement with Malaysia that replaces certain provisions in the existing bilateral air services agreements between Member States and the Government of Malaysia. Article 2 of the Agreement replaces the traditional designation clauses with a Community designation clause, permitting all Community carriers to benefit from the right of establishment. Article 4 (Pricing) resolves conflicts between the existing bilateral air services agreements and Council Regulation 2409/92/EC on fares and rates for air services which prohibits third country carriers from being price leaders on air services for carriage wholly within the Community. The services of the European Commission have indicated to the Malaysian authorities that provisions of air services agreements between Member States and the Government of Malaysia which may render ineffective the competition rules applicable to undertakings must be brought into conformity with competition law. To this effect, the Commission services have proposed an article in the Horizontal Agreement to ensure compatibility with competition law. The Malaysian authorities have informed the Commission services that they do not wish to include such a provision at this stage, and prefer to address these issues in bilateral negotiations with Member States, rather than in the context of a "horizontal" agreement. The European Commission has informed the Government of Malaysia that it has taken note of its decision and reiterated that issues of incompatibility with competition rules must be resolved.

The relevant provisions of bilateral air services agreements between Member States and the Government of Malaysia will be superseded or complemented by provisions in one single Community agreement. In accordance with the standard procedure for the signature and conclusion of international agreements, the Council is asked to approve the decisions on the signature and provisional application and on the conclusion of the Agreement and to designate the persons authorised to sign the Agreement on behalf of the Community.