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Edward M. Weld

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SOME NOTES ON THE MULTILATERAL AGREEMENT ON COMMERCIAL RIGHTS OF NON-SCHEDULED AIR SERVICES IN EUROPE*

BY EDWARD M. WELD

Asst. Sec. Gen. for Air Transport, International Civil Aviation Organization

THE limited scope of this article is to describe the background of the "Multilateral Agreement on Commercial Rights on Non-Scheduled Air Services in Europe" that was opened for signature at the ICAO office in Paris on 30 April 1956.¹ It will not, therefore, attempt to treat the more ambitious but hitherto unsuccessful attempts to reach comparable agreements on commercial rights of scheduled air services, either in Europe or elsewhere, nor the wider aspects of commercial rights for non-scheduled air transport throughout the world.

General Provisions of the Chicago Convention

The point of departure for the work leading up to the Agreement was the 1944 Chicago Convention on International Civil Aviation, which already confers on the 68 members of ICAO certain rights of flight over the territories of these members, expressly excluding, however, the operations of scheduled airlines. As regards the right of non-scheduled flight, Article 5 on the Convention confers this generally upon both non-commercial and commercial non-scheduled flights subject, however, to certain restrictions where the aircraft concerned seeks actually to load or unload traffic within a particular territory. The pertinent language is as follows:

Article 5

"Right of non-scheduled flight"

1. "Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services, shall have the right . . . to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission . . .
2. "Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also . . . have the privilege of taking on or discharging passengers, cargo, or mail, *subject to the right of any State where such embarkation or discharge takes*

* Developed by the International Civil Aviation Organization and the European Civil Aviation Conference.

¹ As of 20 August 1956, the Agreement has actually been signed by seven countries: Belgium, Federal Republic of Germany, France, Ireland, Luxembourg, Netherlands and Switzerland.

place to impose such regulations, conditions or limitations as it may consider desirable." (Emphasis and paragraph numbering supplied.)

The question of what "regulations, conditions or limitations" may or may not be imposed under the foregoing language has been troublesome from the very outset, and the Multilateral Agreement above referred to is essentially an attempt to settle this question, at least as regards the European region.

In its official analysis of Article 5,² ICAO has stated that the right of a State to impose "regulations, conditions or limitations" on the taking on or discharging of passengers, cargo and mail by non-scheduled commercial air transport is unqualified, but that it should be understood that the right is not to be exercised in such a way as to render the operation of this important form of air transport impossible or non-effective. This, however, serves to emphasize the difficulty of the question rather than to solve it. The ICAO analysis, furthermore, recognizes that the "regulations, conditions or limitations" may be either standing general requirements, or they may be specially formulated for the particular case under consideration.

As regards the substance of the right conferred by *the first paragraph of Article 5*, the ICAO analysis³ has further decided that three types of flight are included:

- (i) entry into and flight over a State's territory without a stop;
- (ii) entry into and flight over a State's territory with a stop for non-traffic purposes;
- (iii) entry into a State's territory and final stop there for non-traffic purposes.

The term "stop for non-traffic purposes" should be taken to include stops where passengers or goods, not carried for remuneration or hire, are embarked or disembarked. To be sure, the term "stop for non-traffic purposes," as defined in Article 96 of the Convention itself, is "a landing for any purpose other than taking on or discharging passengers, cargo or mail" without distinguishing between traffic carried for remuneration and traffic carried free. But from the internal evidence in the Article itself, it appears that the intention was that the taking on or discharging of passengers or goods not carried for remuneration should be covered by the expression "flights into" in the first paragraph. This is because the only exception from the generality of the provisions of the Article in this respect is found in those provisions of the second paragraph relating to the taking on or discharging of passengers, cargo or mail carried for remuneration or hire. A stop for non-traffic purposes should not have its status as such affected by reason of the temporary unloading of passengers, mail or goods in

² ICAO Document 7278-C/841, "Definition of a Scheduled International Air Service," page 12.

³ *Ibid.*, page 8.

transit, if the stop is made for reasons of technical necessity or convenience of operation of the flight.⁴

The provision that the flights may be made without the necessity of obtaining prior permission means that aircraft are entitled to operate on flights of the type referred to without applying for a permit that may be granted or refused at the election of the State to be entered. Indeed, no instrument designated a permit should normally be required, even if automatically forthcoming upon the application. Advance notice of intended arrival for traffic control, public health and similar purposes could, however, be required.⁵

When we come to *the second paragraph of Article 5*, it is clear that it covers only the taking on or discharging of traffic for remuneration or hire, whether monetary or other, which the operator receives from someone else for the act of transportation. The word "also," used to introduce the privilege given by the second paragraph of the Article, would indicate at first glance that this privilege was something entirely additional to what is conferred by the first paragraph. However, when it comes to the matter of actually taking on or discharging traffic in a given country, the "regulations, conditions or limitations" of that country come into full play and may nullify some of the rights apparently conferred by the first paragraph, notably that of making the flight "without the necessity of obtaining prior permission."

Special Situation in the European Region

The foregoing analysis is, of course, intended for the world as a whole, and is not meant to have any special application to the European region. ICAO's attempts to obtain a multilateral agreement were at the outset also on a worldwide basis, but were directed primarily at scheduled services. These efforts having met with reverses that appeared to preclude further attempts for a worldwide all-embracing multilateral for any sort of service, active efforts were suspended for a time.

However, on 19 March 1953, the Committee of Ministers of the Council of Europe adopted a resolution requesting ICAO to convene a conference on the coordination of air transport in Europe, the basic agenda of which was stated to be:

- a. Methods of improving commercial and technical cooperation between the airlines of the countries participating in the conference.
- b. The possibility of securing closer cooperation by the exchange of commercial rights between these European countries.

ICAO having accepted the invitation, the meeting was duly convened at the headquarters of the Council of Europe in Strasbourg from 21 April to 8 May 1954.

⁴ *Ibid.*, pages 8-9.

⁵ *Ibid.*, page 9.

Among the many problems considered was that of commercial rights for non-scheduled air services, specifically in the European area. There was general agreement at the meeting that some special measures could be taken to liberalize this form of activity within Europe. The discussions made it clear that it would not be possible at that first meeting to reach a multilateral agreement in this matter for European States to apply in a general way to all European non-scheduled commercial services. There was, however, general agreement that non-scheduled commercial air services could be allowed freedom of operation within Europe without prior permission from governments, if such services did not compete with established scheduled services. A criterion of this kind would be difficult to define in a multilateral agreement for purposes of application in practice, but the meeting felt it would be useful to state the principle and to determine certain classes of flight that could be accepted as satisfying the criterion if they could be sufficiently well defined to form the basis of unified international action in the near future and if possible a multilateral agreement in the longer term.

The meeting thus proposed two phases of action on this matter. In the first phase, it was suggested that European States accept the general principle that intra-European non-scheduled commercial operations not competing with scheduled services could be allowed to operate without prior permission from the governments of the States in whose territory the operation is to take place. The meeting then went on to list a number of types of non-scheduled operation which it suggested could be universally accepted as not competing with scheduled air services to any dangerous extent and suggested that operations of these types should not be required to obtain prior permission for international operation, although notification would be necessary for purposes of traffic control.⁶

The meeting then proposed that, in the second phase, States should endeavor to develop a multilateral agreement concerning intra-European non-scheduled air services. In the meantime, the meeting adopted a recommendation intended to give interim application to the foregoing principles, which recommendation is quoted in the margin.⁷

⁶ ICAO Document 7575-CATE/1, "Report of the Conference on Coordination of Air Transport in Europe," paras. 22-25.

⁷ *Recommendation No. 5 of the Conference On Coordination of Air Transport In Europe.* (ICAO Document 7575-CATE/1).

"WHEREAS this Conference considers that intra-European non-scheduled operations should be accorded the maximum degree of freedom to develop, compatible with the safeguarding of the legitimate interests of the scheduled services in the sphere reserved to them by national laws and policies;

WHEREAS progress towards the liberalization of European non-scheduled air services could be achieved by the development of a unified policy within a European multilateral agreement;

WHEREAS it has not been found practicable at this Conference to reach an Agreement upon a unified European policy which could be embodied in such an agreement;

THE CONFERENCE RECOMMENDS:

to the States invited to be members of the Conference, as an interim

Briefly, this recommendation may be characterized as (1) generally favoring free admittance of non-scheduled services not affecting the interests of the scheduled services, but leaving each government free to determine in its discretion which non-scheduled operations would be considered to affect the interests of the scheduled services and reserving the right to require any operator to cease such operations; (2) designating certain classes of flights (humanitarian, taxi-class, etc.) that should be granted freedom of operation; and (3) recognizing that, for other classes of operations, States might require prior permission from their aeronautical authorities.

The meeting also set up a permanent European aviation organization designated the "European Civil Aviation Conference," composed of the States invited to be full members of the meeting,⁸ the objectives of the Conference being to continue the work of the meeting, generally to review the development of intra-European air transport with

measure until a multilateral agreement on the subject can be concluded,

1. that they accept the general policy that all intra-European non-scheduled flights that do not affect the interests of the scheduled services could be freely admitted to their territories without the imposition of "regulations, conditions or limitations" referred to in the second paragraph of Article 5 of the Convention on International Civil Aviation, provided that such flights comply with the other provisions of that Convention;
2. that each government be understood to be free to place its own interpretation on which operations would be considered to affect the interests of the scheduled services and reserves the right to require any operator to cease any operations affecting the interests of the scheduled services according to that interpretation;
3. that all States, on whatever prior notification they may require for purposes of air traffic control, should accord freedom of operation within their territory to intra-European non-scheduled services of the following types:
 - a. flights for the purpose of meeting emergency or humanitarian needs;
 - b. taxi-class operations employing aircraft with seating capacity for not more than four passengers, provided they do not become a systematic series;
 - c. operations in which a single individual charters the entire space of an aircraft for his own use, or a firm or institution charters the entire space of an aircraft for the carriage of its staff or merchandise, provided that in either case no part of any such space is re-sold;
 - d. operations confined to the carriage of freight (it being understood that the provisions of paragraph 2 concerning the possible cessation of operations apply to this category of flight);
4. that for all other classes of non-scheduled operations the State in whose territory the operator desires to exercise commercial rights may require prior permission to be obtained from its aeronautical authorities (except in the case of single flights or flights not of greater frequency than once a month, which would require only prior notification as in paragraph 3 above). Applications for such permission shall be submitted at least forty-eight hours before the first flight is due to commence, unless a State notifies that a shorter notice is required;
5. that each State should notify ICAO, before the 1st October 1954, of its policy with respect to intra-European non-scheduled air services, in order to facilitate the operation of these services."

⁸ These States are: Austria, Belgium, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey and the United Kingdom.

the object of promoting the coordination, better utilization and orderly development thereof. This work was to be undertaken in close liaison with ICAO and without, at least at the outset, the Conference's establishing a separate secretariat of its own, utilizing instead the ICAO secretariat. The drafting of the proposed non-scheduled service multilateral agreement was confided to ICAO and the European Civil Aviation Conference on the basis of the views and proposals put forward at this meeting.

Development of the Agreement

In accordance with the desires of this first Strasbourg meeting, ICAO proceeded to develop a draft multilateral agreement along the lines discussed, in consultation with the various governments concerned, most of whom were visited and individually interviewed by the ICAO officer in charge. This text was submitted to the first meeting of the European Civil Aviation Conference (ECAC) which took place, again in Strasbourg, from 29 November to 16 December 1955.⁹

When this meeting was held, there was little difficulty in establishing the underlying principle that scheduled and non-scheduled operations have complementary, although independent, fields of activity, and that the criterion to be applied in removing "regulations, conditions or limitations" might properly be the extent to which the non-scheduled flights upon which the Agreement confers benefits may be said to harm, either actually or potentially, the operations of national scheduled services. The Conference then proceeded to consider the extent to which the various categories of non-scheduled flight might satisfy this criterion, and it appeared that three principal categories could be distinguished:

1. Flights that, by their nature, could be accorded freedom of operation because they offered no real danger of harming the interests of scheduled air services. These include flights of aircraft engaged in humanitarian or emergency missions, of small aircraft with seating capacity for no more than six passengers, of aircraft entirely chartered without resale of space, and isolated flights of a frequency of not more than once a month.
2. Flights that were permissible if they did not in fact harm the operations of national scheduled air services, but which might be stopped if they did not fulfill this condition. These include (a) all-freight operations and (b) passenger operations between regions which have no reasonably direct connection by scheduled air services.
3. Other flights.

As to the first two categories, it was proposed that they be allowed freedom of operation without the imposition of any of the "regulations,

⁹ ICAO Document 7676, ECAC/1, "Report of the First Session of the European Civil Aviation Conference," paras. 34-36.

conditions or limitations" envisaged by paragraph 2 of Article 5 of the Chicago Convention. By this it was intended, among other things, to do away with any possible requirement for prior permission.¹⁰ However, flights in the second category might be prohibited if a State, in its discretion, found that they harmed its scheduled aircraft operations; and the States reserved full power to require such information as would enable them to make any necessary determination as to the extent of any such harm.¹¹

As regards other non-scheduled flights (it being, of course, remembered throughout that all non-scheduled flights have the *prima facie* right to operate under Article 5 of the Chicago Convention), the main problem appeared to be to limit the information that might be required to be given in applications for prior permission to make commercial flights, such prior permission being the most troublesome of the "regulations, conditions or limitations" that may be imposed pursuant to paragraph 2 of Article 5. Accordingly the Agreement, as first drafted by the ECAC meeting, spoke merely in terms of prescribing the manner of the exercise of this particular "regulation, condition or limitation," it being provided that the fact of the requirement for prior permission and the conditions pertaining thereto would be prescribed by public regulation, which should not require more than certain specified information. It is provided, moreover, that applications may be made direct to the aviation authority of the State to which the application is made, without passing through diplomatic channels.¹²

Later, however, it seemed best to expand this provision so as to speak not merely in terms of this particular "regulation, condition or limitation," but to make the provision more general, so as to cover also any other "regulations, conditions or limitations" that might be encountered. A new drafting was therefore adopted prior to signature to provide that, in cases other than those covered by Article 2, of the Agreement, where contracting States require compliance with "regulations, conditions or limitations," the terms of any such requirement will be laid down by contracting States in public regulations which shall indicate all information (including the request for prior permission if one is required) that must be submitted.¹³ This has the effect of generally relaxing and making more flexible the provision referred to.

¹⁰ Agreement (ICAO Document 7695), Article 2(1).

¹¹ Agreement, Article 2(2).

¹² ICAO Document 7676, ECAC/1, page 33. This is Article 3 of the text of the Agreement as approved by the Strasbourg meeting. The meeting had further considered the question of how the proposed Agreement should be opened for signature or adherence and ratification. In view of the fact that few, if any, of the delegations present at the meeting were provided with powers that would have permitted their signing the Agreement there and then, a date for opening for signature (30 April 1956) was proposed that would allow States the time for any necessary intra-Governmental consultation. Certain delegates indicated that the internal requirements of their States might result in signatures that would be subject to minor changes on procedural or editorial points. (*Ibid.*, para. 40.) Accordingly, a meeting to finalize the text was held in Paris on 26 April 1956.

¹³ Agreement, Article 3.

The fact that the Agreement is limited to (a) non-scheduled operations and (b) a certain geographical area, raised questions of definition. It was debated whether the category of non-scheduled air services should be defined on the basis of the official ICAO definition of a scheduled service,¹⁴ but it was decided not to do so. The reason for this decision was that, in the first place, the use of the ICAO definition, which is that of a scheduled and not a non-scheduled service, would mean drafting the Agreement on the basis of what was *not* covered by a quoted definition, a somewhat clumsy device. Furthermore, there appeared to be enough dissatisfaction with the ICAO definition to prevent its use from being generally accepted.

As regards the geographical extent of the Agreement, it covers the metropolitan territories of the contracting States, which would include Corsica and Sardinia in the case of France and Italy, but not French territories in North Africa, nor does it cover outlying islands in the Atlantic Ocean, such as the Azores, nor islands with semi-independent status, such as the Channel Islands.¹⁵ The Agreement does not limit its benefits to flights having both their termini within the region, and intra-European segments of longer flights therefore are intended to be covered.

Conclusion

It is difficult at the present writing to evaluate the importance of the Agreement. It does not, to be sure, constitute in itself an epoch-making step forward in the liberalization of commercial rights in international aviation. Its signatories so far are not many, the area to which it applies is limited, and the rights granted do not go much beyond what the contracting States were granting in practice anyway. On the other hand, it does mark the first time since the Chicago Conference that States have sat down together and worked out any grant whatever of commercial rights. If the International Air Transport Agreement, signed at Chicago by a few States and now practically a dead letter, is discounted as being a product of immediate post-war enthusiasm, the Agreement does in fact represent the first time that a completely self-sufficient system for granting commercial rights on any basis whatsoever has been worked out rationally. To what extent it will serve as a guidepost for future grants of more extensive rights is a question to which time alone can give the answer.

¹⁴ *Definition of a Scheduled International Air Service* (ICAO Document 7278-C/841). "A scheduled international air service is a series of flights that possesses all the following characteristics:

(a) it passes through the air-space over the territory of more than one State;

(b) it is performed by aircraft for the transport of passengers, mail or cargo for remuneration, in such a manner that each flight is open to use by members of the public;

(c) it is operated, so as to serve traffic between the same two or more points, either

(i) according to a published time-table, or

(ii) with flights so regular or frequent that they constitute a recognizably systematic series."

¹⁵ Agreement, Article 11.