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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 3.8.2009
COM(2009) 412 final

2009/0115 (CNS)

Proposal for a

COUNCIL DECISION

**on the conclusion of the Agreement on certain aspects of air services between the
European Community and the Federative Republic of Brazil**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- **Grounds for and objectives of the proposal**

Following the judgements of the Court of Justice in the so-called “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 agreement¹ (the “horizontal mandate”). 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.

- **General context**

International aviation relations between Member States and third countries have traditionally been governed by bilateral air services agreements between Member States and third countries, the Annexes to such agreements and other related bilateral or multilateral arrangements.

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, 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.

- **Existing provisions in the area of the proposal**

The provisions of the Agreement supersede or complement the existing provisions in the fourteen bilateral air services agreements between Member States and the Federative Republic of Brazil.

- **Consistency with the other policies and objectives of the Union**

The Agreement will serve a fundamental objective of the Community external aviation policy by bringing existing bilateral air services agreements in line with Community

¹ Council Decision 11323/03 of 5 June 2003 (restricted document)

law.

2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

- **Consultation of interested parties**

Consultation methods, main sectors targeted and general profile of respondents

Member States as well as the industry were consulted throughout the negotiations.

Summary of responses and how they have been taken into account

Comments made by Member States and the industry have been taken into account.

3. LEGAL ELEMENTS OF THE PROPOSAL

- **Summary of the proposed action**

In accordance with the mechanisms and directives in the Annex to the "horizontal mandate", the Commission has negotiated an agreement with Brazil that replaces certain provisions in the existing bilateral air services agreements between Member States and the Federative Republic of Brazil. 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. Articles 4 and 5 of the Agreement address two types of clauses concerning matters of Community competence. Article 4 deals with the taxation of aviation fuel, a matter which has been harmonised by Council Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity, and in particular Article 14 (2) thereof. Article 5 resolves potential conflicts with the EC competition rules.

- **Legal basis**

EC Treaty Art. 80(2), 300(2)

- **Subsidiarity principle**

The proposal is entirely based on the "horizontal mandate" granted by the Council taking into account the issues covered by Community law and bilateral air services agreements.

- **Proportionality principle**

The Agreement will amend or complement provisions in bilateral air services agreements only to the extent necessary to ensure compliance with Community law.

- **Choice of instruments**

The Agreement between the Community and the Federative Republic of Brazil is the most efficient instrument to bring all existing bilateral air services agreements between Member States and the Federative Republic of Brazil into conformity with Community

law.

4. BUDGETARY IMPLICATION

The proposal has no implication for the Community budget.

5. ADDITIONAL INFORMATION

- **Simplification**

The proposal provides for simplification of legislation.

The relevant provisions of bilateral air services agreements between Member States and the Federative Republic of Brazil will be superseded or complemented by provisions in one single Community agreement.

- **Detailed explanation of the proposal**

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 on the conclusion of the Agreement on certain aspects of air services between the European Community and the Federative Republic of Brazil and to designate the persons authorised to sign the Agreement on behalf of the Community.

Proposal for a

COUNCIL DECISION

on the conclusion of the Agreement on certain aspects of air services between the European Community and the Federative Republic of Brazil

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 80(2), in conjunction with the first sentence of the first subparagraph of Article 300(2) and the first subparagraph of Article 300(3) thereof,

Having regard to the proposal from the Commission²,

Having regard to the opinion of the European Parliament³,

Whereas:

- (1) The Council authorised the Commission on 5 June 2003 to open negotiations with third countries on the replacement of certain provisions in existing bilateral agreements with a Community agreement,
- (2) On behalf of the Community, the Commission has negotiated an Agreement on certain aspects of air services with the Federative Republic of Brazil in accordance with the mechanisms and directives in the Annex to the Council Decision authorising the Commission to open negotiations with third countries on the replacement of certain provisions in existing bilateral agreements with a Community agreement,
- (3) The Agreement has been signed on behalf of the Community on subject to its possible conclusion at a later date, in conformity with Decision .../.../EC of the Council on ⁴,
- (4) The Agreement should be approved,

HAS DECIDED AS FOLLOWS:

Article 1

1. The Agreement on certain aspects of air services between the European Community and the Federative Republic of Brazil is approved on behalf of the Community.

² OJ C , , p. .

³ OJ C , , p. .

⁴ OJ C , , p. .

2. The text of the Agreement is annexed to this Decision.

Article 2

The President of the Council is authorised to designate the person empowered to make the notification provided in Article 8(1) of the Agreement.

Done at Brussels,

*For the Council
The President*

ANNEX

AGREEMENT

between the European Community and the Federative Republic of Brazil

on certain aspects of air services

THE EUROPEAN COMMUNITY

of the one part, and

THE FEDERATIVE REPUBLIC OF BRAZIL

of the other part

(hereinafter referred to as ‘the Parties’)

NOTING that bilateral air service agreements have been concluded between several Member States of the European Community and the Federative Republic of Brazil containing provisions contrary to Community law,

NOTING that the European Community has exclusive competence with respect to several aspects that may be included in bilateral air service agreements between Member States of the European Community and third countries,

NOTING that under European Community law Community air carriers established in a Member State have the right to non-discriminatory access to air routes between the Member States of the European Community and third countries,

HAVING REGARD to the agreements between the European Community and certain third countries providing for the possibility for the nationals of such third countries to acquire ownership in air carriers licensed in accordance with European Community law,

RECOGNISING that certain provisions of the bilateral air service agreements between Member States of the European Community and the Federative Republic of Brazil, which are contrary to European Community law, must be brought into conformity with it in order to establish a sound legal basis for air services between the European Community and the Federative Republic of Brazil and to preserve the continuity of such air services,

NOTING that under European Community law air carriers may not, in principle, conclude agreements which may affect trade between Member States of the European Community and which have as their object or effect the prevention, restriction or distortion of competition,

RECOGNISING that provisions in bilateral air service agreements concluded between Member States of the European Community and the Federative Republic of Brazil which i) require or favour the adoption of agreements between undertakings, decisions by associations of undertakings or concerted practices that prevent, distort or restrict competition between air carriers on the relevant routes; or ii) reinforce the effects of any such agreement, decision or concerted practice; or iii) delegate to air carriers or other private economic operators the responsibility for taking measures that prevent, distort or restrict competition between air

carriers on the relevant routes may render ineffective the competition rules applicable to undertakings,

NOTING that it is not a purpose of the European Community, as part of this agreement, to increase the total volume of air traffic between the European Community and the Federative Republic of Brazil, to affect the balance between Community air carriers and air carriers of the Federative Republic of Brazil, or to negotiate amendments to the provisions of existing bilateral air service agreements concerning traffic rights.

HAVE AGREED AS FOLLOWS:

ARTICLE 1

General provisions

1. For the purposes of this Agreement, 'Member States' shall mean Member States of the European Community.
2. References in each of the agreements listed in Annex 1 to nationals of the Member State that is a party to that agreement shall be understood as referring to nationals of the Member States of the European Community.
3. References in each of the agreements listed in Annex 1 to air carriers or airlines of the Member State that is a party to that agreement shall be understood as referring to air carriers or airlines designated by that Member State.

ARTICLE 2

Designation by a Member State

1. The provisions in paragraphs 2 and 3 of this Article shall supersede the corresponding provisions in the articles listed in Annex 2 (a) and (b) respectively, in relation to the designation of an air carrier by the Member State concerned, its authorisations and permissions granted by the Federative Republic of Brazil, and the refusal, revocation, suspension or limitation of the authorisations or permissions of the air carrier, respectively.
2. On receipt of a designation by a Member State, the Federative Republic of Brazil shall grant the appropriate authorisations and permissions with minimum procedural delay, provided that:
 - i. the air carrier is established in the territory of the designating Member State under the Treaty establishing the European Community and has a valid Operating Licence in accordance with European Community law; and
 - ii. effective regulatory control of the air carrier is exercised and maintained by the Member State responsible for issuing its Air Operator's Certificate and the relevant aeronautical authority is clearly identified in the designation; and

- iii. the air carrier is owned, directly or through majority ownership, and it is effectively controlled by Member States and/or nationals of Member States, and/or by other states listed in Annex 3 and/or nationals of such other states.
3. the Federative Republic of Brazil may refuse, revoke, suspend or limit the authorisations or permissions of an air carrier designated by a Member State where:
- i. the air carrier is not established in the territory of the designating Member State under the Treaty establishing the European Community or does not have a valid Operating Licence in accordance with European Community law; or
 - ii. effective regulatory control of the air carrier is not exercised or not maintained by the Member State responsible for issuing its Air Operator's Certificate, or the relevant aeronautical authority is not clearly identified in the designation; or
 - iii. the air carrier is not owned, directly or through majority ownership, or it is not effectively controlled by Member States and/or nationals of Member States, and/or by other states listed in Annex 3 and/or nationals of such other states; or
 - iv. the air carrier is already authorised to operate under a bilateral agreement between the Federative Republic of Brazil and another Member State and the Federative Republic of Brazil demonstrates that, by exercising traffic rights under this Agreement on a route that includes a point in that other Member State, it would be circumventing restrictions on traffic rights imposed by that other agreement; or
 - v. the air carrier holds an Air Operators Certificate issued by a Member State and there is no bilateral air services agreement between the Federative Republic of Brazil and that Member State, and traffic rights to that Member State have been denied to the air carrier designated by the Federative Republic of Brazil.

In exercising its right under this paragraph, the Federative Republic of Brazil shall not discriminate between Community air carriers on the grounds of nationality.

ARTICLE 3

Safety

1. The provisions in paragraph 2 of this Article shall complement the corresponding provisions in the articles listed in Annex 2 (c).
2. Where a Member State has designated an air carrier whose regulatory control is exercised and maintained by another Member State, the rights of the Federative Republic of Brazil under the safety provisions of the agreement between the Member State that has designated the air carrier and the Federative Republic of Brazil shall apply equally in respect of the adoption, exercise or maintenance of safety standards

by that other Member State and in respect of the operating authorisation of that air carrier.

ARTICLE 4

Taxation of aviation fuel

1. The provisions in paragraph 2 of this Article shall complement the corresponding provisions in the articles listed in Annex 2 (d).
2. Notwithstanding any other provision to the contrary, nothing in each of the agreements listed in Annex 2 (d) shall prevent a 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 the Federative Republic of Brazil that operates between a point in the territory of that Member State and another point in the territory of that Member State or in the territory of another Member State.
3. On the basis of reciprocity and in conformity with Brazilian legislation, nothing in each of the agreements listed in Annex 2 (d) shall prevent the Federative Republic of Brazil 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 airline of a Member State that operates between points in the territory of Brazil.

ARTICLE 5

Compatibility with competition rules

1. Notwithstanding any other provision to the contrary, nothing in each of the agreements listed in Annex 1 shall (i) require or favour the adoption of agreements between undertakings, decisions by associations of undertakings or concerted practices that prevent or distort competition; (ii) reinforce the effects of any such agreement, decision or concerted practice; or (iii) delegate to private economic operators the responsibility for taking measures that prevent, distort or restrict competition.
2. The provisions contained in the agreements listed in Annex 1 that are incompatible with paragraph 1 of this Article shall not be applied.

ARTICLE 6

Annexes to the Agreement

The Annexes to this Agreement shall form an integral part thereof.

ARTICLE 7

Revision or amendment

The Parties may, at any time, revise or amend this Agreement by mutual consent.

ARTICLE 8

Entry into force and provisional application

1. This Agreement shall enter into force when the Parties have notified each other in writing that their respective internal procedures necessary for its entry into force have been completed.
2. Notwithstanding paragraph 1, the Parties agree to provisionally apply this Agreement from the first day of the month following the date on which the Parties have notified each other of the completion of the procedures necessary for this purpose.
3. This Agreement shall apply to all agreements and arrangements listed in Annex 1 including those that, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally.

ARTICLE 9

Termination

1. In the event that an agreement listed in Annex 1 is terminated, all provisions of this Agreement that relate to the agreement listed in Annex 1 concerned shall terminate at the same time.
2. In the event that all agreements listed in Annex 1 are terminated, this Agreement shall terminate at the same time.

IN WITNESS WHEREOF, the undersigned, being duly authorised, have signed this Agreement.

Done at [...] in duplicate, on this [...] day of [..., ...] in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, and Swedish languages.

FOR THE EUROPEAN COMMUNITY

FOR THE FEDERATIVE REPUBLIC OF
BRAZIL:

List of agreements referred to in Article 1 of this Agreement

Air service agreements or other arrangements between the Federative Republic of Brazil and Member States of the European Community, as amended or modified, which, at the date of signature of this Agreement, have been concluded, signed or initialled

- Agreement between the Federal Republic of Germany and the Federative Republic of Brazil on scheduled air services signed in Rio de Janeiro on 29 August 1957, hereinafter referred to as “**Brazil – Germany Agreement**” in Annex 2 ;
- Agreement between the Government of Austria and the Government of the Federative Republic of Brazil relating to Air Services signed in Vienna on 16 July 1993, hereinafter referred to as “**Brazil – Austria Agreement**” in Annex 2 ;
- Agreement between the Government of the Kingdom of Belgium and the Government of the Federative Republic of Brazil on air transport, signed in Brasilia on 18 November 1999, hereinafter referred to as “**Brazil – Belgium Agreement**” in Annex 2;
- Agreement between the Government of the Kingdom of Denmark and the Government of the Federative Republic of Brazil relating to air transport, signed in Rio de Janeiro on 18 March 1969, hereinafter referred to as “**Brazil – Denmark Agreement**” in Annex 2;
- Agreement between the Spanish Government and the Government of the United States of Brazil on scheduled air transport, signed in Rio de Janeiro on 28 November 1949, as amended, hereinafter referred to as “**Brazil – Spain Agreement**” in Annex 2;
- Agreement between the Kingdom of Spain and the Federative Republic of Brazil, initialled as Annex 2 to the Agreed Record signed in Rio de Janeiro on 13 July 2007, hereinafter referred to as “**Draft Revised Brazil – Spain Agreement**” in Annex 2;
- Agreement between the French Republic and the Federative Republic of Brazil, signed in Paris on 29 October 1965 related to air transport, hereinafter referred to as “**Brazil – France Agreement**” in Annex 2;
- Air Services Agreement between the Government of the Hellenic Republic and the Government of the Federative Republic of Brazil, initialled as Attachment B to the Memorandum of Understanding signed in Athens on 18 March 1997, hereinafter referred to as “**Brazil – Greece Agreement**” in Annex 2;
- Air Services Agreement between the Government of the Republic of Hungary and the Government of the Federative Republic of Brazil, signed in Brasilia on 3 April 1997, hereinafter referred to as “**Brazil – Hungary Agreement**” in Annex 2;

- Agreement between Italy and the United States of Brazil on scheduled air services, signed in Rome on 23 January 1951, hereinafter referred to as "**Brazil – Italy Agreement**" in Annex 2;
- Agreement between the Government of the Italian Republic and the Government of the Federative Republic of Brazil concerning air services, initialled as Attachment 2 to the Record of Discussions signed in Rome on 1 July 2007, hereinafter referred to as "**Draft Revised Brazil – Italy Agreement**" in Annex 2;
- Draft Agreement between the Government of the Grand Duchy of Luxembourg and the Government of the Federative Republic of Brazil on air services, initialled as Annex 2 to the Memorandum of Understanding signed in Luxembourg on 28 August 2008, hereinafter referred to as "**Brazil – Luxembourg Agreement**" in Annex 2;
- Air Transport Agreement between the Government of the Kingdom of the Netherlands and the Government of the Federative Republic of Brazil, signed in Brasilia on 6 July 1997, hereinafter referred to as "**Brazil – Netherlands Agreement**" in Annex 2;
- Air Services Agreement between the Government of the Republic of Poland and the Government of the Federative Republic of Brazil, signed in Rio de Janeiro on 13 March 2000, hereinafter referred to as "**Brazil – Poland Agreement**" in Annex 2;
- Agreement between the Government of Portugal and the Government of the Federative Republic of Brazil on air transport, signed in Lisbon on 11 September 2002, hereinafter referred to as "**Brazil – Portugal Agreement**" in Annex 2;
- Agreement between the Government of the Kingdom of Sweden and the Government of the Federative Republic of Brazil relating to air transport, signed in Rio de Janeiro on 18 March 1969, hereinafter referred to as "**Brazil – Sweden Agreement**" in Annex 2.

List of articles in the agreements listed in Annex 1 and referred to in Articles 2 to 6 of this Agreement

(a) Designation by a Member State:

- Article 3 of the Brazil – Austria Agreement;
- Articles 3 and 4 of the Brazil – Belgium Agreement;
- Article 3 of the Brazil – Denmark Agreement;
- Article 2 of the Brazil – France Agreement;
- Article 3 of the Brazil – Germany Agreement;
- Article 3 of the Brazil – Greece Agreement;
- Article 3 of the Brazil – Hungary Agreement;
- Article 3 of the Brazil – Italy Agreement;
- Article 3 of the Draft Revised Brazil – Italy Agreement;
- Article 2 of the Brazil – Netherlands Agreement;
- Article 3 of the Brazil – Poland Agreement;
- Article 3 of the Brazil – Portugal Agreement;
- Article 4 of the Brazil – Spain Agreement;
- Article 3 of the Draft Revised Brazil – Spain Agreement;
- Article 3 of the Brazil – Sweden Agreement;

(b) Refusal, revocation, suspension or limitation of authorisations or permissions:

- Article 4 of the Brazil – Austria Agreement;
- Article 5 of the Brazil – Belgium Agreement;
- Article 4 of the Brazil – Denmark Agreement;
- Article 3 of the Brazil – France Agreement;
- Article 4 of the Brazil – Germany Agreement;
- Article 4 of the Brazil – Greece Agreement;
- Article 4 of the Brazil – Hungary Agreement;

- Article 7 of the Brazil – Italy Agreement;
- Article 4 of the Draft Revised Brazil – Italy Agreement;
- Article 6 of the Brazil – Netherlands Agreement;
- Article 4 of the Brazil – Poland Agreement;
- Article 4 of the Brazil – Portugal Agreement;
- Article 6 of the Brazil – Spain Agreement;
- Article 4 of the Draft Revised Brazil – Spain Agreement;
- Article 4 of the Brazil – Sweden Agreement;

(c) Safety:

- Article relating to safety as provided for in the Agreed Minutes signed in Rio de Janeiro on 25 April 1996 in relation to the Brazil – Netherlands Agreement;
- Article 14 of the Brazil – Portugal Agreement;

(d) Taxation of aviation fuel:

- Article 8 of the Brazil – Austria Agreement;
- Article 10 of the Brazil – Belgium Agreement;
- Article 6 of the Brazil – Denmark Agreement;
- Article 4 of the Brazil – France Agreement;
- Article 5 of the Brazil – Germany Agreement;
- Article 10 of the Brazil – Greece Agreement;
- Article 8 of the Brazil – Hungary Agreement;
- Article 4 of the Brazil – Italy Agreement;
- Article 9 of the Brazil – Luxembourg Agreement;
- Article 3 of the Brazil – Netherlands Agreement;
- Article 6 of the Brazil – Poland Agreement;
- Article 6 of the Brazil – Portugal Agreement;
- Article 5 of the Brazil – Spain Agreement;
- Article 5 of the Draft Revised Brazil – Spain Agreement;
- Article 6 of the Brazil – Sweden Agreement;

List of other states referred to in Article 2 of this Agreement

- (a) **The Republic of Iceland** (under the Agreement on the European Economic Area);
- (b) **The Principality of Liechtenstein** (under the Agreement on the European Economic Area);
- (c) **The Kingdom of Norway** (under the Agreement on the European Economic Area);
- (d) **The Swiss Confederation** (under the Agreement between the European Community and the Swiss Confederation on Air Transport)