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EUROPEAN COMMISSION

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2010/0296 (NLE)

Proposal for a

COUNCIL DECISION

**on the conclusion of the Agreement on certain aspects of air services between the
European Union and the Republic of Cape Verde**

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 an agreement at Union level¹ (the “horizontal mandate”). The objectives of such agreements are to give all European Union air carriers non-discriminatory access to routes between the European Union and third countries, and to bring bilateral air service agreements between Member States of the European Union and third countries in line with the law of the European Union.

- **General context**

International aviation relations between Member States of the European Union and third countries have traditionally been governed by bilateral air services agreements between Member States of the European Union 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 the law of the European Union. 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 of the European Union but that is not substantially owned and effectively controlled by that Member State or its nationals. This has been found to constitute discrimination against European Union carriers established in the territory of a Member State but owned and controlled by nationals of other Member States. This is contrary to Article 49 of the Treaty on the Functioning of the European Union which guarantees nationals of Member States of the European Union 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 competition, where compliance with the law of the European Union should be ensured through amending or complementing existing provisions in bilateral air services agreements between Member States of the European Union and third countries.

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

The provisions of the Agreement supersede or complement the existing provisions in the eight bilateral air services agreements between Member States of the European Union and the Republic of Cape Verde.

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

The Agreement will serve a fundamental objective of the external aviation policy of the

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

European Union by bringing existing bilateral air services agreements in line with the law of the European Union.

2. Consultation of interested parties and impact assessment

- **Consultation of interested parties**

Consultation methods, main sectors targeted and general profile of respondents

Member States of the European Union 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 of the European Union 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 the Republic of Cape Verde that replaces certain provisions in the existing bilateral air services agreements between Member States of the European Union and the Republic of Cape Verde. Article 2 of the Agreement replaces the traditional designation clauses with an EU designation clause, permitting all European Union carriers to benefit from the right of establishment. 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 competition rules of the European Union.

- **Legal basis**

TFEU Treaty Art. 100(2), 218(6)

- **Subsidiarity principle**

The proposal is entirely based on the "horizontal mandate" granted by the Council taking into account the issues covered by the law of the European Union 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 the law of the European Union.

- **Choice of instruments**

The Agreement between the European Union and the Republic of Cape Verde is the

most efficient instrument to bring all existing bilateral air services agreements between Member States of the European Union and the Republic of Cape Verde into conformity with the law of the European Union.

4. Budgetary implication

The proposal has no implication for the budget of the European Union.

5. Additional information

- **Simplification**

The proposal provides for simplification of legislation.

The relevant provisions of bilateral air services agreements between Member States of the European Union and the Republic of Cape Verde will be superseded or complemented by provisions in one single agreement of the European Union.

- **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 Union and the Republic of Cape Verde and to designate the persons authorised to sign the Agreement on behalf of the European Union.

Proposal for a

COUNCIL DECISION

on the conclusion of the Agreement on certain aspects of air services between the European Union and the Republic of Cape Verde

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 100(2), in conjunction with Article 218(6) thereof,

Having regard to the proposal from the European Commission²,

Having regard to the consent of the European Parliament³,

Whereas:

- (1) By its Decision of 5 June 2003, the Council authorised the Commission to open negotiations with third countries on the replacement of certain provisions in existing bilateral agreements with an agreement at Union level,
- (2) On behalf of the European Union, the Commission has negotiated an Agreement on certain aspects of air services with the Republic of Cape Verde in accordance with the mechanisms and directives in the Annex to the Council Decision of 5 June 2003,
- (3) The Agreement has been signed on behalf of the European Union 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 ADOPTED THIS DECISION:

Article 1

1. The Agreement on certain aspects of air services between the European Union and the Republic of Cape Verde is approved on behalf of the Union.
2. The text of the Agreement is annexed to this Decision.

² OJ C , , p. .

³ OJ C , , p. .

⁴ OJ C , , p. .

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

DRAFT

AGREEMENT

between the European Union and the Republic of Cape Verde
on certain aspects of air services

THE EUROPEAN UNION

of the one part, and

THE REPUBLIC OF CAPE VERDE

(hereinafter referred to as 'Cape Verde')

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 Union and Cape Verde containing provisions contrary to the law of the European Union,

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

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

HAVING REGARD to the agreements between the European Union 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 the law of the European Union,

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

RECOGNISING that in the conclusion of any air services agreements by the Government of the Republic of Cape Verde with non-EU Member States, Cape Verde implements its own policy and rules on air carriers ownership and control,

NOTING that under the law of the European Union, European Union air carriers may not, in principle, conclude agreements which may affect trade between Member States of the European Union 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 Union and Cape Verde 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 Union, as part of this agreement, to increase the total volume of air traffic between the European Union and Cape Verde, to affect the balance between European Union air carriers and air carriers of Cape Verde, 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, 'EU Member States' shall mean Member States of the European Union; 'EU Treaties' shall mean the Treaty on the European Union and the Treaty on the Functioning of the European Union; 'Party' shall mean a contracting party to this agreement; 'air carrier' shall also mean airline; 'territory of the European Union' shall mean territories of the Member states to which the EU Treaties apply.
2. References in each of the agreements listed in Annex 1 to nationals of the EU Member State that is a Party to that agreement shall be understood as referring to nationals of the Member States of the European Union.
3. References in each of the agreements listed in Annex 1 to air carriers or airlines of the EU 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, Authorisation and Revocation by an EU Member State

1. The provisions in paragraphs 2 to 4 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, and the licences and permits granted to it.
2. On receipt of a designation by an EU Member State, Cape Verde shall grant the appropriate authorisations and permissions with minimum procedural delay, provided that:
 - i. the air carrier is established, under the EU Treaties, in the territory of the designating EU Member State and has a valid Operating Licence in accordance with the law of the European Union; and

- ii. effective regulatory control of the air carrier is exercised and maintained by the EU 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 EU Member States and/or nationals of EU Member States, and/or by other states listed in Annex 3 and/or nationals of such other states.
- 3. Cape Verde may refuse, revoke, suspend or limit the authorisations or permissions of an air carrier designated by an EU Member State where:
 - i. the air carrier is not established, under the EU Treaties, in the territory of the designating EU Member State or does not have a valid Operating Licence in accordance with the law of the European Union; or
 - ii. effective regulatory control of the air carrier is not exercised or not maintained by the EU 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 EU Member States and/or nationals of EU Member States, and/or by other states listed in Annex 3 and/or nationals of such other states.
- 4. In exercising its right under paragraph 3 of this Article, Cape Verde shall not discriminate between air carriers of EU Member States 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 an EU Member State has designated an air carrier whose regulatory control is exercised and maintained by another EU Member State, the rights of Cape Verde under the safety provisions of the agreement between the EU Member State that has designated the air carrier and Cape Verde shall apply equally in respect of the adoption, exercise or maintenance of safety standards by that other EU 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 an EU 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 Cape Verde that operates between a point in the territory of that EU Member State and another point in the territory of that EU Member State or in the territory of another EU Member State.

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, all texts being equally authentic.

FOR THE EUROPEAN UNION: FOR THE REPUBLIC OF CAPE VERDE:

List of agreements referred to in Article 1 of this Agreement

(a) Air service agreements between Cape Verde and Member States of the European Union which, at the date of signature of this Agreement, have been concluded, signed and/or are being applied provisionally

- Agreement between **the Government of the Kingdom of Belgium and the Government of the Republic of Cape Verde** on Air Transport signed at Brussels on 22 June 1998, hereinafter referred to “Cape Verde – Belgium Agreement” in Annex 2 ;
- Air Transport Agreement between **the Government of the Federal Republic of Germany and the Government of the Republic of Cape Verde** signed at Berlin on 19 June 2001, hereinafter referred to “Cape Verde – Germany Agreement” in Annex 2 ;
- Agreement between **the Government of the Italian Republic and the Government of the Republic of Cape Verde** concerning Air Services signed at Praia on 7 July 1998, hereinafter referred to “Cape Verde – Italy Agreement” in Annex 2 ;
- Agreement between **the Kingdom of the Netherlands and the Republic of Cape Verde** for air services signed at The Hague on 21 December 1988, hereinafter referred to “Cape Verde – Netherlands Agreement” in Annex 2 ;
- Agreement between **the Portuguese Republic and the Republic of Cape Verde** relating to Air Transport done at Lisbon on 9 March 2004, hereinafter referred to “Cape Verde – Portugal Agreement” in Annex 2 ;
- Agreement between **the Government of the Socialist Republic of Romania and the Government of the Republic of Cape Verde** concerning Air Services signed at Bucharest on 31 August 1983, hereinafter referred to “Cape Verde – Romania Agreement” in Annex 2 ;
- Agreement between **the Kingdom of Spain and the Republic of Cape Verde** relating to Air Services signed at Madrid on 19 September 2002, hereinafter referred to “Cape Verde – Spain Agreement” in Annex 2 ;
- Agreement between **the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Cape Verde** concerning Air Services signed at Praia on 9 January 2007, hereinafter referred to “Cape Verde – UK Agreement” in Annex 2 ;

(b) Air service agreements and other arrangements initialled or signed between Cape Verde and Member States of the European Union which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally

List of articles in the agreements listed in Annex 1 and referred to in Articles 2 to 4 of this Agreement

(a) Designation:

- Article 3 of the Cape Verde – Belgium Agreement;
- Article 3 of the Cape Verde – Germany Agreement;
- Article 4 of the Cape Verde – Italy Agreement;
- Article 3 of the Cape Verde – Netherlands Agreement;
- Article 3 of the Cape Verde – Romania Agreement;
- Article 3 of the Cape Verde – Spain Agreement;

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

- Article 5 of the Cape Verde – Belgium Agreement;
- Article 3 and 4 of the Cape Verde – Germany Agreement;
- Article 4 and 5 of the Cape Verde – Italy Agreement;
- Article 3 and 4 of the Cape Verde – Netherlands Agreement;
- Article 4 of the Cape Verde – Romania Agreement;
- Article 4 of the Cape Verde – Spain Agreement;

(c) Safety:

- Article 12 of the Cape Verde – Germany Agreement;
- Article 10 of the Cape Verde – Italy Agreement;
- Article 15 of the Cape Verde – Portugal Agreement;
- Article 9 of the Cape Verde – Romania Agreement;
- Article 13 of the Cape Verde – Spain Agreement;

(d) Taxation of aviation fuel:

- Article 10 of the Cape Verde – Belgium Agreement;
- Article 6 of the Cape Verde – Germany Agreement;
- Article 6 of the Cape Verde – Italy Agreement;

- Article 6 of the Cape Verde – Netherlands Agreement;
- Article 11 of the Cape Verde – Romania Agreement;
- Article 5 of the Cape Verde – Spain 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)