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2013/0196 (NLE)

Proposal for a

COUNCIL DECISION

**on the signing, on behalf of the Union, and provisional application of the Agreement
between the European Union and the Government of the Republic of Peru on certain
aspects of air services**

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 authorized the Commission to open negotiations with third countries on the replacement of certain provisions in existing agreements with an agreement at Union level (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 and third countries in line with the law of the Union.

- **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 the law of the 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 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 who have exercised their freedom of establishment the same treatment in the host Member State as that accorded to nationals of that Member State.

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

The provisions of the Agreement supersede or complement the existing provisions in the 12 bilateral air services agreements between Member States and the Republic of Peru.

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

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

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

- **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 the Republic of Peru that replaces certain

provisions in the existing bilateral air services agreements between Member States and the Republic of Peru. Article 2 of the Agreement replaces the traditional designation clauses with an EU designation clause, permitting all EU carriers to benefit from the right of establishment. Article 5 resolves potential conflicts with the competition rules of the Union.

- **Legal basis**

Art. 100(2), 218(5) TFEU

- **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 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 Union.

- **Choice of instruments**

The Agreement between the Union and the Republic of Peru is the most efficient instrument to bring all existing bilateral air services agreements between Member States and the Republic of Peru into conformity with the law of the Union.

4. BUDGETARY IMPLICATION

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

5. OPTIONAL ELEMENTS

- Simplification

The proposal provides for simplification of legislation.

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

- Detailed explanation of the proposal

In accordance with the standard procedure for the signing and conclusion of international agreements, the Council is asked to approve the decision on signature and provisional application of the Agreement on certain aspects of air services between the European Union and the Republic of Peru.

Proposal for a

COUNCIL DECISION

on the signing, on behalf of the Union, and provisional application of the Agreement between the European Union and the Government of the Republic of Peru on certain aspects of air services

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(5) thereof,

Having regard to the proposal from the European Commission,

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 Union, the Commission has negotiated an Agreement with the Government of the Republic of Peru on certain aspects of air services (the Agreement) in accordance with the directives in Annex to the Council Decision of 5 June 2003.

(3) The Agreement should be signed on behalf of the European Union, subject to its conclusion at a later date.

(4) The Agreement should be applied provisionally,

HAS DECIDED AS FOLLOWS:

Article 1

The signing of the Agreement between the European Union and the Government of the Republic of Peru on certain aspects of air services (the Agreement) is hereby approved on behalf of the Union, subject to the conclusion of the said Agreement.

The text of the Agreement is attached to this Decision.

Article 2

The Council Secretariat shall establish the instrument of full powers to sign the Agreement, subject to its conclusion, for the person(s) indicated by the negotiator of the Agreement.

Article 3

Pending its entry into force, the Agreement shall be applied provisionally from the first day of the first month following the date on which the parties have notified each other of the completion of the necessary procedures for this purpose¹.

Article 4

The President of the Council is hereby authorised to make the notification provided for in Article 8(2) of the Agreement.

Article 5

This Decision shall enter into force on the date of its adoption.

Article 6

This Decision shall be published in the Official Journal of the European Union.

Done at Brussels,

*For the Council
The President*

¹ The date from which the Agreement will be provisionally applied will be published in the *Official Journal of the European Union* by the General Secretariat of the Council.

ANNEX

AGREEMENT

between the European Union and the Government of the Republic of Peru

on certain aspects of air services

THE EUROPEAN UNION

of the one part, and

THE GOVERNMENT OF THE REPUBLIC OF PERU

(hereinafter referred to as Peru)

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 the Republic of Peru 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 European Union law European Union air carriers established in a Member State 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 the Republic of Peru, which are contrary to European Union law, must be brought into conformity with it in order to establish a sound legal basis for air services between the European Union and the Republic of Peru and to preserve the continuity of such air services,

NOTING that under European Union law 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 the Republic of Peru 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 the Republic of Peru, to affect the balance between European Union air carriers and air carriers of the Republic of Peru, 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 Union and ‘EU Treaties’ shall mean the Treaty on the European Union and the Treaty on the functioning of the European Union.
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 Union.
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, Authorisation and Revocation by a Member State of the European Union

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 a Member State of the European Union, its authorisation and permissions granted by the Republic of Peru, 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 Republic of Peru shall grant the appropriate authorisations and permissions with minimum procedural delay, provided that:
 - the air carrier is established in the territory of the designating Member State under the EU Treaties and has a valid Operating Licence in accordance with European Union law; and
 - 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
 - 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 Republic of Peru may refuse, revoke, suspend or limit the authorisations or permissions of an air carrier designated by a Member State where:

the air carrier is not established in the territory of the designating Member State under the EU Treaties or does not have a valid Operating Licence in accordance with European Union law; or

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

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.

In exercising its right under this paragraph, the Republic of Peru shall not discriminate between European Union 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 Republic of Peru under the safety provisions of the agreement between the Member State that has designated the air carrier and Peru 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 Republic of Peru 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. Notwithstanding any other provision to the contrary, nothing in each of the agreements listed in Annex 2 (d) shall prevent the Republic of Peru 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 carrier of a Member State of the European Union that operates between two points in the territory of the Republic of Peru.
4. Nothing in the above provisions shall allow cabotage.

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) favour the adoption of agreements between undertakings, decisions by associations of undertakings or concerted practices that prevent, distort or restrict 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. In case of divergence, the English version shall prevail over the other language texts.

FOR THE EUROPEAN UNION: FOR THE REPUBLIC OF PERU:

List of agreements referred to in Article 1 of this Agreement

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

- Air Services Agreement between the Government of the Kingdom of Belgium and the Government of the Republic of Peru, signed at Lima on 29 December 1967, hereinafter referred to as “Peru – Belgium Agreement” in Annex 2;
- Agreement between the Government of the Kingdom of Belgium and the Government of the Republic of Peru, initialled at Lima on 28 May 2009, hereinafter referred to as “2009 Draft Peru – Belgium Agreement” in Annex 2
- Bilateral Air Transport Agreement between the Government of the Kingdom of Denmark and the Government of the Republic of Peru, signed at Lima on 14 July 1960, hereinafter referred to as “Peru – Denmark Agreement” in Annex 2;
- Transport Agreement between the French Republic and the Republic of Peru, signed at Lima on 23 April 1959, hereinafter referred to as “Peru – France Agreement” in Annex 2;
- Agreement between the Federal Republic of Germany and the Republic of Peru for air transport, signed at Lima on 30 April 1962, hereinafter referred to as “Peru – Germany Agreement” in Annex 2;
- Bilateral Air Transport Agreement between the Government of the Italian Republic and the Government of the Republic of Peru, signed at Lima on 17 March 1964, hereinafter referred to as “Peru – Italy Agreement” in Annex 2;
- Draft Agreement between the Government of the Kingdom of the Netherlands and the Government of the Republic of Peru related to scheduled air services, initialled as Annex B to the Memorandum of Understanding signed at Lima on 27 June 2001, hereinafter referred to as “Draft Peru – Netherlands Agreement” in Annex 2;
- Agreement between the Government of the Kingdom of Spain and the Government of the Republic of Peru related to air services, signed at Lima on 31 March 1954, hereinafter referred to as "Peru-Spain Agreement" in Annex 2;
- Draft Air Transport Agreement between the Kingdom of Spain and the Republic of Peru, initialled as Annex II to the Agreed Record signed in Madrid on 6 April 2005, hereinafter referred to as "2005 Draft Peru-Spain Agreement" in Annex 2;
- Bilateral Air Transport Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Peru, signed at Lima on 14 July 1960, hereinafter referred to as “Peru – Sweden 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 Peru for air services between and beyond their respective territories, signed at Lima on 22 December 1947, hereinafter referred to as "Peru – UK Agreement" in Annex 2;
- Draft Air Transport Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Peru, initialled as Annex B to the Memorandum of Understanding between the aeronautical authorities of the Republic

of Peru and the United Kingdom of Great Britain and Northern Ireland, signed at Lima on 26 May 2004, hereinafter referred to as "2004 Draft Peru – UK Agreement" in Annex 2;

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 Peru – Belgium Agreement;

Article 3 of the Peru – Germany Agreement;

Article 3 of the Peru – Italy Agreement;

Article 3 of the Draft Peru – Netherlands Agreement;

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

Article 5 of the Peru – Belgium Agreement;

Article 7 of the Peru – Denmark Agreement;

Article 5 of the Peru – France Agreement;

Article 4 of the Peru – Germany Agreement;

Article 4 of the Peru – Italy Agreement;

Article 4 of the Draft Peru – Netherlands Agreement;

Article 11 of the Peru – Spain Agreement;

Article 7 of the Peru – Sweden Agreement;

Article 4 of the Peru – UK Agreement;

(c) Safety:

Article 7 of the 2009 Draft Peru – Belgium Agreement

Article 15 of the Draft Peru – Netherlands Agreement;

(d) Taxation of aviation fuel:

Article 6 of the Peru – Belgium Agreement;

Article 11 of the 2009 Draft Peru – Belgium Agreement;

Article 4 of the Peru – Denmark Agreement;

Article 2 of the Peru – France Agreement;

Article 6 of the Peru – Germany Agreement;

Article 5 of the Peru – Italy Agreement;

Article 10 of the Draft Peru – Netherlands Agreement;

Article 5 of the Peru – Spain Agreement;

Article 5 of the 2005 Draft Peru-Spain Agreement;

Article 4 of the Peru – Sweden Agreement;

Article 8 of the 2004 Draft Peru – UK 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)