EUROPEAN
COMMISSION

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2019/0045 (NLE)

Proposal for a

COUNCIL DECISION

on the signing, on behalf of the European Union of the Agreement between the European Union and the Republic of Korea on certain aspects of air services

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons 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 authorised the Commission to open negotiations with third countries on the replacement of certain provisions in existing bilateral air services agreements with an agreement at Union level (the "horizontal authorisation"). The objectives of such agreements are to give all EU air carriers non-discriminatory access to routes between the European Union and third countries, and hence to bring bilateral air services agreements between Member States and third countries in line with Union law.

• Consistency with existing policy provisions in the policy area

The provisions of the Agreement supersede or complement the existing provisions in 22 bilateral air services agreements between Member States and the Republic of Korea.

• Consistency with other Union policies

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 Union law.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

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

• Subsidiarity (for non-exclusive competence)

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

• Proportionality

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

• Choice of the instrument

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

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

• Ex-post evaluations/fitness checks of existing legislation

Not applicable.

• Stakeholder consultations

In line with Article 218(4) TFEU, the Commission has conducted the negotiations in consultation with a special committee. Industry has equally been consulted during the

negotiations. Comments made in this process have been taken into account. The Member States concerned verified the accuracy of the references to the bilateral air services agreements. Industry underlined the importance of a sound legal basis for their commercial operations.

- **Collection and use of expertise**

Not applicable.

- **Impact assessment**

Not applicable.

- **Regulatory fitness and simplification**

The proposal provides for simplification of legislation. The relevant provisions of bilateral air services agreements between Member States and the Republic of Korea will be superseded or complemented by provisions in one single agreement.

- **Fundamental rights**

Not applicable.

4. BUDGETARY IMPLICATION

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

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The Parties to the Agreement shall notify each other in writing through diplomatic channels about the completion of their respective internal procedures necessary for the entry into force of the Agreement. The Agreement shall enter into force on the date of the later notification.

Explanatory documents (for directives)

Not applicable.

Detailed explanation of the specific provisions of the proposal

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.

However, traditional designation clauses in Member States' bilateral air services agreements infringe Union 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 EU air 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.

There are further issues, such as obligatory commercial agreements between airlines where compliance with Union law should be ensured through amending or complementing existing provisions in bilateral air services agreements between Member States and third countries.

In accordance with the mechanisms and directives in the Annex to the ”horizontal authorisation”, the Commission has negotiated an Agreement with the Republic of Korea that replaces certain provisions in the existing bilateral air services agreements between Member States and the Republic of Korea. 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 4 safeguards the right of Member States under EU law to impose, 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 Korea 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. Article 5 resolves potential conflicts with the competition rules of the Union.

The negotiations on the Agreement having been successfully concluded, it should be signed on behalf of the European Union. A decision to this effect is proposed herewith.

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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) On 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) The Commission has negotiated, on behalf of the Union, an Agreement with the Republic of Korea on certain aspects of air services ('the Agreement'). The negotiations were successfully concluded by the initialling of the Agreement on 12 November 2008.

(3) Subsequently, the Council adopted on 31 March 2009 a Decision on the signing of the Agreement but due to reluctance by the Republic of Korea the Agreement has not yet been signed.

(4) In 2018, however, the Republic of Korea expressed a new interest in signing and concluding the Agreement. Since a number of new bilateral air services agreements between the Republic of Korea and Member States have been initialled or signed since the 2009 Council Decision, the Agreement needed to be updated and, therefore, a new decision by the Council is required for its signature.

(5) The objective of the Agreement is to bring bilateral air services agreements between 22 Member States and the Republic of Korea in line with Union law.

(6) Therefore, the Agreement should be signed on behalf of the Union, subject to its conclusion at a later date

HAS ADOPTED THIS DECISION:

Article 1

The signing of the Agreement between the European Union and the Republic of Korea on certain aspects of air services ('the Agreement') is approved on behalf of the Union, subject to its conclusion[1].

[1] The text of the Agreement will be published together with the decision on its conclusion.

Article 2

The Council Secretariat General 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

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

Done at Brussels,

For the Council
The President