COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22.06.2005
COM(2005)267 final

2005/0113(CNS)

Proposal for a

COUNCIL DECISION

on the signature and provisional application of the Agreement between the European Community and New Zealand on certain aspects of air services

Proposal for a

COUNCIL DECISION

on the conclusion of the Agreement between the European Community and New Zealand on certain aspects of air services

(presented by the Commission)

EXPLANATORY MEMORANDUM

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

Following the judgements of the Court of Justice of the European Communities in cases C-466/98, C-467/98, C-468/98, C-471/98, C-472/98, C-475/98 and C-476/98, the Community has exclusive competence with respect to various aspects of external aviation. The Court of Justice also clarified the right of Community air carriers to benefit from the right of establishment within the Community, including the right to non-discriminatory market access.

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.

Following the Court of Justice judgements, the Council authorised the Commission in June 2003 to open negotiations with third countries on the replacement of certain provisions in existing bilateral agreements with a Community agreement.[1]

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, the Commission has negotiated an agreement with New Zealand that replaces certain provisions in the existing bilateral air services agreements between Member States and New Zealand. 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, particularly Article 14 paragraph 2 thereof. Article 5 (Pricing) resolves conflicts between the existing bilateral air services agreements and Council Regulation No 2409/92 on fares and rates for air services which prohibits third country carriers from being price leaders on air services for carriage wholly within the Community.

The Council is asked to approve the decisions on the signature and provisional application and on the conclusion of the agreement between the European Community and New Zealand on certain aspects of air services and to designate the persons authorised to sign the agreement on behalf of the Community.

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[1] Council decision 11323/03 of 5 June 2003 (restricted document)

Proposal for a

COUNCIL DECISION

on the signature and provisional application of the Agreement between the European Community and New Zealand on certain aspects of air services

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) thereof,

Having regard to the proposal from the Commission[2],

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 with New Zealand on certain aspects of air services 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) Subject to its possible conclusion at a later date, the Agreement negotiated by the Commission should be signed and provisionally applied,

HAS DECIDED AS FOLLOWS:

Sole Article

1. Subject to its conclusion at a later date, the President of the Council is hereby authorised to designate the person or persons empowered to sign on behalf of the Community the Agreement between the European Community and New Zealand on certain aspects of air services.

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[2] OJ C […], […], p. […].

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

3. The text of the Agreement is annexed to this decision.

Done at Brussels,

For the Council
The President

2005/0113(CNS)

Proposal for a

COUNCIL DECISION

on the conclusion of the Agreement between the European Community and New Zealand on certain aspects of air services

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 Commission[3],

Having regard to the opinion of the European Parliament[4],

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 with New Zealand on certain aspects of air services 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 was 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 [5];

(4) The Agreement should be approved,

HAS DECIDED AS FOLLOWS:

Article 1

1. The Agreement between the European Community and New Zealand on certain aspects of air services is approved on behalf of the Community.

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3 OJ C […], […], p. […].
4 OJ C […], […], p. […].
5 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 New Zealand

on certain aspects of air services

THE EUROPEAN COMMUNITY

of the one part, and

NEW ZEALAND

of the other part

(hereinafter referred to as 'the Contracting Parties')

NOTING that bilateral air service agreements have been concluded between several Member States of the European Community and New Zealand containing provisions that have been found 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 that Member State and third countries,

HAVING REGARD to the agreements between the European Community and specified 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 provisions of the bilateral air service agreements between Member States of the European Community and New Zealand, which have been found contrary to European Community law, must be brought into full conformity with it in order to establish a sound legal basis for air services between the European Community and New Zealand and to preserve the continuity of such air services,

NOTING that it is not a purpose of the European Community in this Agreement to increase the total volume of air traffic between the European Community and New Zealand, to affect the balance between Community air carriers and air carriers of New Zealand, or to amend 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; 'Contracting Party' shall mean a contracting party to this Agreement; "party" shall mean the contracting party to the relevant bilateral air services agreement; "air carrier" shall also mean airline; 'territory of the European Community' shall mean territories of the Member States to which the Treaty establishing the European Community applies.

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, Authorisation and Revocation

1. The provisions in paragraphs 3 and 4 of this Article shall prevail over 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 New Zealand, and the refusal, revocation, suspension or limitation of the authorisations or permissions of the air carrier, respectively.

2. The provisions in paragraph 3 and 4 of this Article shall prevail over the corresponding provisions in the articles listed in Annex 2 (a) and (b) to this Agreement respectively, in relation to the designation of air carriers by New Zealand, its authorisations and permissions granted by the Member State concerned, and the refusal, revocation, suspension or limitation of the authorisations or permissions of the air carrier, respectively.

3. On receipt of such a designation, and of applications from the designated air carrier(s), in the form and manner prescribed for operating authorisations and technical permissions, the other party shall, subject to paragraphs 4 and 5 grant the appropriate authorisations and permissions with minimum procedural delay, provided that:

a) in the case of an air carrier designated by a Member State:

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 from a Member State 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 Operators Certificate and the relevant aeronautical authority is clearly identified in the designation; and

iii.the air carrier has its principal place of business in the territory of the Member State from which it has received the Operating Licence*;* and

iv. the air carrier is owned directly or through majority ownership and 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.

b) in the case of an air carrier designated by New Zealand:

i. New Zealand has and maintains effective regulatory control of the air carrier; and

ii. it has its principal place of business and place of incorporation in New Zealand.

4. Either party may refuse, revoke, suspend or limit the operating authorisation or technical permissions of an air carrier designated by the other party where:

a) in the case of an air carrier designated by a Member State:

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 from a Member State in accordance with European Community law;

ii. effective regulatory control of the air carrier is not exercised or not maintained by the Member State responsible for issuing its Air Operators Certificate, or the relevant aeronautical authority is not clearly identified in the designation; or

iii. the air carrier does not have its principal place of business in the territory of the Member State from which it has received the Operating Licence; or

iv. the air carrier is not owned and effectively controlled directly or through majority ownership 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

v. the air carrier is already authorised to operate under a bilateral agreement between New Zealand and another Member State and New Zealand can demonstrate 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 the traffic rights imposed by that other agreement; or

vi. the air carrier designated holds an Air Operators Certificate issued by a Member State and there is no bilateral air services agreement between New Zealand and that Member State and that Member State has denied traffic rights to the air carrier designated by New Zealand; or

b) in the case of an air carrier designated by New Zealand:

i. New Zealand is not maintaining effective regulatory control of the air carrier; or

ii. it does not have its principal place of business and place of incorporation in New Zealand.

5. In exercising its right under paragraph 4, and without prejudice to its rights under paragraph 4(a) (v) and (vi) of this Article, New Zealand shall not discriminate between air carriers of Member States on the grounds of nationality.

ARTICLE 3

Rights with regard to regulatory control

1. The provisions in paragraph 2 of this Article shall complement 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 New Zealand under the safety provisions of the agreement between the Member State that has designated the air carrier and New Zealand 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 Member States or New Zealand from imposing on a non-discriminatory basis taxes, levies, duties, fees or charges on fuel supplied in their respective territories for use in an aircraft of a designated air carrier of a Member State or New Zealand that operates between two points within the respective territories of the Contracting Parties.

ARTICLE 5

Tariffs

1. The provisions in paragraph 2 of this Article shall complement the articles listed in Annex 2 (e).

2. The tariffs to be charged by the air carrier(s) designated by New Zealand under an agreement listed in Annex 1 containing a provision listed in Annex 2 (e) for carriage wholly within the European Community shall be subject to European Community law. European Community law is applied on a non-discriminatory basis.

3. The tariffs to be charged by the air carriers designated by Member States under an agreement listed in Annex 1 containing a provision listed in Annex 2 (e) for carriage wholly within New Zealand shall be subject to New Zealand law. New Zealand law is applied on a non-discriminatory basis.

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

1. This Agreement shall enter in force when the Contracting 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. Agreements and other arrangements between Member States and New Zealand which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally are listed in Annex 1 (b). This Agreement shall apply to all such Agreements and arrangements upon their entry into force or provisional application.

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 Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Polish, Portuguese, Slovak, Slovene, Spanish, and Swedish languages. In case of divergence the English text shall prevail over the other language texts.

Once the institutions of the European Union will be bound to publish all official acts in Maltese in the Official Journal of the European Union, the agreement will also be drawn up in duplicate in Maltese.

FOR THE EUROPEAN COMMUNITY: FOR NEW ZEALAND:

ANNEX 1

List of agreements referred to in Article 1 of this Agreement

(a) Air services agreements between New Zealand and Member States of the European Community which, at the date of signature of this Agreement, have been concluded, signed and/or are being applied provisionally

– Air Transport Agreement between the Austrian Federal Government and the Government of New Zealand done at Vienna on 14 March 2002; hereinafter referred to as "New Zealand-Austria Agreement".

– Agreement between the Government of the Kingdom of Belgium and the Government of New Zealand relating to Air services done at Wellington on 4 June 1999; hereinafter referred to as "New Zealand- Belgium Agreement".

– Air Services Agreement between the Kingdom of Denmark and New Zealand done at Wellington on 7 February 2001; hereinafter referred to as "New Zealand-Denmark Agreement" ;

Supplemented by the Agreement on the Co-operation between the Scandinavian Countries regarding Scandinavian Airlines System (SAS), signed at Wellington on 7 February 2001.

– Agreement between the Government of the French Republic and the Government of New Zealand relating to Air Services done at Paris on 9 November 1967; hereinafter referred to as "New Zealand-France Agreement";

Last modified by Exchange of Notes both dated 9 August 1971.

– **Air Transport Agreement between the Federal Republic of Germany and New Zealand** signed at Bonn on 2 November 1987 as amended; hereinafter referred to as "New Zealand-Germany Agreement".

– **Air Services Agreement between the Government of Ireland and the Government of New Zealand** done at Dublin on 27 May 1999; hereinafter referred to as "New Zealand-Ireland Agreement".

– **Agreement between the Government of New Zealand and the Government of the Italian Republic concerning Air Services** signed at Rome in September 2001; hereinafter referred to as "New Zealand-Italy Agreement".

– **Agreement between the Government of the Grand-Duchy of Luxembourg and the Government of New Zealand on Air Services**; done at Wellington on 2 November 1992; hereinafter referred to as "New Zealand-Luxembourg Agreement".

– **Draft Agreement between the Government of New Zealand and the Government of the Kingdom of the Netherlands for Air Services between and beyond their respective territories** as annexed to the Memorandum of

Understanding signed at the Hague on 11 May 1999; hereinafter referred to as "Draft New Zealand-Netherlands Agreement";

– **Air Transport Agreement between the Kingdom of Spain and New Zealand** done at Madrid on 6 May 2002; hereinafter referred to as "New Zealand-Spain Agreement".

– **Air Services Agreement between the Kingdom of Sweden and New Zealand**; done at Wellington on 7 February 2001; hereinafter referred to as "New Zealand-Sweden Agreement";

Supplemented by the Agreement on the Co-operation between the Scandinavian Countries regarding Scandinavian Airlines System (SAS), signed at Wellington on 7 February 2001.

– **Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of New Zealand** concerning Air Services done at London on 4 October 1982, as amended; hereinafter referred to as "New Zealand-United Kingdom Agreement".

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

[Annex 1b is intentionally left blank.]

ANNEX 2

List of articles in the agreements listed in Annex 1 and referred to in Articles 2 to 5 of this Agreement

(a) Designation by a Member State:

– Article 3 of the New Zealand-Austria Agreement;

– Article 4 of the New Zealand-Belgium Agreement;

– Article 3 of the New Zealand-Denmark Agreement;

– Article 3 of the New Zealand-Germany Agreement;

– Article 3 of the New Zealand-Ireland Agreement;

– Article 4 of the New Zealand-Italy Agreement;

– Article 3 of the New Zealand-Luxembourg Agreement;

– Article 4 of the Draft New Zealand-Netherlands Agreement;

– Article 3 of the New Zealand-Spain Agreement;

– Article 3 of the New Zealand-Sweden Agreement;

– Article 4 of the New Zealand-United Kingdom Agreement.

(b) Refusal, Revocation, Suspension or Limitation of Authorisation or Permissions:

– Article 4 of the New Zealand-Austria Agreement;

– Article 5 of the New Zealand-Belgium Agreement;

– Article 4 of the New Zealand-Denmark Agreement;

– Article 8 of the New Zealand-France Agreement;

– Article 4 of the New Zealand-Germany Agreement;

– Article 4 of the New Zealand-Ireland Agreement;

– Article 5 of the New Zealand-Italy Agreement;

– Article 4 of the New Zealand-Luxembourg Agreement;

– Article 5 of the Draft New Zealand-Netherlands Agreement;

– Article 4 of the New Zealand-Spain Agreement;

– Article 4 of the New Zealand-Sweden Agreement;

– Article 5 of the New Zealand-United Kingdom Agreement.

(c) Regulatory Control:

– Article 6 of the New-Zealand-Austria Agreement;

– Article 7 of the New Zealand-Belgium Agreement;

– Article 13 of the New Zealand-Denmark Agreement;

– Article 11a of the New Zealand-Germany Agreement;

– Article 6 of the New Zealand - Ireland Agreement;

– Article 11 of the New Zealand-Italy Agreement;

– Article 6 of the New Zealand-Luxembourg Agreement;

– Article 12 of the Draft New Zealand-Netherlands Agreement;

– Article 11 of the New Zealand-Spain Agreement;

– Article 13 of the New Zealand-Sweden Agreement.

(d) Taxation of aviation fuel:

– Article 7 of the New Zealand-Austria Agreement;

– Article 10 of the New Zealand-Belgium Agreement;

– Article 5 of the New Zealand-Denmark Agreement;

– Article 6 of the New Zealand-France Agreement;

– Article 6 of the New Zealand-Germany Agreement;

– Article 9 of the New Zealand-Ireland Agreement;

– Article 6 of the New Zealand-Italy Agreement;

– Article 8 of the New Zealand-Luxembourg Agreement;

– Article 10 of the Draft New Zealand-Netherlands Agreement;

– Article 5 of the New Zealand-Spain Agreement;

– Article 5 of the New Zealand-Sweden Agreement;

– Article 8 of the New Zealand – United Kingdom Agreement.

(e) Tariffs for carriage within the European Community:

– Article 11 of the New Zealand-Austria Agreement;

– Article 13 of the New Zealand-Belgium Agreement;

– Article 9 of the New Zealand-Denmark Agreement;

– Article 10 of the New Zealand-France Agreement;

– Article 10 of the New Zealand-Germany Agreement;

– Article 12 of the New Zealand – Ireland Agreement;

– Article 8 of the New Zealand-Italy Agreement;

– Article 10 of the New Zealand-Luxembourg Agreement;

– Article 6 of the Draft New Zealand-Netherlands Agreement;

– Article 7 of the New Zealand-Spain Agreement;

– Article 9 of the New Zealand-Sweden Agreement;

– Article 7 of the New Zealand-United Kingdom Agreement and provisions relating to tariffs as provided for in Paragraphs 4 and 5 of the confidential Memorandum of Understanding signed at London on 22 October 1989 and as amended by Paragraph 10 the Memorandum of Understanding signed at London on 7 August 1997.

ANNEX 3

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)