COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 31.1.2008
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2008/0017 (CNS)

Proposal for a

COUNCIL DECISION

on the signature and provisional application of the Agreement between the European Community and the Government of Nepal on certain aspects of air services

Proposal for a

COUNCIL DECISION

on the conclusion of the Agreement between the European Community and the Government of Nepal on certain aspects of air services

(presented by the Commission)

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 agreement[1] (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, tariffs introduced by third country air carriers on intra-Community routes, or obligatory commercial agreements between airlines 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 seven bilateral air services agreements between Member States and Nepal.

- **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 law.

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

2) CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

- **Consultation of interested parties**

Consultation methods, main sectors targeted and general profile of respondents

Member States were consulted throughout the negotiations.

Summary of responses and how they have been taken into account

Comments made by Member States 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 Nepal that replaces certain provisions in existing bilateral air services agreements between Member States and Nepal. 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 (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. Article 6 brings provisions in bilateral agreements which are clearly anti-competitive (obligatory commercial agreements between airlines) in line with EU competition law.

- **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 Nepal is the most efficient instrument to bring all existing bilateral air services agreements between Member States and Nepal

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 Nepal 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 provisional application and on the conclusion of the Agreement between the European Community and the Government of Nepal on certain aspects of air services and to designate the persons authorised to sign the Agreement on behalf of the Community.

Proposal for a

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on the signature and provisional application of the Agreement between the European Community and the Government of Nepal 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 Nepal 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. The President of the Council is hereby authorised to designate the person(s) empowered to sign on behalf of the Community the Agreement between the European Community and the Government of Nepal on certain aspects of air services subject to its conclusion at a later date.

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 for in Article 9(2) of the Agreement.

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[2] OJ C , , p. .

3. The text of the Agreement is attached to this Decision.

Done at Brussels,

For the Council
The President

2008/0017 (CNS)

Proposal for a

COUNCIL DECISION

on the conclusion of the Agreement between the European Community and the Government of Nepal 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 the Government of Nepal 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 Council Decision …/…/EC of […]5.

(4) The Agreement should be approved,

HAS DECIDED AS FOLLOWS:

Article 1

1. The Agreement between the European Community and the Government of Nepal on certain aspects of air services is hereby 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 attached to this Decision.

Article 2

The President of the Council is hereby authorised to designate the person(s) empowered to make the notification provided for in Article 9(1) of the Agreement.

Done at Brussels,

For the Council
The President

ANNEX

AGREEMENT

between the European Community and the Government of Nepal

on certain aspects of air services

THE EUROPEAN COMMUNITY

of the one part, and

THE GOVERNMENT OF NEPAL

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 Nepal 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 Nepal, 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 Nepal and to preserve the continuity of such air services,

RECOGNISING that bilateral air service agreements between Member States of the European Community and Nepal should be consistent with the laws of Nepal and the European Community and provide a viable and sound legal basis for ensuring continuity and development of air services between the European Community and Nepal,

NOTING that provisions of the bilateral air service agreement between Member States of the European Community and Nepal, which are not inconsistent with European Community law, do not need to be affected by this Agreement,

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 Nepal 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 in 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 bring about any changes in the total volume of air traffic between the European Community and the Nepal, to affect the balance between Community air carriers and air carriers of Nepal, or to make 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, Authorisation and Revocation

1. The provisions in paragraphs 3 and 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 air carriers by the Member State concerned, its authorisations and permissions granted by Nepal, and the refusal, revocation, suspension or limitation of the authorisations or permissions of the air carrier, respectively.

2. The provisions in paragraphs 3 and 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 air carriers by Nepal, 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 authorisations and 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 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 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.

(b) in the case of an air carrier designated by Nepal:

i) it has its principal place of business in Nepal; and

ii) Nepal has and maintains effective regulatory control of the air carrier.

4. Either party may refuse, revoke, suspend or limit the authorisation or 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; 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 and 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

(b) in the case of an air carrier designated by Nepal:

i) it does not have its principal place of business in Nepal; or

ii) Nepal is not maintaining effective regulatory control of the air carrier; or

iii) majority ownership or control of the air carrier designated by Nepal is vested in a third country that does not effectively accept the designation of Community air carriers established in the Community.

5. In exercising its right under paragraph 4, Nepal shall not discriminate between air carriers of 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 a Member State has designated an air carrier whose regulatory control is exercised and maintained by another Member State, the rights of the Government of Nepal under the safety provisions of the agreement between the Member State that has designated the air carrier and the Government of Nepal 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 Nepal 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

Tariffs for carriage within the European Community

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

2. The tariffs to be charged by the air carrier(s) designated by the Government of Nepal 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.

ARTICLE 6

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 7

Annexes to the Agreement

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

ARTICLE 8

Revision or amendment

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

ARTICLE 9

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. Agreements and other arrangements between Member States and the Government of Nepal 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 10

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, Swedish and Nepali languages.

FOR THE EUROPEAN COMMUNITY: FOR THE GOVERNMENT OF NEPAL:

ANNEX 1

List of agreements referred to in Article 1 of this Agreement

(a) Air service agreements between the Government of Nepal 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

– Agreement between **the Austrian Federal Government and His Majesty's Government of Nepal** relating to Civil Air Transport signed at Kathmandu on 29 October 1997, hereinafter referred to as "Nepal-Austria Agreement" in Annex 2;

– Agreement between **the Government of the Grand Duchy of Luxembourg and His Majesty's Government of Nepal** on air services done at Luxembourg on 18 June 1999, hereinafter referred to as "Nepal-Luxembourg Agreement" in Annex 2;

– Agreement between **the Kingdom of the Netherlands and His Majesty's Government of Nepal** on air services done at Schiphol Airport on 10 June 1998, hereinafter referred to as "Nepal-The Netherlands Agreement" in Annex 2;

– Agreement between **the Government of the United Kingdom of Great Britain and Northern Ireland and His Majesty's Government of Nepal** concerning air services done at Kathmandu on 3 March 1994, hereinafter referred to as "Nepal-United Kingdom Agreement" in Annex 2;

(b) Air service agreements and other arrangements initialled or signed between the Government of Nepal 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.

– Air Services Agreement between **His Majesty's Government of Nepal and the Government of the Republic of France** initialled at Kathmandu on 7 July 1998, hereinafter referred to as "Nepal-France Agreement" in Annex 2;

– Agreement **between the Government of the Federal Republic of Germany and His Majesty's Government of Nepal** on Air Services initialled and attached as Annex 3 to the Protocol done at Bonn on 26 July 2000, hereinafter referred to as "Nepal-Germany Agreement" in Annex 2

– Agreement between **His Majesty's Government of Nepal and the Government of the Italian Republic** concerning Air Services initialled at Kathmandu on 8 May 1992 hereinafter referred to as "Nepal-Italy Agreement" in Annex 2.

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 4 of the Nepal-Austria Agreement;

– Article 4 of the Nepal-France Agreement;

– Article 4 of the Nepal-Italy Agreement

– Article 3 of the Nepal-Luxembourg Agreement;

– Article 5 of the Nepal-The Netherlands Agreement;

– Article 4 of the Nepal-United Kingdom Agreement;

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

– Article 4 of the Nepal-Austria Agreement;

– Article 5 of the Nepal-France Agreement;

– Article 4 of the Nepal-Germany Agreement;

– Article 5 of the Nepal-Italy Agreement;

– Article 4 of the Nepal-Luxembourg Agreement;

– Article 6 of the Nepal-The Netherlands Agreement;

– Article 5 of the Nepal-United Kingdom Agreement;

(c) Safety:

– Article 8 of the Nepal-Austria Agreement;

– Article 9 of the Nepal-France Agreement;

– Article 14 of the Nepal-Germany Agreement;

– Article 10 of the Nepal-Italy Agreement.

– Article 6 of the Nepal-Luxembourg Agreement;

– Article 10 of the Nepal-The Netherlands Agreement;

(d) Taxation of aviation fuel:

– Article 9 of the Nepal-Austria Agreement;

– Article 12 of the Nepal-France Agreement;

– Article 7 of the Nepal-Germany Agreement;

– Article 6 of the Nepal-Italy Agreement.

– Article 8 of the Nepal-Luxembourg Agreement;

– Article 13 of the Nepal-The Netherlands Agreement;

– Article 8 of the Nepal-United Kingdom Agreement.

(e) Tariffs for Carriage within the European Community:

– Article 12 of the Nepal-Austria Agreement;

– Article 14 of the Nepal-France Agreement;

– Article 8 of the Nepal-Italy Agreement.

– Article 10 of the Nepal-Luxembourg Agreement;

– Article 8 of the Nepal-The Netherlands Agreement;

– Article 7 of the Nepal-United Kingdom Agreement.

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)