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EUROPEAN COMMISSION

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2010/0371 (NLE)

Proposal for a

COUNCIL DECISION

**on the signature of the Agreement on certain aspects of air services between the
European Union and the Kingdom of Saudi Arabia**

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 Kingdom of Saudi Arabia.

- **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 Kingdom of Saudi Arabia that replaces certain provisions in the existing bilateral air services agreements between Member States of the European Union and the Kingdom of Saudi Arabia. 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(5)

- **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 Kingdom of Saudi Arabia is the

most efficient instrument to bring all existing bilateral air services agreements between Member States of the European Union and the Kingdom of Saudi Arabia 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 Kingdom of Saudi Arabia 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 Kingdom of Saudi Arabia and to designate the persons authorised to sign the Agreement on behalf of the European Union.

Proposal for a

COUNCIL DECISION

on the signature of the Agreement on certain aspects of air services between the European Union and the Kingdom of Saudi Arabia

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 Commission²,

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 Kingdom of Saudi Arabia on certain aspects of air services (hereinafter "the Agreement") in accordance with the mechanisms and directives in the Annex to the Council Decision of 5 June 2003,
- (3) The Agreement negotiated by the Commission should be signed and provisionally applied 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 Kingdom of Saudi Arabia on certain aspects of air services is hereby approved on behalf of the Union, subject to the conclusion of the Agreement.

The text of the Agreement is attached to this Decision.

² OJ C , , p. .

Article 2

The President of the Council is hereby authorised to designate the person(s) empowered to sign the Agreement on behalf of the Union subject to its conclusion.

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 purpose³.

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

³ 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 Kingdom of Saudi Arabia
on certain aspects of air services**

THE EUROPEAN UNION

of the one part, and

THE KINGDOM OF SAUDI ARABIA

of the other part

(hereinafter referred to as ‘the Parties’)

NOTING that bilateral air service agreements have been concluded between Member States of the European Union and the Kingdom of Saudi Arabia 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 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 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 Kingdom of Saudi Arabia, 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 Kingdom of Saudi Arabia and to preserve the continuity of such air services,

NOTING that under the law of the 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 the Kingdom of Saudi Arabia 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 Kingdom of Saudi Arabia, to affect the balance between Community air carriers and air carriers of the Kingdom of Saudi Arabia, 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 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 by a Member State

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 the Member State concerned, its authorisations and permissions granted by the Kingdom of Saudi Arabia, 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 Kingdom of Saudi Arabia 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 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 Member State responsible for issuing its Air Operator 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 Member States and/or nationals of Member States, and/or by other states listed in Annex 3 and/or nationals of such other states.
4. The Kingdom of Saudi Arabia may refuse, revoke, suspend or limit the authorisations or permissions of an air carrier designated by a Member State where:
- i. the air carrier is not established, under the EU Treaties, in the territory of the designating 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 Member State responsible for issuing its Air Operator 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 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
 - iv. the Kingdom of Saudi Arabia demonstrates that, by exercising traffic rights under this Agreement on a route that includes a point in another Member State, the air carrier would be circumventing restrictions on traffic rights imposed by a bilateral agreement between the Kingdom of Saudi Arabia and that other Member State; or
 - v. the air carrier holds an Air Operator Certificate issued by a Member State and there is no bilateral air services agreement between the Kingdom of Saudi Arabia and that Member State, and it can be demonstrated that the necessary traffic rights to conduct the proposed operation are not reciprocally available to the air carrier(s) designated by Saudi Arabia.

In exercising its right under this paragraph, the Kingdom of Saudi Arabia shall not discriminate between Community 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 Kingdom of Saudi Arabia under the safety provisions of the agreement between the Member State that has designated the air carrier and the Kingdom of Saudi Arabia 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 Kingdom of Saudi Arabia 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

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, Swedish and Arabic languages, all texts being equally authentic.

FOR THE EUROPEAN UNION:FOR THE KINGDOM OF SAUDI ARABIA:

List of agreements referred to in Article 1 of this Agreement

Air service agreements and other arrangements between the Kingdom of Saudi Arabia 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 Transport Agreement between the **Austrian Federal Government and the government of Kingdom of Saudi Arabia** signed at Vienna on 13 June 1989, last modified by the Memorandum of Understanding between the **Aeronautical Authorities of the Republic of Austria and the Kingdom of Saudi Arabia** signed at Jeddah on 18 October 2008, hereinafter referred to as "Saudi Arabia – Austria Agreement" and "Saudi Arabia – Austria MoU" respectively in Annex 2;
- Air Services Agreements between the **Government of the Kingdom of Belgium and the Government of the Kingdom of Saudi Arabia** signed at Riyadh on 13 April 1986, last modified by the Memorandum of Understanding between the **Government of the Kingdom of Belgium and the Government of the Kingdom of Saudi Arabia** signed at Brussels on 16 June 2005, hereinafter referred to as "Saudi Arabia – Belgium Agreement" and "Saudi Arabia – Belgium MoU" respectively in Annex 2;
- Air Services Agreement between the **Government of the Republic of Cyprus and the Government of the Kingdom of Saudi Arabia** signed at Jeddah on 22 April 2002, hereinafter referred to as "Saudi Arabia – Cyprus Agreement " in Annex 2;
- Air Transport Agreement between the **Government of the Kingdom of Saudi Arabia and the Government of the Kingdom of Denmark** signed at Riyadh on 15 March 1987, hereinafter referred to as "Saudi Arabia – Denmark Agreement" in Annex 2;
- Agreement between the **French Republic and the Kingdom of Saudi Arabia** concerning the establishment and exercise of scheduled air services between and beyond their respective territories signed on 7 November 1968, last modified by the Memorandum of Understanding between the **Aeronautical Authorities of the French Republic and the Kingdom of Saudi Arabia** signed at Paris on 21 January 2009, hereinafter referred to as "Saudi Arabia – France Agreement" and "Saudi Arabia – France MoU" respectively in Annex 2;
- Air Transport Agreement between the **Federal Republic of Germany and the Kingdom of Saudi Arabia** signed at Jeddah on 19 September 1973, last modified by the Memorandum of Understanding between the **Aeronautical Authorities of the Federal Republic of Germany and the Kingdom of Saudi Arabia** signed at Jeddah on 12 November 2008, hereinafter referred to as "Saudi Arabia – Germany Agreement and "Saudi Arabia – Germany MoU" respectively in Annex 2;
- Agreement between the **Government of the Hellenic Republic and the Government of the Kingdom of Saudi Arabia** on Air Transport signed at Athens

on 23 May 1989, hereinafter referred to as "Saudi Arabia – Greece Agreement" in Annex 2;

- Agreement between **the Government of the Italian Republic and the Government of the Kingdom of Saudi Arabia** signed at Rome on 17 December 1969, hereinafter referred to as "Saudi Arabia – Italy Agreement" in Annex 2;
- Air Transport Agreement between **the Kingdom of the Netherlands and the Kingdom of Saudi Arabia** signed at Riyadh on 13 February 1985, last modified by the Memorandum of Understanding between **the Aeronautical Authorities of the Kingdom of Saudi Arabia and the Kingdom of the Netherlands** signed at Jeddah on 5 August 2008, hereinafter referred to as "Saudi Arabia – Netherlands Agreement" and "Saudi Arabia – Netherlands MoU" respectively in Annex 2;
- Air Transport Agreement between **the Kingdom of Spain and the Kingdom of Saudi Arabia** signed at Jeddah on 29 September 1987, hereinafter referred to as "Saudi Arabia – Spain Agreement" in Annex 2;
- Air Transport Agreement between **the Government of the Kingdom of Saudi Arabia and the Government of the Kingdom of Sweden** signed at Stockholm on 17 March 1987, hereinafter referred to as "Saudi Arabia – Sweden Agreement" in Annex 2;
- Agreement between **the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Saudi Arabia** for Air Services between and beyond their respective territories signed at Jeddah on 20 January 1975, supplemented by the Memorandum of Understanding of 24 June 2008, hereinafter referred to as "Saudi Arabia – 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 by a Member State:

- Article 3, paragraph 5 of the Saudi Arabia – Austria Agreement as amended by Article 1, Paragraph A-1 of the Saudi Arabia – Austria MoU;
- Article 4, paragraph 3 of the Saudi Arabia – Belgium Agreement;
- Article 3 of the Saudi Arabia – Cyprus Agreement;
- Article 3 of the Saudi Arabia – Denmark Agreement;
- Article 3, paragraph 4 of the Saudi Arabia – Germany Agreement;
- Article 3 of the Saudi Arabia – Greece Agreement;
- Article III of the Saudi Arabia – Italy Agreement;
- Article 3 of the Saudi Arabia – Netherlands Agreement;
- Article 3 of the Saudi Arabia – Spain Agreement;
- Article 3 of the Saudi Arabia – Sweden Agreement;
- Article 3 of the Saudi Arabia – UK Agreement.

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

- Article 4, paragraph 1(a) of the Saudi Arabia – Austria Agreement and Attachment (C) of the Saudi Arabia – Austria MoU as supplemented by Article (2), paragraph (D) of the Saudi Arabia – Austria MoU;
- Article 4 of the Saudi Arabia – Cyprus Agreement;
- Article 3 of the Saudi Arabia – Denmark Agreement;
- Article X of the France – Saudi Arabia Agreement as supplemented by Article (2), paragraph (D) of the Saudi Arabia – France MoU;
- Article 4, paragraph 1 (second sentence) of the Saudi Arabia – Germany Agreement as supplemented by Article (2), paragraph (D) of the Saudi Arabia – Germany MoU;
- Article 3 of the Saudi Arabia – Greece Agreement;
- Article III of the Saudi Arabia – Italy Agreement;

- Article 4 of the Saudi Arabia –Netherlands Agreement;
- Article 4 of the Saudi Arabia – Spain Agreement;
- Article 3 of the Saudi Arabia – Sweden Agreement;
- Article 4 of the Saudi Arabia – UK Agreement.

(c) Safety:

- Attachment (C) of the Saudi Arabia – Austria MoU;
- Article 3 of the Saudi Arabia – Belgium MoU;
- Article 12 of the Saudi Arabia – Cyprus Agreement;
- Attachment (C) of the Saudi Arabia – France MoU;
- Annex B of the Saudi Arabia –Netherlands MoU;
- Article 11B of the Saudi Arabia – UK Agreement.

(d) Taxation of aviation fuel:

- Attachment (B) of the Saudi Arabia – Belgium MoU;
 - Article 6 of the Saudi Arabia – Cyprus Agreement;
 - Article 4 of the Saudi Arabia – Denmark Agreement;
 - Attachment (C) of the Saudi Arabia – France MoU;
 - Article 7 of the Saudi Arabia – Germany Agreement;
 - Article 6 of the Saudi Arabia – Greece Agreement;
 - Article V of the Saudi Arabia – Italy Agreement;
 - Article 9 of the Saudi Arabia – Netherlands Agreement;
 - Article 7 of the Saudi Arabia – Spain Agreement;
 - Article 4 of the Saudi Arabia – Sweden Agreement;
 - Article 5 of the Saudi Arabia – UK Agreement.
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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)