



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 8 February 2012

6217/12

**Interinstitutional File:
2012/0014 (NLE)**

**AVIATION 21
RELEX 93
MACAO 1**

PROPOSAL

from:	European Commission
dated:	2 February 2012
No Cion doc.:	COM(2012) 28 final
Subject:	Proposal for a Council Decision on the signature, on behalf of the European Union, and provisional application of the Agreement on certain aspects of air services between the European Union and the Macao Special Administrative Region of the People's Republic of China

Delegations will find attached a proposal from the Commission, submitted under a covering letter from Mr Jordi AYET PUIGARNAU to Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union.

Encl.: COM(2012) 28 final



EUROPEAN COMMISSION

Brussels, 2.2.2012
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Proposal for a

COUNCIL DECISION

on the signature, on behalf of the European Union, and provisional application of the Agreement on certain aspects of air services between the European Union and the Macao Special Administrative Region of the People's Republic of China

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 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 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 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 aviation fuel taxation or tariffs introduced by third country air carriers on intra-EU routes, where compliance with the law of the Union 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 the 15 bilateral air services agreements between Member States and the Macao Special Administrative Region of the People's Republic of China.

- **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

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

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 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 Macao Special Administrative Region of the People's Republic of China that replaces certain provisions in the existing bilateral air services agreements between Member States and the Macao Special Administrative Region of the People's Republic of China. 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 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 Union.

- **Legal basis**

Art. 100(2) in conjunction with 218(5) and (8) 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 Macao Special Administrative Region of the People's Republic of China is the most efficient instrument to bring all existing bilateral air services agreements between Member States and the Macao Special Administrative Region of the People's Republic of China into conformity with the law

of the Union.

4. Budgetary implication

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

5. Additional information

- **Simplification**

The proposal provides for simplification of legislation.

The relevant provisions of bilateral air services agreements between Member States and the Macao Special Administrative Region of the People's Republic of China 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 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 Macao Special Administrative Region of the People's Republic of China and to designate the persons authorised to sign the Agreement on behalf of the Union.

Proposal for a

COUNCIL DECISION

on the signature, on behalf of the European Union, and provisional application of the Agreement on certain aspects of air services between the European Union and the Macao Special Administrative Region of the People's Republic of China

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) and (8) first paragraph 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 on certain aspects of air services with the Macao Special Administrative Region of the People's Republic of China (hereinafter "the Agreement") in accordance with the mechanisms and directives in the Annex to the Council Decision of 5 June 2003,
- (3) Subject to its conclusion at a later date, the Agreement should be signed and provisionally applied by the Union.

HAS ADOPTED THIS DECISION:

Article 1

- (1) The signing of the Agreement between the European Union and the Macao Special Administrative Region of the People's Republic of China 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. .

- (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 2

Pending its entry into force, the Agreement shall be applied provisionally, in accordance with Article 8 (2) of the Agreement, as 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.

Article 3

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

Article 4

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

Done at Brussels,

*For the Council
The President*

ANNEX

AGREEMENT

**between the European Union and the Macao Special Administrative Region of the
People's Republic of China**

on certain aspects of air services

THE EUROPEAN UNION,

(hereinafter referred to as "the Union")

of the one part, and

THE GOVERNMENT OF THE MACAO SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA (hereinafter referred to as "the Macao SAR"), having been duly authorised to conclude this Agreement by the Central People's Government of the People's Republic of China

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 Union and the Macao SAR containing provisions contrary to the law of the Union,

NOTING that the Union has exclusive competence with respect to several aspects that may be included in bilateral air service agreements between Member States of the Union and third parties,

NOTING that under the law of the 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 Union and third parties,

HAVING REGARD to the agreements between the 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 Union,

RECOGNISING that certain provisions of the bilateral air service agreements between Member States of the Union and the Macao SAR, which are contrary to the law of the Union, must be brought into conformity with it in order to establish a sound legal basis for air services between the Union and the Macao SAR and to preserve the continuity of such air services,

NOTING that under the law of the Union air carriers can in principle not conclude agreements which may affect trade between Member States of the 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 Union and the Macao SAR 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 in the relevant routes may render ineffective the competition rules applicable to undertakings.

NOTING that it is not a purpose of this agreement to increase the total volume of air traffic between the Union and the Macao SAR, to affect the balance between Community air carriers and air carriers of the Macao SAR, 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 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.
- (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 Macao SAR, 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 Macao SAR shall grant the appropriate authorisations and permissions with minimum procedural delay, provided that:
 - (a) 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 Union; and
 - (b) 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

- (c) 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 Macao SAR may refuse, revoke, suspend or limit the authorisations or permissions of an air carrier designated by a Member State where:
- (a) 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 Union;
 - (b) 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
 - (c) 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 Macao SAR 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 Macao SAR under the safety provisions of the agreement between the Member State that has designated the air carrier and the Macao SAR 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 Macao SAR 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, Chinese, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish and Swedish languages, all texts being equally authentic.

FOR THE EUROPEAN UNION FOR THE MACAO SPECIAL ADMINISTRATIVE
REGION OF THE PEOPLE'S REPUBLIC OF CHINA

List of agreements referred to in Article 1 of this Agreement

Air service agreements and other arrangements between the Macao SAR and Member States 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 Macau** done at Vienna on 4 November 1994, hereinafter referred to as “Macao SAR-Austria Agreement” in Annex 2;
- Agreement between **the Government of the Kingdom of Belgium and the Government of Macau** on air transport done at Brussels on 16 November 1994, hereinafter referred to as ”Macao SAR-Belgium Agreement” in Annex 2;
- Air Services Agreement between **the Government of the Czech Republic and the Government of the Macao Special Administrative Region of the People’s Republic of China** done at Prague on 25 September 2001, hereinafter referred to as “Macao SAR-Czech Republic Agreement” in Annex 2;
- Air Services Agreement between **the Government of the Kingdom of Denmark and the Government of Macau** done at Oslo on 12 December 1996, hereinafter referred to as “Macao SAR-Denmark Agreement” in Annex 2;
- Air Services Agreement between **the Government of the Republic of Finland and the Government of Macau** done at Macau on 9 September 1994, hereinafter referred to as “Macao SAR-Finland Agreement” in Annex 2;
- Air Services Agreement between **the Government of the French Republic and the Government of the Macao Special Administrative Region of the People’s Republic of China** done at Paris on 23 May 2006, hereinafter referred to as “Macao SAR-France Agreement” in Annex 2;
- Air Transport Agreement between **the Government of the Federal Republic of Germany and the Government of Macau** done at Bonn on 5 September 1996, hereinafter referred to as ”Macao SAR-Germany Agreement” in Annex 2;
- Air Services Agreement between **the Government of the Hellenic Republic and the Government of the Macao Special Administrative Region of the People’s Republic of China** initialled at Macao on 17 February 2006, hereinafter referred to as “Macao SAR - Greece Agreement” in Annex 2;
- Agreement between **the Government of the Grand Duchy of Luxembourg and the Government of Macau** on air services done at Macau on 14 December 1994, hereinafter referred to as “Macao SAR-Luxembourg Agreement” in Annex 2;

- Agreement between **the Kingdom of the Netherlands and Macau** for Air Services between and beyond their respective Areas done at The Hague on 16 November 1994, hereinafter referred to as “Macao SAR-Netherlands Agreement” in Annex 2;
- Agreement between **the Government of the Republic of Poland and the Government of Macau** concerning air services done at Warsaw on 22 October 1999, hereinafter referred to as “Macao SAR-Poland Agreement” in Annex 2;
- Air Transport Agreement between **the Government of the Portuguese Republic and the Government of Macau** done at Lisbon on 31 August 1995, hereinafter referred to as “Macao SAR-Portugal Agreement” in Annex 2;
- Air Services Agreement between **the Government of the Slovak Republic and the Government of the Macao** Special Administrative Region of the People’s Republic of China initialled at Macao on 3 March 2006, hereinafter referred to as “Macao SAR-Slovak Agreement” in Annex 2;
- Air Services Agreement between **the Government of the Kingdom of Sweden and the Government of Macau** done at Oslo on 12 December 1996, hereinafter referred to as “Macao SAR-Sweden Agreement” in Annex 2;
- Agreement between **the Government of the Macao Special Administrative Region of the People’s Republic of China** and the Government of the United Kingdom of Great Britain and Northern Ireland concerning air services done at London on 19 January 2004, hereinafter referred to as “Macao SAR-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 4 of the Macao SAR-Austria Agreement;
 - Article 3 of the Macao SAR-Czech Republic Agreement;
 - Article 4 of the Macao SAR-Denmark Agreement;
 - Article 4 of the Macao SAR-Germany Agreement;
 - Article 4 of the Macao SAR-Luxembourg Agreement;
 - Article 4 of the Macao SAR-Poland Agreement;
 - Article 4 of the Macao SAR-Portugal Agreement;
 - Article 4 of the Macao SAR-Sweden Agreement.
- (b) Refusal, revocation, suspension or limitation of authorisations or permissions:
- Article 5 of the Macao SAR-Austria Agreement;
 - Article 6 of the Macao SAR-Belgium Agreement;
 - Article 4 of the Macao SAR-Czech Republic Agreement;
 - Article 5 of the Macao SAR-Denmark Agreement;
 - Article 4 of the Macao SAR-Finland Agreement;
 - Article 5 of the Macao SAR-Luxembourg Agreement;
 - Article 5 of the Macao SAR-Netherlands Agreement;
 - Article 5 of the Macao SAR-Poland Agreement;
 - Article 6 of the Macao SAR-Portugal Agreement;
 - Article 5 of the Macao SAR-Sweden Agreement.
- (c) Safety:
- Article 7 of the Macao SAR-Czech Republic Agreement;
 - Article 9 of the Macao SAR-France Agreement;
 - Article 7 of the Macao SAR-Greece Agreement;

- Article 7 of the Macao SAR-Luxembourg Agreement;
- Article 6 of the Macao SAR- Slovak Republic Agreement;
- Article 14 of the Macao SAR-UK Agreement.

(d) Taxation of aviation fuel:

- Article 8 of the Macao SAR-Austria Agreement;
- Article 11 of the Macao SAR-Belgium Agreement;
- Article 8 of the Macao SAR-Czech Republic Agreement;
- Article 7 of the Macao SAR-Denmark Agreement;
- Article 6 of the Macao SAR-Finland Agreement;
- Article 7 of the Macao SAR-Germany Agreement;
- Article 9 of the Macao SAR-Luxembourg Agreement;
- Article 10 of the Macao SAR-Netherlands Agreement;
- Article 7 of the Macao SAR-Poland Agreement;
- Article 10 of the Macao SAR-Portugal Agreement;
- Article 7 of the Macao SAR-Sweden Agreement;
- Article 8 of the Macao SAR-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).