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Proposal for a

COUNCIL DECISION

**on the conclusion of an Agreement between the European Union and the Federative
Republic of Brazil on civil aviation safety**

EXPLANATORY MEMORANDUM

1. INTRODUCTION

- 1.1. The Commission requested on 4 August 2009 the authorisation from the Council to conduct negotiations with the Federative republic of Brazil on the reciprocal acceptance of certification findings in the field of civil aviation safety and environmental compatibility¹.
- 1.2. The Council granted that authorisation on 9 October 2009 and instructed the Commission to carry out these negotiations in accordance with a set of negotiating directives and appointed a special committee to assist it in this task.
- 1.3. The authorisation granted to the Commission envisaged an agreement on the reciprocal acceptance of findings focusing in a first instance on the certification of aeronautical products, parts and appliances. Also, the authorisation confirmed that following a confidence building process, the agreement may also cover the approval and oversight of organisations and personnel involved in the maintenance of such aeronautical products, parts and appliances. Hence, an agreement between the EU and the Federative Republic of Brazil should ensure that:
 - (a) products designed, manufactured, modified, or repaired under the regulatory control of one party to be easily issued the necessary approvals to be registered or operated under the regulatory control of the other party;
 - (b) aircraft registered or operated under the regulatory control of one party to be maintained by organisations under the regulatory control of the other party.
- 1.4. The primary objectives of such an agreement would be to facilitate trade in goods and services covered by the agreement, to limit as much as possible the duplication of assessments, tests and controls to significant regulatory differences and to rely on the certification system of either party to check conformity with the requirements of the other party.
- 1.5. In order to achieve these objectives the negotiating directives identified the following means:
 - to approximate progressively the requirements and regulatory processes of both parties;
 - to maintain confidence in the certification systems of both parties building on experience gained from the cooperation between the Civil Aviation Authority (ANAC) of the federative Republic of Brazil and the European Aviation Safety Agency, so as to permit all Member States' competent authorities to execute on

¹ Recommendation for a Council Decision authorising the Commission to negotiate a bilateral agreement between the European Union and the Brazil on the reciprocal acceptance of certification findings in the field of civil aviation safety and environmental compatibility, SEC(2009) 1097 final of 3.8.2009

behalf of ANAC, the tasks they have to execute for the implementation of the Regulation (EC) N° 216/2008.;

- to allow any party to be satisfied that bodies involved in the regulatory process of the other party, are able to conduct in a satisfactory way conformity assessments and regulatory oversight as necessary to issue its own approvals;
- to enhance cooperation by providing for regular consultations between the parties to ensure that the agreement operates satisfactorily in particular by introducing the appropriate co-operation mechanisms to verify on a reciprocal basis the continued fitness and ability of the regulatory bodies involved in the implementation of the agreement;
- to set up a system of continual monitoring of the functioning of the agreement and in particular of its annexes, which are integral part thereof, and to allow for the agreement to be efficiently managed by a joint committee composed of representatives of both parties, entrusted to find and propose solutions timely to any problem raising from the implementation of the agreement.

2. THE PROCESS OF NEGOTIATIONS

2.1. Negotiations with Brazil have focused on how to enable the mutual acceptance of approvals certifying the airworthiness of aircraft, components and appliances fitted thereon as well as approvals to certify organisations involved in their design, production and maintenance. These approvals would be issued by either party in application of certain procedures on airworthiness and maintenance. During the negotiations the two sides decided to set out the details of these procedures in separate Annexes to the Agreement.

2.2. In the framework of the negotiations which were launched in Brussels on 14 and 15 December 2009, and as part of a confidence building process, EASA carried out an assessment visit to ANAC and to the Brazilian aeronautical industry from 22 to 26 February 2010. The main safety areas covered by the visit were design approvals, certification and production approvals. Moreover, the visit included a general assessment of the maintenance approval system applied in the Federative Republic of Brazil. A visit to the Brazilian industry to assess the way ANAC undertakes the oversight of it was also part of the assessment visit. The visit achieved its objective as it gave a better understanding of the organisation and functioning of ANAC as well as of the Brazilian regulatory framework regarding civil aviation safety, including of the certification activities of product design, manufacture, maintenance and organisation approvals. The visit indicates that the Brazilian system affords the same independent level of verification of compliance as provided by European legislation (Regulations 216/2008 and 1702/2003) through the direct involvement of ANAC and the use of the "designee" system (similar to the US system) for design and production. In the area of maintenance, the visit showed that the certification practices and procedures provide evidence of compliance with regulatory requirements equivalent to those contained in European legislation (Regulations 2042/2003). Nevertheless, the visit also showed that further confidence building will provide for clearer understanding of the surveillance of maintenance organisations approved by ANAC.

- 2.3. The text of the draft agreement and two annexes on certification of airworthiness and on maintenance respectively were agreed *ad referendum* in Rio de Janeiro on 2 March 2010.

3. THE LEGAL BASIS OF THE AGREEMENT

- 3.1. According to the case law of the Court of Justice, the removal of technical barriers to trade in goods falls within the scope of the common commercial policy as defined in Article 207(1) TFEU and thus under the exclusive competence of the European Union².
- 3.2. Moreover, with the entry into force in September 2002 of Regulation (EC) N° 1592/2002 on common rules in the field of civil aviation and the establishment of a European Aviation Safety Agency (EASA) the European Union has achieved internal harmonisation in the fields covered by that regulation, i.e.: initial and continued airworthiness (including maintenance) and environmental compatibility of aeronautical products. These rules as replaced by Regulation (EC) N° 216/2008³. This Regulation has been supplemented by a set of Implementing measures (Commission Regulation N° 1702/2003 and N° 2042/2003) setting out the requirements and the procedures to be followed by applicants, certificate holders and authorities to ensure that the essential requirements and objectives of the Basic Regulation are respected at all times. The proposed Agreement affects this European Union legislation within the meaning of the ERTA case law.
- 3.3. The Commission, therefore, considers that the European Union has exclusive competence to conclude the agreement on the basis of Articles 207 (4) and 100 (2) TFEU.

4. STRUCTURE OF THE AGREEMENT

- 4.1. The negotiated Agreement reflects by and large the structure of a "classical" agreement in the area of aviation safety, a "BASA" as are called the existing Bilateral Aviation Safety Agreements between Member States and third countries. As in the case of the BASAs, the agreement is based on mutual trust of each other's system and on the comparison of regulatory differences. Hence, it entails obligations and methods to cooperate between exporting and importing authority so that the latter can issue its own certificate on the aeronautical product, part or appliance without duplicating all the assessments done by the exporting authority as well as dispute resolution procedures for amending the agreement.
- 4.2. The means how to do so, i.e. how to cooperate and mutually accept each other's certification findings in the area of airworthiness and maintenance (methods, scope

² Opinion 1/94, WTO, [1994] ECR I -5267, paragraph 33 Consistent with this case law, Mutual Recognition agreements for products are generally concluded on the basis of Article 133 EC. See e.g. Council Decision 1999/78/EC, of 22 June 1998 on the conclusion of an Agreement on Mutual Recognition between the European Union and the United States of America, OJ L 31 of 4.2.1999.

³ Regulation (EC) N° 216/2008 of 20 February 2008 on common rules in the field of civil aviation and the establishment of a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) N° 1592/2002 and Directive 2004/36/EC, OJ L79, 19.3.2008, p.1

in terms of products or services, regulatory differences called also in their jargon "special conditions") are set out in the Annexes to the Agreement. From the outset of negotiations the two sides agreed that the specific procedures enabling the two sides to mutually accept certification findings in the two areas – certification of design and production and maintenance organisation approvals – would be set out in the annexes which would be equally binding on both sides and would become integral parts of the Agreement.

- 4.3. The draft agreement gives the possibility to the Parties to consider ways to further enhance the functioning of the agreement and make recommendations for modifications including addition of new annexes to the agreement via the Joint Committee. It leaves to the Parties the freedom of choice of ways to modify the agreement and its annexes according to the same amendment procedure that finishes with the latest notification by one Party to the other that its domestic procedures for entry into force of an agreed amendment have been completed. In particular where the subject of modification are amendments to existing annexes or addition of new ones, the Parties can agree to modify the agreement by simple exchange of Diplomatic Notes between the Parties.
- 4.4. Furthermore, the draft agreement constitutes a net benefit for the European Union given that it will establish mutual acceptance of certification findings in all areas of airworthiness for all Member States. It should be noted that currently, only 6 Member States have a bilateral agreement with Brazil covering product certification. To date, Transport Brazil has also accepted findings of European administrations, especially when done under the auspices of the JAA, to issue their own approvals. Reciprocally, the JAA has audited the Brazilian system and agreed on “outsourcing contracts” with the Brazilian administration detailing the processes to be followed to allow the JAA to recommend the acceptance of its findings by JAA member authorities. The same approach prevails for the approvals of maintenance organisations where only 6 formal agreements exist. In this area too, an “outsourcing” arrangement has been concluded between Transport Brazil and the JAA allowing the acceptance by its member authorities of Brazilian repair stations (maintenance organisations) under the oversight of the Brazilian administration. There are currently no arrangements covering the environmental certification of aeronautical products.

5. THE CONTENT OF THE AGREEMENT

5.1. Clear rights and obligations for the Parties

- 5.1.1. The Agreement does not propose to go beyond what is permissible in the applicable law of either party. The applicable law for the European Union is Regulation (EC) N° 216/2008 and its implementing measures including any modification thereof. The European Union system is fully reflected in the draft text setting out clearly a separation of tasks with regard to certification of aeronautical products and components and organisations involved in the design and manufacture of such products and components.
- 5.1.2. With regard to maintenance, while ANAC staff qualification process has been found comprehensive, certain processes regarding training remain to be fully implemented.

By the same token, the surveillance of maintenance organisations is performed through an extensive yearly audit by two ANAC auditors using detailed checklists. Since, ANAC and EASA have only recently started to cooperate in the area of maintenance, in order to provide for a full reassurance of the Brazilian oversight system and to maintain confidence in that system, the Agreement proposes to proceed to full recognition of the certification and oversight carried out by ANAC only when the capability to ensure the oversight of maintenance organisations has been demonstrated. Once such capability has been demonstrated, it is proposed that as in the case of the bilateral agreement between the European Union and Canada on civil aviation safety, ANAC will be in a position to issue approvals on behalf of EASA to maintenance organisations located in Brazil carrying out maintenance on aircraft and parts designed in the EC, without the need for the Agency to issue its own certificates/approvals on the basis of certificates/approvals issued by ANAC. This is in line with the European legal requirements set out in article 12(1) of Regulation (EC) N° 216/2008 which foresees, that in the framework of an international agreement certificates "may" be issued by EASA or Member States' authorities on the basis of certificates issued by third country authorities.

5.1.3. The Commission considers that the provisions of article 12(1) of Regulation (EC) N° 216/2008 is not an obstacle for the European Union to conclude an international agreement whereby certificates issued by the competent authority of the third country are automatically valid in the European Union. With this in mind the agreement provides in the area of maintenance for transitional arrangements to build confidence:

- The parties agree that, for the purposes of the Maintenance Procedure, compliance with the applicable legislation relating to maintenance of one party and with the regulatory requirements specified in its Appendix B1 amounts to compliance with the applicable legislation of the other Party.
- The parties agree that, for the purposes of the Maintenance Procedure, each Party's Competent Authorities certification practices and procedures provide for an equivalent proof of compliance with the requirements referred to above.
- The parties agree that, for the purposes of the Maintenance Procedure, the respective standards of the Parties pertaining to licensing of maintenance personnel are considered to be equivalent.

5.2. Clear means to achieve the objectives of the mandate

5.2.1. The draft stipulates that each party shall accept findings of compliance as results of specified procedures of the other party when these are made according to the provisions of the annexes – Article 3(1).

5.2.2. The draft recognises the right of either party's regulatory authority to issue certificates attesting conformity with the system of the other party on behalf of that other party – Article 3(1).

5.2.3. The draft agreement ensures that confidence is maintained in each other through the appropriate mechanism – it provides for a system of continual cooperation and consultation that is put in place by means of enhanced cooperation in the framework

of audits, inspections, timely notifications and consultations on all matters falling within its scope – Article 8 on mutual cooperation, assistance and transparency.

5.3. Increased cooperation on safety policy through transparency and exchange of safety information

5.3.1. The draft agreement provides the Parties the possibility of cooperating closely on their safety policy by following a proactive approach towards coordination of their safety policies and initiatives. To achieve that it is proposed to exchange information and data, and develop joint programs in order to increase capabilities to predict and prevent or mitigate potential risks for civil aviation with a view to implementing an oversight system for all aircraft operating in their territories.

5.3.2. While safeguarding confidentiality and protection of sensitive (proprietary) information, the agreement (Article 8bis) gives the two sides the possibility

- (a) to provide each other, on request and in a timely manner information and assistance related to accidents, incidents or occurrences related to the matters covered by the agreement, and
- (b) to exchange other safety information relating to aircraft operations and results of surveillance activities including of ramp inspections on aircraft using the airports of each Party in accordance with procedures developed by ANAC and EASA.

5.4. Regular consultations and rapid dispute resolution

5.4.1. The draft agreement is designed to work smoothly on a daily basis so as to solve technical issues arising from its implementation as quickly as possible. To that end a Joint Committee of the Parties is created, as well as sub-committees – the Joint Sectorial Committee on Certification and the Joint Sectorial Committee on Maintenance – reporting to the Joint Committee of the Parties and monitoring the application of the Annexes. The Joint Committee as well as the sub-committees have both consultation and mediation functions, so as to ensure the smooth functioning of the agreement by providing a forum for resolving differences between the parties – Article 9 (Joint Committee) as well as point 2.2 in Annex 1 regarding certification and point 4.2 in Annex 2 regarding maintenance.

5.4.2. The Joint Committee is entrusted with discussing and recommending to the Parties any amendments to the agreement and its annexes and with developing working procedures on regulatory cooperation and transparency for all activities which are not developed by the sub-committees. In this way, discussions in the areas which are not covered by the two annexes but are covered by European Union law (e.g. aircraft operations, licences or synthetic training devices) can be discussed in a constructive manner so as to pave the way for any future modification of the agreement.

5.4.3. Consultations can be requested at any time - Article 15. Nevertheless, the parties should take all efforts to try to solve technical issues at the lowest possible level before they become “disputes”.

5.5. Maintain a high degree of confidence in each other's system

5.5.1. In order to maintain a high degree of confidence in the initial and continued airworthiness certification system of either side, the European Union and Brazil assume certain obligations:

- to notify the other party of the identity of "competent authority"; for the European Union this entails a notification to the Brazilian side that a national aviation authority has been successfully audited (by EASA) and that this audit shows that this authority fully complies with the European Union legislation, that it is familiar with the requirements of the Brazilian legislation in the relevant areas and that it is capable of carrying out the obligations affecting certification and maintenance stemming from the annexes – Article 5(2) and (3);
- to ensure through regular audits that national aviation authorities which have been notified as "competent authorities" to the other side remain capable of fulfilling their obligations stemming from the agreement and its annexes – Article 5(4) and (5);
- to cooperate in quality assurance and permit the participation of each other in standardisation inspections and conformity assessments of each other (authorities and undertakings) – Article 5(6) and Article 8(5);
- to exchange safety data – available information on accidents, incidents or occurrences – article 8(4) and to ensure appropriate confidentiality when exchanging information – article 11.
- to notify each other all applicable requirements and to consult each other on regulatory and organisational changes at an early stage – Article 8.

5.6. Strong safeguard measures

5.6.1. The draft text of agreement is set up to afford the parties the necessary flexibility to react immediately to safety problems or to set up a higher level of protection they consider appropriate for safety – Article 6. In order to enable the two sides to deal with such situations without putting at risk the validity of the agreement, specific procedures are foreseen.

5.6.2. However, should the parties be unable to remedy satisfactorily a specific situation, the draft text of the agreement provides first for the possibility to suspend acceptance of the findings of the contested Competent Authority – Articles 6 and 10 and second for means and procedures to be followed for the termination of a part of the agreement or of its entirety – Article 16(3).

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the functioning of the European Union, and in particular Articles 100(2) and 207(4) in conjunction with Article 218(6)(a) and the first subparagraph of Article 218(8),

Having regard to the proposal from the Commission⁴,

Having regard to the consent of the European Parliament⁵,

Whereas:

- (1) The Commission has negotiated on behalf of the European Union an Agreement on civil aviation safety with the Government of the Federative Republic of Brazil in accordance with the Council Decision authorising the Commission to open negotiations.
- (2) The Agreement negotiated by the Commission was signed on, subject to its possible conclusion at a later stage;
- (3) The Agreement should be approved;
- (4) It is necessary to lay down procedural arrangements for the participation of the Union in the joint bodies established by the Agreement, as well as for the adoption of certain decisions concerning in particular the amendment of the Agreement and its Annexes, the addition of new annexes, the termination of individual annexes, consultations and dispute resolution and the adoption of safeguard measures.
- (5) The Member States should take the necessary measures in order to ensure that their bilateral agreements with Brazil on the same subject are terminated as of the date of the entry into force of the Agreement.

⁴ OJ C , , p. .

⁵ OJ C , , p. .

HAS DECIDED AS FOLLOWS:

Article 1

1. The Agreement between the European Union and the Federative Republic of Brazil on civil aviation safety is hereby approved on behalf of the Union.
2. The text of the Agreement is attached to this Decision.
3. The President of the Council is hereby authorised to designate the person(s) empowered to make the notification provided in Article 16(1) of the Agreement.

Article 2

1. The Union shall be represented in the Joint Committee of the Parties established in Article 9 of the Agreement by the European Commission assisted by the European Aviation Safety Agency and accompanied by the Aviation Authorities as representatives of the Member States.
2. The Union shall be represented in the Joint Sectorial Committee on Certification provided in paragraph 2.1.1 of Annex A of the Agreement and in the Joint Sectorial Committee on Maintenance provided in paragraph 4.1.1 of Annex B of the Agreement by the European Aviation Safety Agency assisted by the Aviation authorities directly affected by the agenda of each meeting.

Article 3

1. The Commission, after consultation with the special committee appointed by the Council, shall determine the position to be taken by the Union in the Joint Committee of the Parties with respect to the following matters:
 - the adoption or amendment of the rules of procedures of the Joint Committee of the Parties provided for in Article 9 of the Agreement.
2. The Commission, after consultation with the special committee referred to in paragraph 1, may take the following action:
 - adopt safeguard measures in accordance with Article 6 of the Agreement;
 - request consultations in accordance with Article 15 of the Agreement;
 - take measures for suspension in accordance with Article 10 of the Agreement;
 - any other action to be taken by a Party as provided for in the Agreement, subject to paragraph 3 and EU law.
3. The Council shall decide, acting by qualified majority, on a proposal from the Commission, with respect to the following matters:

- the adoption of additional Annexes in accordance with Article 16 (5) of the Agreement;
- any other amendments to the Agreement not falling within the scope of paragraph 1;
- the termination of individual Annexes in accordance with Article 16(3) of the Agreement.

Done at Brussels, [...]

For the Council
The President
[...]