

Open Skies: the EU-US Air Transport Agreement

30 March 2008 sees the entry into force of the first phase of the EU-US 'Open Skies' Air Transport Agreement, replacing the existing regime of individual bilateral air service agreements between EU Member States and the United States.

The first stage of this agreement will stimulate competition and lead to the creation of additional routes, giving rise to a wide array of consumer choices and affordable air fares. However, it does not yet provide all elements of a level playing field for fair competition, and is only a first step towards the ultimate goal, a true EU-US Open Aviation Area. AEA looks forward to a comprehensive second stage agreement, which should, it is hoped, address the structural deficiencies of the first.

In 2007, EU-US traffic accounted for 55 million passengers, 385 flights per day in each direction and 235 non-stop city-pairs served by 45 airlines comprising 8 from the US, 26 from the EU and 11 other.

Background

In 2002, the European Court of Justice ruled that bilateral open skies aviation agreements signed by individual EU Member States with the US discriminated by nationality and breached single market rules. Based upon a mandate from the EU Member States, the Commission began negotiations with the United States in June 2003 to replace the individual bilateral agreements with a single EU-US aviation agreement. In June 2004, the Council of EU Transport Ministers deemed the results of the negotiations to be insufficient to meet the terms of the mandate given. By November 2005, a more comprehensive package was initialled, but the US negotiators were unable to overcome concerns in Congress. A US Notice of Proposed Rulemaking, later amended by a Special Notice of Proposed Rulemaking, did not allay fears in Congress that fundamental US constitutional issues had been negatively impacted. In December 2006, the NPRM and SNPRM were withdrawn, thereby reopening negotiations.

All in all, negotiations required 11 rounds to reach the agreement that was signed at the EU-US summit on 30 April 2007.

With its vision of a Transatlantic Common Aviation Area (TCAA), back in 1995, AEA effectively triggered a debate about the ideal content of an international aviation agreement. Its core – the notion that liberalisation and harmonisation of competitive conditions must go hand in hand – had a significant impact on the Commission's mandate, and thus on the agenda of the EU-US negotiations over what has been termed an "Open Aviation Area". We are firm believers in the benefits of a liberalised aviation area covering a diversity of individual markets – as we have had in Europe since 1992 – with a consistent regulatory framework.

The EU and USA have agreed that the Open Aviation Area will be achieved in stages. The entry into force of the first stage on 30 March 2008 marks not only a significant liberalisation of air services between the USA and the European Union, but also a commitment to engaging in further talks for further joint regulatory steps. The EU and the USA have agreed on a timeline for these future negotiations; neither side seeks to stall further progress.

The aviation world is now closely monitoring the negotiations, as the two economic powers proceed to create a regulatory framework for a market covering more than 60% of global air traffic. The result of the second-stage negotiations might well become a template for other economic powers and, ultimately, for the International Civil Aviation Organisation, ICAO, to consider as a market-oriented alternative to the traditional bilateral air service agreements, which served their purpose well over five decades, but have limitations when meeting the requirements of an increasingly globalised economy.

However, it is an ambitious project that cannot be achieved overnight.

The first stage agreement

The Agreement which was signed last year holds the promise of real benefits, but also suffers from real shortcomings that must be addressed in a comprehensive second stage agreement.

The benefits...

- It removes all discrimination between EU airlines, allowing them new opportunities to fly on any transatlantic route between the EU and the US.
- It removes remaining market access restrictions on flights between the EU and the US, thus creating a level playing field between EU carriers.
- It commits both sides towards compatible practices and improved cooperation in the areas of safety, security, government subsidies and the environment – which has already delivered tangible results, such as the launch of the Atlantic Interoperability Initiative to Reduce Emissions (AIRE), a joint project to reduce the environmental impact of transatlantic flights.
- It establishes a Joint EU/US Committee to resolve questions regarding the interpretation of the agreement, and to harmonise standards between the European Union and the United States.
- It creates new cooperation arrangements between EU and US competition authorities, facilitating the joint assessment of alliances between EU and US carriers.
- It creates new opportunities for foreign carriers to wet-lease aircraft to US airlines for use on international routes between the US and any third country.

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... and the shortcomings

- It is imbalanced in terms of market access. There are few constraints to US carriers operating intra-European routes (5th freedom rights), while the economically comparable domestic US market is firmly closed to foreign airlines.
- It only alludes to the definition and implementation of a comprehensive, stable and consistent regulatory framework.
- It does not effectively address the discriminatory market practices that favour US airlines, such as the Fly America programme – the obligation for passengers travelling on US government business to fly an American airline.
- It does not adequately address the imbalance in ownership and control rules, which currently allows US investors to own a greater share of the voting stock of EU airlines (49%) than EU investors can of US airlines (25%).

The issues of ownership and control, and of foreign airlines' access to internal US routes ('cabotage'), are very sensitive to the US side. Both issues are highly politicised and of concern to organised labour, but both are also areas in which there is currently a major divergence between US and European regulation.

It is obvious, consequently, that the first stage agreement does not yet provide all elements of a level playing field for fair competition, and is only a first step towards the ultimate goal, a true EU-US Open Aviation Area. Taken in isolation, the first-stage agreement almost certainly delivers more benefits to US carriers than to European ones, although both sides have access to expanded market opportunities. For this reason, the Europeans are placing a great deal of faith in the second-stage process and have insisted upon 'claw-back' provisions which may nullify the effects of the first stage.

In terms of market access, the focus of the second-stage agreement should be the removal of restrictions on the ownership and control of EU and US airlines by EU and US investors.

Of more far-reaching importance, therefore, is the second stage, which should contain the sort of provisions this mature and competitive industry needs.

Towards a second stage agreement

Negotiations towards a second stage agreement should start in May 2008, 60 days after the entry into force of the Agreement. A review will take place after 18 months, at the end of 2009. Because of Washington's refusal to show more flexibility on ownership and investment rules in the first stage negotiations, the EU obtained a "suspension clause" in the final deal, which allows it to suspend US newly obtained access rights if the US does not take further steps towards opening up its domestic market and loosening its rules on foreign investment and ownership within 12 months, by end-2010.

Ownership and control

Of primary importance from the European point of view is the question of airlines' freedom to provide services within the broader Open Aviation Area (OAA). This includes the reciprocal freedom for airlines on either side of the Atlantic to invest in, acquire or establish other airlines throughout the OAA. It also involves the freedom for them to operate services on their own account within the Area.

The focus of the second-stage agreement in terms of market access, therefore, should be the removal of restrictions on the ownership and control of EU and US airlines by EU and US investors. Removing the current restrictions would be entirely consistent with the Framework Agreement concluded at the EU/US summit in April 2007, which called for the removal of unnecessary investment barriers between the EU and US.

A real EU-US Open Skies agreement would be the most dramatic development in the liberalisation process since the 1992 creation of the single market for aviation. In the same way, Open Skies should pave the way to market opportunities and entrepreneurial innovations which are bound to be beneficial to passengers and the economy on both sides of the Atlantic.

Facilitating private investments into airlines might not have an immediate effect.

Experience suggests that a liberal framework can be both a requirement and facilitator of entrepreneurial innovation: the total liberalisation of European airlines in 1992 gave rise to new

services, allowed the low-cost carrier model to flourish, and triggered further product and price innovations across the board.

A real EU-US Open Skies agreement would be the most dramatic development in the liberalisation process since the 1992 creation of the single market for aviation, where nationality rules were made obsolete across a market of 12 states, since expanded to 30 (EU 27 + Iceland, Norway and Switzerland). In the same way, we expect Open Skies to pave the way to market opportunities and entrepreneurial innovations which are bound to be beneficial to passengers and the economy on both sides of the Atlantic – benefits and openings of which we can only begin to assess the potential.

Lining up EU and US rules and practices

For airlines and their customers to maximize the benefits of a liberalised aviation area, an Open Aviation Area with the US must include as much regulatory cooperation, and indeed convergence, as can be achieved. There are bodies of regulation on the European and the US side which differ in substance and in application and they need to be reconciled for the project to work. It will undoubtedly be difficult to adopt a single set of rules, except in specific areas where they might be appropriate, but we are seeking a process of 'regulatory convergence' whereby fundamental differences in the two sets of rules are ironed out – on issues as crucial as security, safety, air traffic management systems, the environment, and the application of competition rules: The potential for sensible harmonisation is huge.

This has some obvious advantages for passengers. So far, for example, divergent security measures have been a source of hassle for the travelling public, and unnecessary costs for the airlines. Development of one-stop security, whereby transfer passengers, luggage and cargo would be exempted from any additional security measures when travelling to/from the US, has long been advocated by AEA, and the European Commission expects to reach such an agreement by the end of 2008.

The role of the Joint EU/US Committee established under the first stage agreement will be to ensure that the discrepancies resulting from different regulations do not hinder the reciprocal and non-discriminatory application of the general guidelines of the agreement.

AEA is engaging with both the EU institutions and its North American counterpart ATA (Air Transport Association), to ensure convergence and practical collaboration on issues as crucial to airlines and their passengers as security, safety and the environment.

AEA remains committed to a broad-ranging Open Aviation Area. Liberalisation tends to deliver efficiency and consumer choice; dismantling some barriers, as in the first-stage Agreement, brings some benefits but not necessarily to all stakeholders. The more barriers are dismantled, the greater the benefits and the more widely they will be spread.

The Association of European Airlines

The Association of European Airlines (AEA) brings together 33 European established service and scheduled network carriers. These collectively carry 346 million passengers and 6 million tons of cargo each year, operating 2,540 aircraft serving 605 destinations in 161 countries with 11,030 flights a day. They provide around 375,600 jobs directly, and generate a total turnover of EUR 75 billion.

For more information: Contact Françoise Humbert, tel. +32 2 639 89 93 – Email francoise.humbert@aea.be, or David Henderson, tel. +32 2 639 89 72 – Email david.henderson@aea.be.