AN OVERVIEW OF THE AIR SERVICES AGREEMENTS CONCLUDED BY THE EU
AN OVERVIEW OF THE AIR SERVICES AGREEMENTS CONCLUDED BY THE EU

Abstract

Eight years of EU external aviation policy have produced mixed results. Pillar 1 agreements have indeed largely contributed to restoring the bilateral agreements concluded by the Member States to legal certainty, but some of our key partners still do not accept the principle of EU designation. The agreements with neighbouring countries (Pillar 2) benefit the European low-cost carriers but it is difficult to conclude that they have significant impact on market growth. As for the Open Aviation Area agreements (Pillar 3), only two are applied and they are far from having achieved their main objectives. In this context, the major European network carriers call for a review of this policy.
CONTENTS

FOREWARD 5

THE AUTHORS 7

LIST OF ABBREVIATIONS 9

GLOSSARY 11

PART I: ANALYSIS OF THE CONTENTS OF THE OPEN AVIATION AREA AGREEMENTS CONCLUDED BY THE EUROPEAN UNION 15

HEADLINE FINDINGS AND CONCLUSIONS 15

1. INTRODUCTION 17
   1.1. Policy setting 17
   1.2. Pros and cons of negotiating at EU-level 17
   1.3. Overview of political and economic effects and impact 18
   1.4. The open aviation agreement model 21

2. THE PILLAR THREE MANDATE AND THE OPEN AVIATION AREA CONCEPT 23
   2.1. Setting and challenges of the OAA concept 23
   2.2. Strategic and tactical approaches to pillar 3 negotiations 23
   2.3. Policies of the United States and Canada 25
   2.4. Policy trends in the EU likely to impact future OAA negotiations 27

3. MAJOR FEATURES AND IMPACT OF THE EU-US AIR TRANSPORT AGREEMENT 29
   3.1. Provisions 29
   3.2. Impact of the EU-US ATA 32
   3.3. The EU-US ATA as context and precedent for us policy 34

4. MAJOR FEATURES AND IMPACT OF THE EU-CANADA AIR TRANSPORT AGREEMENT 37
   4.1. Provisions 37
   4.2. Impact of the EU-CANADA ATA 40
   4.3. The EU-CANADA ATA as precedent for Canadian policy 43

PART II: OUTCOME OF THE AIR SERVICES AGREEMENTS CONCLUDED BY THE EUROPEAN UNION 45

EXECUTIVE SUMMARY 47

1. HISTORICAL BACKGROUND 51

2. MEASURING THE OUTCOME 55
   2.1. Objective 1: To bring agreements into line with EU law, maximising the potential of the single market 55
   2.2. Objective 2: To advance an agenda for reform internationally, aimed at stimulating air services and increasing international investment in the industry 56
   2.3. Objective 3: To ensure that effective competition is preserved and promoted in order to spread the economic benefits to consumers 59
2.4. Objective 4:
To guarantee high standards of safety, security, environmental protection and passenger protection in the EU and promote them worldwide

PART III: ELEMENTS OF A FUTURE EXTERNAL AVIATION POLICY

EXECUTIVE SUMMARY
1. INTRODUCTION
2. IMPORTANT ROLE OF EUROPEAN NETWORK AIRLINES
3. LESSONS FROM THE PAST
4. A PARTICULAR “CASE STUDY” FOR INSUFFICIENT RESULTS IS THE RELATIONSHIP BETWEEN THE EU AND THE USA
5. A REVIEW OF THE EXTERNAL RELATIONS POLICY IS CALLED FOR.
6. ABSENCE OF AN INTERNATIONAL LEVEL PLAYING FIELD
7. NEED TO REVIEW EU TRADE DEFENCE INSTRUMENTS
8. INTERNATIONAL STANDARDS AND NORMS ARE REQUIRED
9. RECOMMENDATIONS

ANNEX 1:
Evolution of air traffic with or without an EU agreement

ANNEX 2:
Capacities offered with or without an EU agreement

ANNEX 3:
EU airports operating flights to/from third countries with or without an EU agreement

ANNEX 4:
The freedoms of the air
FOREWORD

This overview of the Air Services Agreements concluded by the EU has been composed by practitioners. Both were, notably, responsible for such international aviation agreements for, respectively, the US and the French administrations.

The Association of European Airlines (AEA) which represents major European network carriers has also contributed to the overview as, in the end, airlines are the primary 'users' of these agreements¹.

The European Parliament shall consent to the conclusion of the Air Services Agreements by the EU pursuant to Article 218 of the Treaty on the Functioning of the European Union. It could be worth noting that it appeared on the occasion of this overview that the Commission does not give the Parliament access to the minutes of the Joint Committees established by these agreements.

This refusal seems inconsistent with the above obligation on the Parliament and would certainly merit further legal analysis.

¹ Of course, also the European Low Fares Airline Association (ELFAA) has been encouraged to contribute to this overview.
THE AUTHORS

PART I: ANALYSIS OF THE CONTENTS OF THE OPEN AVIATION AREA AGREEMENTS CONCLUDED BY THE EUROPEAN UNION

Erwin von den Steinen has performed or participated in more than 40 EU air transport policy studies since 1990, dealing with regulation of the internal but especially of the external markets in regions such as North America, Russia, the Mediterranean, East Asia, Southeast Asia, Africa and South America. A former US diplomat and air transport negotiator, he is also the author of National Interest and International Aviation (Kluwer Law, 2006), a study which focuses on North Atlantic aviation policy and regulatory challenges. His business has been based in Germany since 1998.

PART II: OUTCOME OF THE AIR SERVICES AGREEMENTS CONCLUDED BY THE EUROPEAN UNION

Claude Probst has spent all his professional life in civil aviation, dealing with either operational (head of the air navigation services in New Caledonia; Manager of Lyon Airport) or regulatory matters. As the Head of the International and Economic Affairs of the French Directorate General for Civil Aviation he was responsible for, in particular, the negotiation of bilateral air services agreements. From 1993 he was in charge of aviation safety and security, air traffic management and air passenger protection within the European Commission. In 2004, Claude Probst was appointed to the post of Rulemaking Director of the newly established European Aviation Safety Agency. He retired in 2008.

PART III: ELEMENTS OF A FUTURE EXTERNAL AVIATION POLICY

The Association of European Airlines was established 60 years ago. It brings together 32 major airlines.
## LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>ASA</td>
<td>Air Services Agreement</td>
</tr>
<tr>
<td>ATA</td>
<td>Air Transport Agreement</td>
</tr>
<tr>
<td>EASA</td>
<td>European Aviation Safety Agency</td>
</tr>
<tr>
<td>EC</td>
<td>European Commission</td>
</tr>
<tr>
<td>ECAA</td>
<td>European Common Aviation Area</td>
</tr>
<tr>
<td>ETS</td>
<td>Emissions Trading System</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>ICAO</td>
<td>International Civil Aviation Organization</td>
</tr>
<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
</tr>
<tr>
<td>MS</td>
<td>Member State</td>
</tr>
<tr>
<td>OAA</td>
<td>Open Aviation Area</td>
</tr>
<tr>
<td>US</td>
<td>United States of America</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
</tbody>
</table>
GLOSSARY

**Bermuda Agreements**
The US-UK bilateral Air Transport Agreement of 1946 (Bermuda I) was a compromise between the liberal American views and the 'state-controlled' British system. It has served as a model all over the world for almost forty years. The more restrictive US-UK bilateral of 1976 (Bermuda II) has never been such a success.

**Freedoms of the Air**
The rights granted by the states to international commercial aviation as codified by the ICAO. There are nine rights ranging from 'overflight' (First Freedom) to 'cabotage' (Ninth Freedom). *(See Annex 4).*

**Open Aviation Area Agreement**
An EU Open Aviation Area Agreement aims at removing all restrictions on air services (as does the US Open Sky model) and also at establishing a 'regulatory convergence' to 'expand' as much as possible all EU standards related to air transport, including rules on cabotage or foreign investments. None of the 2 OAA Agreements implemented so far has led to the setting up of a true Open Aviation Area.

**Open Sky Agreement**
An US Open Sky Agreement removes all restrictions on routes, capacity and pricing to allow airlines of the contracting states reciprocal unlimited market access. The 'regulatory convergence' is nevertheless not the intention. Cabotage and foreign investments, notably, remain under national regimes. So far the US has concluded over 100 Open Sky Agreements without regard to the size or commercial importance of its partners.
MAJOR FINDINGS

- Pillar 1 Agreements have largely achieved their objective, i.e. to bring the bilateral agreements concluded by the Member States into line with EU law and restore them to legal certainty. This does not add any new traffic right but secures the position of EU carriers abroad, facilitates the consolidation of the European aviation industry and allows low-cost carriers to access new markets that some Member States could have been reluctant to open to them. However:
  
  o Some major partners, such as Russia, China, India and South Korea, still not accept the principle of EU designation.
  
  o Some Member States impose on airlines from other Member States an establishment in their territory as a condition to be eligible for the EU designation clause. This seems to contradict the freedom to provide services.

- Pillar 2 Agreements which contribute to the implementation of the European Neighbourhood concept and aim to extend the EU Single Aviation Market are largely supported. However:
  
  o It is difficult to conclude that these agreements have had significant impact on market growth as traffic data are similar for countries with or without such agreements.
  
  o The transitional mechanisms they contain do not encourage sufficiently the partner countries to conform to the EU acquis. In the case of the ECAA Agreement these mechanisms even hamper the proper implementation of the acquis.

- Pillar 3 Agreements with the United States and Canada are the only Open Aviation Area agreements that so far have been concluded and applied. However, none of them has resulted in a true Open Aviation Area yet. Actually, the 'regulatory convergence' provisions they contain - which cover areas such as consumer protection, social rights, investment freedom and environmental protection - are rather empty and far from implementation (not to mention the disputes over ETS or some security related issues). And the US and Canadian rules on cabotage or foreign investments (i.e. the major EU objectives) are left untouched. Interestingly, the U.S. Administration characterizes the agreement with the EU as an 'Open Sky agreement'.
  
  o With few exceptions the Agreement with the US did not add much to market access as the market was already very open through the former bilateral agreements. Under this Agreement, however, 'airlines of the EU enjoy an equal or superior market access position to that available to airlines of any other partner of the United States.'
  
  o Compared with the former bilateral agreements, the Agreement with Canada has created new opportunities for European carriers. However it 'does not yet achieve the same level of rights for the EU industry in Canada as do some dozen other Canadian ASA's for operators from other states - many of them smaller partners but also notably including the United States as well as EEA Members Switzerland and Iceland.'
  
  o In view of traffic data it is not possible to conclude that these two agreements have had a significant impact on the air transport market.
The EU side expects these two agreements will evolve and the 'regulatory convergence' will be implemented to lead to true Open Aviation Areas. This development should be facilitated by the Joint Committees created by these agreements 'that are likely to exert influence on both day-to-day conduct of business and new policy development'.

- EU low cost carriers have benefited from Pillar 2 Agreements as they 'are very competitive in the short and medium range markets'. However, the major European network carriers call for a review of the three Pillars of the EU external aviation policy 'because in economic terms they have so far not fulfilled expectations'.
PART I

ANALYSIS OF THE CONTENTS OF THE OPEN AVIATION AREA AGREEMENTS CONCLUDED BY THE EUROPEAN UNION

by Erwin von den Steinen
HEADLINE FINDINGS AND CONCLUSIONS

The Open Aviation Area (OAA) agreements negotiated at EU-level with the United States and Canada have made the North Atlantic market more competitive and introduced new areas of air services regulation, such as provisions on consumer and social rights and protection of the environment. Though some important objectives were not met, these agreements have, especially in the Canadian case, significantly broadened and opened market access rights for EU carriers, thereby adding value in comparison to the situation that existed previously under bilateral agreements with individual Member States.

This said, the degree of liberalisation achieved at EU-level with Canada does not yet fully match freedoms already available under three Member State bilaterals or achieve rights contained in 10 other bilaterals with Canada to operate to third countries. This outcome appears to result from a scheme to hold back new third country passenger rights pending liberalisation of Canada's law restricting foreign ownership and control of airlines.

Certain EU objectives were not fully realised - notably with respect to removal of barriers to investment in North American airlines - which had been a primary goal, especially in the US negotiation. Thus a number of EU stakeholders feel that the EU/US Air Transport Agreement did not add significant value in comparison to the US Open Sky agreements that already existed with many Member States.

Regarding provisions in the new regulatory areas, neither Canada nor the US have yet accepted specific content in most cases that achieves clear harmonisation with EU standards. Neither agreement, for example, reflects acceptance of the EU's planned imposition of an ETS system. This said, the establishment of a structured dialogue in the form of Joint Committees can become an important contribution to the safety and efficiency of North Atlantic aviation.

An underlying question raised by the negotiating process in these cases is the fact that the two negotiations (performed in the same region and in the same time frame) were conceived, mandated and executed as independent bilateral negotiations. While the EU Team generally maintained a similar policy line, textual and structural differences in the two agreements are evident and in some cases striking.

Thus a question that might be considered in the Parliamentary review is whether: The EU should formulate its mandates on the basis of a standard set of goals (that could be reflected in a model EU-level air transport agreement); or if EU-level mandates should be thought of as individual cases and lead to the situational approach practiced by Canada.

Both the US and the Canadian Agreements contain framework provisions that enable movement to an Open Aviation Area on the North Atlantic in all areas except cabotage rights. This said, the full implementation of both agreements depends on legislative actions by the US Congress and the Canadian Parliament to amend their laws on foreign investment to remove barriers against national treatment of foreign investors and thus end an historic protectionism that does not apply to other areas of business and trade.

Thus an interesting question may be: What role can the European Parliament play in promoting a greater level of common understanding of the rules needed to advance shared interests of the Parties? Just as Joint Committees can and should address these issues
using specialised expertise as well as general coordination, there can also be basic issues of policy that must be discussed politically to build an underlying consensus. Thus periodic (and perhaps even systematic and thematic) exchanges among competent Parliamentary Committees on both sides of the Atlantic can lead toward better common understanding, common postures and, ideally, normative standards in analysing the issues - and in dealing with stakeholders (who would thus also be encouraged to coordinate their interests when addressing what are often in fact problems and concerns that are shared across political boundaries).
1. INTRODUCTION

1.1. POLICY SETTING

Air transport services are the key to global connectivity and provide a vital public good for the economy and society of the EU. Until recently, all market access rights for such services to states outside the EU have been governed by air services agreements (hence ASA's) between the individual EU Member States (MS) and the external partners.

The 2002 Decision of the Court of Justice of the European Union (CJEU) that certain provisions of the ASA's of Member States were not in conformity with EU law has led to the development of an EU air transport policy that, as articulated in Conclusions reached by the Council of Ministers in June 2005, has resulted in negotiations under the so-called three Pillars along the following lines:

- **Pillar 1 agreements modify existing air services agreements between Member States and external partners.** That is, a Pillar 1 agreement inserts the so-called EU clauses to ensure conformity with EU law but does not replace the ASA between a MS and a third country. Such amendments are achieved: either through bilateral negotiations conducted by the individual MS; or by means of a so-called Horizontal Agreement in which the Commission agrees with the third country to adopt the EU clauses and thereby is able to conform up to 27 single ASA's at one stroke.

- **Pillar 2 agreements establish a comprehensive aviation relationship at EU-level with states which geographically are in, or border on, continental Europe but are not (or not yet) members of the EU.** Such partner states agree to conform their aviation regulations to the acquis communautaire. Thus a Pillar 2 agreement effectively works to extend EU standards. This effect is well-expressed in the title of the "European Common Aviation Area (ECAA)" agreement of 2007. Thus a Pillar 2 agreement suspends and effectively replaces all or most of the provisions of existing bilaterals between the MS and the affected third country. Issues that arise will in future be addressed by Joint Committees at EU level rather than between Aeronautical Authorities of the MS and the external partner.

- **Pillar 3 agreements establish a comprehensive relationship at EU-level with countries beyond the so-called European Neighbourhood.** Political willingness by such countries to adopt the acquis is unlikely. Thus regulatory convergence must be pursued by harmonising rules on market access and public interest quality controls.

Whereas the Commission enjoys a general mandate to negotiate with any external partner under Pillar 1, its authority to negotiate Pillar 2 and 3 agreements requires individual mandates from the Council of the European Union.

1.2. PROS AND CONS OF NEGOTIATING AT EU-LEVEL

The EU has created an integrated continental market with a high level of common economic policy toward the rest of the world. The EU's international negotiating partners, while they tactically may still seek to exploit so-called divide-and-conquer strategies in approaching individual EU stakeholders and Member States, must also focus on the EU market as a whole to assure fair and efficient market access for their companies and citizens. Thus even
physically small countries, such as Singapore, who have negotiated ASA’s with virtually every MS, seek to establish a direct aviation relationship with the EU.

This said, the need for having an ASA at all is the commercial ability to establish viable direct air services. Many countries do not possess the traffic demand to justify frequent services between their airports and multiple points (i.e. cities) in the EU. In such cases, the traditional ASA with several or even just one MS (that may have particular ties and expertise in dealing with the country in question) may be the most efficient way to regulate the relationship.

An EU-level agreement also will be hard to implement if the external partner is unwilling to remove quantitative restrictions on the numbers of routes to be flown and the volume of services to be operated, since an EU-wide procedure would then be required to allocate scarce capacity among interested operators and communities. Thus it makes sense that, as has been followed in the Pillar 2 and 3 negotiations thus far, that at minimum market access restrictions be removed on all direct operations between points in the EU and the external partner state as a condition of coming to an agreement at EU-level.

### 1.3. OVERVIEW OF POLITICAL AND ECONOMIC EFFECTS AND IMPACT

#### 1.3.1. Level of institutional support for EU-level negotiations

Recent work done separately for the European Commission shows that well-defined views exist among industry stakeholders and Member States as to the quality of EU-level negotiations under the respective Pillars to date. These views can roughly be summarised as follows:

- **Pillar 1**: EU efforts have mostly been successful and impressive.
- **Pillar 2**: Stakeholders, virtually without exception and with but a few reservations in individual cases, strongly endorse the European Neighbourhood concept. Consumers have in particular benefitted as the EU's low cost carriers are very competitive in the short and medium range markets.
- **Pillar 3**: These negotiations have been the most difficult and have led to criticism. There are differences in view among Member States as to what the policy should be, just as there is an underlying general view that results obtained, especially in the US negotiations, have not yet significantly improved the competitive position of the EU's long haul operators.

#### 1.3.2. Legal and market access impact of Pillar 1 agreements

Stakeholders and commentators within the Commission have emphasised the "legal" importance of putting all air services agreements with external partners into conformity with EU law. This concern, which was also an excellent tactical posture to take in

---

2 A number of states still insist on limiting the numbers of points to be served and the amount of flying that will be permitted and require advance submission of proposed schedules (“pre-determination of capacity”).

3 Reference is made to a Symposium conducted by the European Commission on March 5, 2012 in Brussels in the context of a Study of EU external aviation policy conducted by Booz & Co. in which the author led the policy research.

4 *Id.* The Commission’s website also reports global progress on Pillar 1, which is updated from time to time.
negotiations with third parties, downplayed the commercial significance of Pillar 1 agreements - as it implied that concessions to the other side were not relevant, indeed that even asking for them was not very reasonable.

In fact, however, obtaining EU designation rights is very helpful in facilitating the network development and consolidation of the major EU-carrier-led alliances. Under the typical ASA between a Member State and an external partner, the Pillar 1 agreement can obtain at one stroke what were formerly very scarce seventh freedom rights for passenger as well as cargo to/from the third country concerned to/from 26 additional states in the EU.

**1.3.3. Strategic and political benefits of Pillar 2**

If fully realised, a common aviation area integrating all airspace from the Caspian Sea and all states bordering on the Mediterranean - operated under uniform standards of safety, security, protection of health and environment and efficiency - will greatly enhance the EU’s strategic position in global aviation. There appears to be solid support across all EU industry stakeholders and Member States for pursuing this policy with the only question being: how far eastwards and southwards to extend the Neighbourhood? The first new EU-level agreements achieved - namely with Morocco and with Western Balkan states in the context of creating the European Common Aviation Area (ECAA) - have led to significant market growth and considerable consumer surplus (in the form of lower fares) as well as strong EU carrier market share.

**1.3.4. Pillar 3 issues and general results**

This Subsection briefly reviews the results obtained and pursued by the EU in its five Vertical Mandate negotiations to date with focus on market access provisions. The US and Canada agreements, which (as of October 2012) are the only two Pillar 3 agreements being implemented, are reviewed more comprehensively in dedicated Sections of the Paper.

**1.3.4.1. The United States**

The EU/US Air Transport Agreement of 2007, as amended by the Protocol of 2010, provided the following traffic rights:

1. Removal of all restrictions on direct services between the signatories (3rd and 4th Freedom rights);
2. Removal of all restrictions on all services connecting to third countries (5th and 6th freedom rights) that operate from or via the territories of the parties;
3. Removal of restrictions on EU all-cargo operations between the United States and third countries, i.e. on services that do not require a stop in the EU (7th freedom);
4. Removal of restrictions on all EU carrier operations to the US from Member States in which the individual operator is not domiciled or owned that, prior to US acceptance of the EU Clauses, would mostly have been unauthorised 7th freedom operations;\(^5\)
5. Removal of nationality restrictions on operations to the US by a third country carrier in which EU interests enjoy ownership and control.

\(^5\) Several MS bilaterals concluded prior to 2007 provided for 7th Freedom all-cargo rights. In one case, the US/UK agreement, UK carriers also received limited rights to provide passenger combination services between non-UK gateways in Europe and the US.
1.3.4.2. **Canada**

The EU/Canada Air Transport Agreement of 2009 provided the following traffic rights:

1. Removal of all restrictions on direct services between the signatories (3rd and 4th Freedom rights) and 5th Freedom all-cargo rights;
2. Conditional liberalisation of any new passenger combination service rights to third countries (subject to changes in Canadian law on investment);
3. Removal of restrictions on all direct EU carrier operations to Canada from Member States in which the individual operator is not domiciled or owned that, prior to Canada's acceptance of the EU Clauses, would have been 7th freedom operations.

1.3.4.3. **Brazil (awaiting signature)**

The EU/Brazil Air Transport Agreement of 2011 (whose implementation has been delayed pending Brazilian signature) provides for the following traffic rights:

1. Phased removal over a three year period of all restrictions on direct services between the signatories (3rd and 4th Freedom rights);
2. New traffic rights to third countries for all-cargo operations only;
3. Removal of restrictions on all direct EU carrier operations to Brazil from Member States in which the individual operator is not domiciled or owned that, prior to Brazil's acceptance of the EU Clauses, would have been 7th freedom operations.

1.3.4.4. **Australia and New Zealand (still under negotiation)**

By means of individual Horizontal Agreements, Australia and New Zealand have separately agreed to the EU Clauses. Reportedly they have also indicated willingness to provide EU investors rights to own domestic airlines not directly engaged in international operations. However, they insist on 5th Freedom rights which reportedly the EU side has been unwilling to extend. Thus the EU in these instances has held back from creating an 'Open Aviation Area' relationship.

1.3.5. **Summary observations on Pillar 3 negotiations and the question of value-added**

The foregoing summaries of the results of the five Vertical Mandates suggest a discernible downward trend in the degree of liberalisation achieved or sought after which is especially evident in the area of fifth freedom rights. The level of liberalisation, however, is not be confused with the question of how much value has been added by a particular agreement.

Value-added depends entirely on a before-and-after comparison. In this sense, the Canada and the Brazil agreements will - in comparison to the most liberal EU agreement (with the US) - have added more value, since they provide more new opportunities over the status quo ante.
1.4. THE OPEN AVIATION AGREEMENT MODEL

The primary focus of this Briefing Paper is to consider the results of EU-level air transport negotiations aimed at establishing an Open Aviation Area (hence OAA). Thus it evaluates the agreements with the United States and Canada, which are the only OAA agreements that so far have been concluded and applied.

The OAA concept constitutes a major innovation in the negotiation of international agreements. Essentially it invites the extension of the rules of the EU's internal market as defined by the three Packages of the 1990's to a wider geography. That is, partners like the United States and Canada would be asked to participate in establishing an effective North Atlantic Neighbourhood in which air transport would be subject to essentially the same rights and responsibilities as exist today within the EU and its ECAA partners.

Such a construct implies that airlines would enjoy greater opportunities to compete (and also cooperate/integrate through reform of ownership rules) but also be subject to more extensive responsibilities. Practically speaking this means either accepting the EU's *acquis communautaire* as it governs the conduct of air transport services in all aspects (the Pillar 2 model) or agreeing to rules and procedures that effectively bridge and harmonise the legislation and regulatory practices of all Parties.
2. THE PILLAR THREE MANDATE AND THE OPEN AVIATION AREA CONCEPT

2.1. SETTING AND CHALLENGES OF THE OAA CONCEPT

An OAA relationship, if achieved in line with the original idea:

- Aims to establish a regulatory framework (including quality controls) at international level that parallels the structure of the EU's internal market as much as possible.
- Seeks to create, therefore, in regional markets (such as the European Neighbourhood Policy region or with North America) a de facto extension of the EU market framework which would:
  - Remove all traditional market access barriers associated with international regulation and allows airlines to compete freely within and across borders in services that have in many cases been closed to them in the past.

For example, very few ASA's countenance the formal exercise of cabotage rights, and the overwhelming majority (including the Open Sky agreements of the US) expressly exclude such rights from the coverage of the agreement. Similarly, national treatment rights of foreign investors remain very limited, despite positive discussions of the possible benefits in the International Civil Aviation Organization (ICAO). 6

Many if not most countries in the world still have national laws requiring majority ownership and control by themselves or their nationals as a condition of being licensed to operate commercial air services. Also transport services have been typically exempted from the coverage of Friendship, Commerce and Navigation (FCN) treaties and thus market access rights have been exchanged bilaterally under independent agreements.

The traditional bilateral Bermuda air services agreement will also tend to limit, often severely, the exercise of traffic rights on routes to third countries that lie between or beyond the territories of the parties.

2.2. STRATEGIC AND TACTICAL APPROACHES TO PILLAR 3 NEGOTIATIONS

A finding of this Paper is that the execution of EU Pillar 3 negotiations so far has produced inconsistent as well as positive results. The underlying policy may not yet reflect a robust consensus within the EU on priorities, strategy and tactics. Thus a serious question facing policy and law makers is whether the EU wishes to pursue a firm general model for negotiating with all external partners or whether if prefers to adapt the rules to perceived needs and priorities of individual markets and to tailor its negotiating mandates accordingly7.

---

6 ICAO is the specialized agency of the United Nations established by the Convention on International Civil Aviation (also known as Chicago Convention) signed 7 December 1944 to which 190 States are currently contracted.

7 Texts of mandates (which may include negotiating instructions as well as negotiating authority) are not made public. However, the OAA concept, as pursued with the US and - despite certain differences in result - also with Canada, has been publically stated and debated.
As the process has evolved in the past seven years, it has become evident that:

- EU airlines' perceptions of their competitiveness vary considerably according to the geography;
- That is, policies welcomed for the North Atlantic market have less support when considered for other world regions.

Stresses have emerged in the form of pressure to maintain controls on market access of at least some external competitors or conversely to accept delays in opening third country markets if the external partners will only agree to liberalisation in phases. While the Commission has, wisely in the author's view, sought to maintain an underlying general consistency of both the policy and its execution, it has also been pushed to alter cases to fit perceived circumstances.

### 2.2.1. Phasing strategies

The experience of the past seven years has led increasingly to the concept of phasing as a key procedural tool to enable both progressive liberalisation of market access and the convergence of regulatory quality controls. The idea of phasing of course enjoys a strong history in modern policy making - especially but not only in the EU.

In historic bilateral air transport regulation, phasing has on occasion also played some role but to a far more limited degree. That is, traditional air services agreements typically created stable general rules for conducting business under which governments could, in less formal ways, agree or simply permit adjustments in route rights and service levels.

In contrast, in the EU's post 2004 agreements the role of phasing has had formal importance. We can see three motivations at work that have resulted in the use of phasing policy in each of the Pillar 3 agreements reached thus far.

- **Mandate compliance.** The test of negotiating success is the achievement of the mandate. When the external country refuses to accept mandated conditions it may be persuaded to accept a formula to enable their future acceptance so as to permit both sides to claim negotiating success.
- **Mollifying EU stakeholders.** Individual EU stakeholders may feel the proposed scope of market opening is too much or too little. For the former, delay through phasing provides reassurance; for the latter hope that restrictions will be lifted later.
- **Conditionality.** A growing feature of the new EU-level agreements (notably of Pillar 2 as well as Pillar 3) is to introduce conditionality mechanisms such as safeguard clauses as well as phased liberalisation.

### 2.2.2. Individuality of negotiated provisions and texts

In contrast to the US Open Sky policy (see Section below), EU-level negotiating strategy has resulted in significant differences in substantive content as well as procedural form among the agreements concluded so far. That is, rather than resulting in the same structure and content with few language deviations (as is the case among the ca. 100 US Open Sky agreements concluded since 1992), the EU agreements constitute a family of individual cases.
There are of course legitimate arguments for individualising agreements. Each market has unique qualities and each country has differences. However, doing so is likely to introduce complexity and even unclarity as well as stimulating a situational philosophy of negotiations in which even standard provisions can be opened up for debate and the overall policy pushed in the direction of *ad hoc* responses.

One consequence, already evident in the overview of strategies pursued in the five mandates granted thus far is that EU commitment to the OAA Concept has become progressively shaky; officials have begun to distinguish between "Comprehensive OAA Agreements" and (in the case of Brazil) simply "Comprehensive Agreements."

### 2.3. Polices of the United States and Canada

Both the United States and Canada have published policies to govern their conduct of international air transport relations. These policies - the *Open Sky* policy in the case of the US and the *Blue Sky* policy in the case of Canada - have certain attributes in common.

The two countries are, with Mexico, members of the North American Free Trade Area (NAFTA) and have also agreed an Open Sky agreement among themselves. This said, the policies of the two countries towards other partners also show significant differences in negotiating approach.

#### 2.3.1. The US Open Sky policy

Following US national airline deregulation in 1978, the US moved in stages to liberalise its relations with other countries. The current Open Sky policy was first manifested in the US/Netherlands air services agreement of 1992 and has essentially remained stable for the past 20 years. While the EU/US agreement introduced new elements and added considerable new text it has not, in the author's view, resulted in any fundamental changes from the US perspective.

Key attributes of the Open Sky policy are:

- Preventing governments and their aeronautical authorities from imposing limits on the numbers of destinations, capacities and routing of international services offered by qualified operators and from restricting freedom to offer competitive prices;
- While promoting competition, at the same time enabling cooperation by providing a framework for airlines to enter into alliance agreements subject to competition law review;
- Maintaining technical quality controls, for example in the form of strong safety and security articles;
- Otherwise maintaining national ownership controls on inward investment while taking a conditioned liberal view toward third party ownership of airlines domiciled in other countries; and finally
- Opening the US market to airlines of any country, regardless of size or commercial importance, willing to extend equal rights to US carriers.
Since the US, from its side, no longer uses market-importance criteria in deciding whether or not to liberalise relations with other countries willing to do so, the Open Sky agreements all have very similar structure and texts. This said, the US also still has a number of more restrictive agreements with States who want to control market access. China and Russia are examples. In such cases, the US side will seek allocations of new rights in future years in line with an agreed schedule so as to enable predictable growth opportunities.

2.3.2. The Canadian Blue Sky policy

Canada's decision to pursue liberalisation of air transport relations as a general matter (formally reached in 2006) is of recent date, though the 1995 agreement with the US demonstrated the large economic benefits of removing dirigiste controls. Previously Canadian policy, while it also demonstrated clear concern for the interests of consumers, focussed on protecting market position of its airlines.

This said, the Blue Sky policy, as enunciated by Transport Canada, places significant new emphasis on liberalisation. This policy adopts the following approach to international negotiations:

"Canada will proactively pursue opportunities to negotiate more liberalized agreements for international scheduled air transportation that will provide maximum opportunity for passenger and all-cargo services to be added according to market forces. As a primary objective, Canada will seek to negotiate reciprocal "Open Skies"-type agreements, similar to the one negotiated with the U.S. in November 2005, where it is deemed to be in Canada’s overall interest."9

Since 2006, in addition to the Comprehensive Agreement with the EU of 2009 and the 2005 agreement with the US, Canada has liberalised many of its air services bilateral agreements and has characterised at least six of these as "Open Sky-type agreements."10 In many agreements, however, it has retained certain forms of control over market access.

An analysis made for the Canadian Parliament in 2010 reports critical reactions by stakeholders and analysts that "Blue Sky does not go far enough to provide access to the air transport market in Canada...Canada’s overall air transportation policy remains, to a degree, protectionist and... that Blue Sky, rather than being an Open Skies-type policy, is a modest evolution of the previous bilateral regime, with liberalization provisions in agreements that are only modestly incremental to previous agreements and in many cases, not yet implemented."11

A 2008 Study of Canadian policy commissioned by the Province of British Columbia that evaluated 73 Canadian bilaterals classified 45 of these as "restrictive".12 While a number of these have been liberalised in recent years, it is clear that the new Canadian policy still considers the competitive situation in the individual case.

8 In the period 1978-1992, US industry stakeholders were politically able to block the US Government’s granting of unrestricted gateway rights using the argument, especially with regard to smaller countries which might have only a few or just one significant airport, as being an unbalanced exchange.
9 See Transport Canada website.
10 United Kingdom, Ireland, Switzerland, Barbados, El Salvador and New Zealand.
12 http://www.th.gov.bc.ca/OpenSkies/documents/081227_IITL_Appendix.pdf
This said, Canada, like the United States, gives consumer interests a high priority. It has, for example, been developing a much more open policy for dealing with small markets, which suggests that its airline industry, in the absence of competitive threat, cannot easily block agreements simply on the basis that "the market does not offer opportunities we now wish to pursue."

2.4. POLICY TRENDS IN THE EU LIKELY TO IMPACT FUTURE OAA NEGOTIATIONS

Before proceeding to more detailed analysis of the stages of liberalisation of the North Atlantic markets we should perhaps also reflect briefly on the priorities of the EU side as they seem to be evolving and pose the concrete question: does Europe itself remain fully behind the OAA model? Here we can put the following questions:

- How many Member States have demonstrated clear philosophical commitment to deregulation of market access controls by adopting a de facto OAA model in their bilateral negotiations with third parties? Clearly this has been the case with the United Kingdom, which has taken a systematic position in this regard. Others, however, while they may have taken much more open approaches than in previous years, have in the author's judgment often been selective - along the lines of the Canadian approach as described above.

- To what degree should the content of EU-level agreements made under vertical mandates be tailored to individual external markets or to what extent should the EU insist on common standards across all of its agreements?

- In examining the results of the US and Canadian negotiations (below) can we: a) determine positive precedents that should be applied generally to future negotiations; b) identify problems that require a different approach; or c) conclude that different criteria, for example other than market access issues, require more emphasis?

A selective position-taking may be justified **tactically**. That is, one-sided market opening with external states that practice strong industrial policies in international trade aimed at creating constant surpluses in their current accounts is likely to impose more costs than benefits.

On the other hand, **strategically** there is strong benefit in arriving at clear, basic and durable positions that both reflect:

- internal agreement on what the EU interest is; and
- thereby make clear to external states what is fundamental and important.

This means defining all core positions in clear and consistent language and arriving desirably at a model agreement that would enjoy a position similar to that of the US Open Sky policy as a known quantity. Failure to do so means that one may end up with a set of inconsistent agreements and in a position analogous to Canada, whose Blue Sky policy, while also taking consumer interests into account, expresses a commitment to liberalisation that can still be described as **situational**.
3. MAJOR FEATURES AND IMPACT OF THE EU-US AIR TRANSPORT AGREEMENT

This Section reviews major features of the current EU-US Air Transport Agreement (hence ATA) as negotiated in 2007 and amended in 2010; compares it to the status quo ante under the air services agreements of the US with the Member States; and considers to what degree this agreement represents change or innovation in US policy.

3.1. PROVISIONS

The EU-US ATA, including the new Articles 6bis and 17bis, has 28 numbered articles and 6 annexes that address both traditional areas of air services regulation - such as the classical forms of market access (routes, capacities and pricing) - and technical quality controls (safety and security) as well as innovative areas such as consumer protection, social rights, investment freedom and environmental protection. The agreement (like many other trade agreements reached by the EU with external partners) also creates a Joint Committee - an institutional form that has not existed under the previous bilaterals at MS level or in any US agreement.

As will be discussed below, the EU side in particular envisages that this agreement will evolve and that in particular the articles governing the newer areas of regulation and liberalisation will lead toward a true OAA. Areas to be reviewed include:

- Route and capacity rights;
- Ownership and control;
- Marketing, doing business and competition issues;
- Technical quality controls (safety, security, environment) and the Joint Committee;
- Consumer and traveller protection as well as social rights of employees; and
- Incentives to complete the liberalisation process.

3.1.1. Route and capacity rights

Unlike most classical air services agreements that typically have Route Annexes, the ATA in its Article 3 (Grant of Rights) provides a basic statement of route rights in the agreement itself, which provides complete liberalisation of the first six Freedoms of the Air - that is, with respect to international operations to and from the territory of the other Party to third countries as well as to the home market. It also removes all economic restrictions on capacity.

Article 3 also provides rights for all-cargo routes to third countries that do not have to connect the home market (Seventh Freedom). The Article does not provide rights to

---

13 In view of US legal inability to agree to opening of investment rights, the Parties agreed to suspend extension of new 7th freedom all-cargo rights for the US carriers only.
operate domestic services in the territory of the other Party (Cabotage) - an original goal of
the EU.

Importantly, the ATA, through its Article 4 (Authorisation), also obtained US acceptance of
EU Designation which enables EU airlines to operate services from points in the EU outside
their home Member State to the US (services which under the previous bilaterals with the
US would, as then-7th Freedom passenger operations, with only one exception, have not
been authorised before)\(^\text{14}\).

### 3.1.2. Ownership and control

Freedom of investment in the North Atlantic market has been a major goal of the EU which
enjoyed some sympathy in the US Administration but which was blocked in the US
Congress. Worker representatives in the US (notably the pilots' union) have lobbied
strongly against relaxation of national legal restrictions on foreign ownership and control of
US airlines. At first glance, the EU negotiating effort seems to have been frustrated. This
said, it is only fair to recognise that changes in the US position have occurred.

The US Administration, using the flexibility that existing US law does allow, has agreed not
to use powers available under its bilaterals with other states to reject designations made by
third, non-EU countries of airlines owned or controlled by nationals of the EU, the ECAA and
Switzerland. This means potential freedom to establish networks using Seventh Freedom
operations under full managerial control (assuming willingness of the third parties to accept
external investors).\(^\text{15}\) The pieces then missing (and they remain significant) are national
treatment rights in the US domestic market and the ability to exercise full control over
feeder operations to international networks.

### 3.1.3. Marketing, doing business and competition issues

The ATA provides for unrestricted pricing freedom (Article 13) as well as the classical rights
for marketing - such as setting up operations and cooperative arrangements in the territory
of the other Party (see Article 10, Commercial Opportunities). This Article also provides for
liberal ground handling and intermodal rights (to enable accountable door-to-door freight
services) as well as introducing new sections on franchising, branding, code-sharing and
leasing arrangements.

The ATA also introduces new language on competition regulation that recognises the
emergence of international alliances and creates framework for expanded coordination
among competition regulators. Importantly it also provides a formal framework in Article 14
for raising issues of government subsidies and supports - a provision that has not been an
explicit, independent part of the US Open Sky model.

The term "government support" is broadly and only indicatively defined and leaves room, in
the author's judgement, to raise issues in the Joint Committee concerning most if not all

---

14 A 1991 amendment of the US-UK Bermuda II agreement that permitted transfer of London Heathrow
operating rights to United and American Airlines also granted the UK certain frequency-limited rights to offer
direct services between other points in the EU and the US that did not have to stop in the UK. Subsequently,
the US also raised no barriers to designations made for airlines established but no longer owned and
controlled in Member States such as AT, BE, ES and NL.

15 So far there are no actual examples that would apply in North Atlantic air services. If, however, an
EU investor were to acquire an operator in, say Morocco (which the EU-Morocco agreement of 2006
authorises) such an operator would have full rights under the US-Morocco agreement. Similarly if EU
interests were able to invest in Asian or African carriers the US would have to accept such designations.
forms of relief that governments might provide airlines to improve their position in international markets\textsuperscript{16}.

3.1.4. Technical quality controls and the Joint Committee

The ATA contains Safety and Security articles whose texts go beyond those in the bilaterals being replaced as well as a new Environmental Article (see 2010 Protocol). Analyses of these specific provisions are performed in a companion Briefing Paper\textsuperscript{17}. An important general point is that these articles (as well as the Competition Annex and certain other sections of the ATA) reflect institutional changes which the ATA has introduced.

That is, the ATA, through its Joint Committee, has created both a general framework as well as identifying explicit areas of cooperation that invite the development of systematic institutional action to manage and solve issues arising in North Atlantic aviation at the EU-US level. For example, the Joint Committee is tasked to consider further issues of infrastructure such as modernisation of Air Traffic Management systems which heretofore have not been covered by conventional bilaterals.

3.1.5. Rights and protections of travelers and employees

These are new areas for international air transport regulation and are not covered, at least explicitly, in the traditional air services agreements. Even in the ATA, the texts are not yet fully developed. For example, the new Article 17bis (The Social Dimension) has a very short and general text and essentially just makes reference to the need for continuing and "regular consideration" by the Joint Committee.

Similarly, consumer rights and protection (topics which are given high priority in the internal regulations of the US as well as the EU) are, in Article 16, dealt with in a single sentence paragraph\textsuperscript{18}. A question, also suggested in the Terms of Reference (TOR's) for this Briefing Paper, is whether this approach is adequate or whether, in areas such data protection and privacy, further provisions at US-EU level may be needed? These do not exist in air transport agreements at present.

Such issues have been discussed elsewhere between the US and the EU in processes being applied by the Parties to ensure the physical security of international aviation as well as in the increasingly sensitive border controls. Such topics are also addressed in non-aviation forums and raise social and political issues.

In my personal judgement, the concerns expressed in the TOR's are extremely timely. Indeed, in my 2006 book, \textit{National Interest and International Aviation}, I made a strong recommendation that air services agreements should include a new provision to protect traveller rights - albeit not so much from the perspective of safeguarding privacy as much as from the concern that any actions by public authorities to restrain travel or travellers be subjected to oversight and timely reporting to the governments of the persons affected\textsuperscript{19}.

\textsuperscript{16} An interesting question is whether this Article provides any room for the EU to seek safeguards against the competitive impact of court proceedings in US carriers have been able use the US Chapter 11 reorganisation laws to create artificial insolvencies in which existing managements shed debt, expropriate shareholders and impose reductions on labour and retirement plan costs.

\textsuperscript{17} See Part II: the outcome of the ASAs concluded by the EU.

\textsuperscript{18} Indirectly of course sections of the ATA that regulate pricing, commercial opportunities and competition all reflect concern for consumer interests. Both partners also have detailed legislation defining rights of travellers to compensation for denied boarding and unjustified delays that provide a reasonably harmonised framework.

3.1.6. Incentives to complete the liberalisation process

The 2010 Protocol\textsuperscript{20} had the legal effect of removing the conditionality expressed in Article 21 of the 2007 Agreement (which gave the Parties the right to suspend the application of the "First Stage Agreement" if Second Stage negotiations did not result in agreement within 30 months). Thus, with the 2010 Agreement, a further stage is no longer a formal requirement for unconditional entry into force.

This said, the ATA as now amended continues to invite further modifications. In particular, the new Article 21 outlines specific tradeoffs that will take legal effect in two sets of circumstances in which laws of the Parties are modified:

1. Reform of US law on rights of investment: If the US removes its restrictions on foreign investment to permit ownership of US airlines by EU interests, the EU will:
   a) Extend reciprocal rights to US investors;
   b) Remove restrictions on new 7th freedom all cargo rights for US operators, and
   c) Grant rights for US carriers to operate 7th freedom passenger services from the EU to five third countries with the possibility of adding more countries.

2. Reform of EU law on imposition of local noise restrictions: If the EU and its Member States adopt legislation giving the European Commission the right of a priori review of any new noise-based operating restrictions at airports with more than 50,000 annual movements\textsuperscript{21}, the US will:
   a) Grant rights for EU carriers to operate 7th freedom passenger services from the US to five third countries with the possibility of adding more countries.

Article 21 is one of the most unusual provisions ever reached in an air services agreement. On the other hand, it also reflects a fundamental reality: the air transport system requires constant adaptation, and global leadership requires the key partners on the North Atlantic (still the world’s biggest air transport market) to cooperate actively to achieve such innovation.

3.2. IMPACT OF THE EU-US ATA

"Impact" can be measured in two ways:

- \textit{Quantitatively} in terms of changes in traffic patterns (such as new cities served) and traffic volume, and
- \textit{Qualitatively} in terms of changes in the conditions of doing business.

This paper will concentrate on the second area, but it may be noted that the period of coming-into-effect of this agreement - that is 2008 to present - has been one of recession or stagnation in most of the North Atlantic economies and not a period of growth of

\textsuperscript{21} This is precisely what the Commission proposed through Article 10 ("right of scrutiny") of the proposal for a regulation "on the establishment of rules and procedures with regard to the introduction of noise related operating restrictions at Union airports within a Balanced Approach" (COM(2011) 828 final of 1.12.2011). This proposal is to amend the current system laid down by Directive 2002/30/EC.
An overview of the air services agreements concluded by the EU

Demand that might have stimulated airlines to exploit new opportunities. Thus qualitative analysis aimed at comparing the situation before and after the ATA may also be the most relevant.

3.2.1. The status quo ante: Regulatory situation under the MS bilaterals with the US

Prior to adoption of the ATA, most aspects of US-EU air transport relations were regulated via air services agreements between the US and the individual Member States, which in 2007 covered 22 of the 27 Member States. Most of these agreements already contained very liberal market access provisions, and 18 fit the category of Open Sky agreements.

Industry observers have pointed out that commercially the market was already very open and that the ATA has done little from the EU carrier perspective to create new opportunities. From the US carrier perspective, removal of route restrictions on London's Heathrow Airport, however, created important new opportunities for many US carriers who had previously been denied access to this key global hub. Thus there is the view among some stakeholders that the EU should have insisted on investment rights as a condition of approving the new agreement.

Arguing against this view are the facts that:

- Other than new access to Heathrow Airport (which is a highly congested airport at which slot acquisition is difficult or expensive) the US gained almost nothing and had to accept the inability to obtain new 7th freedom all-cargo rights (in the absence of granting investment) which EU carriers, however, received through the ATA.

- EU system carriers obtained legal certainty that the US could not legally challenge designations on routes to the US from any of the Member States under the terms of the nationality clauses of the previous ASA's. NB: While some may dismiss such risks as hypothetical, it is well to bear in mind that in a tense political atmosphere (as might, for example, arise through EU implementation of ETS) interest groups, politicians and ultimately negotiators may look for leverage wherever they can find it in order to create effective pressure on the other Party to modify its behaviour.

3.2.2. The question of "value-added"

As is well known, a key criterion given by the Council of the European Union in granting mandates to negotiate comprehensive air transport agreements at EU-level is the objective of "value-added." That is, an underlying standard for negotiating at EU-level is to achieve outcomes that have not been or are not likely to be achieved by the Member States negotiating individually with a particular external party.

Individual Member State negotiations can be an efficient way to proceed especially with the many countries of the world whose air transport interests in Europe are limited to destinations in just a few or even one Member State. Arguably, however, managing relationships primarily at Member State level can be suboptimal under the following circumstances:

- The market of the external partner is a major destination for the EU, its citizens and businesses and EU airlines may be frustrated in achieving growth opportunities;

---

22 As of 2007, Cyprus, Estonia, Latvia, Lithuania and Slovenia had not concluded individual ASA's with the US.

23 ASA's with Bulgaria, Ireland, Spain and the UK were not full Open Sky agreements.
• The external partner has a much larger market than individual MS and can impose its will more easily by pursuing a divide and conquer strategy that would not be the case if it had to confront the EU collectively;

• Smaller MS in particular will be in a difficult position to demand balanced treatment and the overall set of arrangements between the EU and Country X can easily result in a patchwork in which rights of market access among the MS vary considerably and can result in discrimination (in this regard see also discussion of Canada in the following Section);

• The external partner is an important player in policy development at the global level (for example is a Permanent Member of the ICAO Council) and may also be a leader in its own regional organisation.

In the specific case of the EU-US agreement, there can be no question that structured dialogue at the EU level, with what is still the world's leading aviation state, is called for across the full range of air transport system issues. The only question is not whether but how well such dialogue is conducted.

3.3. THE EU-US ATA AS CONTEXT AND PRECEDENT FOR US POLICY

The TOR's for this Paper ask for a comparison of the terms of the EU-US ATA with other US air transport agreements in order to assess how the treatment of the EU compares with that of other states having agreements with the US. At one level, the answer to this question can be simple; at another it becomes considerably more complex.

3.3.1. The simple comparison: the classical ASA perspective

The United States, on the basis of its Open Sky model, has essentially been negotiating the same aviation agreement with international partners for the past 20 years - with only modest variations in text across this period. This model has certain basic attributes:

• In economic regulation: in contrast to the so-called "Bermuda agreements" (that previously dominated international bilateral negotiations) under which the traffic rights had to be named and enumerated to exist, the Open Sky agreements take the philosophical position that it is the restrictions if any that have to be named and/or enumerated.

• In technical regulation: in contrast to Bermuda agreements that mostly incorporated ICAO standards by reference, the Open Sky model shifts considerable authority, especially for enforcement, to the bilateral level.

• In domestic market protection. The Open Sky model maintains a clear distinction between international and domestic markets - expressly excluding cabotage rights and in continuing to treat airlines as an industry not open to national treatment rights for foreign investors.

In all three of the above areas, the new EU-US ATA, in the author's judgement, while it contains much new language, still expresses an underlying conformity with the Open Sky model. The US Government is thus entirely justified in characterising it as an Open Sky agreement.
This said, under the ATA we must also conclude that: Airlines of the EU enjoy an equal or superior market access position to that available to airlines of any other partner of the United States.

3.3.2. The complex comparison: Pursuit of the OAA

While in its specific substantive content the ATA does not grant more or different rights than covered by conventional Open Sky bilaterals, its regulatory scope and its institutional arrangements do constitute a significant change for the United States. It is not only the new articles (outlined in previous sections above) that add scope to the agreement, it is above all the processes, notably the Joint Committee, which the ATA introduces that are likely to exert influence on both day-to-day conduct of business and new policy development.

As an analytical point of departure, it may be important to note that US economic policy has traditionally tended to compartmentalise aspects of the aviation business and the air transport system. Thus economic and technical regulation has tended to have functionally distinct institutional structures, with the Federal Aviation Administration enjoying a certain level of autonomy within the Department of Transportation. Similarly aerospace trade has mostly been kept separate from air transport policy.

By contrast, EU-level policy since 2004 has tended to treat these and other aspects as pieces of an integrated whole. Thus the OAA concept takes a holistic view of policy and regulatory action as it affects public interests in the air transport system. Over time it invites external partners such as the United States and Canada to take a comprehensive inter-continental view of the role and responsibilities of aviation and to create a model inter-regional market.

Thus the key sticking point, liberalisation of investment rights, must be addressed by influencing a stronger perception of mutual interests - both at the level of managements of so-called "legacy" airlines on both sides of the Atlantic and by their employees. The latter fear that air transport, through an opening of the door to "flagging out," could go in the direction of the maritime industry. Adoption of harmonised standards on matters such as flight time rules as well procedures to facilitate the implementation of Workers Councils (representing airline alliances as well as national companies) may be needed as confidence building measures to create a new organisational environment. This may be as crucial as technological modernisation to assure the successful future of North Atlantic aviation.
4. MAJOR FEATURES AND IMPACT OF THE EU-CANADA AIR TRANSPORT AGREEMENT

This Section reviews the major features of the current EU-Canada Air Transport Agreement as signed in 2009; compares it to the status quo ante under the air services agreements of Canada with the Member States; and considers to what degree this agreement represents change or innovation in Canadian policy.

4.1. PROVISIONS

The EU-Canada ATA has 26 numbered articles and 3 annexes. The scope of this agreement is quite similar to that of the EU-US ATA, but there are also clear differences in both structure and content. As will be discussed below, this agreement will - in terms of its immediate effects - provide less total operating freedom than the US agreement. On the other hand, the degree of change compared to the status quo ante under the Member State bilaterals is far greater. Areas of regulation to be reviewed include:

- Route and capacity rights;
- Ownership and control;
- Marketing, doing business and competition issues;
- Technical quality controls (safety, security, environment) and the Joint Committee;
- Consumer and traveller protection as well as social rights of employees;
- Incentives to complete the liberalisation process.

4.1.1. Route and capacity rights

Unlike the EU-US ATA, which provides complete liberalisation of the first six Freedoms of the Air and 7th Freedom all-cargo rights for EU carriers, the EU-Canada agreement provides no new 5th Freedom rights except in the all-cargo area and no 7th Freedom rights - unless Canada first liberalises its investment restrictions. These tradeoffs are embodied in a special annex (Annex 2 to this ATA) which suspends application of open 5th Freedom rights as stated in Annex 1 (the Route Annex), pending progress by Canada on the investment rights issue.

This structure suggests a policy assumption by the EU that Canada will be a demandeur for the extension of new rights to operate services between the EU and third countries and thus have a meaningful incentive to liberalise investment. While this assumption can draw on Canada's recent willingness to extend such third country rights under its "Blue Sky" policy, it may not take sufficiently into account two factors:

1. That Canada's still-primary, international operator Air Canada - under its existing 5th freedom rights - has all the rights that it needs to support its existing business.

---

24 While this agreement is being implemented by joint agreement of the Parties, it has not yet been ratified by the Canadian Parliament.
planning and that the other Canadian operators on the North Atlantic such as Air Transat specialise in point-to-point services rather than serving extended routes;

2. Historically Canada has been an extremely restrictive country with respect to any 5th Freedom rights that might enable a foreign operator to connect attractive destinations in the US with those in Canada. Accordingly the limited 5th Freedom rights under the Member State bilaterals, which have been grandfathered, remain extremely constraining especially for the smaller Member States.

Thus the Parties have not progressed beyond Stage 1 of the Agreement, and, as of this writing there is no evidence of Canadian interest to do so.

Importantly, however, this ATA, through its Article 4 (Authorisation), did also obtain Canadian acceptance of EU Designation which enables EU airlines to operate services from points in the EU outside their home Member State to Canada.

The EU-Canada ATA also removes all commercial capacity restrictions in its Article 13 (Commercial Framework), as to which see also Subsection 4.1.3 below.

4.1.2. Ownership and control

As discussed in 3.1.2 above, freedom of investment in the North Atlantic air transport services market has been a major goal of the EU, and it was hoped that an agreement here with Canada might also work to influence US politicians and interest groups. By obtaining in Article 4 Canadian agreement to the following text:

"Each Party shall permit full ownership of its airlines by Canada or a Member State or States subject to the conditions in Annex 2 of this Agreement"26

EU authorities could at least claim the appearance of progress.

As indicated above, however, the value of these commitments depends entirely on the perception of Canada and its stakeholders that new third country operating rights will benefit Canada. Meanwhile in this agreement the EU failed to achieve any improvement or even standardisation of access at EU level of operating rights for combination services to third countries (see 4.2 below).

4.1.3. Marketing, doing business and competition issues

In the EU-Canada ATA, these issues are addressed in Articles 13 and 14, both of which are highly innovative provisions. The Commercial Framework (Article 13) combines in a single comprehensive approach 11 areas of doing business regulation - establishing a harmonised regime (with respect to EU standards) in all of them. In an entirely logical - but for air transport agreements unusual - approach, it liberalises both pricing and capacity as well as the classical rights for marketing - such as setting up operations and cooperative arrangements in the territory of the other Party - in the same Article. This Article also provides for liberal ground handling and intermodal rights (to enable accountable door-to-door freight services) as well as introducing new sections on franchising, branding, code-sharing and leasing arrangements. Finally it formally extends the regulatory scope of the agreement to charter operations (a feature generally missing in Member State bilaterals).

25 Canada has open beyond rights (i.e. 5th Freedom rights) at Frankfurt (Air Canada is a Star Alliance Member) and the same at London.

26 Cited wording constitutes the full text of the Article.
Article 14 (Competitive Environment) covers ground similar to Article 14 in the US agreement but also goes meaningfully beyond it. The text with Canada includes, for example, "protection against bankruptcy or insurance by any government entities" as a "legitimate subject" for discussion by the Joint Committee. Such language does not exist in the US agreement (see also 3.1.3 above).

More significantly, the EU-Canada ATA language on state aids includes a Safeguard Provision (missing in the EU-US ATA) that enables a Party which is not able to obtain satisfaction through representations in the Joint Committee (that acts only by unanimity) to take unilateral action (albeit following a year's notice) to countervail state aid without having to renounce the agreement as a whole. Absent such a provision, the only formal recourses would be either to take the other Party to arbitration or to renounce the whole agreement.

4.1.4. Technical quality controls and the Joint Committee

The EU-Canada ATA like the US agreement also contains Safety and Security articles whose texts go beyond those in the bilaterals being replaced as well as a new Environmental Article. It also contains an article on Air Traffic Management - a topic rarely addressed so far in air services agreements and one, arguably, of considerable relevance with Canada which regulates some of the world's most significant airspace. Analyses of these specific provisions are performed in a companion Briefing Paper. An important general point is that these articles reflect institutional changes.

That is, as in the US agreement, this ATA, through its Joint Committee, has also created a framework that invites the development of systematic institutional action to manage and solve issues arising in North Atlantic aviation. Thus the procedural aspects of Joint Committee work are similar under both agreements. This said, however, there are a considerable number of language differences between the US and the Canadian Joint Committee articles, though both provisions were under negotiation in the same time frame. These differences include agenda questions - that is naming of topics which the Joint Committee should discuss.

Given that - particularly with regard to questions of aviation infrastructure on the North Atlantic - there are obvious arguments to move toward inter-regional policy between Europe and North America - it might have been preferable for the EU to have achieved a greater standardisation of language in these two Joint Committee articles and perhaps even have provided in both agreements for tri-partite coordination.

4.1.5. Rights and protections of travellers and employees

The EU-Canada ATA contains more explicit language on protecting consumer interests and rights than does the agreement with the US. Article 10 (Consumer Interests) specifies 7 areas in which the Parties are enjoined to develop and implement standards and requirements and on a "compatible" basis. Protection of data and privacy, however, is not such an area. Nor is this issue addressed in the ATA's Security Article.
Article 19 (Labour Matters), though phrased differently, has essentially the same content as in the ATA with the US. That is, this Article consists of little more than a title and the commitment to progress the issue in the Joint Committee.

4.1.6. **Incentives to complete the liberalisation process**

As suggested above, the Annexes to the EU-Canada ATA have been deliberately structured to enable a **staged liberalisation process**. While this may not be based on realistic expectations of progress (at least in the short term) the negotiators envisaged a three stage process in which:

1. **In the first stage**, following agreement to implement the ATA, the Parties open their markets entirely with respect to liberalisation of direct (3rd and 4th Freedom) services between any points in the EU and any points in Canada. They also permit the unrestricted exercise of 5th Freedom rights on all-cargo operations. There are, however, no new rights for combination passenger services extending to or linking third countries. Reciprocal investment rights are those presently available under Canadian law which, similar to the US, permits foreign ownership of up to 25% and requires effective control by its nationals. Fifth and Seventh Freedom rights already established in bilaterals with Member States and set forth in Annex 3, remain, however, in effect.

2. **A possible second stage**, set forth in Annex 2 to the ATA, foresees that Canada might open foreign investment by phases and begin by raising its 25% limit to 49%. Should Canadian law be so amended, so-called *intermediate* Fifth Freedom services would then be liberalised so that airlines could enjoy traffic rights from any points in third countries operated to between the Parties. Canadian carriers could also operate so-called *beyond* services within the EU, to Switzerland, the ECAA and to Morocco. In addition, carriers of both Parties would receive, at least temporarily, the right to operate 7th Freedom all-cargo services, that is, between the territory of the other Party and a third country without having to serve the home country.

3. **In a third or final stage**, Canadian law would be amended to fulfill the criteria of Article 4 of the ATA; that is, there would be full freedom for an EU investor to establish or acquire a Canadian carrier. In such case Annex 2 with all its transitional provisions would become void and only the terms of Annex 1 would apply.

4.2. **IMPACT OF THE EU-CANADA ATA**

As stated in Section 3.2's consideration of the US Agreement, the analysis of the Canada agreement will also concentrate on **qualitative as opposed to quantitative** impact. Here, as will be set forth below, the relative gains in market access rights were much greater than with the US - where all Member States that wanted them already had the liberal traffic rights provided for by the US Open Sky model on a uniform basis.

---

29 See footnote 29.
30 Here it would appear that the EU and the Canadian negotiators may have been guilty of what in German would be termed a *handwerklicher Fehler*; that is, a technical or procedural mistake. That is, Annex 1 fails to provide for 7th Freedom rights of any kind. Thus, when and if Annex 2 becomes moot because of Canada granting freedom of investment, the 7th Freedom all-cargo rights granted in Stage 2 of Annex 2 would by definition then fall away - an outcome that would seem inconsistent with the goals of EU and Canadian policy.
By contrast, many Member States had restrictive agreements with Canada; a few very liberal ones; others fell in the middle; eight MS had no agreement at all. Overall, the status quo ante constituted a veritable patchwork.

4.2.1. The status quo ante: Regulatory situation under the MS bilaterals with Canada

Prior to adoption of the ATA, most aspects of EU-Canada air transport relations were regulated via the air services agreements between Canada and the individual Member States, which in 2009 covered 18 of the 27 Member States. As shown in the Table below, while many of these agreements had certain common features, they were also characterised by unique aspects as well as the influence of Canada in demanding very particular conditions, notably with regard to Fifth Freedom rights. Another factor that contributed to the patchwork structure were periodic shifts in Canadian policy leading to differences in older vs. newer agreements. Finally, even as Canada has shifted in the direction of pursuing a general policy on liberalisation, it continues, in the author's opinion, to take a careful situational view of each negotiation and each market.

While the author has not been able to examine the confidential records of bilateral negotiations, which would be essential in order to have a complete view of the vital details that govern relationships, the published agreements and analyses do provide a fairly clear picture of the regulatory situation between Canada and the Member States as immediately preceding the 2009 Agreement. In this analysis, are considered the following variables:

- Freedom of direct (gateway to gateway) routing (Third and Fourth Freedoms);
- Freedom of connecting traffic (Fifth Freedom);
- Freedom of serving points in the territory of the other Party from third countries (7th freedom);
- Freedom to determine capacity;
- Freedom to set prices.

| Numbers of MS-Canada Agreements with pre-2009 levels of restriction |
|---------------------------------|--------|--------|--------|
| On | None | Moderate | Severe |
| Direct Routes | 3 | 4 | 11 |
| 5th Freedom | 3 | 0 | 15 |
| 7th Freedom (cargo) | 2 | 0 | 16 |
| Capacity | 5 | 2 | 11 |
| Pricing | 13 | 0 | 5 |

The situation shown above suggests that some agreements were much more liberal than others and that quite a number were not liberal at all. Rights at Toronto, Canada's primary gateway, were typically severely conditioned and capacities subject to prior review by Canadian authorities. Access to Vancouver was also restricted in a numerous cases and led

31 As of 2009, Bulgaria, Cyprus, Estonia, Latvia, Lithuania, Luxembourg, Malta, Slovakia and Slovenia had not concluded individual ASA's with Canada that were in force. NB: Bulgaria and Canada had, however, reached an "ad referendum" agreement in 1991, which was of restrictive character.
to concerns, for example by British Columbian authorities, that such limitations might impose restrictions on economic growth in Western Canada.

In order to constrain EU carriers from combining traffic flows between points in their Member States on the one hand and points in North America, many Canadian ASA’s with Member States, specifically denied operation of 5th Freedom beyond services to any US point "West of Chicago" or "South of Washington, DC." These provisions were designed to prevent competition in the major markets of the American South (e.g. Florida) and West (California).

4.2.2. The question of “value-added”

As already discussed in Section 3.2.2, a key criterion given by the Council of the European Union in granting mandates to negotiate comprehensive air transport agreements at EU-level is the objective of "value-added." That is, an underlying standard for negotiating at EU-level is to achieve outcomes that have not been or are not likely to be achieved by the Member States negotiating individually with a particular external party.

Arguably, notwithstanding concerns of some stakeholders that more should have been achieved with Canada and that certain areas of competition (see below) may remain somewhat distorted, it seems a fair conclusion that the EU-level negotiation achieved significant value-added with respect to new and better opportunities for EU carriers. Whether they exploit such opportunities of course remains to be seen. Nevertheless we can depict the following results:

<table>
<thead>
<tr>
<th>Immediate Consequences of the EU-Canada ATA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Member States with</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Free choice of direct service points</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Unrestricted capacity on direct services</td>
</tr>
<tr>
<td>Free Pricing regime (dual disapproval)</td>
</tr>
<tr>
<td>5th Freedom all-cargo rights</td>
</tr>
<tr>
<td>Open 5th Freedom passenger rights</td>
</tr>
<tr>
<td>7th Freedom all-cargo rights</td>
</tr>
</tbody>
</table>

Note: International traffic rights to third countries are an issue that continues to offer potential for distortion and limitation of competition. Industry observers in general will, in my experience, tend to downplay the importance of such rights in today's global market.

On the other hand, if such rights are unimportant, why should negotiators restrict them?

Whether commercially viable or not, one type of operation that would be possible with open 5th freedom rights (but not under this ATA) would be provision of coordinated services from say second tier EU gateways such as Budapest, Prague and Warsaw via a Canadian gateway onward to San Francisco, Los Angeles and Seattle or Vancouver. It is at least imaginable that such rights could play a role in restoring or initiating long haul services to major European cities that have been losing such services.
4.3. THE EU-CANADA ATA AS PRECEDENT FOR CANADIAN POLICY

The TOR's for this Paper ask for a comparison of the terms of the EU-Canada ATA with other Canadian air transport agreements in order to assess how the treatment of the EU compares with that of other states having agreements with Canada. Since Canada has had an evolving policy marked by various changes over the past 20 years and also, as already suggested, takes a more individual and situational view of its relationships than does the United States, this is not an easy question to answer.

As points of departure for the analysis one can perhaps reach five relevant conclusions:

- The Canadian government today places increased priority on protecting consumer and user interests. This has been demonstrated, for example, by its willingness, indeed targeted efforts, to deregulate historic controls on pricing and to pursue dual disapproval regulation with apparently all partners.

- Pro-consumer policy has also been demonstrated by willingness to remove market access limitations for smaller countries where Canadian carriers have little interest or negligible market share but face no major challenges. Thus Canada has concluded Open Sky-type agreements with a number of smaller states in South America, the Caribbean and the Pacific (such as Chile and New Zealand).

- However, Canada has not, heretofore, made a general commitment to liberalisation, for example in the Asia Pacific region, as it could do if it joined the so-called MALIAT agreement open to all APEC (and even non-APEC) states. And it has not deregulated bilaterally with partners such as Singapore, South Korea and even Australia. Thus the EU Agreement is the first step Canada has taken in the direction of inter-regional liberalisation.

- Canada remains concerned that its (at times frequently troubled) airline industry remains or becomes competitive in intercontinental and North American markets. While attentive to users, Canada has also resisted strong pressures to grant new traffic rights to the United Arab Emirates, for example, on the grounds that there is no evident point-to-point demand by consumers for added services to Dubai.

- Finally, the strength of aviation services and the air transport system are strategic priorities for Canada with its vast geography. As the host nation for ICAO, Canada also makes continuing efforts to stay in the forefront of aviation policy development.

Final Observations

The EU-Canada ATA represents significant innovation for Canadian air transport policy, for example in accepting the concept of the Joint Committee and its agenda for comprehensive actions to improve and harmonise regulation in a range of new areas.

As shown above, this ATA has achieved significant improvement in traffic rights for many of the EU's Member States over the status quo ante. This said, the ATA did not generalise some traffic rights at the highest level previously achieved by individual Member States.

32 Reference is made here to the "Multilateral Agreement for the Liberalization of International Air Transport" of 2001 made originally among 7 Member States of the Asia Pacific Economic Community (APEC) with invitations to other APEC MS plus interested 3rd party States to join. See http://www.maliat.govt.nz/.
Indeed, Annex 3 represents a statement of grandfathered 5th and 7th Freedom rights from no less than 13 Member State ASA’s with Canada, that could otherwise have been lost absent such grandfathering.

Moreover, the new agreement does not yet achieve the same level of rights for the EU industry in Canada as do some dozen other Canadian ASA’s for operators from other states - many of them smaller partners but also notably including the United States as well as EEA Members Switzerland and Iceland.
PART II

OUTCOME OF THE AIR SERVICES AGREEMENTS CONCLUDED BY THE EUROPEAN UNION

by Claude Probst
**EXECUTIVE SUMMARY**

1. Following years of disputes between the Commission and the Member States about who had the power to negotiate and conclude Air Services Agreements (ASAs) with third countries, the Court of Justice of the European Union (CJEU) concluded in 2002 that Member States were entitled to do so provided such agreements do not breach EU law. The Court also pointed out that certain provisions of these agreements did contravene EU rules, in particular the provisions regarding the nationality of air carriers and those on the fares that foreign carriers were entitled to charge on intra-Community flights.

2. On the basis of the Court’s opinion the Commission and the Member States have found a compromise to bring the existing agreements back into line with Community law. To do so, it is undeniable that the ‘horizontal agreements’ used by the Commission to negotiate the necessary amendments all at once constitute the most powerful tool. However, several important foreign partners have so far refused to recognise the principle of EU designation. The Commission is thus given a good opportunity to demonstrate that ‘more Europe’ will be the appropriate tool to convince those countries to conclude horizontal agreements without significant compensation. Moreover, some consideration should be given to the fact that some Member States impose an establishment on their territory to be designated under the new EU ownership clauses, which seems inconsistent with the freedom to provide services.

3. In parallel, the Commission was given mandates to negotiate ‘Open Aviation Area Agreements’. On these bases agreements were concluded with the US and Canada. While these agreements give the impression of opening up a wide range of new market access opportunities, it remains to be seen whether such opportunities have a real commercial value. Nothing so far indicates, indeed, that such opportunities have been used if one compares traffic evolution between the EU and those countries with that between the EU and other countries with which the Union has concluded no agreement.

4. Those agreements’ main objective, which was to provide the basis for reciprocal investments in air carriers, has not been reached so far. The agreement with the US provides for consultations on the issue, but significant progress seems unlikely in the foreseeable future. Only a major need for financing the US industry or stimulating competition in the domestic market could ease the American attitude. As regards Canada, the agreement includes a phased implementation which would allow the progressive introduction of new market access opportunities when Canada eases its ownership laws. However, when approving ratification of the agreement the Canadian Parliament specified that it did not intend to change those laws. As mentioned earlier, the agreement with Brazil will need some renegotiation on the same issue.

5. The additional clauses that the Commission wished to include in those agreements, to address cooperation in the fields of competition, passenger protection, social rights and the environment, do not provide for anything more than declarations of intent or, in some cases, a commitment to discuss those issues further in the Joint Committees created by the agreements. The provisions concerning safety and security are similar to those already contained in the ASAs concluded by Member States and do not provide for convergence with the related EU rules.

---

33 Another agreement was initialled with Brazil. However, the Brazilian Parliament expressed concerns as regards its provisions on ownership and blocked its signature. The author has not been able to obtain a copy of that agreement. Agreements with Australia and New Zealand are still under negotiation.
6. In addition to the 'Horizontal' and 'Open Aviation Area' agreements, the Commission had asked for a mandate to negotiate 'Common Aviation Area Agreements' with neighbouring countries and those involved in the Euro-Mediterranean cooperation, with the objective both of achieving open market access and encouraging the countries concerned to align their aviation rules with those of the EU.

7. The first result of this initiative has been the conclusion of a multilateral agreement, the European Common Aviation Area (ECAA) Agreement, with seven Balkan states in May 2006. That agreement aims at fully integrating those countries into the EU internal market as if they were EU Member States. They are required, indeed, to transpose all EU rules in the field and to accept the powers those rules give to the Commission and the European Aviation Safety Agency (EASA), as well as CJEU jurisprudence. They would then be in the same situation than Switzerland, Iceland and Norway. However, the agreement provides for a progressive implementation so that market access is linked to the satisfactory transposition of the EU acquis. Consequently, and as analysis of traffic evolution shows, little has been achieved in terms of market opening, since the convergence conditions are relatively difficult to achieve. In a recent communication, the Commission referred to a benefit evaluation carried out by an independent consultant. However, that study has been kept confidential and has still not been released, and some doubts exist as to the methodology used and the validity of the results achieved.

8. Moreover, because the convergence conditions have to be met in full, the progressive implementation creates some unexpected drawbacks. For example, several countries which would be ready to join the EASA system are obliged to wait until other conditions are met in order to do so. This obliges them to adopt rules and hire staff that will be of no relevance when EASA takes over, in their territory, the regulatory tasks conferred on it by EU law. This seems excessive inasmuch as the related additional traffic rights are of little value, while the real incentive for these countries to align their regulatory system with that of the EU is the perspective of accession. Last but not least, the reports of the relevant Joint Committee meetings do not provide any evidence that regulatory convergence in the fields of safety, security and environmental protection is in fact being given any special attention in terms of verifying whether ECAA states are actively transposing the regulations listed in the agreement's annex.

9. The second achievement concerning neighbouring countries is the conclusion of an agreement with Morocco in December 2006. The traffic data suggests that this agreement is a success. However, it is to be noted that traffic between that country and the EU has grown dramatically since 2003 as a result of a new policy known as 'Vision 2010', adopted in 2001 by Morocco, which then decided to prioritise tourism, to the possible detriment of the national airline. That policy envisaged liberalising the existing ASAs while actually completely liberalising charter flights carrying tourists. Certainly, the market opening provided for by the EU-Morocco agreement eased matters for scheduled services and, in particular, enabled low-cost carriers to enter the market. However, since most of this development is due to services that could be operated on a non-scheduled basis, it is not evident that the merit is essentially that of the EU-Morocco agreement. Here again, it seems appropriate to be cautious as regards the evaluation of benefits made by Booz & Company at the request of the Commission, as the study has still not been published.

10. The EU-Morocco agreement includes regulatory convergence provisions in nearly all fields of aviation. The EU acquis with which Morocco is committed to 'act in conformity' includes a number of regulations which confer executive powers to the Commission and EASA. Morocco is therefore unlikely to be able to act in conformity with such texts, as it has no intention of giving up the related sovereign powers (unlike the ECAA states). Moreover, here too the Joint Committee reports offer no evidence that regulatory convergence in the fields of safety, security and environmental protection is being paid any special attention in terms of verifying whether Morocco is actively transposing the regulations listed in the agreement's annex.

11. Several agreements have been concluded recently with other neighbouring countries, namely Georgia, Moldova and Jordan. It is too soon to assess whether they will bring the expected benefits. These agreements, like that with Morocco, contain provisions for the progressive opening of the market once the convergence provisions are implemented. Taking into account the limited value of the additional traffic rights that could be acquired, it is questionable whether such a link was necessary. Moreover, the convergence to be achieved is difficult to evaluate as the list of EU rules to be implemented does not exclude the provisions transferring executive powers to the Commission and EASA, while the third countries concerned certainly do not intend to go that far.

12. To conclude, it is fair to say that the horizontal approach that allows the free movement of capital within the EU internal market may be considered a success provided Member States do not impose a framework that runs against the freedom to provide services. Similarly, the ECAA agreement with the Balkan countries which anticipates their EU membership in the future could be a good development if the opening of the market was not linked to the full implementation of regulatory convergence provisions which would have been better addressed through specific working arrangements reflecting those countries' commitments in terms of European integration. As regards the other kinds of EU agreements, it is difficult to conclude that they really contribute to market opening, either because the additional rights they create are unlikely to be used or because the conditions on regulatory convergence which they include will not make such rights available until well into the future. Moreover, the regulatory convergence clauses of such agreements are either empty (as in the cases of the EU-US and EU-Canada agreements) or else incomprehensible since they suppose the transposition of EU rules, transferring executive powers to the Commission and EASA, when none of the third countries concerned has any intention to implement those rules.

13. In this context, it would be worth considering whether the current policy is really the right one to reach the objectives set from the beginning by the Commission, the Council and Parliament. Since the EU is unlikely to be able to convince reluctant partners to make any concessions on a sectoral basis, it might be a better option to support the inclusion of air transport in the multilateral free trade agreement (in the World Trade Organisation) or in bilateral free trade agreements between the countries concerned and the EU, so that concession in aviation are linked to other concessions in other domains. When considering that, it might also be worthwhile to consider whether the competitive position of European carriers is strong enough to adapt to the dismantling of the existing institutional framework.
1. **HISTORICAL BACKGROUND**

14. Following the 2002 'open skies judgments' of the Court of Justice of the European Union, which established that certain provisions of the Air Services Agreements concluded by the Member States were not in conformity with EU law, the Commission adopted a communication\(^{36}\) which stated that the legal clarity provided by the Court confirmed the need to devise, at Community level, a comprehensive international policy for the aviation sector. The Commission proposed, therefore, to promote safe, secure and efficient air transport for the benefit of European citizens by pursuing four key aims:

- 'To bring (existing) agreements into line with Community law, maximizing the potential of the Single Market;
- To take forward an agenda for reform internationally, aimed at stimulating air services and increasing international investment in the industry;
- To ensure that effective competition is preserved and promoted in order to spread the economic benefits to consumers;
- To guarantee high standards of safety, security, environmental protection and passenger protection in the (EU) and promoting them worldwide.'

15. Accordingly the Commission also suggested four negotiating priorities:

- 'To enter into negotiations with key bilateral partners (in particular the US, Russia and Japan);
- To continue to build up relations with neighbouring countries (by developing a European Common Aviation Area);
- To build up relations with developing countries;
- To assert the position of the Community in multilateral fora and work for reform internationally (in particular through EU membership of ICAO)'.

16. **Compliance of existing agreements with EU law:** In June 2003, the Commission and Council agreed on the modalities for solving the issues identified by the Court. Two methods were accepted to amend existing bilateral agreements so that they conform to EU law:

- bilateral negotiations between each Member State and its partners to amend each national Air Services Agreement separately, on the basis of common principles set by Regulation 847/2004\(^ {37}\) and standard clauses issued by the Commission; or:
- negotiation of single 'horizontal agreements' by the Commission acting on a mandate of the Member States to amend the relevant provisions of all existing national ASAs with one third country through a single negotiation.

17. **Neighbouring countries:** In 2004 the Commission issued a communication on building a Common Aviation Area with neighbouring countries\(^ {38}\). This communication suggested a flexible approach to promote productive cooperation, taking account of the diversity of the countries concerned.

---


18. As regards countries which participate in ECAC, EUROCONTROL and the JAA, the Commission proposed that, in addition to the 'horizontal approach' referred to in Point 16, more comprehensive agreements should be concluded, an example being the European Civil Aviation Area Agreement (ECAA) which will be concluded with several Balkan countries in 2006.

19. As regards Mediterranean countries for which the transfer of executive powers included in the ECAA would be excessive, the Commission proposed 'Euro-Mediterranean Aviation Agreements' or 'Global Agreements' covering, in addition to market access, commitments to align most aviation legislation (safety, security, environment, passenger protection, competition, social issues, etc) with EU rules.

20. **Agreements with major partners:** Finally, the Commission issued, in March 2005, a communication proposing the negotiation of global agreements with major partners and combining completely open access to the market with new clauses aimed at facilitating fair competition among air carriers based on EU policies in the various fields at stake (doing business, competition, passenger rights), as well as provisions for a structured dialogue to resolve any difference of view between the parties and ensure the proper implementation of the agreement (thereafter called 'Open Aviation Area agreements').

21. On the basis of this Commission communication, the Council adopted, in June 2005, conclusions in which it globally supported the Commission's approach but stressed that the bilateral system of agreements between Member States and third countries would remain, for the time being, the main basis for international relations in civil aviation. The Council also stressed that 'before granting mandates for the negotiation of any further comprehensive agreements with third countries, the added value of any resulting Community-level agreement should be clearly demonstrated in each case, notably with regard to the prospects of obtaining significant new opportunities for EU industry and users and achieving greater levels of regulatory convergence with a view to ensuring a competitive level playing field'. In January 2006, the European Parliament adopted a resolution containing similar recommendations.

22. It is therefore in a more peaceful environment that the Commission has received a number of mandates to implement the agreed external aviation policy, that many of the national ASAs have been brought in line with the Court Opinion, and that numerous agreements have been signed, namely:

- with major aviation partners: the US (27 April 2007) and Canada (17 December 2009) (the agreement with Brazil has been negotiated but has not yet been signed, following the expression by the Brazilian Parliament of concerns as regards its ownership provisions).
- with neighbourhood countries: the European Civil Aviation Area (ECAA) agreement

---

39 The European Civil Aviation Conference (ECAC) is a pan-European intergovernmental organisation, founded in 1955 under the auspices of the Council of Europe. It seeks to harmonise civil aviation policies and practices amongst its 44 contracting States.
40 The Organization for the Safety of Air Navigation (EUROCONTROL) is a pan-European civil-military intergovernmental organization created in 1963 for the purpose of maintaining safety within the field of air traffic management. It consists of 39 contracting States and the European Union.
41 The Joint Aviation Authorities (JAA) was the name of an association of national aviation safety regulators whose objectives were to harmonise their standards and to certify aviation product, organisations and personnel collectively. It was dissolved a few years after the establishment of the European Aviation Safety Agency (EASA).
An overview of the air services agreements concluded by the EU with Albania, Bosnia and Herzegovina, Croatia, FYROM, Montenegro, Serbia and Kosovo was signed on 22 May 2006. Two Euro-Mediterranean agreements have been signed, with Morocco (12 December 2006) and Jordan (15 December 2010), as well as two Common Aviation Area agreements, with Georgia (2 December 2010) and Moldova (26 June 2012).

Although none of these agreements has been ratified yet, they are all being implemented on the basis of the provisional implementation clause they contain. In addition, various negotiations are ongoing, with Australia, New Zealand, Israel, Lebanon, Tunisia and Ukraine.

---

44 This agreement was also signed by Bulgaria and Romania, which subsequently became EU Member States. Iceland and Norway are also taking part, as members of the European Economic Area.

45 The author has not been able to obtain from the Commission a copy of the EU-Moldova agreement, as it has not yet been officially published.
2.  MEASURING THE OUTCOME

23. Since EU Air Services Agreements pertain to Article 218 of the Treaty on the Functioning of the European Union, the European Parliament must give its consent to them before they can be concluded by the Council. So far Parliament has supported the proposals of the Commission, but has expressed the opinion, consistent with its January 2006 resolution, that it would appreciate being informed on the added value of these agreements.

24. To carry out such an assessment, the author found it appropriate to verify whether the objectives set by the Commission for external aviation policy in its communication of November 2002 (as specified in Point 14) are met by the agreements concluded so far. These four major objectives - which have not been changed through the many communications issued by the Commission since 2002 - cover, indeed, the adaptation of current ASAs to Member States’ obligations under the Treaty, as well as all necessary criteria for measuring the added value of Community action.

2.1. Objective 1: To bring agreements into line with EU law, maximising the potential of the single market

25. It is a fact that a great number of existing ASAs have been modified through 'horizontal' or other agreements. As of mid-2012, nearly 1000 bilateral ASAs include the EU designation clause, as well as revised provisions concerning the other areas where the EU has an exclusive competence. Altogether, 117 third countries have accepted the EU designation (55 through EU horizontal agreements and 62 on a bilateral basis with individual Member States)\(^{46}\). For doing so, it is undeniable that the 'horizontal agreement', by which the Commission negotiates the necessary amendments taken together, is the most powerful tool. Moreover, it can be expected that the EU can use its power and influence to convince its foreign partners that it is wiser to accept the changes. It is also clear that the EU designation bring major benefits to low-cost carriers who can access new markets that Member States would probably have been reluctant to open to them, since they are certainly not welcome to incumbent carriers.

26. However some major partners, in particular Russia, China, India and South Korea, have shown reluctance to recognise the principle of EU designation. This should provide a good opportunity for the Commission to demonstrate that 'more Europe' is a good means to force these countries to conclude a 'horizontal agreement' with the EU. In order to avoid giving compensations to obtain that concession, it is likely that the EU will have to exercise some degree of threat on other commercial issues, since it is difficult to convince reluctant partners in a purely 'aviation context'.

27. Considering also the current crisis and the difficulties met by the incumbent carriers, it is likely that consolidation will happen in that domain as it happens in any other industrial field. Although not solving all difficulties, the EU designation will facilitate such a process, at least at European level by allowing mergers that the traditional bilateral system would have made impossible because merged carriers would lose their citizenship and therefore the traffic rights linked to such citizenship.

\(^{46}\) See European Commission, MEMO 12/714, 27.9.2012, on the EU External Aviation Policy Package.
28. It might nevertheless be useful to consider whether the current practices are in line with EU law and Court of Justice jurisprudence. Indeed, some Member States require that new entrants be established in their territory so that they are obliged to pay taxes and employ staff in accordance with their national laws. In its above-mentioned communication of June 2003, the Commission seems to consider that the ruling of the Court of November 2002 (which establishes that former national ASAs' ownership clauses infringe what is now Article 49 TFEU) requires a company asking for designation to have an establishment in some form on the territory of the Member States to which it addresses that request. This might be challenged, as the EUCJ was only answering a Commission question related to the right of establishment, while no question as regards the right to provide services was put. It might indeed be disproportionate to require an EU air carrier to have an establishment in each Member State from which it intends to operate services if such services are only a small part of its activity. The issue should be further examined by the Commission, taking into account current jurisprudence of the Court as regards the freedom to provide services.

29. To conclude, it is undeniable that the implementation of the Community's external aviation policy has allowed substantial progress in terms of bringing national ASAs into line with EU law. It also contributes, therefore, to maximising the potential of the single market insofar as it facilitates the consolidation of the EU aviation industry at a time when globalisation calls for stronger economic actors to resist foreign competition. However, some consideration should be given to the consistency of some national practices with the freedom to provide services, as some Member States impose an establishment on their territory as a condition for designation as an EU carrier under the new ownership clauses.

2.2. Objective 2: To advance an agenda for reform internationally, aimed at stimulating air services and increasing international investment in the industry

30. The first part of the question is whether the agreements concluded contribute to stimulating air services. It is already evident that horizontal agreements, which do not provide for any new market access opportunity, play little role, if any, in that field. Further investigations are then necessary to check the effects of other kinds of agreements. To do so, some investigation into traffic data is necessary, as well as comparison between traffic evolution with the countries that have concluded agreements with the EU and some others, with similar market conditions, that have not done so. This has been done on the basis of such limited data as are available, namely the data published by Eurostat. Such traffic evolution is presented in Annex 1. The Commission has carried out a similar exercise using the capacity planned by airlines 47 as shown in Annex 2.

31. None of these data demonstrate that the agreements concluded by the EU have had a significant impact on traffic development, as the results are similar for countries with such agreements and those without. There is, however, an exception as regards Morocco, at least up to 2010: the 2011 results show a decline that is not visible, for example, in the case of EU-Cape Verde relations. Traffic between Morocco and the EU has grown dramatically since 2003, i.e. since well before the agreement concluded in 2006. This is the result of a new policy change known as 'Vision 2010' adopted by Morocco in 2001, reflecting a decision to prioritise tourism, to the possible detriment of Morocco’s national airline. That policy entailed consideration of liberalising the existing ASAs and

47 Number of seats offered for sale during a given period.
complete liberalisation of charter flights carrying tourists. Certainly, the market opening provided for by the EU-Morocco agreement eased matters for scheduled services, and, in particular, allowed low-cost carriers to enter the market. However, since most of the development is due to services that could be operated either on a scheduled or a non-scheduled basis, it is not evident that the merit lies primarily with the EU-Morocco agreement.

32. Traffic data, then, do not give a clear view on the question at stake. An attempt has also been made to verify whether the EU agreements have had any impact on the number of EU airports operating to/from a given third country. The findings are in Annex 3. Here again, it is difficult to conclude that the conclusion of EU agreements has had a significant impact on market development.

33. As a last attempt to obtain a clearer picture of the results of the EU agreements, we have tried to verify whether increased competition due to new entrants has led to a decrease in the fares paid by passengers. Unfortunately, the complexity of the current tariff structure and the lack of any public database on the subject make such an exercise impossible. With regard to this area, the Commission states in its communication of September 2012 that the Booz study points to a significant decrease in fares. However, since that study remains confidential it is difficult to simply accept that conclusion as such. It would also be reasonable to check whether similar decreases have or have not occurred in other comparable markets where no EU agreement exists.

34. To conclude, it has not been possible to find objective proofs that the EU agreements have significantly stimulated the development of the air transport market with the countries which have signed them. This might be due to the fact that these agreements have not been concluded for a sufficient time, or that the situation of the partners with whom they were concluded has not changed so far, or that pre-existing arrangements related to scheduled and non-scheduled services were already providing the necessary opportunities and flexibility.

35. Looking more closely at the provisions of the EU agreements, it seems, indeed, that they create relatively few new opportunities of significant interest for air carriers. As regards the North Atlantic, the pre-existing agreements were already giving sufficient rights to fulfil market needs. Even if the EU agreements allow services from any point (i.e. city) to any other point, this does not mean that points which are not the main bases of the incumbent carriers have a commercial value. To be of interest a point must generate sufficient traffic to sustain a daily flight on the transatlantic market. Past experience has shown that this is difficult to achieve. This is supported by the fact that the number of new airports actually served is relatively small, and in any case has not increased more than towards similar destinations for which no EU agreement exists. As regards intermediate or beyond points, experience has also shown that the flight frequencies and timings required by the transatlantic market have rarely been adapted to compete in the local market. Moreover, in order to sell seats carriers need a presence on the market, but this is rarely the case for carriers based far away and whose possible market share is likely to be very small. Such new opportunities now exist on paper, but have little chance of being used.

49 It has been impossible to obtain from the Commission the report arising from the Booz study, not even the parts evaluating the benefits of the already concluded agreements so as to verify the methodology used and the validity of the findings.
36. Besides, as regards the Euromed and ECAA agreements the remarks made in relation with the transatlantic market are even more applicable, as the distances are shorter and the combination of stops on a flight seriously reduces its commercial value. Moreover, as fifth freedom rights in the Jordanian and Georgian agreements, as well as fifth freedom and cabotage rights in the ECAA agreement, are subject to compliance with part of the EU acquis, little has changed so far with these countries. Analysis of the content of the agreements as they stand today would seem to indicate that the situation has probably not changed enough to genuinely stimulate air services between the EU and these partners.

37. Turning to the increase of international investment in the industry, we have to examine the relevant provisions in the various EU agreements. The one with the US contains as yet no possibilities for reciprocal investment in each other’s air carriers. It only foresees further negotiations/trade-offs to address this issue, among others. In the current state of US law, it seems unlikely that significant progress on the issue can be made in the foreseeable future. Only a major need for financing the US industry or stimulating competition on the US domestic market could ease the American attitude.

38. In the EU-Canada agreement, the possibility of reciprocal investment is foreseen but is subject to changes in the laws of the parties. The agreement contains, therefore, provisions for a progressive availability of traffic rights (mainly fifth freedom traffic rights) that are supposed to create an incentive for such changes. Notwithstanding this reference to the value of such rights, when it approved ratification of the agreement the Canadian Parliament specified that it did not intend to change its ownership laws.

39. In the Moroccan, Georgian, Jordanian and Moldovan agreements, investment in each other’s air carriers is envisaged subject to prior agreement in the Joint Committees established by those agreements. The ECAA agreement permits complete reciprocal ownership inasmuch as it requires the Balkan states to apply EU law concerning the licensing of air carriers as it stands. However, it must be pointed out that this agreement is of a completely different nature from all the others, since it was drafted as a first step towards EU membership and puts the Balkan states in the same position as any EU Member State as regards EU law and the powers of the Union institutions and bodies.50

40. In conclusion, it can be said that apart from the case of the Balkan states the agreements concluded so far by the EU have done little to increase international investment in the aviation industry. This is not really surprising as the current regulatory system for international air transport is based on the citizenship of air carriers. Traffic rights are reserved to air carriers owned and controlled by a citizen of the designating party. Carriers which lose that status lose their right to access the markets of third countries. This constitutes a serious obstacle to any significant progress in this domain.

41. The real question is whether such an objective can be achieved through bilateral agreements as suggested by the Commission in its recent communication. The answer is certainly negative. Even if two countries agree to release their ownership legislation on a reciprocal basis, other countries are not obliged to accept to maintain the operating permits issued to air carriers that would change ownership by means of such bilateral

50 This agreement, known as a ‘single pillar’ agreement, is similar to the EU-Switzerland air transport agreement. Through such agreements the partner countries accept to implement EU law as if they were EU Member States, subject to EU Court jurisprudence, and accept the powers given by the EU Treaty and applicable laws to the EU Institutions (the EUCJ, Parliament, the Council, the Commission) and bodies (in the case of aviation this means that EASA shall execute in their territory the same tasks as those it executes in the territory of the Member States).
arrangements. In other words, if a European air carrier comes under the control of Moroccan citizens, another third country will probably not allow that carrier to fly any more to/from its territory.

42. **The two objectives set by the Commission under this point are, then, unlikely to be achieved through the current policy.** The only viable means would be to address them on a multilateral basis so as to completely open the market and eliminate any citizenship condition for market access. As many countries have no interest so far in doing that, some leverage must be found, but this cannot be done on a sectorial basis. The issue must then be put on the agenda of the World Trade Organisation (WTO) so that air transport liberalisation becomes part of the general economic trade-off. As a second best, the EU could decide to include air transport in its bilateral free trade agreements. But then the ultimate question arises: is that in the interest of Europe at a time when the competitive position of European carriers is probably not very strong? Here again, the a priori position of the Commission in its communication of September 2012 to the effect that the future of the European air transport industry relies on the dismantling of the current institutional framework is not self-evident, and would justify a serious discussion with all concerned parties.

2.3. **Objective 3: To ensure that effective competition is preserved and promoted in order to spread the economic benefits to consumers**

43. It is a fact that all EU agreements concluded contain provisions for multiple designation\(^{51}\), free capacity-setting and free pricing. These are essential conditions to stimulate competition. However, all these agreements were concluded with partners known for their liberal attitude and their willingness to open up the market. One of the criticisms made of the Commission is that it can only negotiate with countries that agree with the proposed open market. This does not really create new opportunities, as the same could be obtained unilaterally\(^{52}\) or bilaterally at national level, without the need for an EU agreement. To promote competition, negotiations should then be conducted with more conservative countries with which Member States have not been able to make progress.

44. That criticism seems valid, but the suggested corrective action has little chance of succeeding. As pointed out above, if these countries do not want to open up the market, what chances has the EU of convincing them in a sector-based context in which they would find no compensation? Possibly some link could be made with other issues, as was the case with Russia whose WTO candidacy was supported by the EU on condition that Russia renounced the payment of royalties on trans-Siberian flights. Now Russia is a WTO member, but that agreement, which set 2013 as the deadline for ending payments, has yet to be complied with, and many observers doubt that will happen. **This shows that a better approach would be to address air transport issues in the context of the WTO, as this would provide for dispute resolution mechanisms and possible retaliation in case a commitment is not respected.**

45. Another difficulty arises from the fact that the EU is not able to allocate traffic rights to EU air carriers in cases where the results of the negotiation do not include provision for

---

51 The right of any Party to designate several air carriers to use the rights granted by the agreement.
52 Certain countries decide by law or through public policies to give open access to foreign air carriers, generally non-scheduled operators, without requiring reciprocity by means of a bilateral agreement.
unlimited multiple designation or full freedom to set capacity. If the allocation of traffic rights is left to be examined only after the negotiations have finished, there is little chance that Member States will give a mandate. If, however, the matter is to be part of the mandate, the negotiations in Council will also have little chance of succeeding, as the mandate would be extremely complicated. Moreover, as it would mark in advance the winners and losers under the possible new agreement, the making of majorities would be even more difficult. One possible option to overcome this difficulty would be to agree in advance, by means of an EU regulation, on objective criteria for allocating traffic rights between EU carriers where the agreements concluded limit the traffic rights that can be distributed. This certainly would be a difficult task, but it is the only means to disconnect the decision-making from individual cases and give the Commission the powers it needs to act in this field.

46. The EU agreements contain the necessary provisions to address issues of doing business, access to airports, ground handling and computer reservation systems, with a view to establishing fair and equal opportunities among all competing air carriers. However, this is also the case of most current ASAs concluded by Member States. It is, then, difficult to claim that EU agreements bring a real added value in these fields.

47. As regards competition rules, all EU agreements except the one with Jordan include an article on state aids. These articles, pointing out that state aids may distort competition, provide for reciprocal information, including possible discussions within the Joint Committee, before a party makes use of its own competition rules in that field. As regards the Balkan countries party to the ECAA agreement, their commitment goes much further as it implies the application of the principles related not only to state aids, but also to state monopolies, dominant positions and agreements between undertakings, which mirror the related provisions in the Treaty.

48. These provisions are probably quite adequate for developed countries with strong experience and practice in the field of competition. It is also the case for the Balkan countries committed to developing such a capacity. However, more could probably have been done as regards the other partners, in particular Jordan, to meet the objective set by the Commission in 2002. Of course the EU can unilaterally apply its own competition rules, but this would create disputes with the bilateral partner which no provision in the agreement would be of use in addressing. This is probably due to the reluctance of the partners to address such issues or to commit to developing rules in this field. The fact that they were able to make their case and ensure that the agreements did not include more ambitious competition objectives shows that the Commission is in a relatively weak position, as well as suggesting that the fact of concluding the agreement has been given priority over the quality of its content.

49. We can conclude, as regards this objective, that the EU agreements certainly preserve the level of competition existing in the national ASAs, but do not really promote overall competition in the field of air transport. Negotiations only take place with countries willing to open their markets, and even in such cases only state aid issues are addressed, while other current key issues in the field, such as dominant positions or cooperation between air carriers, are ignored. Of course the Commission can claim that the Joint Committees established by the agreements are a tool for addressing these issues - but the former national agreements included provisions requiring the parties to accept consultations on request to address any issue arising in the implementation of the agreement, having the same result.
2.4. Objective 4: To guarantee high standards of safety, security, environmental protection and passenger protection in the EU and promote them worldwide

50. As far as these objectives are concerned, little can be said about the provisions included in the EU-US and EU-Canada agreements. As regards safety and security, these provisions are indeed similar to those included in all recent ASAs. In the field of safety they foresee that the parties shall comply with ICAO standards. In the case one party considers the other does not do so, it shall notify its concerns and following consultations may take appropriate measures to protect its interests. In addition, in both cases the parties recognise the validity of the safety certificates issued by their competent authorities; this looks a new development that should help reduce or eliminate the need to issue foreign operating certificates (or operations specifications) as those countries currently do. However, since what is in question is simply a repetition of the provisions included in the Chicago Convention, it remains to be seen whether this will allow the automatic acceptance of certificates, as desired by the industry. In addition, the EU-Canada agreement makes reference to the agreement on civil aviation safety concluded in May 2009, but does not add anything to its content.

51. In the field of security, the provisions of the EU agreements are similar to those included in the earlier national ones. They recall the obligations of the parties under international conventions, establish a system of exchange of information, and oblige the parties to assist each other should there be an exceptional threat. Nothing is said as regards a possible mutual recognition of security checks which would reduce the burden on transit passengers and freight: the EU-Canada agreement merely states that further consultation will take place towards that aim.

52. In the field of the environment, neither of the two agreements says much. The parties recognise the importance of protecting the environment and the right of all to take appropriate measures to do so. They also recognize the pre-eminence of ICAO standards other than where differences have been filed. This in fact implies very little. It is not surprising, knowing the differences in the views of the parties over including aviation in the Emissions Trading Scheme.

53. As regards consumer protection, the parties have very similar policies. The agreements therefore recognise the importance of this issue and agree on exchanges of views as appropriate. To conclude, it is difficult to argue that the agreements with the US and Canada do more than the previous national ASAs to reach the objective of convergence announced initially by the Commission.

54. In the case of the Balkan states, since the agreement is a first step towards EU membership the objective set can be fully met as they are supposed to completely transpose the EU acquis in all these domains. The question is then whether this will really happen. As already mentioned, the transitional phases included in the ECAA agreement aim at creating incentives for the effective implementation of EU law by these partners. However, since the traffic rights that could be operated when this is achieved are of little interest, as explained in Point 36, the incentive is very weak.

55. The real incentive for these countries is in fact their continued participation in the European aviation community activities and the perspective of EU membership. All of them indeed are members of the ECAC and Eurocontrol, and most were members of the former
JAA. Through these memberships they have acquired a European recognition which they wish to retain, in the hope that it will facilitate accession. The question is whether the ECAA agreement will allow them to reach that objective.

56. The Balkan states’ continued participation in the ECAC helps them remain in the loop as regards security, since that body has retained a certain leadership in that field. The same may be said as regards air traffic management, due to their membership of Eurocontrol. Participating in pan-European coordination, they constitute good allies in the field of the environment, as the ECAC usually supports the EU’s positions in the International Civil Aviation Organization (ICAO). The ECAA agreement has played only a small role, if any, in helping these countries stay in the European loop. Moreover, the technical assistance provided to several neighbouring countries through the Instrument for Pre-accession Assistance to facilitate their institution-building seems to be a factor independent of whether or not the countries concerned are parties to the ECAA agreement.

57. On the subject of safety, two working arrangements have been concluded by all the non-EU members of the former JAA with the European Aviation Safety Agency to fill the gap left by the dismantling of the JAA. The first arrangement deals with those countries’ involvement in the SAFA process. The second is about continued cooperation in the fields of rule-making and aircraft certification; it also specifies that the countries concerned are subject to EASA standardisation inspections to check whether they are correctly implementing EU aviation safety rules. Such inspections show that several of these countries do already apply the EU acquis. Unfortunately, the protocols attached to the ECAA, which define the transitional mechanisms for the progressive entry into force of the agreement for each party, link all the aspects together. As a consequence, even if a given country is ready in one field, it has to wait for the Commission to agree that it meets all the other conditions to become fully associated. In the field of safety, this means that this country has to develop rules and capabilities in domains where the EU and EASA will take over responsibility, thus making those efforts null and void. In this field, therefore the ECAA agreement has until now had a rather detrimental effect: it would be wiser to associate the Balkan countries to the EASA system as soon as they are ready (and the ECAA agreement is ratified).

58. If we now turn to the two other neighbourhood countries, Georgia and Moldova, we may note that, despite their membership of ECAC, Eurocontrol and the former JAA, these two countries still have a relatively long way to go until they reach a level equivalent to that of EU Member States. The question is then whether the concluded agreements offer sufficient incentives to push them ahead. They are requested to ‘act in conformity’ with a number of EU rules before they can operate fifth freedom traffic rights on their routes to the EU and between points in the EU. As already mentioned, the value of such traffic rights is very small and it is doubtful whether they could compensate the efforts needed to meet the conditions. The real incentive is, therefore and here again, more one of a political nature than any result of the aviation agreement concluded with the EU.

59. Another significant weakness of these two agreements is the fact that the list of EU rules to be implemented is a copy (more or less adapted) of that included in the ECAA

---

53 The International Civil Aviation Organization (ICAO) is the specialised agency of the UN established by the Convention on International Civil Aviation (also known as the Chicago Convention), signed on 7 December 1944 and to which 190 states are currently contracting parties. The ICAO notably lays down 'standards and recommended practices' to be enforced by the Contracting States, but there is no binding mechanism to guarantee their full and proper application.

54 The ‘Safety Assessment of Foreign Aircraft’ programme was established by Directive 2004/36/EC. It provided for ramp inspections of third-country aircraft to assess their compliance with international safety standards.
agreement while there does not seem to be any intention to oblige Georgia and Moldova to renounce their sovereignty in any field or accept the exercise on their territory by the Commission and EASA of the powers they are given by those rules. This list does not, indeed, specify how those rules are to be interpreted in this specific case.

60. As an example, these countries are required to ‘act in conformity’ with the whole of Regulation 216/2008 establishing the EASA system\(^{55}\), except for its Articles 65, 69.1 (second paragraph) and 69.4, and its annexes. These articles address the issues of comitology and of the correspondence between the new and the former legislation (the latter being Regulation 1592/2002). The annexes are the legal basis for all implementing rules adopted by the Commission. As a consequence, Georgia and Moldova are supposed to accept the powers given to EASA, which is the only body entitled to approve the design of products manufactured or registered in the EU or to issue certificates to third-country organisations operating in the EU. This is reinforced by the fact that the acquis they are expected to implement includes a number of Commission regulations related to the activities of EASA (Regulation 1702/2003 on the certification of products; Regulation 104/2004 on the EASA Board of Appeal\(^{56}\); Regulation 593/2007 on the fees and charges levied by EASA; and Regulation 736/2006 on the conduct of inspections by EASA). Does this mean that EASA is entitled to certify products on behalf of Georgia, to charge applicants accordingly, and to conduct inspections of the way the Georgian administration works? Legally speaking it should be so, but no-one in the Commission or the Georgian administration understands the text in that sense.

61. The situation is similar in the field of security. Regulation 300/2008\(^{57}\) applies from Article 1 to Article 18. This includes the systematic inspection by the Commission of the way these countries apply the law. Moreover, Regulation 18/2010 on specifications for national quality control programmes also applies. Does this mean that the Commission will inspect Georgia or Moldova as if they were EU Member States? A case-by-case analysis shows that similar problems exist in most other cases covered by EU rules, as those rules confer powers on the Commission which should automatically create obligations for the partner (as they do vis-à-vis ECAA members). However, this is not so far the understanding of either party.

62. Looking now at the agreement with Morocco, everything that has been said above about the ECAA agreements equally applies, except as regards security (there is no obligation to act in conformity with EU law) and regulations that did not exist at the time of signature of that agreement (in the absence to date of full ratification the Joint Committee has not been able to amend the list of applicable rules). Moreover, a rapid examination of the reports of the Joint Committee’s meetings\(^{58}\) does not suggest that regulatory convergence in the fields examined here is being carefully implemented, and that particular attention is being paid to verifying whether Morocco is actively transposing the regulations listed in the agreement’s annex.

---

56 Recourse is had to this board in cases of disagreement between the EASA and the industry over certification decisions.
58 It has been impossible to obtain from the Commission a copy of the reports of the Joint Committees. The author was invited to a meeting during which he was shown some of them. Although that gave him an idea of what was dealt with in those committees, it was difficult under those circumstances to fully study how the Joint Committees’ meetings contribute to the implementation of the ‘convergence’ provisions of the agreements.
63. Probably reflecting awareness of the difficulties mentioned above, the agreement with Jordan has been drafted slightly differently. It requires the parties to ‘ensure that their legislation delivers, at a minimum, the standards’ specified in an annex which, again, outlines the EU acquis in the same way as in the other agreements. It is difficult to argue that the alteration in the wording of the requirement changes the obligation on Jordan to implement the EU acquis and accept the powers given to the Commission and EASA. If that were not so, would it mean that the agreement would also give the right to the EU to deviate from its own law, since ratified treaties have precedence over EU law? However, it is clear that no one wants the Commission or EASA to exercise in the Mediterranean countries the powers they have been given in the internal market. Apart from that small change, the remarks made above as regards ECAA and the agreement with Morocco also apply to the Jordanian case.

64. To conclude, it is not evident that the EU agreements contribute ‘to guarantee high standards of safety, security, environmental protection and passenger protection in the EC and promoting them worldwide’. The agreements with the EU’s major partners do not indeed say more than the existing national ASAs, and those countries have no intention to adopt our standards. As regards the other agreements, the transitional mechanisms do not really create a sufficient incentive to push the partners into adopting the EU acquis. In the ECAA, the transitional mechanisms may even make it more difficult to achieve the objective. Moreover, the drafting of these agreements, except in the case of the Balkan countries, creates major uncertainty as regards the objectives to be attained.

65. In this context, the real question is whether the novelty introduced in the EU agreements, which is to address both market issues and regulatory convergence, is worth continuing. While indeed it is necessary to ensure fair competition between designated carriers, does this require the partners to accept a progressive harmonisation with EU rules in domains such as safety, security, or environmental protection, which have little to do with the exercise of traffic rights and fair competition among air carriers? When such a possible link was envisaged in the 1980s, at the time when the Commission was proposing a progressive liberalisation of the internal market, the Commission and several Member States objected that ICAO rules were already providing sufficient harmonisation and that no further action was required as a prerequisite to market opening. What has changed so dramatically that justifies today the Commission’s views as regards the need to include regulatory convergence in any agreement with a possible partner? As the experience gained in the implementation of the existing agreements does not show that EU agreements seriously contribute to such a harmonisation, it would probably be more appropriate to address such issues on a case-by-case basis, using specific sector-based arrangements as is being done with a number of partners\(^{59}\).

---

\(^{59}\) For instance, aviation safety agreements or arrangements have been concluded with the US, Canada, Brazil, China, Russia, India, Japan, Israel and the United Arab Emirates, as well as with all non-EU former JAA members.
PART III

ELEMENTS OF A FUTURE EXTERNAL AVIATION POLICY

by the Association of European Airlines

2013
EXECUTIVE SUMMARY

1. A coherent EU external relations policy should:
   - Foster the competitiveness of Europe’s airline industry in an increasingly challenging environment;
   - Develop a politically acceptable policy and regulatory proposal to safeguard a European and international level playing field.

2. Change is now called for. With increasing competitive pressure on the European airline industry coming from non-EU airlines, it is essential that a number of key challenges are picked up in order to recognise aviation as a key driver for economic recovery and efficiency in Europe:
   - To counter the EU’s ‘destabilising’ of the playing field for Europe by addressing the imposition of administrative, operational and financial burdens through regulatory intervention;
   - To ensure that the EU’s policy of primarily negotiating with neighbourhood and likeminded countries is not detrimental to the interests of the European airlines;
   - To develop a framework for fair competition worldwide.

3. AEA believes that the EU should integrate the following requirements into its approach on external relations:

   **Within Europe:**
   - The need for European institutions to control costs and decrease on-going and pending burdensome regulation beyond the airlines’ control (e.g. ETS, slots, consumer policy);
   - The need for Europe to increase efficiency and invest into infrastructure as a key strategic asset (e.g. SES, airport capacity);
   - The need for swift implementation of current regional ‘state aid’ rules and decisions on pending cases.

   **International**
   - The development of an appropriate regulatory framework which aims at achieving convergence and harmonization;
   - The definition of ‘control’ in order to achieve mutual liberalisation of the ‘ownership and control’ issue;
   - The achievement of an international ‘level playing field’ and framework for fair competition on safety, security, consumer policy, state aids and environment policy;
   - The development of an effective international arbitration mechanism (bilateral or multilateral).
1. INTRODUCTION

The European Commission should assess the market before and after conclusion of the agreement in terms of:

- Number of carriers;
- Number of destinations;
- Capacity;
- Tariffs;
- Regulatory convergence;
- Ownership and control requirements;
- Investments in the airline industry.

After this assessment, the Commission should also determine in what respect a new EU agreement can deliver added value in comparison with existing bilateral agreements. In the view of AEA, the three pillars of the European Union’s external aviation policy are indeed in need of review, because in economic terms, they have so far not fulfilled expectations:

- Horizontal (Pillar 1) agreements have not been beneficial for EU carriers and EU consumers;
- Neighbourhood (Pillar 2) agreements have accelerated the structural change to point-to-point operations for short and medium-haul flights, which effectively weakens international hub operations;
- EU Open Aviation Area (Pillar 3) agreements have:
  - Granted additional market access to the carriers of the third country concerned, meaning that European hub operators have been less able to capitalise on the new opportunities. [In fact, it is far from certain what triggers additional economic benefit for the European consumer - is it a new ASA, a new trade agreement, an investment policy or a different factor?]
  - Failed to improve regulatory convergence beyond the achievements of bilateral agreements, including open skies.

AEA therefore believes that the time has come to reorient the EU’s external aviation policy in order to provide economic benefits for international operators that are based in Europe.
2. IMPORTANT ROLE OF EUROPEAN NETWORK AIRLINES

European network airlines play a fundamentally important role for the European economy by creating jobs and added value, and through their contribution to the Budgets and the social security systems of the Member States.

These economic benefits must drive the EU policy, not an institutional quarrel over jurisdiction. This is a fundamentally important policy orientation that cannot be emphasised strongly enough. It has consequences from “outside-in” and from “inside-out”.

If the catalytic effects of airline hub operations are understood by policy-makers, then the resulting effects of aviation on employment, economic growth and exports will determine the parameters of the European industry policy.

We can learn a great deal from successful industry policy outside the EU. The Turkish government, for example, has taken the deliberate decision to reduce aviation taxes because it anticipated that this would stimulate travel, which in turn stimulated economic activity and resulted in income and corporate tax revenues; its policy has effectively created a win-win situation. This is not economic theory, this is empirical data. If Turkey could do it, why should the European Union be incapable of developing a sound industry policy as the basis for a powerful international aviation policy?

The production costs of European airlines must be contained, if EU aviation is to remain competitive in a globalised competitive economy. The plethora of aviation taxes and austerity measures implemented and envisaged throughout Europe is counterproductive, as this stifles growth, the functionality of hubs, and Europe’s competitiveness. Airlines for America, a trade organization for American carriers, has compiled the data for US airports and has shown how costs for airlines have exploded in the US. The European Commission should investigate the same development in Europe. We expect the Commission to act as a catalyst in promoting the role of aviation, at the same time drawing on the positive experience gained outside the European Union, from “outside-in” so to speak.

Drawing from “the inside-out” is another role of the EC: it is on the basis of the impressive and successful cost reduction programmes within Europe’s aviation sector, notably the airlines, that the Commission should determine international growth opportunities. The EC tends to use administrative and procedural mechanisms to determine next steps - that is not conducive to promoting competitiveness. External Relations are fundamentally about growth opportunities, which cannot be assessed as a regulatory or administrative process, but on the basis of comprehensive analyses.
3. LESSONS FROM THE PAST

Any reform of the EU’s external aviation policy must take into account the consequences and “lessons learned” from past liberalisation.

Evidently, growth opportunities created by international aviation agreements must provide for sustainable growth, by ensuring a convergence of conditions for competition. The intra-Community air transport liberalisation, from 1987 to 1993, certainly promoted growth, but also led to a deterioration of service standards; cost competition has been the key advantage for consumers, but airlines have had to sell assets to compensate for the extreme revenue loss (40% yield decline in 10 years within Europe).

The intended harmonisation following the liberalization has not taken place: Member States and regions still pursue their own fiscal, environmental, infrastructural, local and social policy. The Eurozone in its current format depends upon convergence of a policy for a monetary and fiscal Union. The absence of such harmonization of policies within Europe weakens Europe’s negotiating stance internationally.

Therefore, the EU institutions should enable and support Member States by establishing, for example, a non-discriminatory income tax and/or social security regime for airlines having a base in their country employing crew living in their country. Without such harmonisation, different tax and social security regimes continue to apply for crews flying the same aircraft between the same destinations. Liberalisation without such harmonisation merely accentuates the problem, without providing a solution; its impact is that the carrier with the lower external costs in its country gains market shares, turning the competition solely to competition between locations. Growth opportunities and pressure on convergence must go hand in hand.

4. A PARTICULAR “CASE STUDY” FOR INSUFFICIENT RESULTS IS THE RELATIONSHIP BETWEEN THE EU AND THE USA

When assessing the benefits of the EU-US Open Aviation Area Agreement, the Commission has failed to recognize the opportunity costs. The then good performance of the European airlines relative to their US competitors was not leveraged to promote access into the US market. Had ownership and control rules been successfully negotiated, they would have ensured greater growth opportunities for European carriers in the mid- to long-term. Now the tables have turned. Chapter 11-supported restructuring of US airlines has enabled them to gain market clout and thus negotiating leverage.
5. **A REVIEW OF THE EXTERNAL RELATIONS POLICY IS CALLED FOR.**

The “golden age of EU aviation external relations” (1990 – 2010) is over.

It has been useful for many years, with leverage created by the 2002 Decision of the Court of Justice of the European Union, to “think bigger”. In the meantime, however, the markets have evolved; regions such as China and India have matured into industrialised nations. The market has created new “bigger” structures which transcend the scope of traditional bilateral reciprocal negotiations. Mergers, as in the USA, cross-border acquisitions within Europe and international cross-border co-operation agreements substantiate this.

These developments have changed the relevant traffic flows between and within international markets. Competition has developed for access to third country markets, and integration of these markets into global networks. The negotiations between the United Arab Emirates and Canada were not bilateral, but for access to India; the negotiations between Qatar and Belgium were for access to the international market to/from Africa, etc.

The EU policy is not a facilitator of such developments; they are taking place **despite** the EU policy.

6. **ABSENCE OF AN INTERNATIONAL LEVEL PLAYING FIELD**

If these issues are not addressed internationally, the consequence will be a further decline of European market share.

Because the EU’s industry policy is not targeted at promoting aviation as a facilitator of growth, Europe’s aviation is **systemically** inefficient. The absence of a market-oriented EU aviation policy within Europe is exacerbated by the absence of an international level playing field. **Liberalisation without sufficient convergence of conditions for competition internationally means that non-EU carriers gain access to European markets, European carriers lose market shares.**

So what is the solution?

If the focus is to be exclusively upon the effect of increased services – from wherever – on the profitability of airports, and on the consumer choice, then the short-sighted solution is to focus exclusively on liberalisation and to accept the consequence of Europe’s weak and ineffective industry policy, exporting employment to non-EU hubs, decreasing their importance, and to accept further market share losses for the international airlines based in Europe. This appears to be the solution advocated by some: liberalise, and thereby generate further services from airlines irrespective of where they are based, irrespective of the consequences for employment and irrespective of the catalytic effects of European network carriers on local and regional employment, and for growth for European industries. The European consumer who would benefit from the possible cheapest airfares is at the same time a European citizen who wants to work in Europe, and to have access to a reliable social security system, high educational standards and good infrastructure. All of
this requires a healthy economy to which EU airlines can contribute provided they are globally competitive, complementing intra-European point to point local traffic.

It is inconceivable that the purpose or effect of a European aviation policy should be the gradual decline of the European aviation industry. Contrary to the maritime sector, European airlines cannot simply relocate to a country of registration outside of the European Union. Surely flags of convenience are not a policy option.

7. NEED TO REVIEW EU TRADE DEFENCE INSTRUMENTS

While the EU should concentrate on a cohesive regional competition and industry policy within Europe, it also needs to carry out a convincing and compelling review of internationally applicable EU trade defence instruments. In the aftermath of the EC Trade Defence Evaluation study of February 2012, AEA seeks to ensure that the specificities of international aviation are given due consideration in this review. But such instruments are only a means to an end.

8. INTERNATIONAL STANDARDS AND NORMS ARE REQUIRED

Ultimately, international standards and norms which create compatible levels of competitiveness are required. The market is already developing structures which will enable the carriers of the respective regions to tap into the future global traffic flows. The role of the EC is to act as catalyst for the development of, and agreement upon, such standards.

However, we need to be realistic: the EU has so far not even accomplished such standards within the EU and implementing them internationally will be an even greater challenge. The experience with EU Emissions Trading System (ETS) clearly shows that Europe cannot impose such standards internationally. With its environmental policy, the EU transport sector has been marginalised, and the EC has led the industry to the brink of a serious trade conflict. Whatever the resolution of the EU ETS conflict may be, the EU will have failed to impose its policy. Similarly, financial tools and safety or security standards cannot be imposed, but must be consensually sought internationally, either through ICAO, IMF, WTO or other international bodies.
9. RECOMMENDATIONS

- Define its future external aviation policy based on the unbiased analysis from the past, elaborating whether and how EU agreements can generate added value for the EU economy and EU airlines, strengthening European hubs and European aviation. Therefore, the external relations policy of the EU should not be seen in isolation from the state of the European airline industry.

- Ensure that aviation agreements – either bilateral or multilateral, at Member State level or EU level - strengthen market access for EU carriers and are part of a comprehensive EU economic policy. The EC Directorate General for Transport (DG MOVE) should coordinate international negotiations by other EC services (such as, but not limited to DGs CLIMA, TRADE, COMP) in order to ensure that aviation agreements are part of a comprehensive EU external economic policy. It may even elaborate an EU template which can be used by MS to negotiate with third countries when an analysis demonstrates that a comprehensive EU agreement would not render added value. **Focusing an EU policy merely on liberalizing air services and promoting financially healthy infrastructure providers will go against the stated objective of stimulating growth and jobs in the EU economy.**

- Regulatory convergence is essential and the EU needs to reflect on building an international regulatory framework to secure fair and open skies. The EU has to consider a new type of agreement with third countries which may condition market access for carriers from third countries if there are markets at stake that cannot ensure reciprocal economic opportunities for EU carriers. Why should Europe with its market of 500 million people provide unrestricted access to carriers from countries which cannot offer equal opportunities for EU carriers or which are structured by conditions which are not equal to those of the European market? We should learn from other countries how they openly declare aviation as part of their external policy to strengthen their own economies – and do the same, but in a way that benefits Europe and its citizens.
### ANNEX 1

Annual evolution of air traffic between the EU and various countries with or without an EU agreement *(In thousands of passengers and %)*  
*(Source: Eurostat)*

<table>
<thead>
<tr>
<th>: EU Agreement applied</th>
</tr>
</thead>
</table>

#### Traffic between the EU and Nord & South America:

<table>
<thead>
<tr>
<th>Year</th>
<th>USA</th>
<th>Canada</th>
<th>Mexico</th>
<th>South America</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>48119</td>
<td>8613</td>
<td>2661</td>
<td>8575</td>
</tr>
<tr>
<td>2006</td>
<td>49108</td>
<td>8793</td>
<td>2896</td>
<td>8884</td>
</tr>
<tr>
<td>2007</td>
<td>52131</td>
<td>9336</td>
<td>2982</td>
<td>9718</td>
</tr>
<tr>
<td>2008</td>
<td>52705</td>
<td>9373</td>
<td>3124</td>
<td>10570</td>
</tr>
<tr>
<td>2009</td>
<td>48441</td>
<td>8828</td>
<td>2440</td>
<td>9997</td>
</tr>
<tr>
<td>2010</td>
<td>48526</td>
<td>9290</td>
<td>2714</td>
<td>10659</td>
</tr>
<tr>
<td>2010/2005</td>
<td>+ 0.8%</td>
<td>+ 7.9%</td>
<td>+ 2%</td>
<td>+ 24.3%</td>
</tr>
</tbody>
</table>

#### Traffic between the EU, some Euromed States & Turkey:

<table>
<thead>
<tr>
<th>Year</th>
<th>Morocco</th>
<th>Algeria</th>
<th>Egypt</th>
<th>Tunisia</th>
<th>Turkey</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>5638</td>
<td>2569</td>
<td>9721</td>
<td>8248</td>
<td>23885</td>
</tr>
<tr>
<td>2006</td>
<td>6618</td>
<td>2649</td>
<td>9621</td>
<td>8523</td>
<td>21118</td>
</tr>
<tr>
<td>2007</td>
<td>8042</td>
<td>2872</td>
<td>11522</td>
<td>8745</td>
<td>23765</td>
</tr>
<tr>
<td>2008</td>
<td>8661</td>
<td>3051</td>
<td>13188</td>
<td>8809</td>
<td>25422</td>
</tr>
<tr>
<td>2009</td>
<td>9243</td>
<td>3383</td>
<td>12673</td>
<td>8280</td>
<td>25817</td>
</tr>
<tr>
<td>2010</td>
<td>11040</td>
<td>3557</td>
<td>14302</td>
<td>8442</td>
<td>30391</td>
</tr>
<tr>
<td>2010/2005</td>
<td>+ 95.8%</td>
<td>+ 38.5%</td>
<td>+ 47.1%</td>
<td>+ 2.4%</td>
<td>+ 27.2%</td>
</tr>
</tbody>
</table>
### Traffic between the EU and some Neighbouring States:

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Albania</strong></td>
<td>646</td>
<td>758</td>
<td>940</td>
<td>1055</td>
<td>1184</td>
<td>1340</td>
<td>+107.4%</td>
</tr>
<tr>
<td></td>
<td>-</td>
<td>17.3%</td>
<td>24%</td>
<td>12.2%</td>
<td>12.2%</td>
<td>13.2%</td>
<td></td>
</tr>
<tr>
<td><strong>Bosnia Herzeg.</strong></td>
<td>286</td>
<td>294</td>
<td>294</td>
<td>288</td>
<td>306</td>
<td>313</td>
<td>+ 9.4%</td>
</tr>
<tr>
<td></td>
<td>-</td>
<td>2.8%</td>
<td>0%</td>
<td>-2%</td>
<td>6.3%</td>
<td>2.3%</td>
<td></td>
</tr>
<tr>
<td><strong>Croatia</strong></td>
<td>2547</td>
<td>2978</td>
<td>3264</td>
<td>3313</td>
<td>3154</td>
<td>3405</td>
<td>+ 33.7%</td>
</tr>
<tr>
<td></td>
<td>-</td>
<td>16.9%</td>
<td>9.6%</td>
<td>1.5%</td>
<td>-4.8%</td>
<td>8%</td>
<td></td>
</tr>
<tr>
<td><strong>FYROM</strong></td>
<td>592</td>
<td>595</td>
<td>345</td>
<td>362</td>
<td>329</td>
<td>334</td>
<td>- 43.6%</td>
</tr>
<tr>
<td></td>
<td>-</td>
<td>0.5%</td>
<td>-42%</td>
<td>4.9%</td>
<td>-9.1%</td>
<td>1.5%</td>
<td></td>
</tr>
<tr>
<td><strong>Montenegro</strong></td>
<td>170</td>
<td>176</td>
<td>189</td>
<td>198</td>
<td>192</td>
<td>258</td>
<td>+ 51.8%</td>
</tr>
<tr>
<td></td>
<td>-</td>
<td>3.5%</td>
<td>7.4%</td>
<td>4.8%</td>
<td>-3%</td>
<td>34.4%</td>
<td></td>
</tr>
<tr>
<td><strong>Serbia</strong></td>
<td>1713</td>
<td>1759</td>
<td>1974</td>
<td>2116</td>
<td>2040</td>
<td>2347</td>
<td>+ 37%</td>
</tr>
<tr>
<td></td>
<td>-</td>
<td>2.7%</td>
<td>12.2%</td>
<td>7.2%</td>
<td>-3.6%</td>
<td>15%</td>
<td></td>
</tr>
<tr>
<td><strong>Georgia</strong></td>
<td>175</td>
<td>179</td>
<td>224</td>
<td>225</td>
<td>204</td>
<td>238</td>
<td>+ 36%</td>
</tr>
<tr>
<td></td>
<td>-</td>
<td>2.3%</td>
<td>25.1%</td>
<td>0.4%</td>
<td>-9.3%</td>
<td>16.7%</td>
<td></td>
</tr>
<tr>
<td><strong>Moldova</strong></td>
<td>224</td>
<td>253</td>
<td>397</td>
<td>437</td>
<td>417</td>
<td>466</td>
<td>+ 108%</td>
</tr>
<tr>
<td></td>
<td>-</td>
<td>12.9%</td>
<td>56.9%</td>
<td>10.1%</td>
<td>-4.6%</td>
<td>11.8%</td>
<td></td>
</tr>
</tbody>
</table>
ANNEX 2

Evolution of capacities offered between the EU and various countries with or without an EU agreement
(Source: OAG Aviation Data)

Evolution of scheduled traffic between EU27 and Cape Verde Islands

Source: OAG schedules
Date: 26jun12

Evolution of scheduled traffic between EU27 and Senegal

Source: OAG schedules
Date: 26jun12
### ANNEX 3

**Evolution of the number of European airports operating flights to/from various countries with or without an EU agreement**

(Source: Eurostat)

<table>
<thead>
<tr>
<th>Region</th>
<th>2005</th>
<th>2010</th>
<th>2010/2005</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>North America</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>USA</td>
<td>55</td>
<td>62</td>
<td>+ 12.7%</td>
</tr>
<tr>
<td>Canada</td>
<td>47</td>
<td>49</td>
<td>+ 4.3%</td>
</tr>
<tr>
<td>Mexico</td>
<td>21</td>
<td>26</td>
<td>+ 23.8%</td>
</tr>
<tr>
<td><strong>Mediterranean</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Morocco</td>
<td>65</td>
<td>77</td>
<td>+ 18.5%</td>
</tr>
<tr>
<td>Algeria</td>
<td>32</td>
<td>28</td>
<td>- 12.5%</td>
</tr>
<tr>
<td>Egypt</td>
<td>97</td>
<td>126</td>
<td>+ 29.9%</td>
</tr>
<tr>
<td>Tunisia</td>
<td>120</td>
<td>130</td>
<td>+ 8.3%</td>
</tr>
<tr>
<td>Turkey</td>
<td>134</td>
<td>164</td>
<td>+ 22.4%</td>
</tr>
<tr>
<td><strong>Balkans</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Albania</td>
<td>18</td>
<td>32</td>
<td>+ 77.8%</td>
</tr>
<tr>
<td>Bosnia-Herzeg.</td>
<td>17</td>
<td>16</td>
<td>- 5.9%</td>
</tr>
<tr>
<td>Croatia</td>
<td>82</td>
<td>92</td>
<td>+ 12.2%</td>
</tr>
<tr>
<td>FYROM</td>
<td>12</td>
<td>14</td>
<td>+ 16.7%</td>
</tr>
<tr>
<td>Montenegro</td>
<td>25</td>
<td>15</td>
<td>- 40%</td>
</tr>
<tr>
<td>Serbia</td>
<td>51</td>
<td>64</td>
<td>+ 25.5%</td>
</tr>
<tr>
<td>Georgia</td>
<td>11</td>
<td>12</td>
<td>+ 9.1%</td>
</tr>
<tr>
<td>Moldova</td>
<td>12</td>
<td>18</td>
<td>+ 50%</td>
</tr>
</tbody>
</table>
ANNEX 4

The Freedoms of the Air

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT B
STRUCTURAL AND COHESION POLICIES

Role

The Policy Departments are research units that provide specialised advice to committees, inter-parliamentary delegations and other parliamentary bodies.

Policy Areas

- Agriculture and Rural Development
- Culture and Education
- Fisheries
- Regional Development
- Transport and Tourism

Documents

Visit the European Parliament website:
http://www.europarl.europa.eu/studies