

## **Die Entwicklung der auswärtigen Luftverkehrspolitik der Europäischen Union: Von vielen erfolglosen Versuchen zum großen Aufbruch**

### **Introduction**

In 2017, we celebrate the 25 year anniversary of the creation of the EU's internal single aviation market which completely transformed the European aviation landscape and changed the ways in which our citizens travel. We also mark the 15 year anniversary of the landmark "open skies" judgement by the European Court of Justice which kick-started a process towards an increasingly coordinated and ambitious EU external aviation policy towards third countries. This year we also celebrate the 10 year anniversary of the signature of the EU-US Air Transport Agreement which liberalised the most important aviation market in the world and was a direct effect of the Court judgement.

In this article we will describe some of the key elements in the development of the EU's external aviation policy and how aviation relations between European countries evolved from pure bilateralism to a fully liberalised and integrated single aviation market across the continent. We will describe the implications that the creation of the EU internal market had for the external relations of the EU and its Member States in relation to the rest of the world.<sup>1</sup>

We will further illustrate that the external dimension of aviation policy was already present in the Commission's earliest proposals in the 1970s. However, in spite of the political, legal and economic arguments for negotiating with one common voice, the Commissions' attempts to devise an EU external aviation policy proved to be an uphill battle for many years. Even though the first EU air transport agreements were signed during the 1990s, it was the 2002 "open skies" judgement that irreversibly tipped the scale in favour of "more Europe" in external aviation. Several important policy communications followed and a number of EU-level agreements, including with the United States, were signed. Today, an ambitious EU external aviation policy is a cornerstone of the Aviation Strategy for Europe, the holistic blueprint guiding EU aviation policy. Many EU-level initiatives, including the

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<sup>1</sup> The views expressed in this article are those of the authors and do not necessarily reflect those of the European Commission and the article does therefore not constitute any formal commitment on behalf of the Commission.

negotiation of a first bloc-to-bloc air transport agreement with ASEAN, are underway to provide a modern framework allowing the EU to benefit from the air transportation growth of the future and to adapt to the gradual shift of economic gravity towards Asia.

## **International air transport – a short introduction**

### *The Chicago Convention*

In 1944, 700 delegates from 52 states met in Chicago for a conference that would become one of the defining moments for the global development of civil aviation. Driven by technological advancement of aircraft and an increasing number of airplanes, the objective was to lay down a global regulatory framework for the peaceful development of civil aviation in a post-war world. The Chicago Convention, signed on 7 December 1944 after a month of conference negotiations, became the key guiding document for civil aviation, which is still valid today. It also led to the creation of the International Civil Aviation Organization, a United Nations specialised agency, with its headquarters in Montreal, Canada. When negotiating the text of the Convention, several landmark choices were made that paved the way for the future development of international aviation relations.<sup>2</sup>

### *Bilateralism*

One of the key issues was the economic regulation of the sector. The main question was whether to pursue a more liberal approach based on a multilateral agreement on air services or a more restrictive framework based on bilateral agreements between individual States. The US argued in favour of the former but concerns among other states of a commercial dominance of US industry, in particular from the United Kingdom which had suffered considerable losses of its aviation fleets during the war, prevailed and led to a strong emphasis on national sovereignty in Article 1 ("Sovereignty") of the Chicago Convention: "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."<sup>3</sup>

Article 6 ("Scheduled air services") of the Chicago Convention specifies that without "special permission or other authorization" of a State, for example, by means of an air services agreement, no scheduled air services can be operated in the airspace of that State. To date, this remains the fundamental basis of the regulatory architecture of global civil aviation.

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<sup>2</sup> ICAO, "The History of ICAO and the Chicago Convention", <http://www.icao.int/about-icao/History/>; ICAO, "The Chicago Conference", <http://www.icao.int/ChicagoConference..>

<sup>3</sup> ICAO, Convention on International Civil Aviation, ICAO Doc 7300 (Chicago Convention), Article 1.

A web of bilateral air services agreements<sup>4</sup> between sovereign states still constitutes the legal system governing global civil aviation - a convoluted patchwork of thousands of agreements and arrangements that regulate and in most cases continue to restrict competition under free market conditions in various ways. While in the end not resulting in a full liberalisation of commercial aviation, the Chicago Conference conceptualised the traffic rights required to achieve this objective, the so called freedoms of the air and, through a multilateral agreement, sought to liberalise transit rights (the right to fly over another State's territory (first freedom right) and the right to make a technical stop in another State's territory (second freedom right).<sup>5</sup>

#### *Maritime transport: one freedom, the freedom of the sea*

International maritime transport and air transport are regulated very differently. One must caution against comparing the freedoms of the air with the freedom of the seas, a fundamental principle of maritime transport. The free and open access to the high seas for vessels of all States is an established principle and derived from long-standing international practice among seafarers. The similarities between the freedoms of the air and of the seas largely remain of linguistic nature as States decided on a fundamentally different approach for aviation.

#### *Air transport: nine freedoms of the air, yet all but free*

#### **Figure 1: The Freedoms of the Air**

The freedoms of the air are different forms of privileges: to enter, to land, and to carry passengers and cargo in another State's airspace (see illustration in Annex 1).

- The first and second freedoms concern the abovementioned transit and stop-over rights.<sup>6</sup>

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<sup>4</sup> OECD counted more than 3000 in OECD/International Transport Forum, "Air Service Agreement Liberalisation and Airline Alliances", 2014, p. 47.

<sup>5</sup> Tobias P. Maass, "Handelspolitische Schutzinstrumente im Luftverkehr", 2012, pp.106-109; Rigas Doganis, "Air Transport: A Case Study in International Regulation", Journal of Transport Economics and Policy, Vol. 7, No. 2, 1973, pp. 109-133, pp. 109-110; OECD/International Transport Forum, "Air Services Agreement Liberalisation and Airline Alliances", 2014, p. 47.

<sup>6</sup> Example: EU airline overflying Brazil, EU airline making a technical stop in Rio de Janeiro.

- The third freedom is the right to bring paying passengers (or cargo) from the State of origin to the destination, with the fourth freedom being the right to bring them back (not surprisingly they are mostly negotiated together)<sup>7</sup>.
- The fifth freedom is the right to offer commercial services between an intermediary point between the State of origin and the destination or to continue to a point beyond the destination.<sup>8</sup> It is a right that was historically needed to ensure the commercial viability of certain long haul routes by filling planes with additional passengers. Today, advanced capabilities of aircraft, including the ability to fly much longer distances, a higher demand for air transport, preference for non-stop flights and costs related to fifth freedom operations (crew, lay-over, catering etc), have reduced the overall number of services operated using fifth freedom rights. Fifth freedom rights always involve at least three States agreeing on such a right.
- The sixth freedom is the commercial privilege that allows carrying passengers or cargo to the State of origin and then transfers them on to a flight to a third State under a different flight number, so to say a combination of two sets of third and fourth freedom rights.<sup>9</sup>
- Seventh freedom rights entitle an operator to carry passengers or cargo between two foreign States without touching base in its home country.<sup>10</sup>
- We speak of eighth freedom rights, when a State grants the privilege to continue an incoming flight, from the first airport in that State to another one in the same State and to take on and carry passengers and/or cargo.<sup>11</sup> This is often referred to as consecutive cabotage.
- Finally, the ninth freedom – or pure cabotage – rights allow operating stand-alone domestic services in another state.<sup>12</sup>

*What is not explicitly allowed, is prohibited: restrictions on just about everything*

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7 Example: EU airline flying passengers from the EU to Rio de Janeiro and back to the EU.

8 Example: EU airline flying passengers from the EU to Rio de Janeiro, leaving some there, taking others on board, and continuing to Buenos Aires – and back to the EU.

9 Example: EU airline flying passengers from Rio de Janeiro to the EU (first 3<sup>rd</sup>/4<sup>th</sup> freedoms) where they change to another flight with the same airline to Beijing (second 3<sup>rd</sup>/4<sup>th</sup> freedom).

10 Example: EU airline flying passengers from Rio de Janeiro to Buenos Aires – without continuing to the EU.

11 Example: EU airline flying passengers from the EU to Rio de Janeiro, leaving some there, taking others on board, and continuing to São Paulo – and back to the EU

12 Example: EU airline flying passengers from Rio de Janeiro to São Paulo – without continuing to the EU; See Annex 1.

Comparing the freedom of the seas with the freedoms of the air may suggest describing the latter as euphemistically disguised exceptions to the general principle that everything that is not explicitly allowed is prohibited. This principle is cemented in the bilateral air services agreements negotiated between States. These agreements include rules that stipulate conditions on the exercise of the rights exchanged, typically starting with rules on who can operate under the agreement. Most often, an airline of a contracting State must be majority owned and controlled by interests of that State to use the rights under an agreement. These rules on ownership and control determine who can own airlines and, contrary to most other sectors, "threaten to ossify the development of a global industry and deny [...] carriers important new sources of capital".<sup>13</sup>

It is ironic and appears archaic that the most globalised of all industries, aviation which is international by its very nature, is constrained by nationalistic ownership rules which do not apply in other sectors, not even in strategic sectors such as banking or telecommunication.

Also, traditional air services agreements (ASAs) limit the number of airlines allowed to be designated to provide services. In the past, these were typically the state-owned so called "flag carriers". Most air services agreements even include rules on how to set the price of air tickets.<sup>14</sup> Traditionally, ASAs even included anti-competitive provisions that invited the carriers designated by the two States to agree on prices and capacity between them. Some of these provisions still exist. The ASAs helped creating an "industry characterized by a rigid compartmentalisation of national markets, wherein traffic rights are essentially shared out by reference to the nationality of the air transport companies".<sup>15</sup>

When exchanging the above mentioned freedoms in bilateral air services agreements, States mostly cover freedoms one to four, to a somewhat lesser extent fifth freedoms, and only rarely seventh freedoms and above. The exercise of traffic rights is often subject to further conditions, guided by the leitmotifs of equality, reciprocity and mutual benefit. For instance, there can be limitations on the maximum number of flights possible per week; of the airports that can be served; of the authorised capacity in terms of seats and even rules on the specific type of aircraft allowed to fly on a specific route.

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13 European Commission, Communication, "The EU's External Aviation Policy – Addressing Future Challenges", COM(2012)556 final, 27 September 2012, p. 4.

14 ICAO, "Manual on the Regulation of International Air Transport", Doc 9626, 2<sup>nd</sup> edition, 2004, 3-1 and Appendix 5, ICAO Template Air Services Agreements.

15 European Commission, "Proposal for a Council Decision concerning the creation of a common policy in the civil aircraft and aviation sector", Official Journal C 265 19 November 1975, 265/2.

To summarise this little *tour d'horizon* of the regulatory framework of air transport, we could imagine a fictional State A and State B concluding a typical air services agreement that covers first, second and third/fourth freedoms. However, the rights under the agreement are only available to one designated airline for each State. The third/fourth freedom rights are further limited to passenger services, which only allow flights between the capitals of State A and B and not more than one flight per day. Let us now imagine that several airlines of State A would be interested to open services to State B. Yet, State A is required to pick only one of them as its designated airline. Several large cities in State A are keen to attract direct flights from State B. Again, the agreement does not provide for that. Finally, after a number of years, pension funds of State C and a bank of State D acquire 30% each of the stock market listed designated airline of State A. The provisions of the bilateral agreement between State A and State B entitle the latter to revoke the operating authorisation of the designated airline of State A because of said investment that lowers the ownership State A's to 40% which is then no longer in conformity with the requirement of majority ownership. In short, the traditional system of restrictive bilateral air services agreements fails to create market conditions where competition leads to opportunities for businesses and benefits for consumers. Instead it is a "system [that] enables governments to ensure that their airlines do not suffer from the operations of competitors to a degree that they consider unacceptable".<sup>16</sup>

#### *Bilateral air services agreements between EU Member States in the past*

Air transport relations between EU Member States also used to be governed as described above. Most airlines were state-owned and Member States continued to exchange traffic rights in bilateral air services agreements long after the creation of the European Economic Community. Regardless of European integration in other economic sectors, Europe looked pretty much like the rest of the world with regards to how air transport was organised. The European Commission saw this compartmentalisation of the sector as a structural obstacle to creating the internal market for air services and to realising the potential benefits for European industry and the European consumer. The first initiatives were launched during the course of the 1970s<sup>17</sup> and in 1979, the Commission declared

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16 European Commission, Communication, "Progress towards the development of a Community air transport policy", COM(84) 72 final, p. 22.

17 See European Commission, "Proposal for a Draft Council decision on first steps towards joint action", 1972 Official Journal, C 110, 18 October 1972 or European Commission, Commission proposal, "Proposal for a Council Decision concerning the creation of a common policy in the civil aircraft and aviation sector", Official Journal C 265, 19 November 1975 ("1975 proposal").

“*the time is ripe*”<sup>18</sup> for a Community approach for air transport to ensure that “air transport, like other economic sectors can take advantage of benefits related to European economic integration and the establishment of the common market”<sup>19</sup>.

To that end, the Commission launched a public debate with a series of proposed actions in a comprehensive memorandum to achieve an “*evolutionary*” normalisation of the sector towards *inter alia* full application of competition and state aid rules, gradually enhanced market access, a phase out of restrictive bilateral rules on tariffs and measures on the external side.<sup>20</sup>

### *EU landscape completely transformed over 25 years*

In 1983, the 1979 memorandum was followed by a second memorandum putting forward a concrete action plan to gradually liberalise air transport services.<sup>21</sup> In 1987, a first legislative package was approved *inter alia* relaxing the rigid bilateral rules on tariffs and seat capacity sharing and in 1990 a second package took effect partly liberalising third and fourth freedom rights, i.e. direct traffic, between Member States. Although some capacity regulation was maintained, the second package could accommodate normal traffic growth. The 1992 third package finally fully liberalised tariffs and market access on a gradual basis, and by April 1997 EU airlines were granted all freedoms of the air and also able to operate domestic services in another Member State (cabotage). To date, this represents the most in-depth example of regional liberalisation and “*an unprecedented step in international air transport*”<sup>22</sup>.

The EU broke with the principle of national majority ownership and control for its air carriers. Instead, within the EU, the “EU carrier principle” was introduced according to which there was no longer any requirement on carriers to be majority owned and controlled by one single State or nationals of that State but a new requirement to be majority owned by EU Member States or their nationals. It could therefore be said that the EU no longer had national carriers but EU carriers based on common EU licensing rules. The principle of EU ownership of airlines could even be further derogated from under EU

18 European Commission, Memorandum, “Air Transport: A Community Approach”, Bulletin of the European Communities, supplement 5/79, p. 7.

19 *Ibid*, p. 11.

20 *Ibid*, p. 4.

21 European Commission, Communication, “Progress towards the development of a Community air transport policy”, COM(84) 72 final, 15 March 1984.

22 European Commission, Commission Staff Working Document accompanying the Aviation Strategy for Europe, SWD (2015) 261 final, 7 December 2015, p.7.

aviation agreements with partner countries which could allow for full and reciprocal liberalisation of ownership and control of airlines between the EU and such partner countries.

The EU also completely liberalised market access and pricing of services. A whole new EU-wide legal framework was created based on EU regulations granting unlimited commercial freedom to air carriers which replaced the traditional mercantilist bilateral air services agreements under which everything was forbidden unless explicitly allowed for. This marked the end to bilateral air services agreements between EU Member States and the end of traditional protectionism because carriers were now free to operate and provide services where ever they wished and without any prior government permission, as it had been the case until then. The impact was remarkable and completely transformed the intra-EU aviation market.

In 2008, Regulation 1008/2008 on common rules for the operation of air services in the Community was adopted to further integrate and update the three regulations comprised in the 1992 "third package" (licensing, market access and pricing). Today, Regulation 1008/2008 contains the basic rules for the EU air transport market, for instance on airline licensing, leasing, access to routes, public service obligations, traffic distribution between airports, pricing freedom and transparency, code sharing and foreign investments in EU airlines.

### **1975–2002: Developments towards an EU external aviation policy in the context of creating the internal aviation market**

#### *First proposals to create the EU aviation market – and first external elements*

From the outset, the Commission saw the interrelationship between the creation of the EU internal aviation market and the external aviation relations of EU Member States with third countries. Already in 1975, the European Commission, for the first time, proposed to negotiate Community-level air transport agreements with third countries "*particularly in respect of traffic rights and with the aim of optimizing international routes and services.*"<sup>23</sup> In the 1979 memorandum, the Commission clearly pointed to the potential impact of external aviation relations on the internal EU aviation market – and vice versa –, underlining that the right of establishment fully applies to air transport and reaffirmed its intention to "*ensure that this principle is respected.*"<sup>24</sup> The Commission therefore

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23 European Commission, "1975 proposal", Art 3 b).

24 European Commission, Memorandum, "Air Transport: A Community Approach", Bulletin of the European Communities, supplement 5/79, 4 July 1979, p. 20.

suggested a consultation procedure for bilateral air transport negotiations of Member States with third countries, which was supported by the European Parliament but not by the Council. In 1983, the Commission reaffirmed the strong link between the internal and external aviation markets and continued compelling States to "*eliminate provisions*" counter to the freedom of establishment by replacing the national designation clauses of the bilateral air services agreements.<sup>25</sup>

#### *EU external aviation policy in the 1990s: Full thrust, first results*

In a 1990 Communication, the Commission further argued that external aviation matters, being a trade in services, would be an exclusive Community competence, similar to external commercial/trade matters.<sup>26</sup> The Commission, in its call for a common external aviation policy, urged Member States to "*abandon narrow minded nationalistic tactics in order to avoid serious long term damage to the European air transport industry as a whole*".<sup>27</sup>

EU-level air negotiations should therefore replace bilateral negotiations of Member States, "*not only for legal reasons but also for commercial, practical and tactical reasons*". As an exception to the general rule of EU-level negotiations, it was proposed that Member States, following a consultation mechanism, could be temporarily authorised to negotiate bilaterally "*where negotiation by the Community is not yet possible*".<sup>28</sup>

A first priority identified by the Commission for EU-level air transport negotiations were Member States of the European Free Trade Association. Norway and Sweden, both EFTA Member States at the time, subsequently became the first partners with which an air transport agreement was concluded in 1992. This agreement, negotiated, signed and concluded by the European Economic Community, established a strong link between the creation of an open and liberal aviation market and the acceptance of common rules, starting with the affirmation that Parties deemed it "*appropriate to base these rules on the*

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25 European Commission, Communication, "Progress towards the development of a Community air transport policy", COM(84) 72 final, 15 March 1984, pp. 13, 50.

26 European Commission, Proposal for a Council Decision on a consultation and authorisation procedure for agreements concerning commercial aviation relations between Member States and third countries, COM(90) 17 final; European Commission, Communication, "Air transport relations with third countries", COM(92) 434 final, 21 October 1992.

27 European Commission, Press Release, Opening address at the Financial Times Conference on "World Aerospace and Air Transport to the year 2000", 28 August 1990, IP/90/714.

28 European Commission, Proposal for a Council Decision on a consultation and authorisation procedure for agreements concerning commercial aviation relations between Member States and third countries, COM(90) 17 final, p. 16.

*legislation in force within the European Economic Community".* The incorporation of future legislation was already foreseen, *inter alia* in areas such as airports, slots, licencing, relations with third countries or predatory practices. The agreement further includes comprehensive rules on competition, including unfair practices, state aid, abuse of dominant positions, and enforcement mechanisms providing the Commission with access to information and the right to conduct investigations.<sup>29</sup>

Later in 1992, the Commission stressed that "*the Community will also externally have to act as one*", and modified its earlier proposal for external aviation to provide for a gradual introduction of EU-level negotiations. Yet, the Commission clearly underlined that "*there can be no negotiations with third countries [...] without Community involvement*" and named North America and Asia as "*the markets of prime interest to the Community*"<sup>30</sup> The United States and Japan were identified as potential key negotiating partners and further integration into the European regulatory system similar to the EFTA States, was contemplated for the Central and Eastern European countries, formerly members of the Warsaw Pact, and Slovenia, Croatia and Bosnia-Herzegovina. As for the content, the Commission argued in favour of liberal agreements "*as long as fair competition is ensured*" - a continuation of the approach taken in the agreement with Norway and Sweden.<sup>31</sup>

The Council, however, rejected the Commission's point of view that the negotiation of air transport agreements was an exclusive Community competence, and underlined that Member States "*shall remain fully responsible for their relations with third countries in the field of aviation*" and stressed "*the need not to contest the validity of existing air services agreements*" linked to the freedom of establishment.<sup>32</sup> The Council further insisted that as a principle, any EU-level negotiations must be individually authorised by the Council.

The European Parliament found this position of the Council to be unacceptable and supported the idea to gradually shift the competence for external aviation matters to the Community, but also challenged the legal basis proposed by the European Commission. It further underlined its opinion that the objective of the EU's external aviation policy should be to "*completely liberalise international aviation by eliminating restrictions [...], discrimination and by guaranteeing fair competition*" in the interest of the consumers, airlines and airports. The European Parliament suggested that the external aviation policy

29 Agreement between the European Economic Community, the Kingdom of Norway and the Kingdom of Sweden on civil aviation, Official Journal of the European Communities, L 200, 18 July 1992.

30 European Commission, Communication, "Air transport relations with third countries", COM(92) 434 final, p. 5.

31 *Ibid.*, p. 20.

32 Council, conclusions of the 1647<sup>th</sup> Council meeting of Transport ministers, 15 March 1993.

should address the following categories of third countries: “(1) *the US and the rest of North America*, (2) *the Far East, notably Japan, ASEAN, China and Korea*, (3) *Eastern Europe* and (4) *the rest of the world*”. Priority should be given to negotiate with the US and Japan. In Asia, negotiations should focus on opening the air transport markets with “*a few large countries*”, such as Japan, China or Indonesia, in the absence of a regional negotiating partner. For Eastern Europe, it was suggested to bilaterally negotiate full acceptance of the air transport *acquis* with each negotiating partner with a view to ultimately extend the common market. For the rest of the world, the Parliament recommended a case-by-base bilateral approach based on reciprocity.<sup>33</sup>

In 1994, the Commission criticised the Council’s failure to complement the creation of the single aviation market with the development of a common external aviation policy. It announced its intention to enforce the principle of EU designation and to present proposals for negotiating authorisations for air transport agreements with Central European States. For the US, the Commission, in cooperation with Member States, intended to hold exploratory talks so as to identify points for joint EU-level actions.<sup>34</sup> These initiatives led to limited negotiating mandates for the Commission to open air transport negotiations with the US and a full negotiating mandate to establish a Common Aviation Area with the associated countries of Central Europe (Bulgaria, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and the Czech Republic), Iceland and Norway.<sup>35</sup> In 1996 however, the Commission, in its first assessment of the impact of the third aviation package, strongly underlined that “*the absence of a common external policy leaves the internal air transport market in a fragile state and at the mercy of positions acquired through bilateral agreements concluded between the Member States and third countries*.”<sup>36</sup>

The before mentioned negotiations on a Common Aviation Area were already nearly finalised when a legal opinion of the European Court of Justice was requested to address some Member States’ concerns regarding the compatibility of the proposed agreement

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33 European Parliament, Report of the Committee on Transport and Tourism on the modified Commission proposal for a Council decision on a consultation and authorisation procedure for agreements concerning commercial aviation relations between Member States and third countries, A-0299/93, 15 October 1993, 27–28.

34 European Commission, Communication, “The way forward for civil aviation in Europe”, COM(94) 218 final, 1 June 1994.

35 European Commission, Communication, “Impact of the third package of air transport liberalisation measures”, COM(96) 514 final, 22 October 1996, p. iv.

36 *Ibid.* 22

with the EC Treaty.<sup>37</sup> The Court confirmed the compatibility in 2002 but the proposed agreement was eventually overtaken by progressing accession negotiations with the ECAA negotiating partners who joined the EU in 2004.

#### *The EU-Switzerland air transport agreement*

Following its decision to reject the EEA Agreement in 1992, Switzerland requested negotiations on a wider package of sectoral agreements, including on air transport, to limit the otherwise foregone benefits of a closer relationship with the EU. Air transport negotiations were opened in 1994 and the EU-Switzerland air transport agreement was finally signed in 1999. The agreement entered into force in 2002. It aligned Switzerland with the EU aviation *acquis*, fully opened up 3<sup>rd</sup> and 4<sup>th</sup> freedom traffic rights and additionally provides Swiss carriers with the possibility to operate between points in the EU (7<sup>th</sup> freedom traffic rights). Cabotage rights (8<sup>th</sup> and 9<sup>th</sup> freedom traffic rights) were not covered although the prospect of such rights to be negotiated at a later stage was included in the text of the agreement. Today, Switzerland is the third largest extra-EU market and air traffic has increased by more than 14 million since the agreement was signed to reach 32 million annual passengers.<sup>38</sup>

Throughout the 1990s, the negotiations at EU-level with its neighbours had in common combined market opening with common rules through the transposition of EU aviation legislation by the other party. Further, as a key element, they had a Joint Committee as a monitoring mechanism. Both elements can be found in later EU-level air transport agreements with the neighbourhood. Interestingly, all three negotiations (Norway/Sweden, ECAA and Switzerland) were on so-called "EU-only agreements", which means they commit only the EU and not the EU *and* its Member States as in other later "mixed" agreements. That does not mean that Member States are not involved, but that they are in their capacities constituting the Council. Consequently signature on the EU side is only required from a representative of the EU, and not by a representative of the EU *and* every Member State. Also, the ratification mechanism is less burdensome and faster, avoiding that agreements enter into force only 10 years or even more after signature – as is the case with some so-called "mixed" air transport agreements signed after 2002. It also helps

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37 European Court of Justice, Opinion 1/00, 18 April 2002, I- 3499.

38 Agreement between the European Community and the Swiss Confederation on Air Transport, Official Journal of the European Communities, L114, 30 April 2002; European Commission, Press Release 'A new stage in relations between the European Union and Switzerland', IP/98/1100, Brussels, 11 December 1998; Eurostat.

prevent possible scenarios where a single parliament, or even a single regional parliament, can effectively block the entering into force of an agreement.

#### *First discussions on opening negotiations with the US*

The Commission repeatedly requested a negotiating mandate for a Community-level air transport agreement with the US. The overall objective was to "*ensure competition [...] on fair terms*" in response to what was considered a US *divide et impera* external aviation policy by means of negotiating bilateral air services agreements, so called "open skies" agreements, with individual Member States. Without an EU-level agreement, EU Transport Commissioner Kinnock in 1995 expected that "*we will witness the implementation of a policy that is not just America first, but America first, last, both ways across the Atlantic, and within and beyond Europe*".<sup>39</sup> Yet, the Commission's proposals went largely unheard. Its 1990 request to open negotiations was declined by the Council the following year. The 1995 request led to a limited negotiating mandate in 1996, where the Council allowed the Commission to explore soft matters with the US, such as ownership and control, the environment etc. but did not grant the Commission a mandate to negotiate traffic rights – the main issue for the imbalance between EU Member States and the US. In 1997, the Commission once more requested to open negotiations on a transatlantic common aviation area. Again, the request was not met favourably by the Council and formally withdrawn in 2004.<sup>40</sup> In 1996, the Commission once more criticised the most recent "open skies" agreements concluded between the US and several Member States because they did not respect the legal obligations concerning EU designation and therefore concluded in breach of EU law. In 1998, the Commission eventually took eight Member States to Court which resulted in a step change towards a common external aviation policy.<sup>41</sup>

In 1999, the Commission once more illustrated the asymmetry created by bilateral air services agreements that are disadvantageous for EU industry and called for "completing the single aviation market with a genuine external dimension". It further considered

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39 European Commission, Press Release, "Commission approves draft mandate to negotiate "Open Skies" accord with the United States, IP/95/414, 26 April 1995.

40 European Commission, Proposal for a Council decision authorising the Commission to open negotiations for an agreement with the United States on the creation of a transatlantic common aviation area, SEC(97) 2053 final.

41 European Commission, Communication, "Impact of the third package of air transport liberalisation measures", COM(96) 514 final, p.22

addressing air transport under the WTO and put forward the objective of creating a "single air transport market which is genuinely open to the outside".<sup>42</sup>

### **2002-2005: Ignition and "take-off"**

As this article has described, the development of an EU external aviation policy has been a gradual and very long process starting with some initial reflections by the European Commission already in the 1970s. 40 years later, the process is still on-going and evolving. As we have seen, it has also been a process in which the internal and external dimensions of the EU aviation market were inter-related and could not be seen in separation. On the contrary, the creation of the liberalised single EU aviation market – which followed the liberalisation of the domestic US aviation market in 1978 – also generated its own pressures for changes externally. The creation of the EU single aviation market broke with a number of established principles in the international aviation community following the Second World War. The EU revolutionised international air transport by replacing the concept of nationally majority owned and controlled air carriers by *EU* majority owned and controlled air carriers. Along with the full liberalisation of tariffs and traffic rights, including cabotage rights, it was a major effort to "normalise" air transport within the EU. The impact was remarkable and completely transformed the intra-EU aviation market, not least by creating entirely new commercial opportunities for pan-European carriers such as Ryanair or easyJet.

But it also increasingly revealed tensions between the way in which the internal EU market had changed and became organised, and the way in which the EU and its Member States continued to conduct their external, international aviation relations which in most cases remained based on bilateral air services agreements between individual States. Typically these agreements contained the restrictions described above (who can own an airline, number of airlines, routes, frequencies allowed, tariffs etc.) which have all disappeared within the EU. As a result, only designated national carriers could operate externally, as third countries, on the basis of the bilateral agreement, were entitled to refuse the designation of a non-national EU carrier. It became increasingly problematic that the single EU internal market was not recognised externally.

While the process towards an EU external aviation policy had been slow and long, events in 2002-2003 marked a milestone that should have major implications for the EU's external

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42 European Commission, Communication, "The European airline industry: from single market to worldwide challenges", COM(1999) 182 final, 20 May 1999, pp. 16-17.

aviation relations, for the respective roles of the EU and its Member States, and for the cooperation between them.

#### *"Open skies" judgements*

In 1992, the US signed its first-ever "open skies" agreement with The Netherlands. Two years later, the US government released an "*International Aviation Policy Statement*" in which it offered "open skies" agreements with partner countries including with EU Member States which would include third, fourth and fifth freedom traffic rights.

For a number of reasons, the European Commission asked Member States not to enter into any new arrangements with the US. The Commission argued that the removal of internal market barriers within the EU should be matched by a common external aviation policy towards third countries. The Commission was of the view that Member States should no longer enter into bilateral agreements with non-EU countries on an individual basis as such agreements:

- would affect the operation of the EU single aviation market based on common rules;
- discriminate in favour of national flag carriers of EU Member States;
- hamper competition between EU carriers due to the national ownership and control requirements which also hamper EU carriers' access to capital markets and prevent them from consolidating into financially stronger international carriers (even at EU level) thereby preventing EU airlines with global ambitions from establishing international operations in other EU Member States than its own.

Moreover, specifically in relation to the US, the Commission was of the view that bilateral agreements between individual EU Member States and the US would lead to an imbalanced outcome, and would not reflect the fact that the EU had become one large liberalised market comparable in size and nature to that of the domestic US market. Bilateral agreements would give US carriers considerable commercial advantages and operational opportunities compared to their EU competitors because US carriers would be able to fly freely from any point in the US to nearly any point in the EU (and even operate intra-EU fifth freedom traffic rights between many EU Member States), whereas European carriers would only be able to operate from their "home country" to the US, and on top of that would have no access to the US domestic market (cabotage).

Despite the Commission's request to Member States not to enter into "open skies" with the US, during 1995 and 1996 Belgium, Finland, Denmark, Sweden, Luxembourg, Austria and Germany did so. This led the Commission in 1998 – after the last failed attempt in 1995 to obtain a meaningful mandate from the Council to negotiate a transatlantic common aviation area including traffic rights – to bring before the European Court of Justice cases against these seven Member States. The Commission brought an eighth case against the United Kingdom in respect of its 1977 "Bermuda II" agreement with the US which was also based on national ownership and control, although more restrictive in terms of traffic rights than the "open skies" agreements.

#### *The Court's ruling*

On 5 November 2002, the European Court of Justice ruled in the so-called "open skies" case that the nationality clauses in the agreements were contrary to the fundamental right of establishment laid down in the Treaty which allows EU nationals to establish businesses throughout the EU free from any discrimination. The Court ruled that the ownership and control clauses in the agreements discriminated between EU carriers on the basis of nationality e.g. by preventing a UK carrier to establish itself in Germany and enjoy the designation and traffic rights available in, for example, Germany's bilateral air transport agreement with China (which was reserved for German and Chinese carriers owned and controlled respectively by Germany and China or their nationals).

The Court also specified that "whenever the Community had included in its internal acts provisions relating to the treatment of nationals of non-member countries, it acquires an exclusive external competence in the spheres by those acts"<sup>43</sup>. The Court identified three specific areas of Community exclusive competence: airport slots, computer reservation systems and intra-Community fares and rates. The Court found that even where Member States sought to take action to reflect Community law directly in their bilateral air services agreements, they had nonetheless failed in their obligations, because Member States no longer have competence to make undertakings of any sort on these issues. Since the court cases were launched, Community competence has expanded considerably including into areas such as safety, ground handling, customs duties, environment, security etc.

The implications of the "open skies" judgement were not just limited to the "open skies" agreements with the US in question but went much further. Since most, if not all, other

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<sup>43</sup> See e.g. European Court of Justice, Case C-471/98 Commission of the European Communities v Kingdom of Belgium, 5 November 2002.

bilateral agreements between EU Member States and third countries contained similar nationality clauses and in many cases had infringed Community exclusive competence, the Commission considered it necessary "*to devise a comprehensive international policy for the aviation sector that will allow the Community to address these problems*".<sup>44</sup>

#### *The Commission's assessment of the consequences of the Court judgements*

For the European Commission, the Court judgement was obviously a clear victory but more importantly an opportunity not only to address the immediate legal issues but more broadly for developing a new, coordinated and coherent Community external aviation policy based on key principles and negotiating priorities. In the Communication<sup>45</sup> issued only two weeks after the ECJ judgement, the Commission identified the following four negotiating priorities:

- To enter into negotiations with key bilateral partners (the US and Russia were highlighted. In relation to the US, the Commission requested the eight Member States concerned by the ECJ judgements to activate the procedures for termination of the agreements);
- To continue building up relations with neighbouring countries (the planned European Common Aviation Area also to include partners around the Mediterranean and to the East);
- To build-up relations with developing countries including through continuation of assistance programmes to assist with application of safety standards;
- To assert the position of the Community in multilateral fora and work for reform internationally (notably with ICAO).

#### *Concrete proposals for implementing measures to remedy the consequences of the ECJ judgements*

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<sup>44</sup> European Commission, Communication, "Communication from the Commission on the consequences of the Court judgements of 5 November 2002 for European air transport policy", COM(2002) 649 final, 19 November 2002.

<sup>45</sup> *Ibid.*

Already three months later, the Commission issued a new Communication<sup>46</sup> "on relations between the Community and third countries in the field of air transport" which was accompanied by three concrete proposals for Council decisions:

- A draft Council decision authorising the Commission to open negotiations on the creation of an Open Aviation Area with the United States (the "US mandate");
- A draft Council decision authorising the Community to open negotiations with any third country on the designation of Community carriers on international routes to and from third countries and on matters with Community exclusive competence (the "horizontal mandate" aimed at replacing certain provisions (notably national designation by Community designation) in bilateral agreements by provisions in a Community agreement);
- A proposal for a new legal framework (Regulation) on the negotiation and implementation of air services agreements between Member States and third countries which, *inter alia*, aimed at establishing a clearer division of responsibility and means of cooperation between the Community and its Member States in the area of international air transport relations. This mechanism was created 25 years after the Commission first made a proposal for a consultation mechanism to coordinate bilateral air transport negotiations of Member States.

#### *The Council authorises the Commission to open EU-level negotiations – a new beginning*

At its meeting on 5 June 2003, the Council authorised the Commission to open negotiations with the US and also authorised the Commission to negotiate so-called "Horizontal Agreements" with any third country to bring bilateral agreements between EU Member States and third countries into conformity with Community law. Less than a year later, the Council and the European Parliament also adopted Regulation 847/2004 on the negotiation and implementation of air services agreements between Member States and third countries.

With these important decisions a new impetus and direction had been given to the EU's external aviation policy which would give the European Union as such, a gradually increasing role in the negotiation and regulation of international aviation relations. A new

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46 European Commission, Communication, "Communication from the Commission on relations between the Community and third countries in the field of air transport", COM(2003)94 final, 26 February 2003.

foundation had been laid for cooperation between the EU (represented internationally by the Commission) and EU Member States for aviation relations with third countries.

Given that this new internal organisation of cooperation with third countries was established on the back of legal Court cases lodged by the Commission against a number of Member States, it took time to recover from a situation of dispute about competences, and EU vs national interests and to build trust and good working relations between the Commission and EU Member States in implementing the new decisions.

But a page had been turned and a new and irreversible form of closer and closer cooperation between the EU and Member States had begun. While there were still forces that sought to maintain the status quo and protect national flag carriers and restrict market opening, there were other interests at play that strongly supported the Commission's vision for reform of international aviation, ensuring effective, open and fair competition in order to generate economic benefits for consumers.

In 2004, the Council and the European Parliament also adopted Regulation 868/2004 concerning protection against subsidisation and unfair pricing practices causing injury to Community air carriers in the supply of air services from non-EC countries. The Regulation was initially aimed at protecting Community carriers against unfair government support to US carriers in the aftermath of 9/11. Regulation 868/2004 has, however, never been applied and has been found impractical. A new proposal to replace it with a more effective instrument is expected to be presented by the European Commission shortly.

While the negotiations on an EU-US air transport agreement had started – which would prove lengthy - and the Commission had begun negotiations on Horizontal Agreements with a number of partner countries, the Council authorised the Commission to open new negotiations. The following years would see a number of new EU-level agreements with partner countries and regions being signed.

In December 2004, the Council of Ministers authorised the European Commission to start negotiations with eight South-East European partners (Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the Former Yugoslav Republic of Macedonia, Romania, Serbia and Montenegro and the U.N. Mission in Kosovo) on a "European Common Aviation Area" (ECAA) agreement. In contrast to the original ECAA mandate of 1996 which was for an "EU-only" agreement, the 2004 mandate was for a "mixed agreement". The Central- and

Eastern European countries for which the ECAA had initially been intended had in the meantime become EU Member States (1 May 2004). The objective was to integrate the EU's neighbours in South-East Europe in the EU's internal aviation market which, at the time, consisted of 25 EU Member States as well as Norway and Iceland.

The negotiations were opened on 31 March 2005 with a multilateral high-level meeting, at which all negotiating parties expressed support for reaching the ECAA Agreement as quickly as possible. After only nine months of negotiations, the text of the Agreement was agreed between all parties in December 2005. (On 1 January 2007, Bulgaria and Romania joined the European Union.)

The eight South-East European partners agreed to the full application of the European Community's aviation law (*Community acquis*). Once ECAA partners fully implement the EC's aviation *acquis*, ECAA airlines will have open access to the enlarged European single market in aviation. The ECAA agreement would therefore create new market opportunities due to an integrated aviation market of 36 countries and more than 500 million people. At the same time, the agreement would lead to equally high standards in term of safety and security across Europe, through the uniform application of rules.

In December 2004, the Council also authorised the Commission to open negotiations with Morocco.

### **Next step: the 2005 Communication and Council conclusions**

Another important milestone in the development of the EU external aviation policy was marked in 2005. In March, the European Commission presented a Communication<sup>47</sup> on further developing the agenda for the Community's external aviation policy, followed in June 2005 by Conclusions of the Council of EU Transport Ministers. These texts laid out an ambitious roadmap for further developing the external aviation relations of the European Community, according to which the EU policy is based on three pillars which respectively aim at:

1. ensuring legal certainty of the approximately 1800 existing bilateral agreements of EU Member States notably through new EU designation clauses;
2. developing the wider European Common Aviation Area by 2010 and;
3. negotiating new comprehensive agreements with key trading partners laying out the inseparable twin aims of, on the one hand, market opening creating new economic

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<sup>47</sup> European Commission, Communication, "Developing the agenda for the Community's external aviation policy", COM(2005)79 final, 11 March 2005.

and investment opportunities and, on the other hand, a process of regulatory convergence that ensures a satisfactory level playing field with fair and equitable competition conditions.

In its March 2005 Communication, the Commission had set out an ambitious agenda for negotiating comprehensive aviation agreements with key partners. Short-term priority was given to Russia and China (in addition to conclusion of the negotiations with the US) but several other important partner candidates were also identified – in addition to all the pre-accession and neighbourhood countries – this included India, Japan, South Korea, Australia, New Zealand, Canada, Mexico and Chile.

In its June 2005 conclusions, the Council 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 obtaining new opportunities for EU industry and users and achieving greater levels of regulatory convergence in order to ensure a competitive level playing field. The Council also considered that the acceptance of Community clause (such as on EU designation) should be a necessary starting point for Community negotiations.

In response to the Commission's proposed negotiations with key partners, the Council undertook *"to examine with interest in light of the "added value" principle"* the Commission's proposals to open negotiations with Russia and China. The China mandate was discussed in the Council during the second half of 2005 but it became clear that there was not sufficient support for an ambitious mandate including negotiation of traffic rights – not even through a phased approach.

#### *Further requests for negotiating mandates*

In summary, in the years after the "open skies" judgements, the Commission presented the following country-specific requests for mandates some of which the Council granted:

- **US** (mandate granted in June 2003 with an agreement signed in April 2007)<sup>48</sup>
- **ECAA** (mandate granted in December 2004 with an agreement signed in June 2006)<sup>49</sup>

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48 EU-US Air Transport Agreement, Official Journal of the European Union, L 134, 25 May 2007; Protocol to amend the EU-US Air Transport Agreement, Official Journal of the European Union, L 223, 25 August 2010.

49 Multilateral Agreement [...] on the establishment of a European Common Aviation Area, Official Journal of the European Union, L 285, 16 October 2006.,

- **Morocco** (mandate granted in December 2004 with an agreement signed in December 2006)<sup>50</sup>
- **China** (mandate requested in March 2005 – not granted)
- **Russia** (mandate requested in March 2005 – never discussed in any detail in view of the discussion on the China proposal)
- **India** (mandate requested in September 2005 – never discussed in any detail in view of the discussion on the China proposal)
- **Australia** (mandate requested in September 2005 – granted in June 2008 and negotiations started in November 2008 but never led to an agreement)
- **New Zealand** (mandate requested in September 2005 – granted in June 2008 and negotiations started in November 2008 but never led to an agreement)
- **Ukraine** (mandate granted in December 2006 with an agreement initialled in November 2013 but not yet signed due to internal EU dispute over definition of territory)
- **Canada** (mandate requested in January 2007 and granted in October 2007 with an agreement signed in December 2009)<sup>51</sup>
- **Jordan** (mandate granted in November 2007 with an agreement signed in December 2010)<sup>52</sup>
- **Georgia** (mandate granted in June 2009 with an agreement signed in December 2010)<sup>53</sup>
- **Lebanon** (mandate granted in October 2008 but never led to an agreement)
- **Algeria** (mandate granted in December 2008 but negotiations never started as Algeria did not show interest)
- **Israel** (mandate granted in April 2008 with an agreement signed in June 2013)<sup>54</sup>
- **Brazil** (mandate granted in October 2010 – negotiations still on-going)
- **Moldova** (mandate granted in June 2011 with an agreement signed in June 2012)<sup>55</sup>

In March 2016, the Commission informed Member States that it did not consider negotiations with Algeria, Australia and New Zealand active. As a result, Member States would be able to negotiate bilaterally with these countries in conformity with Regulation 847/2004. In February 2017, the Commission informed Member States that negotiations with Lebanon were also no longer active.

## 2012: New challenges facing European aviation – how to respond?

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50 Euro-Mediterranean Aviation Agreement between the European Community and its Member States, of the one part, and the Kingdom of Morocco, of the other part, Official Journal of the European Union, L 386, 29 December 2006.

51 Agreement on Air Transport between Canada and the European Community and its Member States, Official Journal of the European Union, L 207, 6 August 2010.

52 Euro-Mediterranean Aviation Agreement between the European Union and its Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part, Official Journal of the European Union, L 334, 6 December 2012.

53 Common Aviation Area Agreement between the European Union and its Member States, of the one part, and Georgia, of the other part, Official Journal of the European Union, L 321, 20 November 2012.,

54 Euro-Mediterranean Aviation Agreement between the European Union and its Member States, of the one part and the government of the State of Israel, of the other part, Official Journal of the European Union, L 208, 2 August 2013.

55 Common Aviation Area Agreement between the European Union and its Member States and the Republic of Moldova, Official Journal of the European Union, L 292, 20 October 2012.

In 2012, ten years after the ECJ "open skies" judgement, the European Commission considered that it was time to take stock of the progress achieved and of the new challenges facing the European aviation sector in a rapidly changing global aviation environment. In a new Communication<sup>56</sup> the Commission assessed whether the 2005 "road-map" policy was still fit for purpose or whether adjustments were needed. The Communication sought to define key objectives and principles for the EU's future aviation policy and how to engage with key external partners.

The Communication showed that progress and achievements since 2005 had been significant under all three pillars. Legal certainty had been restored to nearly 1000 bilateral air services agreements representing 75% of all extra-EU passenger traffic. 117 non-EU countries now recognised EU law in aviation. The advantages for EU carriers are important.

The EU had signed agreements with a number of neighbouring countries: Western Balkans, Morocco, Jordan, Georgia, Moldova and recently finalised negotiations with Israel. Negotiations were ongoing with other important neighbouring countries such as Ukraine.

#### *Agreements with key partners to "normalise" air transport*

Comprehensive agreements had been concluded with the US and Canada thereby opening up the transatlantic market and a similar agreement was being negotiated with Brazil. As described above, air transport is an industry like no other, as it is deprived of many opportunities which are present in many other sectors. In particular the patchwork of bilateral air services agreements and the obstacles towards foreign investment in air carriers continue to hamper the development of a normal market and a normal industry. The EU therefore strives to liberalise foreign ownership on a reciprocal basis through the negotiation of EU-level air transport agreements, for instance with the US and Canada.

In 2007, the first stage of the globally most important air transport agreement, the EU-US air transport agreement, was signed. It fully liberalised 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> freedoms without limitations for both sides and additionally provides for intra-EU 5<sup>th</sup> freedom rights for the US, as well as limited 7<sup>th</sup> freedom rights for passengers and full 7<sup>th</sup> freedom rights for cargo for the EU. The agreement further provides for a Joint Committee, for regulatory

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<sup>56</sup> European Commission, Communication, "The EU's External Aviation Policy – Addressing Future Challenges", COM(2012)556 final, 27 September 2012.

cooperation and was expanded by a second stage agreement signed in 2010, wherein both sides "commit to the goal of continuing to remove market access barriers [...] including enhancing the access of their airlines to global capital markets".<sup>57</sup> This provision, intended to open the way to a gradual liberalisation of foreign investment, and the creation of a genuine transatlantic common aviation area has, however, not yet produced the desired outcome. However, the Commission remains committed to further liberalisation, reminding the US to "to raise the sights and ambition", to realise what "was also in the minds of those who negotiated the agreement", and to "lay the foundations for global carriers that are emerging on both sides of the Atlantic".<sup>58</sup>

The EU-Canada Air Transport Agreement was signed in 2009 and can be described as "so far the most ambitious air transport agreement between the EU and a major partner in the world". It not only immediately liberalised 3<sup>rd</sup> and 4<sup>th</sup> freedom traffic rights, but also interlocks the granting of additional traffic rights with progressive liberalisation of foreign investment according to stages foreseen in the agreement, thereby incentivising further normalisation of the EU-Canada air transport market.<sup>59</sup>

#### *Significant economic benefits generated by EU agreements*

Through the removal of obstacles to market entry and competition, EU air transport agreements with neighbouring countries and other key partners further afield generate significant benefits for consumers and the wider economy, while offering new opportunities for operators such as airlines and airports. In 2012, it was estimated that the accumulated benefits of the ECAA and EU-Morocco air transport agreements from 2006 to 2011 was €6 billion with an average drop in prices of around 40%<sup>60</sup> while offering more choice for consumers!

The numbers speak for themselves: Since the signature of the ECAA agreement, for instance passenger numbers have tripled, the number of routes offered has doubled and the number of competing airlines has increased by 60%. With Morocco, passenger numbers have more than doubled, direct city pairs have nearly doubled and the number of

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57 EU-US Air Transport Agreement; Protocol to amend the EU-US Air Transport Agreement.

58 European Commission, Directorate General for Mobility and Transport, The Aviation Strategy of the European Union, Presentation of Director General Henrik Hololei at the International Aviation Club, Washington DC, 13 June 2016, <https://ec.europa.eu/transport/sites/transport/files/2016-06-13-speech-hh-washington.pdf>.

59 EU-Canada Air Transport Agreement; European Commission, Directorate General for Mobility and Transport, International aviation: Canada, [https://ec.europa.eu/transport/modes/air/international\\_aviation/country\\_index/canada\\_en](https://ec.europa.eu/transport/modes/air/international_aviation/country_index/canada_en).

60 European Commission, Communication, "The EU's External Aviation Policy – Addressing Future Challenges", COM(2012)556 final, 27 September 2012.

competing airlines has increased by 50%. Likewise there has been strong growth of services, competition and passenger numbers in other markets since the signature of an EU air transport agreement, yielding economic benefits, such as lower fares and better services, to consumers, and testimony of enhanced commercial opportunities for the industry.<sup>61</sup>

Aviation really matters for the EU. The EU aviation industry makes a vital contribution to the EU economy and to connecting the EU with the rest of the world. Connectivity is key to the EU's competitiveness in a globalised economy. Aviation also makes a major contribution to jobs and growth in Europe. Europe has a number of world leading airlines, airport hubs, aircraft and engine manufactures and with the SESAR project the EU is also a leader in developing the next generation of Air Traffic Management technology.

But the Commission argued in its 2012 Communication that none of these positions could be taken for granted, in fact some key positions - both of EU airlines and EU airport hubs - were being challenged.

In 2012, the world economy was still fragile – and the EU had been harder hit than other regions. Moreover, the world aviation growth markets were now outside the EU primarily in emerging markets. Airline profitability in Europe was poor, squeezed between increasing costs (including higher fuel costs) and diminishing yields as a result of increased competition. Europe was – and still is - also suffering from a capacity crunch and constraints on airport infrastructure and ATM capacity with congestion in the air as a result which are unknown in other regions. European network carriers were facing stiff competition from so-called 6<sup>th</sup> freedom carriers which connect markets through long-haul inter-continental routes via their hubs. These carriers and hubs – not least in the Gulf region - are rapidly attracting traffic and capturing traffic from European hubs.

There was a growing understanding in some parts of the EU aviation industry and among Member States that a European response to new challenges was needed and that individual Member States would not be able to respond effectively. There was also a sense of urgency (as one senior industry representative put it: "*something needs to be done – and quickly!*"). The Commission's Communication considered it strategically important for

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61 European Commission, Staff Working Document accompanying the Aviation Strategy for Europe, Brussels, 7 December 2015, SWD(2015) 261 final, p. 8; Eurostat.

the EU to remain directly and well connected with the rest of the world and not become an end-point relying on other hubs for its connectivity.

Based on the success story of the EU single aviation market, the EU had also learned that open markets and free competition is the best basis for international aviation and the EU therefore embraces competition. The Commission argued that in the increasingly open, liberal and competitive international aviation market it was also increasingly important to ensure that competition is both open and fair.

In the Communication, the Commission presented a package of proposals that it considered necessary in order to address the challenges. The Communication made a strong case for "more Europe" in the way the EU relates with the rest of the world in aviation. The EU has much to offer partner countries – and more so if it combines its actions, tools and resources. The Commission proposed to accelerate cooperation with neighbouring countries and complete the Common Aviation Area by 2015.

The Communication demonstrated very substantial economic benefits (in the order of €12 billion a year) – for the EU and partner countries – from further comprehensive agreements with key partners such as Russia, China, India, Japan, the Gulf countries and countries in South-East Asia (ASEAN).

Along with proposals for negotiations of more open market agreements, the Commission also proposed a number of measures to safeguard fair competition including the development of a standard EU 'fair competition clause' and an overhaul of a Regulation 868/2004 on unfair practices from third country carriers.

The Communication also reiterated the need for liberalisation of ownership and control rules for airlines and proposed to double the efforts – both on a bilateral basis, primarily with the US, but also at global level through ICAO – to achieve this goal.

The Commission argued that the challenges facing the European aviation sector in an increasingly competitive and rapidly changing aviation world were serious, and required the response to be equally so. It was now time for EU Member States and the Council to carefully consider how best to devise the EU's future external aviation policy and take the necessary decisions.

The Commission's Communication – both its analysis of the challenges and the proposed responses - was well received and led to a set of new and ambitious Council Conclusions. In this sense, the 2012 Communication and Council conclusions were very important and

represented a significant step forward in developing a coherent and ambitious EU external aviation policy. It probably also helped change the mind-sets of many stakeholders from having been very nationally rooted in the past to realising what the Commission had been arguing for decades: that the EU is stronger and better equipped and able to achieve its objectives and defend its interests when it speaks with one voice.

This was very apparent in the Council's conclusions<sup>62</sup> in which the Council, *inter alia*:

- "considers that while important progress has been made since 2005, a more ambitious and robust EU external aviation policy should be pursued..."
- ....
- "underlines the need for the Commission, EU Member States and industry stakeholders to work together in an increasingly concerted manner, using all available means and inclusive processes, to promote and advance European interests..."
- ....
- "considers that a tailored EU approach is now particularly appropriate in relation to Turkey, India, Russia, certain Gulf countries, ASEAN, and at the earliest opportunity to China...."

Nevertheless, the Council again in December 2012 fell short of fully supporting the Commission's concrete proposals for example with regard to opening negotiations with key partners including ASEAN, China and countries in the Gulf. In relation to ASEAN, the Council merely noted with interest the development within ASEAN of a single aviation market and welcomed the Commission's intention to organise an EU-ASEAN Aviation Summit (as the Commission had successfully done with other key partners in the past: China, India, Latin-America, Africa and Russia). And with regard to the Gulf States, the Council limited the scope of cooperation to a dialogue "*with a view to enhancing transparency and safeguarding competition*" thereby separating the achievement of these objectives from any negotiation of traffic rights.

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62 Council, conclusions on the EU's External Aviation Policy – Addressing Future Challenges, 20 December 2012.

It was not really before the presentation of the Aviation Strategy for Europe in December 2015 and in the implementation of the strategy that the 2012 proposals were more broadly accepted by EU Member States.

## 2015: An Aviation Strategy for Europe

**Table 2: The EU's top 25 external aviation partners in 2017**

With partners in **bold** an EU-level air transport agreement is in place, with underlined partners negotiations are ongoing.

	Partner	Passengers (million)	Share	Population (million)	Share	GDP (billion USD)	Share
1	USA	55	16%	325	4,5%	18.560	24,7%
2	<u>Turkey</u>	41	12%	80	1,0%	755	1%
3	Switzerland	32	10%	8	0,1%	660	0,9%
4	UAE*	21	6%	10	0,1%	375	0,5%
5	Norway	20	6%	5	0,1%	380	0,5%
6	Russia	17	5%	145	2,0%	1.270	1,7%
7	Morocco	12	3%	35	0,5%	110	0,1%
8	Canada	11	3%	35	0,5%	1.530	2,1%
9	<u>ASEAN</u>	11	3%	625	9,0%	2800	3,7%
10	Israel	9	3%	9	0,1%	310	0,4%
11	<i>China</i>	8	2%	1380	18,5%	11.390	15,1%
12	Egypt	8	2%	92	1,2%	330	0,4%
13	ECAA	7	2%	18	0,3%	170	0,2%
14	<u>Brazil</u>	6	2%	210	3,0%	1.770	2,4%

15	India	6	2%	1310	17,5%	2.250	3%
16	Algeria	5	2%	40	0,5%	168	0,2%
17	<u>Qatar</u>	5	2%	3	0,0%	155	0,2%
18	Japan	5	1%	125	2,0%	4.730	6,3%
19	<u>Tunisia</u>	5	1%	11	0,2%	42	0,1%
20	Hong Kong	4	1%	7	0,1%	316	0,4%
21	Ukraine**	4	1%	43	0,6%	87	0,1%
22	<i>Mexico</i>	4	1%	120	1,5%	1.060	1,4%
23	Iceland	3	1%	0,3	0,0%	19	0,0%
24	South Africa	3	1%	55	0,8%	280	0,4%
25	Rep.Korea	3	1%	50	0,7%	1.400	1,9%
	Others	39	11%		35,3%		32,3%
	EU	341	100%	510	7%	16.520	22%

\* Negotiations with the UAE have been authorised but been opened yet.

\*\* A EU-Ukraine Common Aviation Area Agreement is pending signature since 2013.

Sources: European Commission, Eurostat, IMF

The Aviation Strategy for Europe was a strategic initiative included in the Juncker Commission's first work programme and was the EU's first attempt to present a holistic

analysis of all aspects of EU aviation policy and the entire aviation value network/eco-system. It was a blueprint for enhancing the competitiveness of the European aviation sector. To achieve the objective of sustaining and enhancing the important contribution of aviation to the EU's economy, the Aviation Strategy considers it

"critical that the EU aviation sector remains competitive, maintains its leadership position and is able to grow. Europe must be a leading player in international aviation and a global model for sustainable aviation, with a high level of service and ambitious EU standards."<sup>63</sup>

Referring to the success of the EU internal aviation market, where restrictions have been fully abolished, the Aviation Strategy again recalled that "*unlike other industries, air transport [still] suffers from a number of restrictions in relation to investment and market access which hinder the sustainable and dynamic growth of the sector.*" An ambitious EU external aviation policy was therefore a key pillar of the strategy aimed at delivering on the priorities of tapping into growth markets, tackling limits to growth, safeguarding open and fair competition and maintaining high EU standards. The Commission therefore recommended to open EU air transport negotiations with China, ASEAN (the Association of South-East Asian Nations), Turkey, Saudi Arabia, Bahrain, the UAE, Kuwait, Qatar, Oman, Mexico and Armenia, to launch aviation dialogues with key partners such as India, and set forth to devise legislative measures to address unfair practices to replace Regulation 868/2004. In addition, the Commission proposed opening negotiations on bilateral aviation safety agreements with China and Japan, which provide for a mutual recognition of standards and can serve as a catalyst for the aeronautical manufacturing industry and trade of aeronautical products.

In June 2016, the proposals made in the Aviation Strategy led the Council under the Dutch Presidency to authorise the Commission to open negotiations with a number of key partners and important growth markets including ASEAN, Qatar, Turkey and the UAE.<sup>64</sup>

An EU-ASEAN air transport agreement would be the first bloc-to-bloc agreement, combining a market of more than 1.1 billion people with more than 11 million annual passengers with a significant growth potential. In addition to significant estimated economic benefits such an agreement would provide a modern regulatory framework to link the EU with a booming aviation region. It would also underpin the ongoing process of

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63 European Commission, Communication, "An Aviation Strategy for Europe", 7 December 2015, COM(2015) 598 final, p.2.

64 European Commission, Press Release, "International Aviation: New EU-level Agreements will benefit European passengers and businesses", 7 June 2016.

creating an intra-ASEAN single aviation market, similar to what has been achieved in the EU. Negotiations were launched in October 2016.

Qatar and the UAE are among the fastest growing aviation markets with well-established links to the EU. They currently account for an annual traffic of more than 25 million passengers to and from the EU, who they also provide with additional transfers, notably to Asia. As with all other EU negotiating partners, the agreements with these partners would implement the Aviation Strategy by combining market opening with common rules ensuring a level playing field. Negotiations with Qatar were launched in September 2016. The proposed negotiations with the UAE have not yet started.<sup>65</sup>

Turkey is an important and fast growing aviation market and the second largest extra-EU aviation market only second to the US. Negotiations with Turkey were launched in November 2016 with the aim of the EU to create an open common aviation area with Turkey based on liberalisation of market access and regulatory convergence towards the EU aviation *acquis* which Turkey is already in the process of aligning its own regulatory framework to.

### **Relations with other important aviation partners**

#### **Figure 3: EU-level air transport agreements and negotiations in 2017**

As has been demonstrated in this article, China, India, Russia and Japan have at various stages been considered by the Commission and the Council as important potential partners and candidates for EU-level aviation agreements. Some progress has been made with some of these countries but the partnerships have not yet been developed to their full potential and to the level they would merit.

#### *China*

In 2013, the Directorate-General of the European Commission (DG MOVE) and the Civil Aviation Authority of China (CAAC) signed a Letter of Intent with the objective of strengthening EU-China cooperation in all areas of civil aviation. Currently the two sides are negotiating a bilateral aviation safety agreement (BASA) and a Horizontal Agreement

<sup>65</sup> European Commission, "An Aviation Strategy for Europe", 7 December 2015, COM(2015) 598 final, p.4; European Commission, Directorate General for Mobility and Transport, Twitter, "Today EU opens negotiations with Qatar on new aviation agreement", 19 September 2016.

which will bring China's bilateral agreements with EU Member States into conformity with EU law in line with the Court's 2002 judgement. China is also interested in exploring the prospects of an EU-China comprehensive air transport agreement.

#### *India*

In 2008, India and the EU signed a Horizontal Agreement which is currently being implemented. Brussels Airlines (since January 2017 owned and controlled by the Lufthansa Group i.e. no longer majority owned and controlled by Belgian interests) was the first EU carrier to enjoy the benefits of India recognising the principle of EU designation when the airline started operations between Brussels and Mumbai on 30 March 2017.<sup>66</sup>

The natural objective should be a closer dialogue and cooperation between the EU and India which is already a large and fast growing market, with the ultimate objective of a comprehensive EU-India aviation agreement. In 2016, India adopted a new liberal aviation policy in which India is seeking to attract foreign investment and conclude "open skies" agreements with partner countries and regions located outside a radius of 5,000 kilometres of New Delhi thereby including the EU and its Member States.

#### *Japan*

Relations with Japan have not evolved as far as the European Commission would have liked. Japan has accepted the principle of EU designation bilaterally with individual Member States i.e. not through a Horizontal Agreement with the EU. The Commission has obtained a mandate to negotiate an EU-Japan aviation safety agreement (BASA).

#### *Russia*

The development of aviation relations with Russia has been disappointing and relations remain overshadowed by Russia's continued non-respect of its international commitments on phasing-out Siberian overflight royalties and its reluctance to effectively implement the principle of EU designation.

In November 2006, the European Commission and the Russian government signed a set of "Agreed Principles of the Modernisation of the existing system of the Trans-Siberian routes". This agreement has however, never been respected by the Russian Federation, even after it was reconfirmed in the context of Russia's accession to the WTO. In November/December 2011, close to the decision of the WTO Council on Russia's WTO

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<sup>66</sup> European Commission, Directorate General for Mobility and Transport, Twitter "Today progress on EU-India #aviation agreement! Prospect for legal certainty & new opportunities, [https://twitter.com/Transport\\_EU](https://twitter.com/Transport_EU), 16 March 2017.

accession, the European Commission and the Russian government exchanged formal letters with the effect that the "Agreed Principles" on the modernisation of the Siberian overflight regime should enter into force as from 1 January 2012.

In relation to Russia, the Commission's 2012 external aviation policy Communication noted that: "With Russia, it is high time to agree on a more coherent, stable and ambitious relationship that can offer planning predictability for both sides' carriers. Russia must urgently demonstrate its commitment to the 2011 agreement to implement the "Agreed principles on the modernisation of the Siberian overflight system". Beyond that, the scope for cooperation is vast and the potential benefits for Russia and the EU of a genuine strategic partnership, or even a normalised relationship, are equally significant."

It is to be hoped that political conditions and willingness on both sides will emerge which would allow the EU and Russia to reap the significant mutual benefits from closer cooperation in aviation which should at some stage logically be based on a comprehensive EU-Russia air transport agreement.

## **Conclusion**

Over the past decades, there has been a gradual development of an EU external aviation policy. However, it took a long time, and it may be argued that it took unnecessarily long, to put in practice what seems to be a logical and obvious step, complementing the internal market with its external dimension. This was clearly justified on legal, political and economic grounds. The "open skies" judgements of 2002 can be seen as the tipping point towards "more Europe" in external aviation policy. Since then, there has been significant progress towards ensuring the acceptance of EU designation which allows all EU carriers to benefit from the existing bilateral agreements of all EU Member States. In addition, EU-level air transport agreements with a number of key partners and the neighbourhood countries have been negotiated since 2002.

Today, air transport relations with 6 out of the 10 largest extra-EU markets, namely, the US, Switzerland, Norway, Morocco, Canada and Israel are governed by EU-level agreements. With another two of them, Turkey and ASEAN, EU-level negotiations are currently under way, and for a third one, the UAE, the Council has authorised the opening of negotiations. That means that already today nearly half of all passengers flying in and out of the EU, more than 150 million per year, are benefitting from the advantages of EU-level air transport agreements. Once the ongoing negotiations are finalised EU-level

agreements will cover some 70% of all extra-EU passengers or 240 million passengers per year.

Further requests for EU negotiations with major aviation partners, including China, Mexico and the remaining Gulf states, are on the table of the Council. If all of these agreements were in place, three quarters of all extra-EU passenger traffic would be covered by EU-level air transport agreements, including travel flows to and from the major growth markets for decades to come.

All these agreements will deliver on the objectives of the Aviation Strategy for Europe: EU industry will benefit from market access, investment opportunities and a level playing field; the wider economy from air connectivity to the rest of the world and passengers from more travel options, better service and lower fares. Much has been achieved at EU-level to progress international aviation in the 25 years since creating the EU's internal market and in particular in the 15 years since the "open skies" judgements. However, these successes do not keep the European Commission from working towards further normalising international aviation for the benefit of European industry and consumers. While EU aviation has changed significantly over the past 25 years, the opportunities to bring about change at a truly global level have not yet, as the sector remains largely governed by restrictive bilateral air services agreements, outside the scope of the WTO and with significant obstacles to foreign investment. With its comprehensive air transport agreements with an increasing number of important partners, the EU may be setting new standards in international aviation which may over time facilitate similar progress also at global level.