

MEMORANDUM OF CONSULTATIONS

1. *Delegations representing the European Community and its Member States and the United States of America met in Brussels 27 February – 2 March 2007, to complete negotiations of a comprehensive air transport agreement. Delegation lists appear as Attachment A.*
2. *The delegations reached ad referendum agreement on, and initialed the text of, an Agreement (the "Agreement," appended as Attachment B). The delegations intend to submit the draft Agreement to their respective authorities for approval, with the goal of its entry into force in the near future.*
3. *With respect to paragraph 2 of Article 1, the delegations affirmed that the definition of "air transportation" included all forms of charter air service. Furthermore, they noted that the reference to carriage "held out to the public" did not prejudice the outcome of ongoing discussions on the issue of fractional ownership.*
4. *With respect to paragraph 5 of Article 1, the EU delegation noted that flights between Member States are considered as intra-Community flights under Community law.*
5. *With respect to paragraph 6 of Article 1, the EU delegation noted that nothing in this Agreement affects the distribution of competencies between the European Community and its Member States resulting from the Treaty establishing the European Community.*
6. *The EU delegation confirmed that the overseas territories to which the Treaty establishing the European Community applies are: the French overseas departments (Guadeloupe, Martinique, Reunion, Guyane), Azores, Madeira, and the Canary Islands.*
7. *In response to a question from the U.S. delegation, the EU delegation affirmed that, under European Community legislation, a Community airline must receive both its AOC and its operating license from the country in which it has its principal place of business. Further, no airline may have an AOC or operating license from more than one country.*
8. *With respect to paragraphs 1, 3 and 5 of Article 3, paragraph 3 of Article 1 of Annex 4 and paragraph 2 of Article 2 of Annex 4, and in response to a question from the U.S. delegation, the EU delegation explained that as of the date of signature of the Agreement the members of the European Common Aviation Area comprise, in addition to the Member States of the European Community, the Republic of Albania, Bosnia and Herzegovina, the Republic of Croatia, the Republic of Iceland, the former Yugoslav Republic of Macedonia, the Republic of Montenegro, the Kingdom of Norway, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo.*
9. *In response to a question from the EU delegation, the U.S. delegation explained that the following countries are implementing Open-Skies air services agreements with the United States as of the date of signature of the Agreement: Burkina Faso, the Republic of Cape Verde, the*

Republic of Cameroon, the Republic of Chad, the Gabonese Republic, the Republic of The Gambia, the Republic of Ghana, the Federal Democratic Republic of Ethiopia, the Republic of Liberia, the Republic of Madagascar, the Republic of Mali, the Kingdom of Morocco, the Republic of Namibia, the Federal Republic of Nigeria, the Republic of Senegal, the United Republic of Tanzania and the Republic of Uganda. The U.S. delegation also indicated that it intended to treat airlines of the Republic of Kenya in the same way as airlines of states implementing an Open-Skies air services agreement for the purposes of paragraph 2 of Article 2 of Annex 4.

10. With respect to Article 4, the U.S. delegation noted that the Department of Transportation would require any foreign air carrier seeking authority to operate services pursuant to the Agreement to indicate the responsible authority that had issued its AOC and operating license, thus making clear which authority is responsible for safety, security and other regulatory oversight of the carrier.

11. For the purposes of Article 8, "responsible authorities" refers, on the one hand, to the U.S. Federal Aviation Administration and, on the other hand, to the authorities of the European Community and/or the Member States having responsibility for the issuance or validation of the certificates and licenses referenced in paragraph 1 or for the maintenance and administration of the safety standards and requirements referenced in paragraph 2, as is relevant to the matter in question. Furthermore, where consultations are requested pursuant to paragraph 2, the responsible authorities should ensure the inclusion in the consultations of any territorial or regional authorities who, by law or regulation or in practice, are exercising safety oversight responsibility relevant to the matter in question.

12. With respect to Article 9, the delegations affirmed that, to the extent practicable, the Parties intend to ensure the greatest possible degree of coordination on proposed security measures to minimize the threat and mitigate the potentially adverse consequences of any new measures. The delegations further noted that the channels referred to in paragraph 7 of Article 9 are available to consider alternative measures for current and proposed security requirements, in particular the Policy Dialogue on Border and Transport Security and the EU-US Transportation Security Cooperation Group. In addition, the U.S. delegation stated that the U.S. rulemaking process for adopting regulations routinely provides the opportunity for interested parties to comment on, and propose alternatives to, proposed regulations and that such comments are considered in the rulemaking proceeding.

13. During the discussion of paragraph 6 of Article 9, the U.S. delegation explained that the Transportation Security Administration (TSA) must immediately issue a security directive when the TSA determines that emergency measures are necessary to protect transportation security. Such measures are intended to address the underlying security threat and should be limited in scope and duration. Emergency measures of a longer-term nature will be incorporated into TSA requirements using public notice and comment procedures.

14. With respect to the procedure to be established under paragraph 11 of Article 9, the delegations confirmed the need to establish a protocol for the preparation, implementation and conclusions of assessments carried out on the basis of this paragraph.

15. *With respect to paragraph 2 of Article 10, the delegations affirmed their willingness to facilitate prompt consideration by the relevant authorities of requests for permits, visas, and documents for the staff referred to in that paragraph, including in circumstances where the entry or residence of staff is required on an emergency and temporary basis.*

16. *The delegations noted that the reference to "generally applicable law or regulation" in paragraph 5 of Article 10 includes economic sanctions restricting transactions with specific countries and persons.*

17. *Both delegations recognized that, under paragraph 7 of Article 10, the airlines of each Party holding the appropriate authority may hold out code-share services, subject to terms and conditions that apply on a non-discriminatory basis to all airlines, to and from all points in the territory of the other Party, at which any other airline holds out international air transportation on direct, indirect, online, or interline flights, provided that such code-share services:*

(i) are otherwise in compliance with the Agreement; and

(ii) meet the requirements of traffic distribution rules at the relevant airport system.

18. *The delegations discussed the importance of advising passengers which airline or surface transportation provider will actually operate each sector of services when any code-share arrangement is involved. They noted that each side had regulations requiring such disclosure.*

19. *With respect to paragraph 7 (c) of Article 10, the delegations expressed their understanding that surface transportation providers shall not be subject to laws and regulations governing air transportation on the sole basis that such surface transportation is held out by an airline under its own name. Moreover, surface transportation providers, just as airlines, have the discretion to decide whether to enter into cooperative arrangements. In deciding on any particular arrangement, surface transportation providers may consider, among other things, consumer interests and technical, economic, space, and capacity constraints.*

20. *In response to a question from the EU delegation, the U.S. delegation affirmed that, under the current interpretation of U.S. law, the carriage of U.S. Government-financed air transportation (Fly America traffic) by a U.S. carrier includes transportation sold under the code of a U.S. carrier pursuant to a code-share arrangement, but carried on an aircraft operated by a foreign air carrier.*

21. *The U.S. delegation explained that under Annex 3 to the Agreement, and in the absence of a city-pair contract awarded by the U.S. General Services Administration, a U.S. Government employee or other individual whose transportation is paid for by the U.S. Government (other than an employee, military member, or other individual whose transportation is paid for by the U. S. Department of Defense or military department) may book a flight, including on a Community airline, between the U.S. and the European Community, or between any two points outside the United States, that, at the lowest cost to the Government, satisfies the traveler's needs. The U.S. delegation noted further that the city pairs for which contracts are awarded change from fiscal year to fiscal year. A U.S. Government department, agency or instrumentality, other than the*

Department of Defense or a military department, may ship cargo on a flight, including on a Community airline, between the U.S. and European Community, or between any two points outside the United States, that, at the lowest cost to the Government, satisfies the agency's needs.

22. The EU delegation explained that the EU does not have a similar program to Fly America.

23. Both delegations expressed their intentions to explore further possibilities for enhancing access to government procured air transportation.

24. In response to a question from the EU delegation concerning the economic operating authority that Community airlines must obtain from the U.S. Department of Transportation, the U.S. delegation began by noting that, over the years, DOT economic licensing procedures have been streamlined. When foreign airlines are seeking authority provided for in an air services agreement, their applications normally can be processed quickly. The U.S. delegation went on to explain that a Community airline has the option of submitting a single application for all route authority provided for in paragraph 1 of Article 3, which includes both scheduled and charter rights. On August 23, 2005, DOT announced further expedited procedures under which it is contemplated that foreign air carriers seeking new route authority would file concurrent exemption and permit applications. Assuming that DOT is in a position to act favorably, based on the record and on the public interest considerations germane to its licensing decisions, DOT would proceed to issue a single order (1) granting the exemption request for whatever duration would normally have been given, or until the permit authority becomes effective, whichever is shorter, and (2) tentatively deciding (i.e., show-cause) to award a corresponding permit, again for the standard duration that would normally have been given (such as indefinite for agreement regimes). Where carriers have already filed for both exemption and permit authority, and where the record regarding those applications remained current, DOT has begun to process those applications pursuant to the August 23 approach.

25. If a Community airline wishes to exercise any of the authority through code sharing pursuant to paragraph 7 of Article 10, the code-share partner airlines can file a joint application for the necessary authority. The airline marketing the service to the public needs underlying economic authority from DOT for whatever type of services (scheduled or charter) is to be sold under its code. Similarly, the airline operating the aircraft needs underlying economic authority from DOT: charter authority to provide the capacity to the other airline to market its service, and either charter or scheduled authority for the capacity it intends to market in its own right. The operating airline also needs a statement of authorization to place its partner's code on those flights. An operating airline can request an indefinite duration blanket statement of authorization for the code-share relationship, identifying the specific markets in which the code-share authority is requested. Additional markets can be added on 30 days' notice to DOT. A code-share statement of authorization is airline-specific, and each foreign code-share partnership requires its own statement of authorization, and, if applicable, a code-share safety audit by the U.S. airline under DOT's published Guidelines.

26. If, pursuant to paragraph 9 of Article 10, a Community airline wishes to provide an entire aircraft with crew to a U.S. airline for operations under the U.S. airline's code, the Community airline would similarly need to have charter authority from DOT, as well as a statement of

authorization. The U.S. delegation indicated its belief that virtually all Community airlines that now provide scheduled service to the United States also hold worldwide charter authority from DOT. Therefore, from an economic licensing perspective, they would only need a statement of authorization to provide an entire aircraft with crew to U.S. airlines. The U.S. delegation further indicated that it did not anticipate that applications from other Community airlines for charter authority would raise any difficulties.

27. The issuance of a statement of authorization, whether for code sharing or for the provision of an entire aircraft with crew, requires a DOT finding that the proposed operations are in the public interest. This finding is strongly facilitated by a determination that the proposed services are covered by applicable air services agreements. Inclusion of the rights in an agreement also establishes that reciprocity exists.

28. With respect both to code sharing and to the provision of an entire aircraft with crew under paragraphs 7 and 9 of Article 10, the primary focus of the public interest analysis would be on whether:

- a safety audit has been conducted by the U.S. airline of the foreign airline
- the country issuing the foreign carrier's AOC is IASA category 1
- the foreign airline's home country deals with U.S. carriers on the basis of substantial reciprocity
- approval would give rise to competition concerns

29. With respect to the provision of aircraft with crew, the public interest analysis would additionally focus on whether:

- the lease agreement provides that operational control will remain with the lessor carrier
- the regulatory oversight responsibility remains with the lessor's AOC-issuing authority
- approval of the lease will not give an unreasonable advantage to any party in a labor dispute where the inability to accommodate traffic in a market is a result of the dispute

30. Statements of authorization for the provision of an entire aircraft with crew will be issued, at least initially, on a limited-term (e.g., six to nine months) or exceptional basis, which is consistent with the approach in the European Union.

31. In response to a concern expressed by the EU delegation about the discretion that DOT has under the "public interest" standard, the U.S. delegation stated that, in the context of open-skies aviation relationships, DOT has found code-share arrangements to be in the public interest and has consistently issued statements of authorization with a minimum of procedural delay. The U.S. delegation indicated that, in relation to both code sharing and the provision of aircraft with crew involving only airlines of the Parties, DOT, unless presented with atypical circumstances, such as those relating to national security, safety or criminality, would focus its analysis of the public interest on the elements described above. Furthermore, in the event that such atypical circumstances exist, the United States would expeditiously inform the other Party.

32. In response to a question from the U.S. delegation, the EU delegation affirmed that, under the currently applicable legislation in the EU (Council Regulation (EEC) 2407/92 of 23 July 1992), aircraft used by a Community airline are required to be registered in the Community. However, a Member State may grant a waiver to this requirement in the case of short-term lease arrangements to meet temporary needs or otherwise in exceptional circumstances. A Community airline that is party to such an arrangement must obtain prior approval from the appropriate licensing authority, and a Member State may not approve an agreement providing aircraft with crew to an airline to which it has granted an operating license unless the safety standards equivalent to those imposed under Community law or, where relevant, national law are met.

33. Both delegations recognized that the failure to authorize airlines to exercise the rights granted in the Agreement or undue delay in granting such authorization could affect an airline's fair and equal opportunity to compete. If either Party believes that its airlines are not receiving the economic operating authority to which they are entitled under the Agreement, it can refer the matter to the Joint Committee.

34. With respect to paragraph 4 of Article 14, the EU delegation recalled that, in accordance with its Article 295, the Treaty establishing the European Community does not prejudice in any way the rules in Member States governing the system of property ownership. The U.S. delegation in response noted its view that government ownership of an airline may adversely affect the fair and equal opportunity of airlines to compete in providing the international air transportation governed by this Agreement.

35. With respect to Article 15, the delegations noted the importance of international consensus in aviation environmental matters within the framework of the International Civil Aviation Organization (ICAO). In this connection, they underscored the significance of the unanimous agreement reached at the 35th ICAO Assembly, which covers both aircraft noise and emissions issues (Resolution A35-5). Both sides are committed to respecting that Resolution in full. In accordance with this Resolution, both sides are committed to applying the "balanced approach" principle to measures taken to manage the impact of aircraft noise (including restrictions to limit the access of aircraft to airports at particular times) and to ensuring charges for aircraft engine emissions at airport level should be based on the costs of mitigating the environmental impact of those aircraft engine emissions that are properly identified and directly attributed to air transport. Both sides also noted that where relevant legal obligations existed, whether at international, regional, national or local level, they also had to be respected in full; for the United States, the relevant date was October 5, 2001, and for the European Community, the relevant date was March 28, 2002.

36. The delegations further noted the provisions on Climate Change, Energy, and Sustainable Development contained in the 2005 "Gleneagles Communiqué" of the G8 nations as well as the framework for cooperation on air traffic management issues in the Memorandum of Understanding signed by the Federal Aviation Administration and the Commission on July 18, 2006. The delegations noted the intention of the responsible U.S. and EU authorities to enhance technical cooperation, including in areas of climate science research and technology development, that will enhance safety, improve fuel efficiency, and reduce emissions in air transport. Having regard to their respective positions on the issue of emissions trading for international aviation, the two

delegations noted that the United States and the European Union intend to work within the framework of the International Civil Aviation Organization.

37. With regard to the composition of the Joint Committee, the U.S. delegation indicated that it was the U.S. intention to have multi-agency representation, chaired by the Department of State. The EU delegation indicated that the EU would be represented by the European Community and its Member States. The two delegations also indicated that stakeholder participation would be an important element of the Joint Committee process, and that stakeholder representatives would therefore be invited as observers, except where decided otherwise by one or both Parties.

38. With respect to Article 18, the delegations affirmed their intention to hold a preliminary meeting of the Joint Committee not later than 60 days after the date of signature of this Agreement.

39. The Delegations confirmed their understanding that practices such as a first-refusal requirement, uplift ratio, no-objection fee, or any other restriction with respect to capacity, frequency or traffic are inconsistent with the Agreement.

40. The EU delegation suggested that both Parties should understand as clearly as possible the extent to which representatives of the U.S. Department of Transportation (DOT) and the European Commission could exchange information on competition matters covered by Annex 2 to the Agreement under their respective laws, regulations and practices, particularly regarding data and perspectives on issues involving proceedings being actively considered by those authorities.

41. The U.S. delegation indicated that the proceedings covered by Annex 2 to the Agreement are adjudications under U.S. law and are subject to statutory, regulatory and judicial constraints to ensure that the agency decision is based only on the information that is included in the docket of the proceeding, including public information that DOT has determined is officially noticeable, on which the parties have had an opportunity to comment before final agency decision.

42. The U.S. delegation explained that these constraints do not preclude representatives advising the DOT decision-maker in an active proceeding from discussing with representatives of the Commission such matters as (1) the state of competition in any markets based upon non-confidential data; (2) the impact of existing alliances or other cooperative ventures and the results of previously imposed conditions or other limitations to address competition issues; (3) general approaches to competition analysis or methodology; (4) past cases, including records and decisions; (5) substantive law, policies, and procedures applicable to any cases; (6) issues that might be raised by potential cases that have not been formally initiated, so long as DOT representatives do not "prejudge" the facts or results of such cases; and (7) in active proceedings, what issues have already been raised by the parties and what non-confidential evidence has been provided for the record, again up to the point of potential prejudgment of the facts and outcome.

43. There are two basic procedural constraints on discussion of ongoing cases. The first applies largely to communications from the Commission to DOT: the latter's decision cannot be based on any substantive information or argument unavailable to all parties for comment on the record before final decision. Should such information be received, it cannot be considered in the decision

unless it is made available. The second constraint involves communications from rather than to DOT: the agency cannot demonstrate or appear to demonstrate “prejudgment” of the issues—that is, articulating a conclusion before the record in the case is ripe and a final decision has been publicly released. This constraint applies to DOT in any context, whether in discussions with the EU or with any other entity not legitimately part of the U.S. Government’s internal decision-making process, interested or not. DOT intends to notify the Commission’s representatives immediately whenever, in its experience, prejudgment or decisional input becomes a consideration in discussing a particular topic, so that the representatives can decide how to proceed.

44. The EU delegation requested assurance from the U.S. delegation that the statutory “public interest” criterion is not used under the U.S. competition regime to prefer the interests of individual U.S. airlines over those of other airlines, U.S. or foreign. The U.S. delegation responded that this criterion and the competition standards that DOT must use for its decisions are designed and used to protect competition in markets as a whole, not individual airline competitors. Among other considerations, the U.S. delegation noted that the “public interest” in international air transportation is defined by statute to include equality of opportunity among U.S. and foreign airlines, as well as maximum competition. Moreover, the public interest criterion in the statutes governing DOT approval of, and antitrust immunity for, intercarrier agreements, is not an “exception” to the competition analysis that the agency must follow, but rather an additional requirement that must be met before DOT may grant antitrust immunity. Finally, the U.S. delegation emphasized that all DOT decisions must be consistent with domestic law and international obligations, including civil aviation agreements that uniformly contain the requirement for all Parties to provide a “fair and equal opportunity to compete” to the airlines of the other Parties.

45. In the context of this discussion, both delegations affirmed that their respective competition regimes are applied in a manner to respect the fair and equal opportunity to compete accorded to all airlines of the Parties, and in accordance with the general principle of protecting and enhancing competition in markets as a whole, notwithstanding possible contrary interests of individual airline competitors.

46. Regarding the European Commission’s procedures, the EU delegation explained that the principal limitation on the ability of the European Commission to engage in active cooperation with foreign governmental agencies results from restrictions on the ability to communicate confidential information. Information acquired by the Commission and the authorities of the Member States in the course of an investigation, and which is of the kind covered by professional secrecy, is subject to Article 287 of the EC Treaty and Article 28 of Regulation (EC) 1/2003. Essentially, this refers to information which is not in the public domain and which may be discovered during the course of an investigation, be communicated in a reply for information or which may be voluntarily communicated to the Commission. This information also includes business or trade secrets. Such information may not be disclosed to any third country agency, save with the express agreement of the source concerned. Therefore, where it is considered appropriate and desirable for the Commission to provide confidential information to a foreign agency(ies), the consent of the source of that information must be obtained by means of a waiver.

47. Information which is related to the conduct of an investigation, or the possible conduct of an investigation, is not submitted to the above mentioned provisions. Such information includes the

fact that an investigation is taking place, the general subject-matter of the investigation, the identity of the enterprise(s) being investigated (although this also may, in some circumstances, be protected information), the identity of the sector in which the investigation is being undertaken, and the steps which it is proposed to take in the course of the investigation. This information is normally kept confidential to ensure proper handling of the investigation. However, it may be communicated to DOT, as the latter is obliged to maintain the confidentiality of the information under the terms of Article 5 of Annex 2 to the Agreement.

48. In response to a question from the EU delegation, the U.S. delegation confirmed that the competent U.S. authorities will provide fair and expeditious consideration of complete applications for antitrust immunity of commercial cooperation agreements, including revised agreements. The U.S. delegation further confirmed that, for Community airlines, the U.S.-EU Air Transport Agreement, being applied pursuant to Article 25 or in force pursuant to Article 26, will satisfy the Department of Transportation requirement that, to consider such an application from foreign airlines for antitrust immunity or to continue such immunity, an Open-Skies agreement must exist between the United States and the homeland(s) of the applicant foreign airline(s). The foregoing assurance does not apply to applicants from Ireland until Section 4 of Annex 1 expires.

49. In response to a question from the EU delegation, the U.S. delegation stated that all of the DOT rules on computer reservations systems ("CRSs" or "systems") terminated on July 31, 2004. DOT, however, retains the authority to prohibit unfair and deceptive practices and unfair methods of competition in the airline and airline distribution industries, and DOT can use that authority to address apparent anticompetitive practices by a system in its marketing of airline services. In addition, the Department of Justice and the Federal Trade Commission have jurisdiction to address complaints that a system is engaged in conduct that violates the antitrust laws.

50. With respect to Article 25, the EU delegation explained that in some Member States provisional application must be approved first by their parliaments in accordance with their constitutional requirements.

51. Both delegations confirmed that, in the event that one of the Parties decided to discontinue provisional application of the Agreement in accordance with Article 25(2), the arrangements in Section 4 of Annex 1 to the Agreement may continue to apply if the Parties so agree.

52. With respect to Article 26, the EU delegation explained that in some Member States the procedures referred to in this Article include ratification.

53. In response to a question from the U.S. delegation concerning restrictions arising from the residual elements of bilateral air services agreements between Member States, the EU delegation affirmed that any such restrictions affecting the ability of U.S. and Community airlines to exercise rights granted by this Agreement would no longer be applied.

54. The two delegations emphasized that nothing in the Agreement affects in any way their respective legal and policy positions on various aviation-related environmental issues.

55. The two delegations noted that neither side will cite the Agreement or any part of it as a basis for opposing consideration in the International Civil Aviation Organization of alternative policies on any matter covered by the Agreement.

56. Any air services agreements between the United States and a Member State the applicability of which was in question as of the signing of the Agreement have not been listed in Section 1 to Annex 1 of the Agreement. However, the delegations intend that the Agreement be provisionally applied by the United States and such Member State or States according to the provisions of Article 25 of the Agreement.

**For the Delegation of the United
European Community and
Its Member States**

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