European

Cockpit

Association

Rue du Commerce 41
B-1000 Brussels
Belgium
Tel: (32 2) 705 32 93
Fax: (32 2) 705 08 77
eca@eurocockpit.be
www.eurocockpit.be

ECA POSITION

on the Resumption of EU-US Negotiations on a Transatlantic Open Aviation Area (OAA)

The European Cockpit Association (ECA) has been a long-standing supporter of the initiative to create a Transatlantic Open Aviation Area (OAA). Representing over ***34.000 European professional pilots***, ECA speaks on behalf of a key group of stakeholders who will be directly impacted by any OAA.

I. Basic Principles

During the briefing of the Consultative Forum, on 27th Sept.'05, the European Commission asked stakeholders for specific comments and proposals on the provisions of a potential future OAA agreement. ECA therefore would like to reiterate the main principles that should be considered when going back to the negotiation table with the US.

In its position paper of April 2005 ECA stated:

"To achieve a balanced OAA agreement, negotiations should be based on ***four principles***:

- Recognition of the ***EU as an equal and full partner*** in international air services negotiations;
- ***Reciprocity & equal opportunities*** for EU carriers and their employees. The best way to re-balance the current situation is a managed liberalisation where operators and employees of both sides would move freely in a common area with high safety and social standards;
- Establishment of a framework that allows real ***fair competition*** not only in economic terms, but also ***in social, safety, security and environmental terms***;
- ***Full involvement of social partners*** as a key to the success of the OAA agreement and its implementation."

Following the technical talks between the European Commission and the US over the summer, ECA concludes that those principles are unlikely to be achieved in the proposed first stage agreement, and the prospect of them being achieved in a subsequent second stage of negotiations would risk being diminished.

Speaking on behalf of the "front-end users" of any future OAA, ECA therefore states its concern that ***the type of deal that would have a realistic chance of being acceptable*** to the US – within the set time frame – ***would not be in Europe's interest***.

Until the conclusion of bilateral 'Open Skies' agreements, competition on the Atlantic was between US carriers, who had access to an American network to collect and distribute passengers, and European carriers with access to the European market in the same way. The USA and the EU are the two largest aviation markets in the world. ***If we create a situation where one continent's airlines can create feeder networks on both sides of the Atlantic while the other cannot, the final outcome is inevitable***.

ECA suggests that both EU Member States and their negotiator, the European Commission, rethink their approach to these negotiations. Such an approach should set the principles of ***a fully open, safe, managed aviation area*** encompassing the whole European and US markets. This may mean that negotiations are not completed in 2005. However, if we take the deal which seems feasible within the set timeframe, the EU risks losing its bargaining power for any second-stage negotiations, as there will be nothing significant left for the USA to gain from further negotiation.

II. Specific Comments & Proposals

In order to contribute positively to a possible resumption of negotiations, ECA submits the following comments and text proposals. These should be seen in the light of the above opinion, and complement the comprehensive position paper submitted by ECA in April 2005.

Preamble

ECA proposes a new recital to the Agreement's preamble:

> ***Proposed new recital:***
> ***(new):*** *Recognizing the importance of stakeholder participation in the implementation and any further modification of this agreement;*

Article 1 – Definitions

For a definition of "principal place of business" see proposal made in the chapter of Art. 3/4.

Article 2 – Grant of Rights

ECA favours open access for US carriers to the EU market – provided this is based on ***reciprocity***. Reciprocity starts by recognising the EU as the reference market for the determination and granting of rights (as it will be done for competition purposes).

ECA acknowledges that the current unbalanced situation is largely due to the prior conclusion of fifteen bilateral Open Skies Agreements between Member States and the US offering the US 5th freedom rights within and beyond the EU, and, in six of such Agreements, granting 7th freedom rights for All-Cargo carriers.

However, extending these bilateral rights to all 25 EU Member States would further tip the balance to the detriment of EU carriers and their employees. ECA therefore supports:

- ***"Recognition of US grandfather rights": freezing of current concessions*** until there is movement on the US side on the establishment of a real OAA, including the recognition of the EU as a common airspace; the freezing of such rights shall be done *on a non discriminatory basis* and on the principle that *only the rights actually used should remain* (possibly increased by a small percentage for projected expansion of current operations); the way to freeze concessions could be through a limitation on carriers for routes on which 5th or 7th freedom rights would continue to be exercised.

Article 3/4 – Authorisation

ECA welcomes that the Memorandum of Consultation confirms that an EU airline must receive both its Air Operation Certificate and its Operating License from the country where it has its ***principal place of business***.

However, in view of the forthcoming changes in the EU aviation market, and in view of ensuring an *effective safety oversight*, this link between the principal place of business and the place of licensing needs to be made more explicit, legally binding and be based on clear definitions. ECA therefore strongly suggests that:

- the reference to the ***link between the place of licensing and of principal place of business*** is moved from the Memorandum of Consultations into the legally binding OAA text . ECA proposes to add a new sub-paragraph to Art. 3:

> ***Art. 3 - Proposed new Wording:***
> ***(c) (new):*** *– the airline holds both AOC and operating licenses issued by the competent authority from the country where the airline has its principal place of business.*

  A symmetrical provision should be added to ***Art. 4*** (Revocation of Authorisation)

- ***Art. 1*** of the the OAA text provides a clear ***definition of principal place of business*** inspired by the one suggested by the ICAO Air Transport Regulation Panel (ICAO 5th worldwide air transport conference, Montreal, 24-29 March 2003):

> ***Art. 1 - Proposed new paragraph:***
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> ***10. (new):*** *"Principal Place of Business" means the Member State in which an air carrier is established and incorporated in accordance with national laws and regulations, and where the carrier undertakes the largest portion of its activities.*
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> *The following factors shall be considered to determine where the largest portion of activities is located: where the carrier has a significant portion of its operations (i.e. the largest portion of flights commencing and returning each week), a significant capital investment in physical facilities, pays income tax, registers its aircraft, and employs a significant number of nationals in managerial, technical and operational positions.*

Article 8 – Commercial Opportunities

ECA acknowledges the US offer to allow wet-leasing on international routes The principle of reciprocity, would demand ***wet-leasing on US domestic routes also.***

However, wet-leasing arrangements should *not be permitted to the detriment of employees* by allowing the possibility to circumvent existing employment terms and conditions, as well as applicable social and labour legislation.

Should wet-leasing be part of the OAA agreement, ECA demands that the agreement contains ***specific conditions to be imposed on wet-leasing operations***, based on, among others, a precise definition of "temporary" and of "exceptional circumstances".

Article 17 – Joint Committee

ECA notes that the USA has sought to ensure that its stakeholders have permanent access to the Joint Committee and yet the EU is seeking to relegate EU Stakeholder access to an 'invitation only' basis.

ECA strongly recommends that:

- the ***Joint Committee includes stakeholder/worker representatives as permanent observers***, unless the Committee discusses issues that are clearly not relevant to them. This permanent observer status should be explicitly mentioned in the agreement rather than in the legally non-binding Memorandum of Consultations;

Article 17 *1. A Joint Committee consisting of representatives of the Parties shall meet at least once a year to conduct consultations relating to this Agreement and to review its implementation.*	***Proposed new Wording:*** *1. A Joint Committee consisting of representatives of the Parties,* ***and interested stakeholders as observers****, shall meet at least once a year to conduct consultations relating to this Agreement and to review its implementation.*

- Art 17 specifically provides for the full involvement of employee and employer representatives when social effects of the Agreement are dealt with:

Article 17 *4.(b) considering the social effects of the Agreement as it is implemented and developing appropriate responses to concerns found to be legitimate;*	***Proposed new Wording:*** *4.(b) considering the social effects of the Agreement as it is implemented and developing appropriate responses to concerns found to be legitimate****, while fully involving stakeholders representing employees and employers****;*

Article 20 – Further Liberalisation

ECA welcomes the European Commission's intention to ensure a second-stage OAA Agreement will be negotiated soon after the application of the first-stage Agreement.

Given the imbalance that currently exists in market access, which would be exacerbated by the extension of US 5th/7th freedom rights across the EU, ECA is sceptical that a commitment to further negotiate would leave the EU with sufficient bargaining power to balance the final deal.

To ***generate sufficient bargaining power during the second-stage negotiations***, EU commitments in the first-stage Agreement – e.g. on traffic rights – could be made conditional upon US concessions, during the second stage, in areas which would allow the EU to re-balance the deal. This could be done by means of ***"sun-set" clauses*** which would automatically end certain of the EU's first-stage concessions if the US does not deliver during the second stage. Or by means of ***"phase-in" clauses***, by which certain of the EU's first-stage concessions kick-in automatically if the US delivers during the second stage.

ECA is aware that such safeguards would create – in the short-term – legal uncertainty for the industry on both sides of the Atlantic. However, this needs to be weighted against the potential – long-term – benefits to the EU industry and its workforce.

NEW Article: Law Applicable to Mobile Staff in Civil Aviation

Today's reality is that through the legislation allowing for foreign investment in the EU and wet-leasing, combined with the traffic rights in the bilateral Open Skies agreements, a considerable number of US pilots are already working in the EU.

The current proposals for an OAA, if eventually adopted, would intensify this situation. As stated above, the proposals in their current form raise serious concerns with ECA.

However, if they are to happen, ECA urges to introduce a clause that ensures that ***social dumping is not a consequence***. Indeed, there are serious flaws in the patchwork of disparate, non-harmonised employment legislation across the EU. Certain airlines would be tempted to abuse these flaws – to the detriment of employees. As the OAA risks exacerbating this situation there must be protection against this being abused on a wider trans-Atlantic scale.

- ECA strongly urges the negotiators to include a new article into the text of the agreement:

> ***Proposed new Article***
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> *Art. "New": Law applicable to mobile staff in civil aviation:*
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> *The parties agree that the employment law applicable to mobile staff in civil aviation is the law of the country where the employee is based and from where the employee carries out habitually his or her duties, or the law stated in the employment contract / collective working agreement concluded between the employee and their employer, whichever is more favourable to the employee.*

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