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Position Paper
on
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). Speaking on behalf of ***34.000 European pilots***, ECA represents a key group of stakeholders who will be directly impacted by the OAA.

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*** is a key to the success of the OAA agreement and its implementation.

1. Introduction

The European Aviation market is an economic reality. Therefore, aviation issues can no longer be considered as a national matter.

The negotiation of international air services agreements is an opportunity for the international acknowledgement of this economic reality. ***Europe***'s overall negotiating objective must be to ***be recognised as an equal and full partner by the US*** and the international community, thereby ***strengthening the EU industry and their employees.***

The first negotiating rounds with the US revealed the difficulty for the EU to be recognised as a full partner. They show the need for European Member States and stakeholders to increase their cohesion and solidarity and to continue the process of integration that has been initiated.

Previously, the US took advantage of a lack of European unity by concluding bilateral agreements that largely benefit US interests. This has put the EU in a difficult negotiating position for the OAA. To succeed in the OAA negotiations, national interest should be put aside and all European players should seek an agreement that re-balances the current situation, which is detrimental to the European industry and its employees.

With this context in mind, the first negotiation sessions with the United States should be considered as a positive step. However, ECA is concerned that the ***draft OAA agreement of June 2004*** did not achieved the basic concerns of the European industry and its employees, and its implementation ***would have consolidated and even expanded the existing unlevel playing field*** offering the US additional access to the EU market, while getting little in return. The June draft would have further tipped the balance to the EU's disadvantage.

The European flight crew community therefore calls for a joint effort in ***re-balancing in the negotiations*** to ensure the long-term competitive positioning of the European aviation industry and their employees.

2. Involvement of Social Partners

Involvement of social partners is key to the success of the EU-US initiative to create an Open Aviation Area.

The front-end users of the future OAA are the crews. Depending on the outcome, they can be either winners or losers of the OAA – in terms of ***working opportunities, working and social conditions***, etc. While some studies have shown potential benefits to the flight crew community, they generally downplay any adverse impacts. They also fail to examine which groups of aviation employees (EU or US) would benefit/ lose out, and the impact on the *quality* of employment conditions.

Some of these repercussions are linked to the risk of an un-balanced outcome on ***market access, ownership & control, state aid*** and certain regulatory issues. Other repercussions, however, are inherent to the concept of an OAA and the possibilities it opens up for airlines, such as the creation of ***"flags of convenience ", cheap labour substitution***, etc. Sections 3-6 offer suggestions on how to address such repercussions in the negotiations.

ECA considers ***addressing social concerns*** about the envisaged liberalisation as an important ***precondition for concluding an OAA agreement***. The European flight crew community considers itself as a partner in a joint undertaking, providing expertise, political support and concrete input into the negotiations.

We therefore welcome the European Commission's policy of regular stakeholder consultation on the negotiations. In addition pilots must be able to provide input into the implementation of the future OAA. 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;
- the OAA agreement provides for a ***Working Group on labour issues***, involving a limited number of employee (ECA) and employer representatives from the EU and US. Such a Working Group would discuss the social consequences of the OAA and its implementation. It should be created informally already ahead of the conclusion of the 1st stage agreement. The Commission, and all parties involved should encourage and build on the emerging discussion of labour market issues at national and Community level.

The European Union has experience in the market integration of different social/labour legal regimes. The principles contained in the EU's key labour/social legal instruments should be spelled out in the OAA. Notably, the Agreement should ***guarantee that collective work agreements will be recognised*** by all the signatory parties ***and that the*** **mandatory labour laws of the home base** ***of the workers are applied***.

We therefore suggest that the ***following text is included in the Agreement***:

> "*Airlines with permanent bases outside of the country of register shall inform the designated authorities of the host country of the number and identity of persons assigned to that base. The Authorities shall inform the company of the national laws that are applicable to those workers irrespective of the law that has been chosen by the contracting parties as being applicable to their contract. The applicability of the national laws does not preclude the validity of collective agreements. In case of conflict between the collective agreement and the law of the country of the base, the provision most favourable to the worker shall prevail.*
>
> *Provisions for information and consultation of employees shall be developed for each category of workers in civil aviation."*

3. Ownership & Control

Based on the principles of reciprocity and fair competition, ECA's main concern, at this stage, is to provide for ***equal opportunities for employees and airlines on both sides*** of the Atlantic.

A 1st stage agreement is unlikely to contain ownership & control beyond 49% as the distinction between a European and American company becomes blurred, raising a whole series of significant issues. However, the agreement could include a commitment to further address this issue – both for cargo and for passenger carriers – during the 2nd stage negotiations. Such a "***built-in agenda***" should:

- specify the objectives and parameters for these negotiations, including the creation of ***social safeguards for employees***;
- foresee that any 2nd stage agreement on O&C will have to be preceded by an ***in-depth analysis of the possible social consequences*** of moving beyond 49%, and the identification and implementation of adequate social safeguards (the joint Working Group on labour issues - see Section 2 - should be mandated to carry out this work).

ECA stresses that any move beyond 49% would only be acceptable as part of a ***wider package that includes solid safeguards for mobile staff*** in the new open area.

The existence of differences in labour and social laws within the OAA should not be seen as an opportunity whereby operators could enhance their competitive edge by circumventing existing legislation in the markets that they wish to penetrate. Cheap ***labour substitution shall not be an outcome of establishing an OAA***.

4. Market Access

As supporters of the OAA concept, ECA favours open access for US carriers to the EU market – provided this is based on ***reciprocity***.

The ***draft June agreement*** does not meet this criteria. While the US would obtain substantial additional market access to the EU, the current draft does not provide for any meaningful access for EU carriers to the US domestic market.

The result would be a ***further distortion in competition*** between EU and US carriers. Given the dominant position of the US in international aviation, such a distortion would have a ***disproportionate negative effect on EU airlines and their employees***. ECA therefore calls for a re-balancing.

4.1. Grant of Rights

ECA continues to believe that the best way to obtain a fair deal with reciprocal rights for airlines and employees of both sides is the establishment of an OAA, accompanied by the necessary safeguards and guarantees. It seems that the envisaged liberalisation is not possible at this stage, and that the US is not ready to grant the necessary traffic rights to the European operators.

However, the ***current unbalanced situation cannot be maintained***. Fifteen bilateral Open Skies Agreements offer the US 5th freedom rights within and beyond the EU, and six such Agreements grant 7th freedom rights for All-Cargo carriers.

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:

- ***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 stay*** (possibly increased by a small percentage for projected expansion of current operations);
- ***keeping passenger and cargo rights together***, rather than proceeding with an all-Cargo-only agreement (this also applies to O&C).

One of the preoccupations of the US is the effectiveness of the 5th freedom rights in ***highly congested airports***. ECA stresses that this issue needs to be managed very carefully and be looked upon in the context of overall reciprocity. However, to address US concerns, one solution could be the creation of a special system for this kind of airports.

For this the parties need to agree on a ***definition of a "highly congested airport***" and find arrangements to ***guarantee a certain number of frequencies on a case-by-case basis***. This would allow a controlled solution to flights into airports such as Heathrow.

4.2. Authorisation

The change from national designation to European designation is one of the biggest differences between the OAA and the current situation. Among others, it will facilitate intra-European mergers and the setting up of subsidiaries in EU Member States which are not an airline's principle place of business.

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, 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*** (Art.3 c new: ".... the airline is incorporated in and has its principle base of business in the designated country;").
- The OAA text provides a ***clear definition of principle place of business.***
- The OAA text states that the ***authority*** granting the authorisation ***must assume full responsibilities for the safety oversight*** of the operations of airlines wherever they take place. If the authority cannot effectively perform this task, it should ***delegate*** the elements of oversight that it cannot ensure to another capable authority.

ECA considers that these elements, and notably the definition of principal place of business, would be instrumental in ***preventing the emergence of "flags of convenience"*** in terms of safety.

For ECA, the insertion of these provisions in the main text of the 1st stage OAA agreement is a ***key factor in its support*** for the negotiations.

4.3. Wet-leasing

Wet Leasing should be considered as an exceptional event for air carriers. European regulations state that operators must satisfy the Authority that its organisation and management are suitable and properly matched to the scale and scope of the operation (JAR-OPS 1.1975).

In the EU, intra-European wet leasing is permitted. The wet-lease of foreign aircraft is only authorised in case of "*short-term lease agreements to meet temporary needs of the air carrier or otherwise in exceptional circumstances*" (Article 8 of Regulation 2407/92). The US do not allow for foreign wet-leasing (considering it as a form of *Cabotage*), ***US carriers benefit from the comparatively liberal EU provisions on wet-leasing***. Hence, European pilots do not benefit from the same opportunities in the US as their US colleagues do in Europe.

ECA therefore ***welcomes*** the US offer to allow ***wet-leasing on international routes***, as long as this right is reserved to EU carriers *only*. Furthermore, this proposal needs to be clarified since there are uncertainties as to the possibility of third countries to refuse this kind of operations.

However, to provide equivalent opportunities for EU employees, and based on the principle of reciprocity, ***ECA supports Wet-leasing on US domestic routes*** – on a temporary and exceptional basis.

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

Furthermore, there is a very distinct ***aviation safety element*** that must be considered in Wet-leasing, notably as regards the equivalence of safety standards and the effective safety oversight by the responsible National Aviation Authority.

4.4. Market Access for Employees

ECA is concerned with ***current imbalance*** that exists with regard to the access of foreign crews to employment in the EU, compared with the difficulties that EU citizens experience when applying for work permits in the US.

Today, US carriers and their staff can operate within the European Union on a more or less unrestricted basis. No such equivalent access to the US labour market exists.

In addition to the US' refusal to allow European wet-leasing on their domestic market, EU-based workers – including pilots – face a ***restrictive US Visa / Green Card policy*** that *de facto* prevents them from operating services within the US on the same level as their US counterparts within the EU. The resulting imbalance is particularly evident in the case of cargo operations where US carriers operating in the EU make extensive use of US pilots.

ECA therefore urges the EU negotiators to ***address this issue, preferably in the framework of a Social Issues Working Group***

5. Security

ECA is of the firm opinion that ***parties to an OAA should 'consult', and not just inform each other, in advance of any new security measures*** to be established. Stakeholders shall be consulted to ensure the measures are feasible from a technical and operational point of view. In addition both sides should agree on setting up a process that would allow for ***mutual recognition of security standards*** even if measures taken sides are not strictly identical.

6. State Aid and Competition

Imbalances in state aid create an unlevel playing field to the detriment of those actors that do not have access state aid or schemes having an equivalent effect. ECA therefore asks – as a minimum – for ***reciprocity in the allowable subsidies and support systems*** available to carriers on both sides of the Atlantic.

ECA is particularly concerned about the nature of ***US bankruptcy laws*** which tend to give an important competitive advantage to US carriers. ***Chapter 11*** under the US insolvency code allows a bankrupt carrier to try restructuring whilst servicing only its immediate short-run operating costs. This removes any obligation to creditors for an extended period, allows some carriers to abrogate labour contracts, and – in the case of "serial bankruptcy", - creates incentives to reduce prices to generate cash flow, thus harming the financial health of the entire industry.

The existence of "serial bankruptcy" protection is in some ways analogous to the provision of state aid in that it allows an operator to reduce fares by offloading the costs onto others, in this case creditors and employees. The existence of such a clear distortion protects American carriers from takeover, a situation that confers an unfair advantage.

In addition, ECA is concerned about the ***"Fly America" policy***, which applies to both passengers and freight, and discriminates directly against non-US carriers.

ECA therefore calls for the 1st stage OAA agreement to ***mandate a joint Working Group*** to study and agree upon a list of subsidies, support, and measures having equivalent effect (bankruptcy laws, pension plans, etc.) and to propose ways to tackle their negative effect on competition. The 1st stage agreement should also include a firm commitment to have state aid part of the 2nd stage negotiations ("build-in agenda").

ECA also promotes the establishment of a common EU/US approach on aviation ***competition*** issues bearing in mind that the ***impact of policy on employment shall be properly addressed***.

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