EUROPEAN COMMISSION

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2010/0113 (NLE)

Proposal for a

Decision of the Council and the representatives of the Governments of the Member States of the European Union, meeting within the Council

On the signature and provisional application of the Protocol to Amend the Air Transport Agreement between the European Community and its Member States, of the one part, and the United States of America, of the other part

EXPLANATORY MEMORANDUM

1. Context of the proposal

- **Grounds for and objectives of the proposal**

On 30 March 2008, the Air Transport Agreement between the United States of America, of the one part, and the European Community and its Member States, of the other part, signed on 25 and 30 April 2007 ("the 2007 EU-US Air Transport Agreement"), entered into provisional application.

In accordance with Article 21 of the 2007 EU-US Air Transport Agreement, the Commission started second stage negotiations with the United States in May 2008. The Council reviewed the progress made in December 2009 and March 2010. After eight rounds of second stage negotiations, agreement was reached on 25 March 2010 on a draft Protocol to Amend the 2007 EU-US Air Transport Agreement.

The Protocol aims at:

- launching a process towards additional foreign investment opportunities in the airline industry,

- further opening market access, including further access by EU airlines to US Government-financed air transportation, and

- further strengthening the regulatory cooperation in all fields of aviation policy, particularly on addressing the environmental impact of aviation.

- **General context**

The 2007 EU-US Air Transport Agreement represented a significant change in transatlantic aviation relations, providing broad new commercial freedoms for airlines and a comprehensive framework for regulatory cooperation with the United States on a wide range of issues. The 2007 EU-US Air Transport Agreement created substantial benefits for airlines, airports and air transport users in Europe.

However, the EU was seeking additional investment and market access opportunities. Therefore, Article 21 of the 2007 EU-US Air Transport Agreement established a non-exhaustive list of 'items of priority interest' for the second stage negotiations, including additional investment and market access opportunities, as well as environmental issues.

In accordance with Article 21 (1) of the 2007 EU-US Air Transport Agreement, second stage negotiations were launched in May 2008. Article 21 (3) of the 2007 EU-US Air Transport Agreement entitles each Party to suspend certain rights if no second stage agreement has been reached by 30 November 2010.

After eight rounds of negotiations, agreement was reached on the draft Protocol to Amend the 2007 EU-US Air Transport Agreement ("the Protocol") on 25 March 2010.

- **Existing provisions in the area of the proposal**

The Protocol amends the 2007 EU-US Air Transport Agreement.

- **Consistency with the other policies and objectives of the Union**

The conclusion of second stage negotiations with the United States has been a priority for the EU in its external aviation policy, as identified in Commission Communication "Developing the agenda for the Union's external aviation policy"[1].

The EU-US Summit on 3 November 2009 confirmed the political commitment of the Union to reach a second stage agreement in 2010 in the context of the overall objective of reducing barriers to trade, investment and economic activity.

Due to its strong environmental dimension, the Protocol is fully consistent with the objective of the Union to limit the climate change impact of international aviation. Special attention is also given to the social dimension of the Agreement.

2. Consultation of interested parties and impact assessment

- **Consultation of interested parties**

Consultation methods, main sectors targeted and general profile of respondents

Throughout the negotiating process, the Commission has consulted with stakeholders, in particular via regular meetings of the Consultative Forum comprising representatives of air carriers, airports, and labour organisations.

Member States have been closely involved throughout the negotiating process via the Special Committee and expert meetings.

Summary of responses and how they have been taken into account

All comments from stakeholders and individual Member States were duly taken into consideration in the preparation of the Union's negotiating position.

- **Collection and use of expertise**

There was no need for external expertise.

- **Impact assessment**

The Protocol further increases the benefits for consumers, airlines, labour, and communities in the Union. The economic benefits of a fully Open Aviation Area between the EU and the United States have been estimated in a study by Booz Allen Hamilton on behalf of the Commission at several billion Euros per year.[2]

A study undertaken by Ecorys on behalf of the Commission (DG TRADE)[3] estimates that further regulatory convergence in the field of air transport could significantly

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1 COM(2005) 79 final.

2 Booz Allen Hamilton (2007), The economic impacts of an Open Aviation Area between the EU and the US, http://ec.europa.eu/transport/air/international_aviation/country_index/doc/final_report_us_bah.pdf

3 Ecorys (2009), Non-Tariff Measures in EU-US Trade and Investment – An Economic Analysis. http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc_145613.pdf

reduce costs for the industry. The same study concluded that the second stage negotiations have the potential to change the structure of the market in the EU and in the US, increasing profitability in the airline industry.

The inclusion of an article on the social dimension ensures that the further market opening will be accompanied by high labour standards and that labour-related rights will not be undermined by the new opportunities created by the Protocol.

The Protocol includes firm commitments from both Parties to limit or reduce the impact of international aviation on the environment. An enhanced cooperation on addressing the environmental impacts of international aviation and mitigating the climate change impact will minimise any potential adverse environmental effects of the Protocol.

3. Legal elements of the proposal

- **Summary of the proposed action**

The Protocol amends the 2007 EU-US Air Transport Agreement with the following provisions:

- A legal obligation to reciprocally recognise the regulatory determinations of the other Party with regard to airline fitness and citizenship (New Article 6 *bis*). This will significantly reduce the regulatory burden for airlines and regulatory authorities.

- An enhanced cooperation to limit the impact of international aviation on the environment (New Article 15). The cooperation on addressing the environmental impacts of international aviation will include the areas of research and development, air traffic management innovation, coordination in international fora. An important element in that respect is the joint work to ensure consistency among the respective market-based measures regarding aviation emissions. The cooperation on environmental issues will also increase the transparency with regard to noise-related operating restrictions at airports with more than 50,000 annual movements of civil subsonic jet aeroplanes.

- An explicit recognition of the importance of the social dimension and the benefits of high labour standards as well as an enhanced cooperation on the social effects of the agreement (New Article 17 *bis*).

- A strengthened role of the Joint Committee, enabling it to address incompatible regulatory approaches, allow for reciprocal recognition of decision-making, and promote cooperation across a number of additional fields, including air traffic management, facilitation, safety and cooperation with other countries (New paragraphs in Article 18).

- A process towards further market access and investment opportunities (New Article 21). Both sides commit to continuing to remove market access barriers. The Joint Committee will regularly review progress in that respect. Both sides will establish a process of cooperation in the Joint Committee towards the shared goal of removing market access barriers. Upon legislative change that would give the Commission a stronger role in monitoring the procedures for the introduction of noise-based operating

restrictions at EU airports with more than 50,000 annual movements, EU airlines would benefit from additional seventh freedom rights between the US and third countries, and market access barriers to the US for third-country airlines owned and controlled by EU investors would be removed. Upon legislative change in the US allowing majority EU ownership and control of US airlines, the EU will allow majority US ownership and control of EU airlines. If the EU has fulfilled the requirements with regard to the monitoring of noise-based operating restrictions, but there is no progress in the US on investment liberalisation, the EU will have the right to freeze the operations of US carriers, and vice versa.

- Further access of EU airlines to air transport funded by the US Government (New Annex 3) that is restricted currently to US airlines ("Fly America"). EU airlines will be able to sell air transportation to contractors of the US Government on any route, with exception of transport financed by the US Department of Defence.

The Protocol is accompanied by a Memorandum of Consultations that includes additional new elements, in order to further enhance the existing cooperation in the areas of aviation security, competition policy, and the joint efforts to address the environmental impact of international aviation.

- **Legal basis**

Article 207 (5), in conjunction with Article 218 paragraphs (2) and (5) of the Treaty on functioning of the European Union.

- **Subsidiarity principle**

The subsidiarity principle applies insofar as the proposal does not fall under the exclusive competence of the Union.

The objectives of the proposal cannot be sufficiently achieved by the Member States for the following reasons.

The 2007 EU-US Air Transport Agreement has established a harmonised regulatory framework for air transport between the Union and the United States. An amendment of an international treaty at Union level can only be done at Union level. Furthermore, the objectives of the Protocol can only be achieved at Union level because they involve a number of areas of exclusive Union competence.

Union action will better achieve the objectives of the proposal for the following reasons.

An amendment of an international treaty at Union level can only be done at Union level. Furthermore, the objectives of the Protocol can only be achieved at Union level because they involve a number of areas of exclusive Union competence.

The proposal therefore complies with the subsidiarity principle.

- **Proportionality principle**

The proposal complies with the proportionality principle for the following reasons.

The Protocol will reduce the regulatory burden and costs for airlines. It will not impose any new obligations on industry.

Member States will continue to carry out the traditional administrative tasks they execute in the context of international air transport, but under common rules applied uniformly.

Member States will continue to carry out their administrative tasks with regard to noise-based operating restrictions at EU airports. The EU and its Member States do not enter into obligations with regard to noise-based operating restrictions that would go beyond the requirements of the Noise Directive (2002/30/EC)

- **Choice of instruments**

Proposed instruments: international agreement

Other means would not be adequate for the following reason.

An international agreement can only be amended through an international agreement.

4. Budgetary implication

The proposal has no implication for the Union budget.

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THE COUNCIL OF THE EUROPEAN UNION AND THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES MEETING WITHIN THE COUNCIL

Having regard to the Treaty on the Functioning of the European Union and in particular Article 207(5), in conjunction with Article 218 paragraphs (2) and (5) thereof,

Having regard to the proposal from the Commission,

Whereas

(1) The Air Transport Agreement between the United States of America, of the one part, and the European Community and its Member States, of the other part, signed on 25 and 30 April 2007 (the "Air Transport Agreement") included an obligation on both parties to enter into second stage negotiations.

(2) The Commission has negotiated on behalf of the Union and of the Member States a Protocol to amend the Air Transport Agreement (hereinafter, the “Protocol”) in accordance with Article 21 of that Agreement.

(3) The Protocol was initialled on 25 March 2010.

(4) The Protocol is fully consistent with EU legislation, particularly with the EU Emissions Trading System.

(5) The Protocol negotiated by the Commission should be signed and applied provisionally by the Union and the Member States, subject to its possible conclusion at a later date.

(6) It is necessary to lay down procedural arrangements for deciding, if appropriate, how to discontinue the provisional application of the Protocol and how to take measures pursuant to Article 21(5) of the Air Transport Agreement as amended by the Protocol. It is also necessary to lay down procedural arrangements for the suspension of the reciprocal recognition of regulatory determinations with regard to airline fitness and citizenship and for implementing certain provisions of the Agreement, including those concerning environment.

HAVE DECIDED AS FOLLOWS:

Article 1 (Signature and provisional application)

1. The signing of the Protocol to Amend the Air Transport Agreement between the United States of America, of the one part, and the European Community and its Member States, of the other part, (hereinafter the 'Protocol'), is hereby approved on behalf of the Union, subject to a Council Decision concerning the conclusion of the Protocol. The text of the Protocol is attached to this Decision.

2. The President of the Council is hereby authorised to designate the person(s) empowered to sign the Protocol on behalf of the Union, subject to its conclusion.

3. Pending its entry into force, the Protocol shall be applied on a provisional basis by the Union and its Member States, to the extent permitted under national law, from the date of signature.

4. A decision to discontinue the provisional application of the Protocol and give notice thereof to the United States of America in accordance with Article 9(2) of the Protocol, and a decision to withdraw such notice, shall be taken by the Council, on behalf of the Union and of the Member States, acting unanimously in accordance with the relevant Treaty provisions.

Article 2 (Suspension of Reciprocal Recognition)

A decision to suspend the reciprocal recognition of regulatory determinations with regard to airline fitness and citizenship and to inform the United States thereof in accordance with Article 6 *bis*(2) of the Air Transport Agreement as amended by the Protocol, shall be taken by the Council, on behalf of the Union and of the Member States, acting unanimously in accordance with the relevant Treaty provisions.

Article 3 (Joint Committee)

1. The Union and the Member States shall be represented in the Joint Committee established under Article 18 of the Air Transport Agreement as amended by the Protocol by representatives of the Commission and of the Member States.

2. The position to be taken by the Union and its Member States within the Joint Committee with respect to matters of exclusive competence of the Union that do not require the adoption of a decision having legal effect shall be established by the Commission and shall be notified in advance to the Council and the Member States.

3. For Joint Committee decisions concerning matters that fall within competence of the Union, the position to be taken by the Union and its Member States shall be adopted by the Council, acting by qualified majority on a proposal from the Commission,

unless the applicable voting procedures set down in the Treaty on the Functioning of the European Union provide otherwise.

4. For Joint Committee decisions concerning matters that fall within Member States' competence, the position to be taken by the Union and its Member States shall be adopted by the Council, acting by unanimity, on a proposal from the Commission or from Member States, unless a Member State has informed the General Secretariat of the Council within one month of the adoption of that position that it can only consent to the decision to be taken by the Joint Committee with the agreement of its legislative bodies notably due to a parliamentary scrutiny reserve.

5. The position of the Union and of the Member States within the Joint Committee shall be presented by the Commission, except in areas that fall exclusively within Member States' competence, in which case it shall be presented by the Presidency of the Council or, if the Council so decides, by the Commission.

Article 4 (Decisions in accordance with Article 21 of the Agreement)

A decision not to allow airlines of the other Party to operate additional frequencies or enter new markets under the Air Transport Agreement and give notice thereof to the United States of America in accordance with Article 21(5) of the Air Transport Agreement as amended by the Protocol shall be taken by the Council, on behalf of the Union and of the Member States, acting unanimously in accordance with the relevant Treaty provisions.

Article 5 (Information to the Commission)

Member States shall inform the Commission immediately of any requests or notifications made or received by them under Article 15 (Environment) of the Air Transport Agreement as amended by the Protocol.

Done at Brussels, […]

For the Council
The President
[…]