

# INTERNATIONAL LAW OFFICE

## Aviation - USA Skies Open over New Agreement

*Contributed by Katten Muchin Rosenman LLP*

June 06 2007

### **Status**

On March 22 2007 the EU transport ministers unanimously approved the Open Skies Air Transport Agreement between the European Union, its member states and the United States. On April 30 2007 at the US-EU summit in Washington DC the agreement was executed by the US secretary of state, the German minister for transport and the European Commission vice president. The agreement will become effective on March 30 2008 and will replace existing bilateral air transport agreements between the United States and individual EU countries that were deemed illegal by the European Court of Justice. The agreement does not require congressional approval and no legislation has yet been introduced to curtail its efficacy.

### **Terms and Effects**

The terms of the agreement allow for liberalized travel between the United States and EU member states. Under the agreement every US airline and every EU airline may operate between any city in the European Union and any city in the United States. In other words, any EU carrier can fly to the United States whether or not the flight originates in such a carrier's home country (eg, British Airways could fly from Charles de Gaulle airport in Paris to John F Kennedy airport in New York without a stop at London Heathrow airport). Despite the expanded traffic rights and some objections to the decision, cabotage remains prohibited under the agreement; although a US airline can fly between European cities, it may not fly between two airports within the same country (eg, Paris to Toulouse). Likewise, EU carriers cannot provide service solely within the US domestic market and may not, for example, operate between New York and Los Angeles. However, despite the continued prohibition of cabotage there are no restrictions on the quantity of flights, routes, equipment or fares that can be operated or charged by US and EU airlines. Wet leasing for international transportation has also been approved and the wet lessor itself does not have to have independent traffic rights to the international route the wet lease is operated on.

Arguably one of the most important results of the Open Skies Agreement is the removal of carrier restrictions at Heathrow airport, effectively replacing the Bermuda II Agreements that limited traffic between Heathrow and the United States. Prior to the date of the agreement coming into effect, only American Airlines and United Airlines can fly to Heathrow from the United States and only British Airways and Virgin Atlantic can fly to the United States from Heathrow. Under the agreement, any carrier can fly to and from Heathrow. Continental Airlines has already filed for rights to serve Heathrow and has announced plans to launch service from Houston beginning on March 30 2008. Nevertheless, access to Heathrow will remain limited due to the unavailability of landing slots. Any carrier seeking access to Heathrow will have to obtain slots from the existing carriers that currently hold them.

The agreement allows EU and US airlines to enter into cooperative agreements including codesharing, franchising and branding. As long as actual control restrictions are not violated, branding and franchise agreements may include:

- the use and display of a specific brand or trademark of a franchisor;
- displaying on the franchisee's aircraft the colours and logo of a franchisor's brand;
- maintaining customer service standards for marketing purposes and to protect the integrity of the franchise brand;
- and

- participation in frequent-flyer programmes.

Franchise agreements may be independent of codeshares or co-exist with codeshares, and can provide for the payment of licence fees on standard commercial terms.

Furthermore, the agreement provides for enhanced cooperation between the European Union and the United States on competition issues and specifies that such cooperation should reduce potential conflict between the competition regimes in the United States and the European Union concerning the transatlantic market. An additional goal of the agreement is the promotion of compatible regulatory approaches to other agreements between US and EU airlines. This may be accomplished through a clearer understanding of the respective methodologies and analytical techniques used to consider competition issues in the United States and the European Union. The agreement provides that this can be accomplished by holding meetings every six months between representatives of the EU member states and the United States. The Department of Transportation and the European Union also commit to providing each other with notices of review, applications for approval of cooperation agreements and requests for antitrust immunity. This cooperation shall not otherwise affect or alter the provisions of competition laws that exist in the United States and the European Union.

### **Ownership and Citizenship**

Due to the objections of some interested parties, the agreement leaves unchanged the US rules concerning citizenship and ownership of US airlines. Foreign nationals may not own more than 25% of a US carrier's voting equity. Control of US airlines by nationals of a member state remains prohibited. The agreement does clarify existing Department of Transportation policy and maintains that member state nationals may own up to 25% of voting equity and/or 49.9% of total equity of a US airline and this shall not be deemed, of itself, to constitute control of the US airline. It also clarifies that ownership by a national of a member state of 50% or more of the total equity of a US airline shall not be presumed to constitute control; such ownership issues will be considered on a case-by-case basis. The Department of Transportation shall furthermore treat investments by EU nationals at least as favourably as those by nationals of bilateral or multilateral Open Skies partners.

The European Union permits ownership by US nationals of an EU airline subject to two limitations. First, the airline must be majority owned by member states and/or by nationals of member states. Second, the airline must be effectively controlled by such states and/or such nationals. However, in the agreement the European Union and member states expressly reserve the right to limit investments by US nationals in the voting equity of an EU airline to a

### **Second Stage Negotiation**

Although this agreement is an unprecedented breakthrough in the global aviation industry, several issues remain to be addressed in second stage negotiations. Second stage negotiations are to take place "not later than 60 days after the date of provisional application of this agreement". The progress of these talks shall be reviewed no later than 18 months from the start date, and if no agreement has been reached within 12 months of the start of the review, "each party reserves the right thereafter to suspend rights specified in this agreement". As such, if any of the nations is not satisfied with the progress of the second stage negotiations, it may suspend all rights granted under the agreement.

On the agenda for these negotiations is further liberalization of air traffic rights, namely cabotage, that could allow EU airlines to operate between two US airports. Also on the agenda is further access for EU airlines to the 'Fly America' programme. The key issue that blocked the Open Skies agreement in previous attempts, specifically with the Department of Transportation's withdrawal of its proposal to relax foreign ownership and investment restrictions, will also be re-evaluated at these second stage talks. Progress on the ownership and investment restrictions will be essential to the success or failure of the second stage negotiations.

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