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CONSUMER NEWS

By Ryan Eddings*

Tentative Agreement in EU-US “Open Skies” Talks

After years of intense negotiations, the United States and European Union reached a tentative “open skies” agreement on November 18, 2005.¹ The agreement will replace the current system consisting of twenty-five bilateral deals between the US and individual EU member nations.² It will also lift many of the restrictions placed on carriers flying between US and EU cities.³ As a result, transatlantic carriers will be subjected to increased competition.⁴ This increased competition should lead to lower ticket prices and greater service options for consumers, as well as a more efficient transatlantic cargo distribution network.⁵

Transatlantic air carriers currently operate under a number bilateral agreements between the US and individual members of the

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¹ *EU-US Land “Open Skies” Agreement*, BBC NEWS, Nov. 18, 2005, available at <http://news.bbc.co.uk/1/hi/business/4451440.stm> (last visited Nov. 26, 2005).

² Kevin Done, *EU-US Aviation Talks Appear Ready for Take-Off at Last*, FIN. TIMES, Oct. 20, 2005, at 6, available at 2005 WLNR 16948703.

³ John Crawley, *US-EU Reach Tentative Deal on “Open Skies” Pact*, REUTERS, Nov. 18, 2005, available at <http://go.reuters.com/newsArticle.jhtml?type=topNews&storyID=10337842&src=rss/topNews> (last visited Nov. 26, 2005).

⁴ *Id.*

⁵ *US, EU Agree to Throw Open Transatlantic Air Routes*, EU BUSINESS, Nov. 18, 2005, available at <http://www.eubusiness.com/Transport/051118213333.ymx7xa29/view> (last visited Nov. 26, 2005).

EU.⁶ These bilateral agreements grant reciprocal rights of access at specific cities to the signatories.⁷ In addition, some of the agreements regulate such matters as fares, flight frequency, and flight capacity.⁸ The first such agreement, the "Bermuda I," was signed in 1946 between the US and the United Kingdom.⁹ The Bermuda I agreement became the template for thousands of other agreements signed among European nations and the US over the following thirty years.¹⁰ The resulting patchwork of agreements created the transatlantic network that exists today.¹¹

Under the contemporary transatlantic network, many European carriers can fly from European cities to destinations in the US.¹² However, under most current agreements, these flights cannot continue onto other cities in the US once they land. For example, while a British Airways plane can fly from London's Heathrow Airport to New York's JFK, that flight cannot pick up additional passengers and provide domestic service to other American cities like Chicago or Dallas.¹³ Similarly, American carriers can fly from American cities to European destinations, but some cannot continue onto third cities on the continent or fly to Asian cities.¹⁴ Moreover, while United Airlines may offer service from Chicago to London, Paris, and Frankfurt, each route is subject to a different bilateral agreement.

In November 2002, the European Court of Justice struck

⁶ *Open Skies Should Not be the Limit in Air Talks*, FIN. TIMES, Oct. 18, 2005, at 16, available at 2005 WLNR 16825277.

⁷ Jacob A. Warden, "Open Skies" at a Crossroads: How the United States and European Union Should Use the ECJ Transport Cases to Reconstruct the Transatlantic Aviation Regime, 24 NW. J. INT'L L. & BUS 227, at 230.

⁸ Thomas Firey, *Nothing to Fear From Open Skies with European Union*, CATO INST., Sept. 24, 2003, available at <http://www.cato.org/research/articles/firey-030924.html> (last visited Nov. 26, 2005).

⁹ Warden, *supra* note 7, at 230.

¹⁰ *Id.*

¹¹ *Id.*

¹² EU Business, *supra* note 5.

¹³ *Id.*

¹⁴ *Id.* The right for a foreign airline to fly domestic routes within another country is known as "full cabotage." A few US airlines had achieved some degree of full cabotage within European nations, and this fact helped convince the European Commission to bring suit against the US in the Transportation Cases.

down many of these bilateral agreements after hearing multiple suits brought by the European Commission.¹⁵ This decision was the catalyst for the current round of open skies talks.¹⁶ The Commission sought the exclusive authority to negotiate aviation agreements on behalf of the entire EU. While the ECJ did not explicitly grant the Commission's request, it did declare that some provisions of the current bilateral agreements run afoul of European Law.¹⁷ In particular, the ECJ took issue with the so-called "nationality clauses."¹⁸ The nationality clauses incorporated in the bilateral agreements allowed the US to deny access to European carriers whose home nation had not signed an agreement.¹⁹ Such clauses had the potential to grant preferential rights of access over other carriers.²⁰ As a result, the ECJ voided the agreements and suggested that the new agreements could be efficiently negotiated between the US and the entire EU, rather than individual member states.²¹ After the ECJ's announcement, the Commission made it clear to the US that if a new agreement were not reached by the end of 2005, it would force the termination of all existing bilateral aviation agreements between EU members and the US.²²

In late 2003, trade representatives from the EU and US began

¹⁵ Case C-466/98, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, 2002 ECR I-9427; Case C-467/98, *Commission of the European Communities v. Denmark*, 2002 ECR I-9519; Case C-468/98, *Commission of the European Communities v. Kingdom of Sweden*, 2002 ECR I-9575; Case C-469/98, *Commission of the European Communities v. Republic of Finland*, 2002 ECR I-9627; Case C-471/98, *Commission of the European Communities v. Kingdom of Belgium*, 2002 ECR I-9681; Case C-472/98, *Commission of the European Communities v. Grand Duchy of Luxembourg*, 2002 ECR I-9741; Case C-475/98, *Commission of the European Communities v. Republic of Austria*, 2002 ECR I-9797; Case C-476/98, *Commission of the European Communities v. Federal Republic of Germany*, 2002 ECR I-9855.

¹⁶ FIN. TIMES, *supra* note 6.

¹⁷ John R. Byerly, *Liberalizing Transatlantic Aviation: The Case for Stability, Expansion, and Vision*, Address to the USA-BIAS Conference, Oct. 14, 2005, available at <http://www.state.gov/e/eb/rls/rm/2005/55129.htm> (last visited Nov. 26, 2005).

¹⁸ *Id.*

¹⁹ Warden, *supra* note 7, at 243.

²⁰ *Id.*

²¹ *Id.*

²² Byerly, *supra* note 17.

negotiations to reach a new agreement.²³ In June 2004, the EU ministers rejected a deal proposed by the US.²⁴ After that setback, the talks went into a stalemate.²⁵ By late summer of 2005, there was renewed optimism on both sides of the Atlantic that a deal could be reached.²⁶

The tentative deal reached on November 18, 2005 is designed to replace the patchwork of bilateral agreements with a single streamlined agreement.²⁷ The new agreement will remove the restrictions on foreign airlines offering domestic routes within another nation.²⁸ Under the agreement there will no longer be regulations concerning the type of aircraft that can be used, the frequency of service, or the routes serviced by the airlines.²⁹ Furthermore, fares will no longer be set by the International Air Transport Association,³⁰ but would rather be determined by the carriers themselves.³¹ As a result, the EU estimates that transatlantic travel could increase between four and eleven million passengers.³² Further estimates predict an additional thirty five million passengers in intra-European travel alone.³³

Though the plan appears to open the gates for the “vigorous competition” that the US delegation hoped to achieve, the agreement must first be accepted by both the EU and US.³⁴ In the US, the deal does not require approval from Congress, but it is not without

²³ *Id.*

²⁴ Raphael Minder and Sarah Laitner, *US and EU Hopeful on Deal on Liberalising Air Travel*, FIN. TIMES, Oct. 22, 2005, at 3, available at 2005 WLNR 17092327.

²⁵ Byerly, *supra* note 17.

²⁶ Doug Cameron, et al., *Hopes Fade for “Open Skies” Agreement This Year*, FIN. TIMES, Nov. 14, 2005, at 5, available at 2005 WLNR 18432261.

²⁷ BBC, *supra* note 1.

²⁸ *Id.*

²⁹ Crawley, *supra* note 3.

³⁰ Warden, *supra* note 7, at 231.

³¹ Crawley, *supra* note 3.

³² Minder and Laitner, *supra* note 24.

³³ *Id.*

³⁴ Byerly, *supra* note 17.

opposition.³⁵ From the European perspective, the deal does not open up US airlines for total foreign ownership, a central goal of the European delegation.³⁶ Nevertheless, there is a good chance that EU transport ministers will approve the agreement if the US shows a willingness to accept foreign ownership of US airlines.³⁷ Currently, the US limits the voting rights of foreign entities in domestic airlines to 25%, which is less than the 49% allowed by the EU.³⁸ In early November, the Bush administration proposed to ease restrictions on foreign ownership in US airlines, but seventy-five members of the House of Representatives have come out against the proposal.³⁹ Another potential problem is that the UK is reluctant to grant more access to London's Heathrow Airport to foreign airlines, which is currently serviced by only two US carriers – United Airlines and American Airlines.⁴⁰ Increased access to Heathrow is a major goal of the US delegation, and in turn is a major bargaining chip of the EU.⁴¹

The new open skies agreement, if finalized, will be a significant step forward for consumers. Not only will transatlantic routes be opened to “vigorous competition,” but domestic routes could potentially see the entrance of new foreign carriers. At the same time, the increased competition will indirectly benefit consumers in the form of lower cargo rates that could produce retail and other savings. The fact the Bush administration is apparently willing to grant the necessary concessions to the Europeans is a sign that an agreement is a real possibility. And that possibility should give optimism to consumers.

Seventh Circuit Splits From Sister Circuits Over Telephone Consumer Protection Act

In an opinion by Judge Easterbrook,⁴² the Seventh Circuit

³⁵ Crawley, *supra* note 3.

³⁶ BBC, *supra* note 1.

³⁷ Crawley, *supra* note 3.

³⁸ EU BUSINESS, *supra* note 5.

³⁹ Crawley, *supra* note 3.

⁴⁰ Cameron, et al, *supra* note 26.

⁴¹ Done, *supra* note 2.

⁴² Brill v. Countrywide Home Loans, Inc., 2005 U.S. App. LEXIS 22514, 1,