



Universiteit Leiden
The Netherlands

The impact of the EU-US Open Skies Agreement

Pablo Mendes de Leon
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The impact of the EU-US Open Skies Agreement

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I. Introduction/'historical' notes



Jimmy Carter signs the Airline Deregulation Act of 1978.
White House photo.

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A rather *long history* before its conclusion in 2007:

- From US deregulation in 1978 to:
- Liberal bilateral agreements between the US and other states, via:
- Intra EC liberalization from 1986-1992 creating the internal EC market, and:

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- The first Open Skies bilateral agreement in 1992 (US-NL, liberalizing air traffic principally through unlimited exercise of international traffic rights (5 Freedoms of the Air) linked with the two countries;
- Misunderstandings between the Commission and EC Member States in the following period on competency questions;
- AEA's proposal for the establishment of a Transatlantic Common Aviation Area in 1997

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- Misunderstandings resulting into Court Cases, started by the European Commission, against EC states having Open Skies Agreements with the US
- Result: the well know Open Skies decisions of 2002
- Main decision: *national ownership and effective control* clauses accompanied by designation exclusively by the airline's state infringes the *Freedom of establishment* – requiring 'national treatment' for all EC undertakings, including EC air carriers

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- Main problem: International law (Chicago Convention; bilaterals) checked against Community law rather than the other way around – questionable approach from an international law point of view
- Introduction of Freedom of establishment into international air law amounts to recognition of 7 Freedoms of the Air – not agreed upon in Open Skies agreements (US-EC states)

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II. The mandate



The Berlaymont -- EU Commission building.

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- Follow up: grant of *'horizontal'* and *'vertical'* mandate by the Council to the Commission
- *Vertical mandate*: Council requests the Commission to deal with all aspects of bilateral negotiations, including market access and traffic rights
- Mandate in relation to the US granted in 2003
- Stated objective: the realization of an Open Aviation Area – linking the EC internal market with the US domestic market

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Objective

The stated objective of the 2003 mandate is designed to realise an Open Aviation Area,

“where air carriers of both sides can freely establish themselves and freely provide their services on the basis of commercial principles and be able to compete on a fair and equal basis and subject to equivalent or harmonised regulatory conditions.”

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Ambitious objectives, based on *Open* (as opposed to internal and common) market principles!

- Freedom of establishment – meaning what?
- Freedom to provide air services – to what extent? All Freedoms of the Air?
- Fair competition, under:
- “Equivalent or harmonised regulatory conditions” – see the new ‘buzz term’ *regulatory convergence*

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- Position of EC states divergent: most but not all Open Skies states
- Principal exception: UK-US- Bermuda 2 (amended) -UK position: slot trading rather than traffic rights trading
- Alignment of intra EC standpoints proved to be a difficult process
- Agreement per April 2007 – saved by the bell: ETS on the agenda – no mention in agreement EC-US

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III. Achievements



London – Heathrow Airport.

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- Attempt to liberalize ownership and control restrictions – up to 49.9% ownership and control conditions subject to restrictions imposed by the two jurisdictions
- Recognition of *principal place of business – but*: requirements are linked to ownership and control conditions and licensing – in so far an *Open Market* has not been created: BA will not be licensed as a US carrier if it moved its principal place of business – however defined - to the US (cf. *Mandate*)

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- Application of right of establishment internally but not externally: Freedom of EC carriers to provide air services from any point in the 'European Area' as defined in the agreement to all points in the US
- EC carriers are not allowed to establish themselves in the US, with rights to provide services from such a point, and *vice versa*
- Extra 'seventh Freedom' rights for all cargo EC carriers: from point in the US to points beyond – subject to third state approval

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Other results:

- *Wet lease* on Transatlantic and intra-EC services, but not on intra-US and domestic EC services, allowed;
- Environment and security subject to ICAO's minimum standards
- Consumer protection mentioned as a point of attention
- Establishment of a *Joint Committee* with limited powers

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IV. The next steps



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A. Regulatory convergence –

see Annex 1 of AEA paper on external aviation relations of the EU (2008), on such matters as:

- State aid
- Privatisation/government influence
- Infrastructure access (including slot allocation)
- Level playing field
- Distribution systems

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- Ground handling
- Consumer rights
- Doing business (working permits; transfer of earnings; avoidance of double taxation)
- Safety and security
- Air traffic management
- Environmental policies
- Fuel taxation

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B. Special subject:

Convergence of competition law regimes

- Facilitating the examination of Transatlantic alliances (Star Alliance; Sky team etc.)
- No reference to the EC-US agreement of 1995 on cooperation re competition, not applied to air transport, providing for 'positive comity'
- No converged let alone harmonised rules
- No institutional framework
- Distant future: GATT panels

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C. Extension of traffic and related rights:

- Seventh Freedom
- Cabotage
- Wet lease

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D. Recognition of the Freedom of establishment

- Not only within the EC and within the US but also within the Open Aviation Area
- See also, relationship with traffic rights/Freedoms of the Air
- Leading to “open”, that is, between ”common” markets – as dictated by the EC treaty
- See also, position, of third states and their carriers (Singapore, Emirates etc.)

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V. Conclusions



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Results:

- Mandate of 2003 not quite fulfilled, but:
- A few steps have been taken
- Two common markets with some openings
- More freedom for carriers to enter the market with no restrictions on capacity, pricing, frequencies
- An Open Transatlantic Market has yet to be established
- See also, rights for third country carriers

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[Other] Points to tackle:

- Further relaxation of ownership and control rules
- Application of environmental standards, including introduction of Emission Trade System
- Agreement to be reached on security and human rights
- Convergence of competition law regimes
- Recognition of the Freedom of establishment
- Institutional arrangements
- To name a few!

Thank you!