



**COUNCIL OF
THE EUROPEAN UNION**

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INFORMATION NOTE

From: European Commission
To: Council
Subject: Negotiations for a comprehensive air transport agreement with Brazil
- Information from the Commission

Delegations will find annexed an information note from the Commission on the above mentioned subject, which will be dealt with under "Any Other Business" at the meeting of the Council (**Transport**, Telecommunications and Energy) on 31 March 2011.

Information note from the European Commission

"Completion of negotiations on a draft EU-Brazil Air Transport Agreement".

1. Introduction

On 15 October 2010, the EU Transport Council authorised the European Commission to negotiate a comprehensive air transport agreement with Brazil.

Following five rounds of negotiations (two of which have been through video-conference), the negotiations were recently concluded at the level of officials with the initialling of a draft Air Transport Agreement.

Negotiations with Brazil have not been easy.

Firstly, the fact that the Commission's mandate only includes 5th freedom rights for cargo and not for passenger services (the right to fly via inter-mediate points en-route to Brazil or onwards to points beyond Brazil) proved to make negotiations more difficult.

Secondly, Brazil was initially only willing to consider two options: either a "narrow" agreement (3rd and 4th freedom rights – i.e. direct flights between the EU and Brazil and vice versa - for cargo and passenger services, 49% foreign ownership of airlines) or a "broad" agreement (3rd, 4th and 5th freedom rights for cargo and passenger services, 100% foreign ownership of airlines and right of establishment in its territory of airlines of the other part) with no room for manoeuvre for accepting anything in-between. The second, broader option was not possible given the EU mandate (no 5th for passengers). In addition, in view of the process of market liberalisation and integration in South America and the ongoing consolidation of airlines, Brazil made an agreement conditional on EU recognition of this process including in particular allowing the carrier resulting from the on-going merger between LAN (Chile) and TAM (Brazil) to fly to the EU.

Thirdly, in contrast to the recent US agreement with Brazil, the agreement that the EU have negotiated with Brazil is not an "open skies" agreement limited to liberalisation of traffic rights but has equally aimed at ensuring closer regulatory cooperation and convergence in areas such as safety, security, environment, air traffic management, protection of consumers, labour issues and application of competition law and state aid rules. This was clearly new to Brazil.

Finally, the fact that Brazil has traditionally been known as a difficult market to operate in with bureaucratic regulations and considerable obstacles to "doing business" did not make the negotiations any easier.

2. State of play of the negotiations

Despite these challenging circumstances, it was possible on 17 March 2011 to conclude the negotiations at the level of officials with the initialling of a draft Air Transport Agreement and the signature of a Memorandum of Consultations.

In the end, the EU side managed to escape the choice between the "narrow" and the "broad" Brazilian scenarios.

The result of the negotiations is very close to fulfilling the negotiating mandate given to the European Commission. The following key elements have been achieved:

- Full liberalisation of 3rd and 4th freedom rights for passengers and cargo.
- Full liberalisation of 5th freedom rights for cargo.
- Further liberalisation of ownership of Brazilian carriers (with possibility of 49% EU ownership which is more than the 20% allowed today).
- Resolution of a number of doing business issues and the creation of an effective framework for addressing such issues in the future.
- Substantial provisions on environment including safeguarding the inclusion of aviation in the EU's ETS system.
- An acceptable phasing-in of new capacity to allow for growth including an end to current geographical restrictions and even possibilities for additional frequencies at the most important and congested hubs in Sao Paulo.

The only element of the mandate that was not possible to obtain was 100% foreign ownership of airlines (and the related right of establishment). Brazil was not willing to include this without liberalisation of 5th freedom rights for passenger services.

3. Preliminary assessment of outcome

5th freedom for cargo

Obtaining the 5th for cargo can only be seen as a victory given the EC's negotiating mandate and Brazil's insistence until the final round of not granting 5th for cargo without also including 5th for passengers. This outcome is being welcomed by the European cargo industry as it opens new business opportunities for EU carriers while making life easier for those already operating.

Ownership of airlines

The EU and Brazil have agreed to allow ownership and control of up to 49% of their carriers to be owned by nationals of the other Party. Brazil was ready to go to 100% (as was the EU) - but not without liberalising 5th freedom rights for passengers.

The draft agreement also allows Brazilian carriers to be majority owned and controlled by other Latin American states or nationals thereof provided that a number of pre-conditions are fulfilled. First, such countries must recognise the EU through a Horizontal Agreement. The country in question must also have "a good record of cooperation" with the EU. In addition, a number of provisions of the draft agreement ensure that Brazil will maintain the full and effective regulatory control of its carriers under the agreement and that those carriers - whether owned by Brazilian or other Latin-American interests - shall be subject to all relevant laws and regulations in force in Brazil.

Doing business issues

Although the negotiating mandate did not require doing business issues to be resolved during the negotiations (but only the creation of a framework in which they will be addressed), in fact a number of doing business issues have already been resolved. One such example relates to the filing of tariffs. EU carriers are currently required to file tariffs on a monthly basis in a cumbersome way. During the negotiations, it has been possible to reach agreement on simplifying this system so that tariffs can only be required to be notified, only on a quarterly basis and for information purposes only – not for approval.

Environment

The environment article of the agreement remained a difficult issue until the very end. Initially, Brazil had preferred not to have an environment article altogether in the agreement as it was claimed to be outside the Brazilian negotiating mandate. However, the EU side insisted on substantial provisions on environment which in the end was accepted by Brazil. In addition to substantial provisions on cooperation and shared objectives in many respects, the agreed wording of the environment article safeguards the EU's inclusion of aviation in ETS.

Phase-in

Another difficult issue in the negotiations was caused by the fact that Brazil is not able, for constitutional reasons, to apply the agreement on a provisional basis. It can, however, apply most parts of the agreement on an administrative basis until the Brazilian Congress has ratified the agreement. However, the Brazilian administration can not grant full liberalisation immediately but has needed - also for political reasons - a gradual phase-in through a transitional period.

The agreed phase-in period will in principle last 3 years. However, growth opportunities that are satisfactory to EU carriers have been secured during the phase-in period.

From the date of signature, all Member States will be allowed to increase their frequencies, compared to their rights today, with 10% to all airports (except Sao Paulo), and by a further 10% to the same airports, except Rio.

It has also agreed that all existing geographical restrictions and demarcation lines within the Brazilian market will gradually be phased out. It has also been possible to secure that there will be no restrictions for cargo at the key cargo airport in Sao Paulo.

Finally, it was possible, albeit particularly difficult, to secure certain possibilities for Member States - already during the transition period - to grow further even at the most congested airports in Sao Paulo.

4. Conclusion

The European Commission has consulted closely with EU Member States and industry throughout the negotiations and before initialling the agreement. The Commission is pleased that, both EU Member States and industry stakeholders including notably airlines seem generally content with the draft agreement that has been negotiated.

Significant new rights and benefits from the agreement will start to flow as from the date of signature of the agreement.

The Commission is already in the process of preparing the draft Council decisions that will allow for the agreement to be signed and concluded in due time.