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Subject: Draft Decision by the Council and the Representatives of the Governments of the Member States of the European Union, meeting within the Council, on authorising the Commission to open negotiations with Canada in the field of air transport

Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.

RESTREINT UE



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THE EUROPEAN UNION**

Brussels, 6 September 2007

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ADD 1**

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**AVIATION 136
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ADDENDUM TO NOTE

From : Council Secretariat

To: Delegations

No. Cion prop. : 5276/07 AVIATION 16 RELEX 17 CDN 1

No. prev. doc. : 11850/07 AVIATION 129 RELEX 566 CDN 17

Subject : Draft Decision by the Council and the Representatives of the Governments of the Member States of the European Union, meeting within the Council, on authorising the Commission to open negotiations with Canada in the field of air transport

Delegations will find attached the position of the Government of the Federal Republic of Germany on the above mentioned subject.

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ANNEX

**Position of the Government of the Federal Republic of Germany
of 21 August 2007**

**on the draft Decision by the Council and the Representatives of the Governments of the
Member States of the European Union, meeting within the Council, authorising the
Commission to open negotiations with Canada in the field of air transport**

– 12117/07 RESTREINT UE AVIATION 136 RELEX 588 CDN 18 of 25 July 2007 (03.08)
(OR. en)

No. prev. doc.: 11850/07 AVIATION 129 RELEX 566 CDN 17

No. Cion prop.: 5276/07 AVIATION 16 RELEX 17 CDN 1

The Federal Government's comments on the above draft Decision are as follows:

**1. Section 2(1) of the negotiating directives in Annex I to the Annex, scrutiny reservation in
footnote 2:**

Following careful scrutiny of section 2(1) (page 5) of 12117/07 of 25 July 2007, the Federal
Republic of Germany finds itself unable to support the wording discussed in the Working
Party on Air Transport on 23 July 2007. That wording reads as follows:

"2. Scope of the agreement

...

- (1) As a matter of priority, the Commission shall ensure, through a binding commitment
made by the authorities of Canada, that the agreement is consistent with the EC Treaty
and relevant Community legislation. **Should the Commission encounter difficulties
in achieving such commitment it shall refer to the Special Committee and, if
appropriate, to the Council prior to pursuing negotiations.**"

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Reasons:

(a) **First sentence of section 2(1) (consistency with Community legislation):**

Under its future "vertical mandate" the European Commission is to start ("as a matter of priority, ...") with a horizontal approach. It must first ensure that certain clauses in the existing bilateral air services agreements between the EU Member States and Canada are consistent with Community legislation; in a departure from usual practice, it is to do this not by concluding a separate horizontal air transport agreement, but simply by establishing that there is a binding commitment on the part of the relevant Canadian authority.

The first sentence of section 2(1) refers to "*the agreement*", obviously meaning the comprehensive air services agreement which is to be negotiated. However, the wording does not take sufficient account of the afore-mentioned step-by-step approach. It should be made clear that the first stage is to bring existing bilateral (!) air services agreements into line with Community legislation; this is to be followed, at the next stage, by actual negotiations on a full range of topics (including economic aspects such as traffic rights) – leading to a comprehensive air services agreement which is consistent with Community legislation. This last aspect may well be implied in the first paragraph of the first section (page 4), which states that the agreement is to establish "legal certainty for all operations covered by the agreement".

Legal certainty includes making sure that all the clauses in the "final" air services agreement which the Commission negotiates with Canada are legal. Furthermore, the task of negotiating a comprehensive agreement which is consistent with Community legislation is probably only declaratory in nature, given the Commission's role as "guardian of the Treaty" (Article 211 TEC), whereas it is yet to be established, in stage one, that the bilateral agreements are consistent with Community law.

It should also be made clear that, properly speaking, the binding commitment should be entered into with a subject of international law such as "Canada" or at least "the Canadian Government" (instead of: "the authorities of Canada").

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The first sentence of section 2(1) should therefore read as follows:

"(1) As a matter of priority, the Commission shall ensure, through a binding commitment made by Canada, that **with regard to the existing bilateral air services agreements legal certainty is restored** [and the final agreement will be consistent with the EC Treaty and relevant Community legislation.¹]"

(b) **Second sentence of section 2(1) (body to be referred to in the event of difficulties)**

The Federal Government notes that the alternative proposal made by France and supported by Germany (see the relevant footnote to 11850/07) has not been taken on board. Under this proposal, the Commission would have been obliged to refer (back) to the Council if the Canadian authorities failed to provide the relevant binding commitment. However, the Federal Government can accept the phrase "*Should the Commission encounter difficulties in achieving such commitment*" found in the second sentence, because it assumes that it will be the Special Committee which determines whether this state of affairs obtains. The following wording would also be possible: "*Should there be difficulties in achieving such commitment.*"

It is the second part of the second sentence to which the Federal Government cannot agree. We are not in favour of referring the matter to the "Special Committee". In the final analysis, it is the Council which has to decide in difficult situations. A special committee, in which not all Member States may be represented (as, for example, during the negotiations for the comprehensive air transport agreement between the EC and its Member States and the US) is unable to carry out this role, if only for practical reasons.

The Federal Government therefore considers that the second sentence of section 2(1) should read as follows:

"Should the Commission encounter difficulties in achieving such commitment **it shall refer to the Council prior to pursuing negotiations.**"

¹ Optional addition in Germany's opinion, i.e. not absolutely necessary.

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General comment on section 2(1)

The Federal Republic of Germany is able to go along with the above compromise/procedure only by way of exception, and without prejudice to other directives for negotiations on air transport with third countries which may be adopted in future, because the European Commission has assured Member States, following informal talks with the Canadians, that Canada will not receive any market access concessions in return for accepting the Community clauses. The Member States have also been referred to a letter from the Canadian Ministry to this effect. Purely as a precaution, the Federal Government wishes to point out that should the above procedure prove unsuccessful after all, it considers that the only possible course would be to return to the principles laid down in the 2005 Council conclusions: first a horizontal EC agreement, and then a comprehensive agreement.

2. Section 3(1) of the negotiating directives in Annex I to the Annex (page 6):

In respect of the sentence "*The final agreement will replace the relevant provisions of the existing bilateral air services agreements between EU Member States and Canada*" it could be spelt out that it is entry into force which counts, not signing².

3. Section 5(2) of the negotiating directives in Annex I to the Annex (page 7)

The Federal Government considers it important that the following sentence be added to paragraph 2:

"... concerns are reflected adequately. **A language clause shall be concluded.**"

Reasons:

In the light of experience with the EU-US Agreement, which does not include the language clause usually contained in international agreements, provision should be made for conclusion of a language clause, to avoid any difficulties.

² Optional addition in Germany's opinion, i.e. not absolutely necessary.