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NOTE

From: General Secretariat of the Council

To: Delegations

Subject: Memorandum of Consultations attached to the Agreement with Respect to
Time Limitations on Arrangements for the Provision of Aircraft with Crew

Memorandum of Consultations

1. On March 8, 2019, delegations of the United States (U.S.), the European Union (EU), Iceland, and Norway reached agreement, *ad referendum*, on the text of an agreement with respect to time limitations on arrangements for the leasing of aircraft with crew (the “Agreement” appended as Attachment A), which they intend to submit to their respective authorities for approval. A list of the members of the delegations is appended as Attachment B.
2. The U.S. delegation and the EU delegation expressed their view that the drafters of the Air Transport Agreement between the United States of America and the European Community and its Member States, signed on April 25 and 30, 2007, as amended by the Protocol to Amend the Air Transport Agreement between the United States of America and the European Community and its Member States, signed on June 24, 2010 (“U.S.-EU ATA”), intended to promote flexibility in operating arrangements between airlines pursuant to Article 10(9). The U.S. delegation, the EU delegation, the Icelandic delegation, and the Norwegian delegation also expressed their view that the drafters of the Air Transport Agreement among the United States of America, the European Union and its Member States, Iceland, and the Kingdom of Norway (“Four Part ATA”), which applies the provisions of the U.S.-EU ATA to Iceland and Norway, intended to promote corresponding flexibility.
3. The U.S. delegation noted its concerns that the application of Regulation (EC) No 1008/2008 hinders the exercise of commercial rights for U.S. airlines under the U.S.-EU ATA, including as applied by the Four Part ATA, and that it has worked through the Joint Committee since 2014 to ensure that airlines that wish to enjoy the commercial leasing markets as provided in Article 10(9) may do so. The U.S. delegation recalled the significant efforts undertaken by the U.S. Department of Transportation (DOT) to create new market opportunities for the leasing of aircraft with crew, culminating in the notice of revised guidance in February 2008, as published in Volume 73, Number 41 of the Federal Register. The U.S. delegation further stated that its decision to engage in negotiations and drafting of the Agreement and to submit the text of the Agreement for approval were without prejudice to its position on the above-mentioned Regulation.

4. In response, the EU delegation, the Icelandic delegation, and the Norwegian delegation stated that they did not share the U.S. delegation's concerns regarding the application of Regulation (EC) No 1008/2008 and that they consider that the imposition by the U.S. of time limitations on the operation of wet leases between European airlines as defined in Article 1(1) of the Agreement would hinder the exercise of commercial rights for European airlines under the U.S.-EU ATA, including as applied by the Four Part ATA. These delegations further stated that their decision to engage in negotiations and drafting of the Agreement and to submit the text of the Agreement for approval were without prejudice to their position regarding the above-mentioned Regulation and U.S. practice.
5. Particularly in light of the comprehensive aviation relationship among the Parties to the Agreement, the EU delegation, the Norwegian delegation, and the Icelandic delegation stressed their position that this Agreement does not constitute a precedent for negotiating an equivalent agreement between the EU, Iceland, or Norway, and any other country.
6. In response to a question from the U.S. delegation regarding the application of Regulation (EC) No 1008/2008 and this Agreement by Iceland and Norway, the Icelandic delegation and the Norwegian delegation confirmed that Regulation (EC) No 1008/2008 is applied by Iceland and Norway through incorporation of that regulation into the Agreement on the European Economic Area ("EEA Agreement"). Furthermore, the Icelandic delegation and the Norwegian delegation noted that the Agreement will constitute an agreement under public international law, binding upon Iceland and Norway.
7. The EU delegation noted that under EU law, and in particular Article 216(2) of the Treaty on the Functioning of the European Union ("TFEU"), the Agreement, which will form part of EU law, will be binding on the Member States, although they are not parties to the Agreement as a matter of international law; consequently, the Member States will be prevented, by virtue of EU law, from acting in contravention of the Agreement, such as by imposing time limitations on wet leases that are incompatible with the Agreement.
8. The EU delegation further noted that the EU has exclusive competence, to the exclusion of the Member States, to conclude the Agreement, in accordance with Article 3(2) TFEU.

9. In this connection, the EU delegation noted that if a Member State were to act in contravention of the Agreement, such as by imposing time limitations on wet leases that are inconsistent with the Agreement, and, as the Agreement forms part of EU law, thereby fails to fulfil an obligation under EU law, the European Commission is the EU institution responsible under the TFEU for the enforcement of EU law and may bring an action against the Member State before the Court of Justice of the European Union under Article 258 TFEU. It further noted that if a Member State were to act in contravention of the Agreement, the EU would be responsible under the Agreement for such an act and would be subject to the procedures referred to in Articles 3 and 5.
10. In this context, and in response to a question from the U.S. delegation, the EU delegation confirmed that the European Commission does not have powers under EU law, and in particular under the EEA Agreement, to ensure the application of the Agreement by Iceland and Norway. A possible violation of the Agreement by Iceland or Norway would be subject to the procedures referred to in Articles 3 and 5. The Icelandic delegation and the Norwegian delegation confirmed these statements.
11. The U.S. delegation noted that the Agreement is to be provisionally applied by the United States in accordance with Article 7(2) thereof.
12. In response to a question from the U.S. delegation about provisional application of the Agreement and the EU's ability to ensure such application by the Member States, the EU delegation noted, first, that, in accordance with Article 218(5) TFEU, the Council of the EU, on a proposal by the European Commission, is to adopt a decision authorising the signing of the Agreement and, in accordance with Article 7(2) thereof, its provisional application, and that such a decision, under Article 288 TFEU, is binding in its entirety. It further noted that, pursuant to Article 216(2) TFEU, the Agreement, including the provisions on provisional application in Article 7(2) thereof, will be binding on the Member States as a matter of EU law, and referred to the procedure provided for under Article 258 TFEU to ensure compliance by the Member States of their obligations under EU law.
13. In response to a question from the U.S. delegation about provisional application of the Agreement as regards Iceland and Norway, the Icelandic delegation and the Norwegian delegation confirmed that the Agreement will be provisionally applied from its date of signature in accordance with Article 7(2) thereof.

14. In responding to a question from the EU delegation, the U.S. delegation provided information on the U.S. regime for long-term wet lease licensing. Airlines applying for such authority are required to conform to the requirements specified in Part 212 of Title 14 of the U.S. Code of Federal Regulations (14 C.F.R. Part 212). These regulations define long-term wet leasing to mean such leases that either a) last more than 60 days, or b) are part of a series of such leases that amount to a continuing arrangement lasting more than 60 days. The U.S. delegation noted that DOT issues statements of operations for wet lease services if all requirements have been met and it determines that the authorization is in the public interest. The public interest conditions are specified in 14 CFR 212.11(b) and discussed in the Regulatory Guidance issued on February 15, 2008 (73 Fed. Reg. 10986). In this connection, the U.S. delegation confirmed the statements regarding the application of the public interest analysis made in paragraphs 27, 28, 29, and 31 of the 2007 Memorandum of Consultations accompanying the U.S.-EU ATA.
15. The U.S. delegation noted that, as a matter of long established practice, DOT consistently approves applications for wet lease arrangements filed by carriers of the EU, Iceland, and Norway. All delegations noted their expectation for this practice to continue in a manner consistent with the Agreement and the U.S.-EU ATA, including as applied by the Four Part ATA.
16. The delegations noted that the Joint Committee referenced in Article 18 of the U.S.-EU ATA has a mandate to review the implementation of the U.S.-EU ATA, including as applied by the Four Part ATA, and is comprised of parties to the Four Part ATA, which include non-parties to the present Agreement. However, given that all the Parties to the present Agreement are members of the Joint Committee, and that the EU Member States are bound by the Agreement under EU law although they are not parties to the Agreement, the delegations expressed their expectation that any consultations under Article 3 of the Agreement, or review under Article 4, would be held in connection with regular or special meetings of the Joint Committee referenced in Article 18(1) of the U.S.-EU ATA. In the case of any such consultations, the delegations expressed the hope that the nature of the forum would help the Parties to the Agreement to come to a resolution.

17. The delegations also noted that the Agreement does not affect the mandate of the Joint Committee to address issues relating to wet leasing arrangements under Article 10(9) of the U.S.-EU ATA, including as applied by the Four Part ATA.
18. The U.S. delegation and the EU delegation acknowledged the linguistic regime of the EU. In that regard, the EU delegation recalled that, pursuant to EU law, the EU is obligated to draw up the Agreement in the Bulgarian, Croatian, Czech, Danish, Dutch, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, and Swedish languages. The EU delegation stated its position that these additional language versions should be authenticated by application of the procedure provided for in the Joint Declaration (appended as Attachment C) with all authenticated versions being of equal value. The Icelandic and the Norwegian delegations stated their position that versions in Icelandic and Norwegian should be authenticated in the same way. The U.S. delegation took note of the EU, Icelandic and Norwegian delegations' position and, while noting that the Agreement does not require authentication of additional language versions, confirmed its commitment to work constructively with the EU, Icelandic and Norwegian delegations to address requests for the authentication of additional language versions of the Agreement through the procedure provided for in the Joint Declaration.

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