



**CANADA-EUROPE TRANSATLANTIC DIALOGUE:
SEEKING TRANSNATIONAL SOLUTIONS TO 21ST CENTURY PROBLEMS**

<http://www.carleton.ca/europecluster>

Policy Brief April 2009

**The EU-Canada Air Services Agreement:
a plea for rapid implementation**

**Mark Glynn under the direction of Professor Armand de Mestral,
McGill University***

On December 8, 2008 representatives from Canada and the European Union (EU) concluded a new agreement on air services (hereafter: “the EU-Canada Air Services Agreement”)¹. The Canadian aircraft industry² hailed this agreement, the near conclusion of which we announced in our previous article.³ However, it is important to note that, three months after the text was signed, its contents, as well as the timetable for implementation are still unknown. The comparable text concluded by the United States and the European Union two years ago was made public almost immediately. The only information available on the EU-Canada Air Services Agreement to date is the information contained in the first press releases.

This article outlines the content of the agreement which is known and strongly recommends that the signatories, especially Canada, proceed as rapidly as possible with ratification and implementation.

D) The EU-Canada Air Services Agreement

The EU-Canada Air Services Agreement envisages the liberalization over time of the Euro-Canadian aviation market. A first phase will provide for the exchange of unrestricted third and fourth freedoms traffic rights⁴ between the two territories for any European or Canadian airline. This phase will start once the Agreement comes into effect. The second phase of the Agreement envisages the exchange of seventh freedom traffic rights⁵ for airlines transporting freight. This phase is dependent upon the liberalization of Canadian legislation pertaining to foreign investment in Canadian airlines. At present foreign investment with voting privileges in Canadian carriers is limited to 25%. The EU requires that Canada adopt the 49.9% threshold currently in place in Europe. Given that the government of Canada has already taken the first steps to carry out this liberalization, it may in fact be that the first two phases of liberalization are in fact only one. The third phase of liberalization envisages the exchange of unlimited fifth freedom traffic rights.⁶ This would be subordinate to the right of citizens of Canada and the EU to develop a new air transport route in the territory of the other party. Finally, in the long

* Mark Glynn is a PhD candidate, Institute of Air and Space Law, McGill University. Armand de Mestral is Jean Monnet Professor of Law at McGill University. The views expressed are attributable only to the authors in a personal capacity and not to any institution with which they are associated.

run, the creation of a joint aviation area is envisaged, with the exchange of cabotage rights as soon as Canada and the European Union remove restrictions concerning the ownership and control of airline companies by citizens of the other party.

This is a revolutionary agreement in that prior to this no bilateral agreement had envisaged the total integration of two air markets. An additional innovative feature is the fact that the exchange of rights of traffic is subordinate to the liberalization of the respective national legislations. Ordinarily, bilateral air service agreements do not influence domestic regulations relating to certification of air carriers. It should also be stressed that the agreement is more liberal than the one concluded by the United States and the EU in 2007. This fact may persuade the United States to respond to the EU's desire to proceed to establish a single transatlantic air market.

That being said, the success of the EU-Canada Air Services Agreement depends in large part on the willingness and diligence of the parties to proceed with the modification of their domestic laws. This article stresses that it is in the best interests of Canada to ratify the Agreement as soon as possible, in order to catch up on some of the ground lost to the United States in the liberalization of the transatlantic air market (II). Canada must also take into account the risk of air traffic diverting to the United States as a consequence of Canadian domestic air policy (III).

II) The Dangers of Delaying Implementation of the Euro-Canadian Air Agreement

Canada risks losing part of its share of the transatlantic market, given the growth and improvement in services between the United States and Europe.

1. Trans-border Diversion

Most of the Canadian population lives within 160 kilometres of the American border. This geographical location presents a double risk in that Canadians may fly from American airports close to the border in order to benefit from lower fares. In addition, visitors to Canada may fly into American airports and then take surface transportation across the border to their Canadian destination. This risk was highlighted in January 2009 when the low cost airline Ryanair, began negotiations with authorities in the Niagara region aimed at launching a transatlantic service to Niagara Falls international airport, NY.⁷ This airport occupies a strategic position in that the majority of leisure visitors to Southern Ontario also go to the Niagara area. In addition, Vancouver Airport could also be in competition for transatlantic services with Bellingham airport which is located 80 kilometres to the south of that Canadian metropolis. Finally, the American airports of Plattsburgh and Burlington already operate at gateways to the American domestic market for the population of southern Quebec. They could also offer long haul services. Ryanair is the master when it comes to the art of service from secondary airports which are close to key centres: in the case of Stockholm, the two airports which are served under the name of the Swedish capital are located more than 100 kilometres from the downtown area.

To combat this risk it is essential for Canada to encourage the growth of effective transatlantic services by existing operators and especially through low cost airlines. It is essential that the first phase of this long term agreement – the exchange of rights of traffic under the third and fourth freedoms of the air⁸ – is applied immediately such as to promote a free entry market across the EU-Canada market.

2) Diversion of traffic arriving and departing from Canada

Airline passengers particularly those in business class enjoy fast and if possible direct flights. As a result, passengers visiting Canada from a regional airport in Europe usually stopover in a European hub where they then pick up a direct flight to Canada. Air Canada is the carrier best placed to attract this traffic thanks mainly to its dominant share of the transatlantic market as well as its network of Star Alliance partners who offer connecting flights within Europe.

One of the anticipated results of the EU-United States agreement is an increase in the number of direct transatlantic flights arriving and departing from regional airports in Europe.⁹ As a result, American carriers sometimes in combination with European allies, will be able increasingly to serve Canada from regional European airports with one stopover in the United States, thereby offering an equivalent service to that currently offered with existing transatlantic services which arrive and depart from Canada. This competition could damage all services between Canada and Europe. The risk could be reduced by encouraging more frequent and direct services between Canada and Europe which would thus reduce the total travelling time and improve the likelihood that the transit in Canada is the most convenient and swiftest option available.

3) Diversion of passengers with international connections

An important part of the traffic between Canada and Europe is passengers in transit to destinations beyond Canada -- for example to Latin America -- either because of an absence of direct connections with Europe, or because prices for direct flights are inflated by a "hub-airport surcharge".¹⁰ Passengers can often choose between a stopover in the United States or Canada. However, Canada is likely to lose gradually its role as a place to stopover if its share of the total direct transatlantic market declines. The new transatlantic services destined for U.S. airports will compete for transit passengers with the oligopoly of existing hub airports in the U.S. and Canada.

This sixth freedom traffic¹¹ represents a key component of the viability of Canadian transatlantic services. The loss of part of this traffic would weaken an industry which employs more than 300,000 Canadians.

The coming into effect of the EU-Canada Air Services Agreement will promote expansion of existing services and introduction of new transatlantic services to and from Canada by offering a more flexible regulatory framework for air transportation. Canada must also ensure that their bilateral accords with third party States are not so restrictive that they discourage the use of Canada as a transit country for air travel.

Canadian Air policy after the agreement comes into force

The Canadian government must remain aware of the competitiveness of American airports which, even after the EU-Canada Air Services Agreement comes into effect, will continue to act as ports of entry into Canada and as a route for transit traffic *en route* to third countries. Canada's second and third airlines used their press releases welcoming the agreement to promote reconsideration of taxation policy with respect to Canadian airlines.¹² A direct flight to London with the same airline is subject to 500% higher surcharges when departing from Montreal than those applicable to a flight starting from New York.¹³ These charges dissuade travellers from using Canadian airports and encourage the use of border airports, particularly among those travelling for leisure. For existing long haul services, these charges are just one small part of the total ticket price. However, if Ryanair is able to offer a transatlantic service for \$10 for a one-way ticket,¹⁴ the taxes and supplements could play a decisive role and discourage low cost carriers from entering the Canadian market. In addition, the disadvantages of additional travel to a border airport will also often be negligible in the context of a long haul journey, whereas they may be dissuasive for a regional or continental flight. It is thus essential that Canadian fiscal policy does not cause a loss of ground *vis à vis* the United States, in the transatlantic air market.

Conclusion

The authors have sought to stress the importance of Canada bringing into force the Agreement to liberalise the transatlantic airline market as soon as possible. A delay in its application risks negatively affecting the viability of EU-Canada services and could lead to Canada losing out on its share of the transatlantic market. Although the prevailing political preferences and economic realities may appear hostile to a fundamental deregulation of the sector, it is in the best long term interests of Canada that the transatlantic aviation regulation framework is at least as liberalized as that which is applied to the United States.

¹ Transports Canada, Press Release, “Le Canada conclut des négociations sans précédent en matière de transport aérien avec l’Union Européenne” (8 December 2008), online: Transport Canada <<http://www.tc.gc.ca/medias/communiqués/nat/2008/08-h237f.htm>>.

² Air Canada, Press Release, «Air Canada se réjouit de la conclusion d'un accord de transport aérien entre le Canada et l'Union européenne» (9 December 2008), online: Air Canada <<http://micro.newswire.ca/release.cgi?rkey=1612098382&view=46513-1&Start=0>>.

³ “Policy considerations in the negotiation of a new air services agreement between Canada and the European Union,” Mark Glynn under the direction of Professor Armand de Mestral McGill University, Policy Brief December 2008, Canada-Europe Transatlantic Dialogue: Seeking Transnational Solutions to 21st Century Problems, <http://www.carleton.ca/europecluster/policy-briefs.html>

⁴ The Third Freedom of The Air is the right or privilege, in respect of scheduled international air services, granted by one State to another State to put down, in the territory of the first State, traffic coming from the home State of the carrier.

The Fourth Freedom of The Air is the right or privilege, in respect of scheduled international air services, granted by one State to another State to take on, in the territory of the first State, traffic destined for the home State of the carrier.

⁵ The Seventh Freedom of The Air is the right or privilege, in respect of scheduled international air services, granted by one State to another State, of transporting traffic between the territory of the granting State and any third State with no requirement to include on such operation any point in the territory of the recipient State, i.e the service need not connect to or be an extension of any service to/from the home State of the carrier.

⁶ The Fifth Freedom of The Air - the right or privilege, in respect of scheduled international air services, granted by one State to another State to put down and to take on, in the territory of the first State, traffic coming from or destined to a third State.

⁷ Sharon Linstedt, “Irish airline Ryanair eyes Falls airport deal“ Buffalo News (10 March 2009).

⁸ See supra note 3.

⁹ Jan Veldhuis, “The Implications of More Transatlantic Point-to-point Routes for European Hubs” (Article presented at the second Airnet Conference, The Hague, 17 April 2008).

¹⁰ The hub premium describes the tendency for Airlines to increase prices when offering service between two major «hub» airports due to the fact that most competitors are only able to provide stopping service.

¹¹ The Sixth Freedom of The Air is the right or privilege, in respect of scheduled international air services, of transporting, via the home State of the carrier, traffic moving between two other.

¹² Westjet, Press Release, “WestJet applauds Canada-European Union air transport agreement” (9 décembre 2008), online: Westjet <<http://micro.newswire.ca/release.cgi?rkey=1612098492&view=87295-2&Start=0>>.

Air Transat, Press Release, “Transat satisfaite qu’une entente de libéralisation du transport aérien survienne entre le Canada et l’Union européenne” (9 December 2009), online: Air Transat <<http://www.transat.com/fr/medias/communiqué.presse.aspx>>.

¹³ Comparison for a one-way ticket to London Heathrow from New York JFK and from Montreal Trudeau travelling on the same dates with British Airways, online: British Airways <http://www.britishairways.com/travel/home/public/en_us>.

¹⁴ Mark Milner, “Ryanair boss plans £7 tickets to America” The Guardian (13 April 2007).