

# TRANSATLANTIC TRANS-NATIONAL AIRLINE COMPANIES: TAKING ACCOUNT OF SOCIAL ISSUES

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## Introduction: the context and aim of this report

1. On 30 March 2008, the first stage EU-US agreement came into force, delivering greater commercial opportunities and a strengthened regulatory framework for carriers operating between the US and the 27 Member States of the European Union. Shortly afterwards, in May 2008, negotiations on a second stage agreement EU-US agreement began. Discussions between the EU and US on a second stage agreement have focused on, amongst other things, further opportunities for the liberalisation of market access restrictions between the EU and the United States; specifically, the reciprocal relaxation of domestic laws precluding the foreign ownership and control of airlines and further regulatory cooperation.
2. These discussions have shown that there is considerable support on both sides for greater commercial opportunities from stakeholders, including the relaxation of ownership and control rules. The US currently retains some of the most restrictive laws on the foreign ownership and operation of airlines in the world, the origins of which date back to a period when commercial transatlantic aviation was non-existent. The US is not alone. Europe's laws require that European carriers must be majority owned and controlled by Europeans<sup>1</sup>. Proponents of reform have argued that this is neither in the interests of the United States nor Europe and that change is necessary in order to place the industry on a firmer footing.
3. Supporters of reform point to the fact that such laws restricting foreign investment have led to airlines being starved of capital and deprived of opportunities to strengthen through diversification into foreign markets. Arguably, this has led to higher costs, greater financial volatility and vulnerability, and lower employment for airlines, and resulted in irrecoverable losses for consumers, aviation employees, investors and businesses.<sup>2</sup> Since 2001, the US airline sector has lost approximately 25 per cent of its full time workforce and made economic returns to investors in only one of the last eight years<sup>3</sup>. Such trends are neither socially desirable nor financially sustainable.
4. Resisting these arguments in favour of reform, some stakeholders representing organised labour have been vocal in their opposition to change, arguing that the market opportunities

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<sup>1</sup> European law also allows for ownership and control rights to be extended to third countries where provided for in an international agreement. Thus, an EU-US agreement allowing for US ownership and control of European carriers would be instantly applicable and would supersede any conflicting domestic provisions on Member States' statutes.

<sup>2</sup> The European Commission's briefing note: *'EU-US Aviation: the importance of reforming cross-border investment'* gives further information on the arguments for reforming ownership and control rules. [http://ec.europa.eu/transport/air/international\\_aviation/country\\_index/united\\_states\\_en.htm](http://ec.europa.eu/transport/air/international_aviation/country_index/united_states_en.htm)

<sup>3</sup> US Air Transport Association (ATA) figures / US DoT Form-41 data.

being discussed would be damaging to the interests of their members by perpetuating the trends that have already occurred. Furthermore, they have argued that the opening up of markets has been partially to blame for the performance of the industry in recent decades. These concerns have led the European Commission to organise two Labour Forums in Washington (December 2008) and Brussels (June 2009) to examine the issues in more detail and determine what might be done to address some of the perceived negative effects of market liberalisation.

5. The two Labour Forums were targeted at policy-makers and stakeholders with an interest in the social dimension of reforms associated with discussions on a second stage EU-US aviation agreement and were attended by representatives from Europe and the U.S., including the U.S. Government's Departments of State and Transportation, airlines, airports, the U.S. National Mediation Board, representatives of the European Commission, EU Member States, EFTA States, the International Labour Organization (ILO), academia, Eurofound and trade unions from both sides of the Atlantic.
6. The two Labour Forums provided further precision and clarity about the shared concerns of union interests and created a valued forum for open and frank discussion of the issues. Although a range of opinion was voiced about the likelihood of any negative effects on the interests of organised labour, it was clear at the conclusion of the second Labour Forum that there was a widely held consensus amongst the EU and U.S. delegations that a second stage agreement should seek to include a social dimension.
7. In order to ensure that the benefit from the dialogue was not lost and to develop the social dimension of the discussions further, the European Commission took the step of appointing me as an "explorateur". The remit given to me was to explore the issues further with key stakeholders and report back with recommendations for tackling the concerns raised.
8. Thankfully, in the short period since the second Labour Forum, it has been possible for me to meet with a broad cross-section of stakeholders in both the United States and Europe, and a large number of meetings have been held with union and airline representatives in Washington and Brussels. Given the time available, it has regrettably not been possible to meet with every one of the parties interested in this subject. However, I am especially grateful to all those that have agreed to discuss the issues with me for the time and effort that they committed to this important subject.
9. This report is the product of the many helpful and informative bilateral meetings in which I participated, as well as the many presentations that were given in the two Labour Forums. The report is set out as follows:
  - *Section 1: The social concerns associated with trans-national airline operations and the solutions put forward by social partners*
  - *Section 2: Examination of the potential for extra-territorial application of national laws and/or labour law harmonisation*
  - *Section 3: The building blocks for a possible solution to the social issues raised by transatlantic trans-national airlines*
  - *Section 4: Recommendations to the EU-U.S. negotiators*

10. In drafting this report, I have attempted to be succinct. The aim has not been to set out an exhaustive account of these issues but instead to try and distil what frequently appear to be complex issues in a way which can be easily assimilated and assessed. At certain points in the report, I have highlighted the key findings of my exploration, in order to clearly sign-post how I formed my recommendations.

### **Section 1: The social concerns associated with trans-national airline operations and the solutions put forward by social partners**

11. The first task faced is setting out concisely the nature of the legitimate concerns raised by stakeholders so that the solutions can be properly targeted. The two Labour Forums provided a firm foundation, providing detail on the challenges that many labour representatives say are posed by liberalisation.

12. In the context of the first stage agreement, the concern most commonly voiced by labour representatives is that the greater commercial freedoms that have been provided by the first stage EU-US agreement have not been matched by a regulatory framework providing equivalent protection for employees. Thus, airline companies have been granted the possibility of basing some or all of their operations in a foreign market (For example, the right for Community carriers to operate from *any* Member State to the US, or for unlimited intra-EU fifth-freedom operations for US carriers) yet similar possibilities for labour groups to mirror the organisational structures of these trans-national airline companies (through, for example, the establishment of union groupings covering subsidiaries based in multiple national jurisdictions) have been precluded by restrictions in place in the national laws on both sides of the Atlantic<sup>4</sup>.

13. A summary of the potential issues for labour created by the second stage proposals to liberalise ownership and control is presented by the executive summary to the second Labour Forum, which notes that:

*'The main concern held by social partners...related to the impact that possible ownership and control reforms would have on employee and union rights in the trans-national operations that would be made possible. The concern was that freedom for airlines to establish themselves (through acquisition, merger, or organic growth) on both sides of the Atlantic would affect the rights traditionally enjoyed by airline employees at the national level (i.e. the right to collectively organise, negotiate, agree and enforce agreements at company level). The question that a number of social partners believe needs answering is how these rights could be protected for workers employed in the US and European airline companies in more than one country?'*

(Source: Executive Summary for the Second Labour Forum,

[http://ec.europa.eu/transport/air/events/doc/2009\\_06\\_22\\_executive\\_summary.pdf](http://ec.europa.eu/transport/air/events/doc/2009_06_22_executive_summary.pdf))

14. It is important to highlight here that the focus of social partners on both sides of the Atlantic has been on the potentially damaging effects that having one company simultaneously owning and controlling airlines in the United States and Europe would

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<sup>4</sup> A number of obstacles to union representation exist, the laws of the United States and some Member State laws only recognise a union if constituted in the jurisdiction of that State. Furthermore, many States forbid employees from being Members of more than one union. These and other rules make impractical the establishment of fully-functioning trans-national unions.

have on the airline's employees in the absence of the ability to bargain collectively, and airline management's potential ability to play one set of employees off against the other. It is therefore the potential trans-national nature of the operations rather than the prospect of investment by foreigners *per se*, that raises concerns.

*Key finding:*

The concerns of social partners have focused on the organisational challenges to labour posed by trans-national airlines; in particular, the ability of unions to replicate at the trans-national holding company level the arrangements for representation that employees have hitherto been used to at the national level. The concept of foreign investment *per se* as a way of helping airlines to access more capital and potentially improve their commercial viability appears to cause far fewer concerns.

I have focused in my report on examining solutions to the social concerns generated by trans-national companies. However, this should not obscure the fact that certain forms of foreign investment made under certain conditions (e.g. investment by a non-airline, or an airline investor with no operations in the same market) should not generate the same concerns.

15. In presenting their own solutions to the problems of organisation in trans-national companies, the social partners on both sides of the Atlantic have focused on two alternative courses of action.

- *Extra-territorial application of national law.* An alternative solution suggested by certain social partners in the United States is that the legal principles governing aviation should be more closely aligned with those in the maritime sector. Thus, the law of an airline holding company's country of establishment would apply no matter where the aircraft were operating. In particular, any collective labour agreement reached between labour and management would be broadly applicable across all of the airline's operations, no matter where located. This would require some additional extra-territorial application of the holding company's national laws.
- *Harmonisation of European labour law.* Another idea put forward by certain US and European social partners is to seek to harmonise labour law in Europe so as to provide a common and consistent legal basis for the engagement of employees with airline management. It should be noted that this proposal does not extend to the harmonisation of European and U.S. labour law.

16. The following section examines the practicality of these solutions.

## **Section 2: Examination of the potential for extra-territorial application of national laws and/or labour law harmonisation.**

### *Extra-territorial application of national law*

17. In discussions with social partners, I found that many unions associated their inability to apply the terms of collective labour agreements extra-territorially (i.e. to employees of operations outside the main country of establishment of the airline concerned) with the

problems cited. The extra-territorial application of labour law was therefore cited as a potential way of solving the problems raised.

18. In examining the practicality of applying the law extra-territorially, my investigations suggested that such measures would face considerable opposition from legislators and courts in Europe and the United States.

- The first common principle is that mobile airline employees domiciled in the US and Europe are subject to the mandatory laws of the country of domicile, irrespective of their citizenship. This principle is enshrined in Europe in the Rome I Regulation Convention<sup>5</sup>. In the U.S., the courts have supported that view in judgments such as *Air Line Pilots Ass'n v. TACA International Airlines S.A.* This means, for example, that the U.S. courts have applied the Railway Labor Act (RLA) to employees of foreign airlines domiciled in the United States. The right to impose the law of the host state appears to be an important principle for legislators and courts in Europe and the United States. Consequently, the mandatory (or statutory) protections of the host state over-ride those of any other statutory or contractual relationship.
- The second common principle is on the extra-territorial application of labour law. In Europe, it is universally recognised that employees are subject to the mandatory protections of the host state (Rome I Regulation). In the U.S., the courts have been careful not to override "*the long-standing principle of American law ... that Congress legislates against the backdrop of the presumption against extra-territoriality*"<sup>6</sup>. One of the most frequently cited cases regarding this question is *Independent Union of Flight Attendants v. Pan Am World Airways, Inc.* (aka. the "Berlin Express" case), which addressed the question of whether flight attendants engaged in extra-territorial operations entirely outside of the US (in this case, operating intra-EU routes) were covered by the protections of the Railway Labor Act. The courts ruled that they were not as the Railway Labor Act does not apply extra-territorially<sup>7</sup>. The rulings of foreign courts have also been consistent with this interpretation of US law, for example in assessing the state of jurisdiction of disputes arising between US carriers and their foreign-based employees<sup>8</sup>. Thus, as in Europe, US courts have decided overwhelmingly against the extra-territorial application of social legislation.

19. These strong parallels in Europe and the US suggest broad commonality in the US and European legal systems based on the principles of applying the labour law of the country in which an employee is domiciled and a strong presumption against extra-territorial

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<sup>5</sup> Rome I Regulation: Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

<sup>6</sup> *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 as cited in Stephen Moldof (2004) *The Extent to which U.S. Labor Laws Apply in an Increasingly Globalized Business/Labor Context*.

<sup>7</sup> The US Congress has twice, in 1991 and 1997, considered proposals on a possible extension of the Railway Labor Act to territories outside of the United States; neither hearing led to a change in the law. The transcript of the 1997 hearing by the House of Representatives' Subcommittee on Aviation details many of the arguments for and against extra-territorial application of the Railway Labor Act.  
[http://commdocs.house.gov/committees/Trans/hpw105-37.000/hpw105-37\\_0.htm](http://commdocs.house.gov/committees/Trans/hpw105-37.000/hpw105-37_0.htm)

<sup>8</sup> *Association of Flight Attendants v. United Airlines* (797 F. Supp. 1115 (E.D.N.Y.), rev'd on other grounds, 976 F.2d 102 (2d cir. 1992), unreported decision following trial, CV-92.2919 (E.D.N.Y. Nov. 19, 1993).

application. It is clear from the history of labour law application in the US and Europe that the courts in both jurisdictions have established similar legal principles when dealing with the representation of workers in trans-national companies. Furthermore, exemptions to these principles in the area of labour law have been made only occasionally and, even then, have had only limited application, for example in many cases only applying to US citizens but not foreign employees of US companies<sup>9</sup>. These principles have been well-defined and supported by a significant body of case-law in Europe and the US<sup>10</sup>. This suggests that a solution to the problem based on extra-territorial application of collective labour agreements would run counter to established precedent and the general presumptions of international law.

20. Furthermore, there are non-legal impediments to the extra-territorial application of labour law. For example, it is likely that such amendments would be technically difficult to achieve, politically difficult to deliver, and would be likely to create their own source of conflicts.
21. It is also unclear to me how the extra-territorial application of collective agreements would be applied in certain cases. For example, in the event of a merger of equals between two large carriers, one US and one European, which collective labour agreement would apply to the merged entity? Would the US employees of the merged company still be covered by the Railway Labour Act, and if so, could their collective agreement be superseded by the European collective agreement or *vice versa*? Would the two collective labour agreements apply simultaneously? It is unclear how the extra-territorial application of collective labour agreements would work in practice.
22. There is also the possibility of undesired consequences. Application of the Railway Labor Act to all employees of US carriers based outside the US would, assuming such an approach was applied reciprocally, lead to the application of Irish or German labour law for employees of, for example, an Irish or German carrier with operations to or from the United States. It is foreseeable that such an approach would lead to the temptation for companies to "flag for convenience", as aircrews operating in the same state would be subject to differing labour law based on the airline's state of registry<sup>11</sup>. By doing so, unions may address their concerns about airline management playing one group of workers within the company against another. However, they would replace that problem with the possibility of airlines forcing down conditions through reference to competing groups of workers in other carriers with operations in the US or Europe but employed on contracts governed by foreign labor law. For example, a third country could base its pilots in the US or Europe and operate direct fifth-freedom services between the US and Europe

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<sup>9</sup> See, for example, Chapter 25, section III, of the Proskauer Guide on International Litigation and Dispute Resolution. [http://www.proskauerguide.com/law\\_topics/25/III](http://www.proskauerguide.com/law_topics/25/III)

<sup>10</sup> For a more detailed overview of the application of US labour law outside the US, see: Stephen Moldof (2001) *Issues in International Labor Law: The Application of U.S. Labor Law to Activities and Employees Outside the United States*, American Bar Association.

<sup>11</sup> Extra-territorial application of the law of the state of registry is applied in the maritime industry, reflecting the reality of life in the sector, which requires employees to live for long periods on ships that spend a significant amount of their time in international waters. It is noteworthy that the sector is frequently criticised for suffering from a problem of flags of convenience, a problem that it has sought to tackle through the application of minimum labour standards in the form of the ILO-sponsored Maritime Labour Convention 2006.

in direct competition with US and European carriers, whilst applying neither European nor US labour standards.

*Key finding:*

There are significant legal and practical obstacles to the extra-territorial application of labour law that make it difficult to envisage such an approach ever being acceptable to legislators in the United States or Europe, not least because existing legal practice in both jurisdictions consciously runs counter to such an approach. Furthermore, the reality of such a proposal would mean the reciprocal application of extra-territoriality, a development that would potentially create considerable concerns for social partners. I remain unconvinced that such an approach is at all practicable.

*Harmonisation of European labour law*

23. The alternative solution to the legal questions posed by trans-national airlines would be the creation of a harmonised legal system for the sector. The proposal put forward by some social partners is that the harmonisation of European labour law should be a pre-condition prior to the opening up of investment rules with Europe's partners such as the United States.
24. Presumably, "arbitrary" harmonisation of European law would not provide an adequate solution for social partners. Such harmonisation would have to tackle the crucial issue of employee representation at the trans-national company level.
25. Putting aside the specifics of how representation would be assured under harmonised laws, there are considerable problems with such a proposal. The most obvious are the political and legal obstacles that would be faced by any attempt to harmonise European social legislation. The harmonisation of European labour law would involve 27 different Member States giving up their sovereignty in this politically sensitive area. Although the European Community represents arguably the most developed system of shared sovereignty in the world, the Member States of the European Union have been keen to ensure that the power of the European Community is expressly limited in the area of social harmonisation. Article 137 of the Treaty, for example, excludes action by the Council to harmonise the laws and regulations of the Member States (paragraph 2(a)), or by the Community to address the issues of pay, the right of association, the right to strike, or the right to impose lock-outs (paragraph 5).
26. The mixed nature of the EU-U.S. agreement (the Community and its Member States) means that some legal flexibility is potentially possible, if the will were ever to exist to harmonise Member State laws in this area. However, the suitability of using an international treaty with an external partner (i.e. the U.S.) to solve an internal issue (i.e. the harmonisation of European labour law) would be highly questionable.
27. A further problem exists with this solution in the context of the EU-U.S. discussions, which is that, assuming European labour law is harmonised, airline employees and management would still be faced with two sets of labour law, American and European.
28. The national labour laws in the United States and Europe are based on recognition of similar principles. In Europe for example, all Member States of the European Union are subject to the principles of the EU Charter of Fundamental Rights, which includes the

right to freedom of association (Article 12(1)); the worker's right to information and consultation within the undertaking (Article 27); and the right to collective bargaining and action (Article 28). Similar principles drive the operation of labour policy in the US, including the Railway Labor Act in the US.

29. Despite these similarities, concerns about trans-national companies operating under (and potentially exploiting) two sets of labour law would remain for the reasons already given. And that is just in the bilateral context. If the EU-U.S. deal really does represent a breakthrough opportunity to reform the industry, and a template to be followed by other parts of the world, then it is clear that the environment in which these subsequent agreements would be implemented is one in which a multitude of labour laws will continue to exist.
30. Thus, the harmonisation of European labour law is not a workable solution in the context of the EU-U.S. agreement, even if such an approach is, in abstract, personally attractive. A related alternative: the creation of a universal set of minimum standards such as that agreed by Members of the ILO for the maritime sector, has also been considered. The creation of a common set of rules governing employment in the maritime sector has been pioneered by the membership of the International Labour Organisation (ILO). Given the need for universal agreement and the divergent interests of Governments in developed and developing markets, an equivalent approach in the aviation sector is likely to be characterised by a trend towards the "lowest common denominator", with the result that it would result in the provision of minimum standards, and may therefore be seen as a threat to the high levels of labour protection in place in the United States and Europe. Certainly, this was a common reaction of many employee representatives at the Second Labour Forum, where the applicability of the maritime convention was discussed. Furthermore, it is doubtful that such an approach would be seen as immediately acceptable in the aviation sector with its entrenched systems of national laws. Although a truly universal solution may ultimately be worth examining, it cannot in the short to medium term be expected to replace the system of national laws currently in place.

*Key Finding:*

European Labour law harmonisation faces considerable political and legal challenges. Given the scale of these challenges, it is disappointing to note that, even if successful, reform of this kind would only provide an incomplete solution to the problem given the fact that other countries' would continue to maintain divergent labour laws.

Furthermore, harmonisation alone would not be enough if the reforms did not tackle the issue of representation in trans-national companies. Thus, the precise form of such representation would still need to be addressed.

The establishment of a minimum universal set of labour conditions for the aviation sector, such as that agreed recently for maritime by the ILO would not provide an adequate solution due to the limited likely scope and level of standards of such an approach.

### **Section 3: The building blocks for a possible solution to the social issues raised by transatlantic trans-national airlines**

31. In searching for a satisfactory solution to the problem of employee representation in trans-national companies, my conclusion is that, for the reasons given above, it is necessary to explore approaches other than the extra-territorial application or transatlantic harmonisation of national labour laws. Evidence from the Labour Forums and my discussions with union representatives suggests that many examples of good practice exist in both the United States and Europe, and the best way forward will be to find a suitable way of facilitating such practices so that they become the norm in trans-national corporations.
32. A Second Stage Air Transport Agreement between the EU and the US provides the opportunity to shape a solution that improves on the current situation faced by employees in engaging with their trans-national employers, whilst also providing for commercial benefits that should strengthen airlines' financial performance and create better prospects for employees. On the other hand, it is vital that we remain realistic about what can be achieved through an EU-US aviation agreement. It is clear that a Second Stage accord cannot hope to solve some of the problems outside of the reach of this kind of air services agreement, and work in other forums may be needed to address the problems cited by stakeholders, which are unique to the legal systems in place in Europe and the US. However, those problems go beyond the scope of the task I have been given - to examine and find solutions to the problems specific to the transatlantic aviation sector.
33. There is much that is good about the current structure of the industry that should be preserved. The airline industry on both sides of the Atlantic demonstrates high levels of union membership, and many categories of its workers have demonstrated a long track-record of securing and maintaining wages and conditions in excess of national averages, reflecting of course the high level of skill, training and experience needed to participate in the sector. Furthermore, the principally national nature of the relationship between airline labour and management, provides considerable benefit in enabling employment to be tailored to the culture, customs and commercial realities of the local markets served by an airline. Any action taken should not undermine these embedded strengths in the system.
34. Companies that have demonstrated a successful and constructive relationship with their employees tend to exhibit a desire to engage in dialogue and exchange information early. Such an approach helps to build trust and establish a culture of mutual sacrifice / reward that positions the company and its employees to adjust in a timely and appropriately way to the changing realities of the market. However, criticism of this approach often centres around the observation that, in many cases, such an approach is voluntary and depends heavily on the goodwill and good intentions of an airline's management. The absence or loss of this goodwill would leave employees reliant on the "bare bones of the law". Thus an approach that encourages such constructive relations would have significant attractions for employee representatives and company management.
35. Furthermore, in transitioning from an industry based largely on a mosaic of national firms to one in which truly international airlines can emerge, the social dimension of change cannot be ignored. And the evidence suggests that changes are necessary in this area too. As airlines have been allowed to explore greater international opportunities, their employees' ability to adapt to these changes has been hamstrung by national laws. In

seeking a solution that helps employees to adapt to the new realities of the global industry, decision-makers will be conscious of the balancing-act involved: employees rights must be protected and enforced, but at the same time, the industry must be allowed to maintain some flexibility in order to exploit commercial opportunities.

36. The policy response to this tension between the need to protect workers and promote commerce differs considerably, so in the context of an agreement between the Community and the 27 Member States of the European Union and the United States, one can expect the discussion about where the balance should be struck to be considerable.
37. In addressing the problem of representation in transatlantic airlines, my sense is that the solutions should be enabling and avoid being too prescriptive. Companies and employees need to find their own solutions based on the unique conditions and cultures that drive those firms. However, the search for those solutions should take place within a framework that provides for high minimum standards and encourages a cooperative and forward-thinking relationship involving both labour and management.
38. Thus, the rationale points in the direction of reforms to allow greater access to foreign capital and foreign market opportunities whilst putting in place structures which would better facilitate the interface between employees and employer in trans-national companies whilst preserving the benefits of national social engagement.

#### **Section 4: Recommendations to the EU-U.S. negotiators**

39. Before setting out the recommendations, it is worth summarising the key findings and principles which have helped steer the solution:
  - Social partners have identified as their principal concern the issue of employee representation and engagement in trans-national airline companies and in particular the need for employees to find a means of elevating their engagement with national airline management to the level of the trans-national holding company. My recommendations therefore are focused on finding a solution to this issue.
  - The existing legal systems on both sides of the Atlantic are complex, politically sensitive, and well established. Radically changing the law will therefore be difficult. Any solution to the problem should therefore seek to “work with the grain” of these existing national laws based on similar principles of application.
40. So what does this mean in practice? I have in mind two recommendations:
  - The creation of company-level 'Labour Chambers'. In order to facilitate the dialogue between employees and management, it could be agreed that the air transport agreement should require, *as a condition of simultaneously exercising the right of airline ownership and control of international airlines in both the United States and Europe*, that the company, or companies, involved should provide for the opportunity for employees to be adequately represented at the holding company level as well as at the national level under the Parties'

existing national laws. Employees shall, in constituting the Labour Chambers, help decide how they should be run.

- The Joint Committee shall receive reports on the operation of the Labour Chambers. A review of the operation of the Labour Chambers should be regularly undertaken by the Joint Committee.

41. The primary aim of these recommendations is to establish at the international holding company level, arrangements for considering issues that affect employees on both sides of the Atlantic. The structure of the Labour Chambers should enable dialogue without providing for duplication of function or cost. In order to promote Labour Chambers that reflect the views of the management and employees involved and preserve the unique culture of the companies involved, I recommend that management and existing employee representatives should have the first opportunity to decide on the scope and functionality of the Labour Chambers established to provide an inter-face between labour and management.

#### *Balancing the rights and obligations of employees and management*

42. I make no apologies for the considerable power that this proposal places in the hands of employee representatives. However, in doing so, I do recognise that such power could be used as a veto by employee representatives to frustrate airlines from exercising the right of investment "at any cost". I propose therefore that the agreement includes details of a fall-back, or 'default' Labour Chamber, that would apply in the event that no agreement can be reached by the temporary negotiating body within a reasonable period to be specified. For details of the content of these default Labour Chambers, see the sub-section '*What happens if there is failure to reach agreement on a Labour Chamber*' below.

#### *Establishing a Labour Chamber*

43. In order to negotiate the scope and functionality of the Labour Chambers, a temporary negotiating body should be established responsible for reaching a written agreement with management. The agreement might cover, for example, the composition of the Labour Chamber, as well as how often it would meet; the relationship with bodies constituted under the Parties' respective laws; and the date of entry into force of the agreement, when it should be reviewed, and the legal aspects, including the law of the state(s) governing the enforcement of the agreement. Agreement shall be reached when the management and a majority of employees vote in favour of the proposed written agreement.

44. The members of the negotiating body might be elected or appointed in accordance with the number of employees employed in the countries of operation of the combined company. Where possible, representation should be by the organisations appointed in accordance with the national laws and procedures of the Parties, including Member States' laws in the case of the European Union. The Parties should be allowed to determine the method to be used for the election or appointment of the members of the special negotiating body who are to be elected or appointed in their territories.

45. With a view to the conclusion of an agreement, the central management shall hold a meeting with the negotiating body. The negotiating body may request assistance from experts of its choice. Such experts may be present at negotiation meetings in an advisory capacity.

*What happens if there is failure to reach agreement on a negotiated Labour Chamber*

46. As explained above, it may not be possible for management and labour to reach an agreement on the scope and powers of the negotiated Labour Chamber. Should such a situation arise, then I propose that a default Labour Chamber should be established. In order to ensure that the composition of the default Labour Chambers does not provide an obvious incentive for airlines or employees to avoid reaching agreement so as to benefit from perceived advantages from the fall-back position, the scope and powers of these default Labour Chambers should be such that they provide a balance between the rights of employees and airline management. The constitution of such default Labour Chambers should therefore be similar to that set out for the temporary negotiating bodies. They would place certain obligations on management, including:

- An obligation on management to consult employee representatives on issues likely to have a significant impact on their employees, such as restructuring or expansion plans.
- An obligation to provide information on matters likely to have a significant effect on the workforce, at such time and in such fashion so as to enable employees to undertake an appropriate examination.

*Some answers to the questions raised...*

47. In orally presenting my ideas to the European and American delegations at the October 2009 meeting of the Joint Committee in Washington, I gained an appreciation of some of the issues that concerned members of both delegations vis-à-vis my preliminary proposals. I have therefore attempted to set out some brief answers to these questions below:

*Q. The recommendations depend heavily on employee representation for the establishment of the temporary negotiating body and Labour Chamber. What happens if there are no pre-existing labour representatives?*

A. If there are no pre-existing employee representatives, then these should be appointed.

*Q. Who would be responsible for enforcing the terms of the Treaty in this area?*

A. The Parties would be responsible for ensuring that participants follow the obligations set out in the Treaty, and for establishing whether the right procedures have been followed.

*Q. Who would be responsible for enforcing the agreements reached in the Labour Chamber?*

A. The agreements reached in the Labour Chamber should specify the law in which they are to be enforced.

*Q. How would an airline establishing a new subsidiary in the other Party's territory meet the requirements of the Labour Forum, given the absence of any existing employees at that subsidiary?*

A. In the absence of subsidiary employees, the Labour Chamber would be made up of representatives of the existing company.

### *Conclusions*

48. In concluding, it is worth remembering why I have drafted this report and why so much effort has been put in by participants on both sides of the Atlantic: change in the aviation industry is long overdue. The current structure of the industry is unsustainable and is undermining the long-term viability of the sector. Such waste could arguably have been tolerated in a domestic industry that was growing and employing increasing numbers of employees. However, the medium-term economic environment facing the industry on both sides of the Atlantic suggests that the industry and its employees can ill-afford a continuation of the *status quo*. Despite this, there is strong resistance from some to any change, to the extent that I believe a minority in the industry would prefer to risk the future viability of their sector than support reforms that would open up airlines to greater investment, opportunities and a more certain future. This position is, in my view, illogical and seriously flawed, particularly as there are solutions to the social concerns raised.
49. One should not underestimate the substantial step that this proposal represents or the substantial obstacles that it faces. When Member States and the Community addressed the issue of how to ensure proper representation in trans-national companies operating within the European Single Market, the discussions were long and difficult. Achieving a breakthrough in the context of transatlantic aviation will also be hard. We should realise, for example, that my proposals for transatlantic aviation could be difficult for many in the industry to accept. And for the US Government, I recognise that it would represent a different and unfamiliar approach to the Railway Labor Act, though I believe one which would be compatible with this and other domestic laws. Furthermore, EU Member States themselves will undoubtedly think hard before accepting this sort of approach in an international trade agreement. It is for this reason that I believe it will take effort from all sides to deliver any solution. However, if all sides are prepared to approach this issue constructively and with an open mind, then I am confident that this valuable and important complement to the liberalisation of investment rules can be delivered successfully to the benefit of everyone in the industry.
50. Furthermore, I do not claim to have a monopoly over the right course of action. And I accept there may be other ways of solving the issue than that set out in this report. However, I am convinced by my discussions with stakeholders that the focus of my recommendations is right: the key issue is how to ensure appropriate employee representation at the holding company level of the rapidly emerging trans-national aviation companies. Other concerns, which could have been expected from social partners, such as worries about how work would be divided between the subsidiary companies of a trans-national airline, have not been raised with me as a reason for not pursuing the reform of investment rights in the sector, perhaps because social partners believe that by solving the problem of representation, these issues will also be addressed.
51. It is worth remembering that the recommendations I have put forward are a solution to the specific dilemma of employee representation in transatlantic trans-national companies exercising ownership and control rights. It would not apply to alliance arrangements, for example. Labour's concerns about one set of employees being played off against another are most acute in situations where, in the absence of a collective agreement governing all mobile employees, the holding company's management has the ability to transfer work

(and hence employment) from one carrier to another. In contrast, there appear to be situations where these concerns should not arise, for example because the foreign owner is not an airline or because it does not operate subsidiaries in the same market. Because these forms of investment raise fewer concerns, progress in these areas may even be possible whilst the specific issues of representation associated with trans-national companies are being solved.

52. I believe that my recommendations would enable companies to make use of the ownership and control provisions in the Second Stage agreement whilst enabling labour concerns to be met within the companies taking advantage of the full freedoms granted. The avoidance of an overly prescriptive approach also means that the remit of the Labour Chamber can be tailored to the specifics of the company involved. By providing a forum in which employees and management of these trans-national airlines can interact, these recommendations provide an appropriate vehicle to manage the transition from national to trans-national airlines in the transatlantic market.
53. The EU-US second stage negotiations provide an opportunity for change. Not just for companies wishing to make use of greater commercial opportunities and sounder finances, but also for stakeholders wary of reform. It is my belief that if this opportunity is wasted, the prospects of social partners improving their situation will suffer as much as the airlines on which they depend.