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EUROPEAN COMMISSION

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Proposal for a

COUNCIL DECISION

**on the conclusion of a Memorandum of Cooperation between the European Union and
the United States of America in civil aviation research and development**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

1.1. Grounds for and objectives of the proposal

On 30 March 2009, the Council requested the Commission to take all necessary actions to achieve the highest level of interoperability between the European air traffic management (ATM) modernisation programme, SESAR (see below), and the corresponding programme in the USA, NextGEN, as well as other regional projects in ICAO (International civil aviation Organisation) regions. Furthermore, the Commission was asked to take into account the need for consistency of SESAR with ICAO global concept developments. For this purpose, the Council invited the Commission to submit a recommendation to authorise the Commission to open negotiations on a Memorandum of Cooperation with the Federal Aviation Administration (FAA) of the USA¹. The Commission presented the recommendation² to the Council on 10 June 2009. However, the Commission proposed to extend the cooperation framework to be negotiated with the FAA beyond SESAR-NextGEN interoperability to the broader field of civil aviation research and development.

Based on the Commission's recommendation, on 9 October 2009, the Council adopted a decision that mandated the Commission to open negotiations on behalf of the EU with the FAA for a Memorandum of Cooperation for research and development in the field of civil aviation. The Council also requested the Commission to develop, in parallel, an Annex addressing SESAR-NextGen interoperability.

The proposed draft Memorandum defines the terms and conditions for mutual cooperation between the EU and the USA for the promotion and development of civil aviation research and development. It constitutes an important instrument that, through a legally binding framework and respecting commonly agreed reciprocity principles, will allow the parties to jointly pursue their common objective to ensure greener and more efficient air transport systems. The draft Memorandum will allow the two parties to establish cooperative research and development activities in any civil aviation issue.

Based on the negotiating directives of the mandate, a draft Memorandum of Cooperation and a draft Annex on SESAR-NextGEN interoperability were initialled by the two parties on 18 June 2010.

1.2. General context

SESAR

The Single European Sky Air Traffic Management Research (SESAR) Programme is the technological pillar of the Single European Sky (SES)³. It is a three phase Programme that has **defined**, is **developing** and will **deploy** a high quality, new generation of ATM technologies, systems and procedures compliant with SES objectives and requirements. One of the key

¹ Council Resolution on the endorsement of the European Air Traffic Management Master Plan, Articles 14 and 15, 30 March 2009

² Recommendation from the Commission to the Council SEC(2009)744 final of 8.06.2009.

³ Regulations....

results of the SESAR definition phase is the European ATM Master plan (*Master plan*), which constitutes a commonly developed roadmap, endorsed by the Council of the EU and recognised by all ATM stakeholders, to achieve deployment of new generation of ATM technologies and procedures within the next 10-15 years. The *Master plan* steers the work programme for the development phase and similarly will be a key tool to govern the SESAR deployment phase.

The SESAR Programme is now in its development phase which consists of over 300 consistent and coordinated research, development and validation projects centrally managed by the SESAR Joint Undertaking (SJU), the first ATM public-private partnership set up as an EU body. The SJU's mission is to ensure the modernisation of the European ATM system by coordinating and concentrating all the relevant research and development efforts in the EU. Its founding members are the EU and Eurocontrol and it counts 15 industrial members (ground and airborne equipment manufacturers, airports, airlines, air navigation service providers), including entities from non-EU states and several associate partners.

In the USA, the FAA has also launched an ATM modernization programme, known as NextGen. Considering the parallelism of SESAR and NextGen, the European airspace users have raised a strong requirement to secure interoperability between SESAR and NextGen to ensure safe and seamless operations worldwide, to increase market opportunities for the European industry and to avoid costly duplication of equipment on board aircrafts. US companies already have access to European research and development programmes such as SESAR. It is therefore, essential to guarantee reciprocal opportunities for European industry.

The Commission considers that strengthening technical and operational cooperation with the FAA is an urgent and necessary action for the civil aviation sector in general. In fact, more efficient and sustainable air transport systems can be better achieved through a holistic approach addressing all aspects of civil aviation. This motivated the Commission to recommend the extension of the scope of the cooperation framework to the broader civil aviation domain.

The proposed Memorandum of Cooperation with the USA provides a sound and legally binding basis for establishing cooperative research and development activities, while duly addressing sensitive issues such as liability, Intellectual Property Rights (IPR) and reciprocity. In addition, the Memorandum has the potential to set the international standards in aviation providing a worldwide interoperability in response to aviation stakeholders' expectations and providing the European industry with wider market opportunities.

1.3. Existing provisions in the area of the proposal

The European Commission and the FAA initially signed a Memorandum of Understanding (MoU) on 18 July 2006 establishing a framework for cooperation to contribute to more global ATM by facilitating joint global operations. The MoU was updated on 17 March 2009 to take into account the SJU's key role in the technical cooperation with the FAA under the authority of the European Commission. However, because of its declarative nature, the MoU does not provide the required legally binding framework to adequately address liability, intellectual property rights and reciprocity issues. The proposed Memorandum of Cooperation, and in particular its Annex on SESAR-NextGEN interoperability, will replace the existing MoU.

1.4. Consistency with the other policies and objectives of the Union

The proposed Memorandum of Cooperation will contribute to achieve the objectives of the SES policy as it supports the SESAR programme, its technological pillar. The timely development and deployment of new ATM technologies and procedures will, in fact, boost Europe's innovation capacity and the competitiveness of its industry worldwide allowing the EU to have a strong voice in standardisation bodies.

The draft Memorandum will stimulate the technical and operational cooperation between the parties through the provision of a clear legal framework. Such a stimulus is in line with the research policy of the EU and will contribute to the achievement of 7th Framework Programme.

2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

2.1. Consultation of interested parties

The aviation industry supports the perspectives offered by a binding Memorandum of Cooperation between the EU and the USA. The European industry expects that through the implementation of reciprocity principles underlying the Memorandum, it will be able to take advantage of comparable opportunities to engage in cooperative activities with the USA on the basis of transparency, mutual benefits, equitable and fair treatment.

Consultation methods, main sectors targeted and general profile of respondents

Throughout the negotiating process, the Commission has consulted with stakeholders, in particular through the SESAR Joint Undertaking, and the Member states, through the Special Committee established by the Council for the negotiation of the Memorandum.

Summary of responses and how they have been taken into account

The comments from stakeholders were duly taken into consideration in the preparation of the Union's negotiating position.

2.2. Collection and use of expertise

Technical expertise during the negotiations was provided by the SESAR Joint Undertaking. Legal expertise was provided by the Commission's Legal Service. There was no need for any other external expertise.

2.3. Impact assessment

The Memorandum provides a sound legal basis that allows for an in-depth technical and operational cooperation, leading to the early development of common standards in civil aviation. Furthermore, the definition, implementation and monitoring of reciprocity principles will help the European industry to step into new US markets. Failing to implement reciprocity would deny fair access of the European industry to the US Market.

In the specific case of ATM modernisation, the coordinated support, between EU and USA, to ICAO standardization activities will be a driving force with the potential to turn common SESAR-NextGen standards into international standards for ATM. Failing to guarantee

interoperability would imply duplication of airborne equipment in thousands of aircraft flying both in Europe and in the US, representing an investment that airlines are unable to afford in this time of financial crisis.

3. LEGAL ELEMENTS OF THE PROPOSAL

3.1. Summary of the proposed action

The proposed Memorandum of Cooperation consists of a main body document, establishing the main principles of cooperation and governance arrangements. The main body shall be complemented by Annexes and Appendices to the Annexes that further address specific technical objectives in the field of civil aviation research and development. As requested by the Council in its mandate, the first Annex addresses SESAR-NextGEN interoperability.

The governance arrangements consist of a Joint Committee composed of representatives of the Commission, assisted by representatives of the EU Member States, and representatives of the FAA. The Joint Committee may address any matter related to the functioning of the Memorandum and its Annexes and Appendices.

3.2. Legal basis

Article 100(2), in conjunction with Article 218, paragraph (6), of the Treaty on the Functioning of the European Union

3.3. Subsidiarity principle

Because of the pan-European nature of air transport and the need to have a consistent approach at European level, the Member States cannot reach the objectives of the Memorandum of Cooperation on a bilateral basis with the USA. The proposal therefore complies with the subsidiarity principle.

3.4. Proportionality principle

The Memorandum of Cooperation between the EU and the USA is an efficient binding legal instrument that fosters technical cooperation between the two parties. It establishes a general framework that allows setting up cooperative activities ensuring both parties comparable opportunities for participation in their research and development activities in any field of civil aviation.

The proposed agreement will not impose any additional administrative or financial burden neither on Member States authorities nor on the industry.

3.5. Choice of instruments

Proposed instrument: Memorandum of Cooperation

External aviation relations can only be given effect through international agreements.

4. BUDGETARY IMPLICATION

The proposal has no implication for the Union budget.

Proposal for a

COUNCIL DECISION

on the conclusion of a Memorandum of Cooperation between the European Union and the United States of America in civil aviation research and development

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union and in particular Article 100(2), in conjunction with Article 218(6) thereof

Having regard to the proposal from the Commission⁴,

Having obtained the consent of ... of the European Parliament

Whereas:

- (1) The Commission has negotiated on behalf of the Union a Memorandum of Cooperation in civil aviation research and development with the United States of America (hereinafter, the “Memorandum”);
- (2) The Memorandum was signed on
- (3) The Memorandum should be approved by the Union;

HAS DECIDED AS FOLLOWS:

Sole Article (Approval)

1. The Memorandum is hereby approved on behalf of the Union. The text of the Memorandum is attached to this Decision.
2. The President of the Council is hereby authorised to designate the person empowered to make the notification provided in Article XII(B) of the Memorandum.

Done at Brussels,

*For the Council
The President*

⁴ OJ C , , p. .

ANNEX

MEMORANDUM OF COOPERATION

NAT-I-9406

BETWEEN THE

UNITED STATES OF AMERICA

AND

THE EUROPEAN UNION

WHEREAS the United States of America and the European Union have as a common purpose the promotion and development of cooperation in civil aviation research and development; and

WHEREAS such cooperation will encourage the development and safety of civil aeronautics in the United States of America and the European Union;

NOW THEREFORE, the United States of America and the European Union (collectively, the “Parties,” and individually, a “Party”) agree to undertake joint programs in accordance with the following terms and conditions:

ARTICLE I—OBJECTIVE

- A. This Memorandum of Cooperation, including its Annexes and Appendices (the “Memorandum”), establishes the terms and conditions for mutual cooperation in the promotion and development of civil aviation research and development. For this purpose the Parties may, subject to the availability of appropriated funds and other necessary resources, provide personnel, resources, and related services to cooperate to the extent called for in the Annexes and Appendices to this Memorandum.
- B. The objectives of this Memorandum may be achieved by cooperation in any of the following areas:
1. The exchange of information regarding programs and projects, research results, or publications;
 2. The execution of joint analyses;
 3. The coordination of research and development programs and projects, and their execution based on shared effort;
 4. The exchange of scientific and technical staff;
 5. The exchange of specific equipment, software, and systems for research activities and compatibility studies;
 6. The joint organization of symposia or conferences; and

7. Reciprocal consultations with the aim of establishing concerted action in appropriate international bodies.
- C. Subject to applicable laws, regulations and policies, as may be amended or modified, the Parties shall foster, to the fullest extent practicable, the involvement of participants in cooperative activities under this Memorandum in view of providing comparable opportunities for participation in their research and development activities. The Parties shall involve participants in the cooperative activities, which shall be conducted on a reciprocal basis in accordance with the following principles:
1. Mutual benefit;
 2. Comparable opportunities to engage in cooperative activities;
 3. Equitable and fair treatment;
 4. Timely exchange of information which may affect cooperative activities; and
 5. Transparency.
- D. Such cooperative activities shall take place pursuant to specific Annexes and Appendices defined in Article II.

ARTICLE II—IMPLEMENTATION

- A. This Memorandum shall be implemented through specific Annexes and Appendices to this Memorandum. These Annexes and Appendices shall describe, as appropriate, the nature and the duration of cooperation for a specific area or purpose, treatment of intellectual property, liability, funding, allocation of costs, and other relevant matters. Unless explicitly stated otherwise, in case of an incompatibility between a provision in an Annex or Appendix and a provision in this Memorandum, the provision in the Memorandum shall have precedence.
- B. Representatives from the United States of America and the European Union shall meet periodically to:
1. discuss proposals for new cooperative activities; and
 2. review the status of ongoing activities that have been undertaken pursuant to an Annex or Appendix to this Memorandum.
- C. The coordination and facilitation of cooperative activities under this Memorandum shall be accomplished on behalf of the Government of the United States of America by the Federal Aviation Administration and on behalf of the European Union by the European Commission.
- D. The designated offices for the coordination and management of this Memorandum, and where all requests for services under this Memorandum should be made, are:
1. For the United States of America:
Federal Aviation Administration

Office of International Aviation
Wilbur Wright Bldg., 6th Floor, East
600 Independence Ave., S.W.
Washington, D.C.
20591 - USA
Telephone: +1-202-385-8900

2. For the European Union:

European Commission
Directorate-General for Mobility and Transport
Directorate for Air Transport
1040 Brussels - Belgium
Telephone: +32-2-2968430
Facsimile: +32-2-2968353

E. Technical program liaisons for specific activities shall be established as indicated in the Annexes and Appendices to this Memorandum.

ARTICLE III—EXECUTIVE MANAGEMENT

- A. The Parties hereby establish a Joint Committee, which shall be responsible for ensuring the effective functioning of this Memorandum and shall meet at regular intervals to evaluate the effectiveness of its implementation.
- B. The Joint Committee shall be composed of representatives of:
1. The United States of America, which shall be the Federal Aviation Administration (FAA, co-chair), and
 2. The European Union, which shall be the European Commission (co-chair) assisted by representatives of the European Union's Member States.
- C. The Joint Committee may invite the participation of subject-specific experts on an *ad hoc* basis. The Joint Committee may establish technical working groups and oversee their work and the work of committees and groups established in the specific Annexes and Appendices. The Joint Committee shall develop and adopt internal governing procedures.
- D. All decisions of the Joint Committee shall be taken by consensus of the two Parties, which comprise the Joint Committee. These decisions shall be in writing and signed by the Parties' representatives on the Joint Committee.

- E. The Joint Committee may consider any matter related to the functioning of this Memorandum and its Annexes and Appendices. In particular it shall be responsible for:
1. providing a forum for discussion, within the scope of this Memorandum and its Annexes and Appendices, of:
 - a. issues that may arise and changes that may affect the implementation of this Memorandum and its Annexes and Appendices;
 - b. common approaches to the introduction of new technologies and procedures, research and evaluation programs, and other areas of mutual interest; and
 - c. draft regulations and legislation by either Party that could affect the interests of the other Party, within the scope of this Memorandum and its Annexes and Appendices;
 2. as appropriate, adopting additional Annexes to this Memorandum and Appendices thereto;
 3. as appropriate adopting amendments to Annexes to this Memorandum and Appendices thereto; and
 4. making proposals, as appropriate, to the Parties to otherwise amend this Memorandum.

ARTICLE IV—EXCHANGE OF PERSONNEL

The Parties may exchange technical personnel as required to pursue the activities described in an Annex or Appendix to this Memorandum. All such exchanges shall be in accordance with the terms and conditions set forth in this Memorandum, its Annexes and Appendices. Technical personnel exchanged by the Parties shall perform work as specified in the Annex or Appendix. Such technical personnel may be from United States or European Union agencies or contractors, as mutually agreed.

ARTICLE V—EQUIPMENT LOAN ARRANGEMENTS

Equipment may be loaned by one Party (the “Lending Party”) to the other Party (the “Borrowing Party”) under an Annex or Appendix to this Memorandum. The following general provisions shall apply to all loans of equipment unless otherwise specified in an Annex or Appendix:

- A. The Lending Party shall identify the value of the equipment that is to be loaned.
- B. The Borrowing Party shall assume custody and possession of the equipment at the Lending Party’s facility as designated by the Parties in the Annex or Appendix. The equipment shall remain in the custody and possession of the Borrowing Party until it has been returned to the Lending Party in accordance with paragraph H below.
- C. The Borrowing Party shall, at its own expense, transport any equipment to the facility designated by the Parties in the Annex or Appendix.

- D. The Parties shall cooperate in securing any export licenses and other documents required for the shipment of the equipment.
- E. The Borrowing Party shall be responsible for installing the equipment at the facility designated by the Parties in the Annex or Appendix. The Lending Party shall, if necessary, provide assistance to the Borrowing Party for installing the equipment that is lent on the basis of terms agreed on by the Parties.
- F. During the period of the loan, the Borrowing Party shall operate and maintain equipment in proper condition, ensure the continued operability of the equipment, and permit inspection by the Lending Party at any reasonable time.
- G. The Lending Party shall assist the Borrowing Party in locating sources of supplies for common items and parts peculiar which are not readily available to the Borrowing Party.
- H. Upon the expiration or termination of the pertinent Annex or Appendix or this Memorandum, or when the use of the equipment is complete, the Borrowing Party shall return the equipment to the Lending Party at the Borrowing Party's expense.
- I. In the event of loss or damage of any equipment loaned under this Memorandum and for which the Borrowing Party assumed custody and possession, the Borrowing Party, at the Lending Party's discretion, shall repair or compensate the Lending Party for the value (as identified by the Lending Party in paragraph A above) of the lost or damaged equipment.
- J. Any equipment exchanged under this Memorandum shall be solely for research, developmental and validation purposes and shall not be used in any way whatsoever for active civil aviation or other operational use.
- K. Any transfers of technology, equipment or other items pursuant to this Memorandum shall be subject to the applicable laws and policies of the Parties.

ARTICLE VI—FUNDING

- A. Unless otherwise specified in an Annex or Appendix to this Memorandum, each Party shall bear the costs of the activities it performs pursuant to this Memorandum.
- B. Memorandum number NAT-I-9406 has been assigned by the United States to identify this cooperative program and shall be referenced in all correspondence related to this Memorandum.

ARTICLE VII—RELEASE OF INFORMATION

- A. Except as required by applicable law or by prior written agreement between the Parties, neither Party shall release any information or material pertinent to the tasks or related to the agreed programs under this Memorandum and its Annexes and Appendices to third parties other than (i) contractors or subcontractors engaged in the tasks or programs insofar as they are necessary for the execution of those tasks and programs; or (ii) other governmental authorities of the Parties.

- B. If one of the Parties becomes aware that, under its laws or regulations, it will be, or may reasonably be expected to become, unable to meet the non-disclosure provisions of this Article, it shall immediately and prior to disclosure inform the other Party. The Parties shall thereafter consult to identify an appropriate course of action.

ARTICLE VIII—INTELLECTUAL PROPERTY RIGHTS

- A. A Party providing intellectual property (which for purposes of this Memorandum includes analyses, reports, databases, software, know-how, technical and commercially sensitive information, data, and records, and associated documentation and materials, regardless of form or the media on which it may be recorded) to the other Party in accordance with the terms of an Annex or Appendix to this Memorandum shall retain such proprietary rights in the intellectual property as it had at the time of the exchange. The Party providing a document or other intellectual property pursuant to an Annex or Appendix to this Memorandum shall clearly mark the document or other intellectual property as confidential, proprietary, or a trade secret, as appropriate.
- B. Except as may be specified in an Annex or Appendix to this Memorandum, the Party receiving intellectual property from the other Party under this Memorandum:
1. Shall not acquire any proprietary rights in the intellectual property by reason of its receipt from the other Party; and
 2. Shall not disclose the intellectual property to a third party, other than contractors or subcontractors engaged in a program related to an Annex or Appendix to this Memorandum, without the prior written consent of the other Party. In the case of a disclosure to a contractor or subcontractor engaged in the program, the Party making the disclosure shall:
 - a. Limit the use of the intellectual property by the contractor or subcontractor to the purposes specified in the applicable Annex or Appendix; and
 - b. Prohibit the further disclosure of the intellectual property to third parties by the contractor or subcontractor except where the other Party consents in advance and in writing to the further disclosure.
- C. Except as may be specified in an Annex or Appendix to this Memorandum, the proprietary rights in any intellectual property jointly developed by the Parties pursuant to this Memorandum and its Annexes or Appendices shall be shared by the Parties.
1. Each Party shall be entitled to a non-exclusive, irrevocable right in all countries to reproduce, prepare derivative works, publicly distribute, and translate such intellectual property, provided that such reproduction, preparation, distribution and translation does not affect the protection of the intellectual property rights of the other Party. Each Party or its implementing authorities shall have the right to review a translation prior to public distribution.
 2. All publicly distributed copies of scientific and technical journal articles, non-proprietary scientific reports and books directly arising from cooperation under

this Memorandum and its Annexes or Appendices shall indicate the names of the authors of the work unless an author explicitly declines to be named.

- D. If a Party disagrees with the designation of a document or other intellectual property provided by the other Party pursuant to an Annex or Appendix to this Memorandum as confidential, proprietary, or a trade secret, then the Party disagreeing with the designation shall request consultations with the other Party to address the issue. The Consultations may be held in conjunction with a meeting of the Joint Committee or a meeting of such other committees as may be established under an Annex or Appendix to this Memorandum.

ARTICLE IX—IMMUNITY AND LIABILITY

- A. The Parties shall address immunity and liability issues associated with activities under this Memorandum in the relevant Annex or Appendix as appropriate.
- B. The Parties agree that all activities undertaken pursuant to this Memorandum and its Annexes or Appendices shall be performed with due professional care and that every reasonable effort shall be made to minimise potential risks to third parties and to fulfil all safety and oversight requirements.

ARTICLE X—AMENDMENTS

- A. The Parties may amend this Memorandum, its Annexes or Appendices. The Parties shall document the details of any such amendment in a written agreement signed by both Parties.
- B. Amendments of the Annexes or the Appendices to this Memorandum, adopted by the Joint Committee, shall enter into force upon a decision of the Joint Committee pursuant to Article III.D of this Memorandum, signed by the co-chairs of the Joint Committee on behalf of the Parties.

ARTICLE XI—RESOLUTION OF DISAGREEMENTS

The Parties shall resolve any disagreement regarding the interpretation or application of this Memorandum or its Annexes or Appendices in consultations between the Parties. The Parties shall not refer any such disagreement to an international tribunal or third party for settlement.

ARTICLE XII—ENTRY INTO FORCE AND TERMINATION

- A. Pending its entry into force, this Memorandum shall be applied provisionally from the date of signature.
- B. This Memorandum shall enter into force when the Parties have notified each other in writing that their respective internal procedures for its entry into force have been completed, and shall remain in force until terminated.
- C. Any individual Annex or Appendix adopted by the Joint Committee after the entry into force of this Memorandum shall enter into force upon a decision of the Joint Committee pursuant to Article III.D of this Memorandum, signed by the co-chairs of the Joint Committee on behalf of the Parties.

D Either Party may terminate this Memorandum or its Annexes or Appendices at any time by providing sixty (60) days' notice in writing to the other Party. Termination of this Memorandum shall not affect the rights and obligations of the Parties under Articles V, VII, VIII and IX. Each Party shall have one hundred twenty (120) days to close out its activities following termination of this Memorandum or its Annexes or Appendices. Termination of this Memorandum also shall terminate all Annexes and Appendices concluded by the Parties pursuant to this Memorandum.

ARTICLE XIII—AUTHORITY

The United States and the European Union agree to the provisions of this Memorandum as indicated by the signatures of their duly authorized representatives.

UNITED STATES OF AMERICA

EUROPEAN UNION

BY: _____

BY: _____

TITLE:

TITLE:

Assistant Administrator

For International Aviation

Federal Aviation Administration

Department of Transportation