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Groundhandling at European Airports

A look at the potential effects of the draft new Groundhandling Regulation proposed by the European Commission

by Dimitri de Bournonville and Carole Blackshaw[1]

BACKGROUND

Since 1996, the European Union (EU) has regulated the provision of ground-handling services at airports by **Council Directive 96/67/EC** (Directive) of 15 October 1996 "on access to the groundhandling market at Community airports". Its main purpose was "the opening-up of access" to provide competition amongst providers and choice for airline users, with the objective to "help reduce the operating costs of the airline companies and improve the quality of service provided".

Liberalising measures were phased in from the late 1990s but by 1st January 2001, the provisions of the Directive were to apply to any airport located in the territory of a Member State (subject to the Treaty) and open to commercial traffic, whose annual traffic was not less than 2 million passenger movements or 50,000 tonnes of freight.

The key points of this Directive are:

First, **self-handling** (provided by an airport user, being a legal person responsible for the carriage of passengers, mail and/or freight by air from the airport in question, for its own use): all EU airports open to commercial traffic (regardless of volumes) must allow self-handling. However, for certain categories of handling (baggage, ramp, fuel & oil, freight & mail – basically airside activities), Member States may restrict the right to self-handle to "no fewer than two airport users", provided that they are chosen on the basis of "relevant, objective, transparent and non-discriminatory criteria". This restriction can only apply to airports where the annual traffic is not less than 1 million passenger movements or 25,000 tonnes of freight.

Secondly, **third party groundhandling** (provided to third-parties by a supplier of one or more categories of groundhandling services specified in the Annex to the Directive): Member States

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must take the necessary measures to "ensure free access by suppliers of groundhandling services to the market for the provision of groundhandling to third parties" in respect of EU airports (open for commercial traffic) with certain volumes of traffic. Those airports must have an annual traffic of not less than 3 million passenger movements or 75,000 tonnes of freight (or not less than 2 million passenger movements/50,000 tonnes of freight during the six-month period prior to 1 April or 1 October of the preceding year). Member States have the right to require that suppliers of groundhandling services are established within the Community.

There are also restrictions on third party handling that may be imposed by Member States, who can limit the number of suppliers of groundhandling services for each of certain categories being baggage, ramp, fuel & oil and freight & mail (basically the airside services mentioned above in the context of self-handling) provided there are no fewer than two in each category. In addition, at least one of the authorised suppliers must not be directly or indirectly controlled by the managing body of the airport or any airport user (who has carried more than 25% of the passengers or freight recorded at that airport for the preceding year) or a body controlling or controlled directly or indirectly by such managing body or airport user.

There are further "**exemptions**" available to Member States where at an airport "specific constraints of available space or capacity, arising in particular from congestion and area utilisation rate, make it impossible to open up the market and/or implement self-handling to the degree provided" in the Directive. These can involve further limitations on the number of handlers (third-party and self-handlers) in particular categories of groundhandling. In these cases and where the number of authorised suppliers is limited for third-party handlers in the airside categories, Member States must provide necessary measures for the organisation of a **selection procedure** for suppliers to be authorised to provide groundhandling services. These are obviously provided by national legislation and such regulations, though subject to general principles laid down by the Directive, will vary from one State to another. In most cases, local airport authorities are actually entrusted by Member States with the mission to organize such a selection procedure.

In recent years there have been various criticisms of the Directive and, in the words of the European Commission, a recognition of the fact that since 1996 the "framework conditions for groundhandling services have changed dramatically". There are a number of concerns about the effectiveness of the existing Directive in today's market. For example, the Commission would like to see an increased choice of groundhandling "solutions" at airports, more harmonisation of regulations and clarity of interpretation and easier market entry.

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PROPOSALS FOR CHANGE

Since 2006 there has been much debate, consultation and assessment, about updating the existing Directive. The Commission recently published a Proposal for a Regulation on groundhandling services at EU airports (Proposal). Significantly, the chosen legal instrument is to be a regulation as a directive is considered "no longer suitable" and the Commission concluded that, in the present changing environment, the current legal framework, as set out in the Directive, is no longer fit for purpose.

Four Policy Packages were considered, the second of which was chosen as the basis of the Proposal which included the following goals:

1. Full opening of self-handling market;
2. Increase of minimum number of service providers to three at large airports;
3. Mutual recognition of approvals with harmonised requirements;
4. Better management of centralised infrastructures;
5. Legal separation of airports from their groundhandling activities;
6. Improved tender procedure;
7. Clarified rules for subcontracting;
8. Recognised role of airport managing body for the coordination of ground services;
9. Responsibility for airport operator for minimum quality requirements for groundhandlers' operations (to be defined in delegated act);
10. Reporting obligations on performance of groundhandling services (to be defined in delegated act);
11. Compulsory minimum training of staff;
12. Allowing Member States to impose a requirement to take over staff with similar conditions where there is a tender.

Since this Proposal, the Commission has, on the 1st of December 2011, published an airport package including a Commission Communication 823 on "Airport policy in the EU – addressing capacity and quality to promote growth, connectivity and sustainable mobility". Part of the package is the latest draft regulation (Regulation) on groundhandling (also included are new draft airport slots and noise regulations) as of the date of the present article.

A NEW REGULATION

The proposed Regulation might be viewed by some as a bureaucratic explosion. Others might see it as the formation of a rationalised comprehensive system. It is far wider in

its approach and more detailed in its application than the existing Directive. In the draft Regulation, the market access provisions that are the focus of the Directive have been enveloped by an administrative compliance system which includes extensive provisions to set and maintain standards of groundhandling services. It creates a hierarchical structure of centralised control from the managing bodies of airports via Member States to, ultimately, the EU Commission.

The proposed Regulation is to apply to any airport located in the territory of a Member State (subject to the Treaty) and open to commercial traffic.

ACCESS TO THE GROUNDHANDLING MARKET

Self-handling (Article 5)

All airport users are to be free to self-handle. Airport users are those responsible for the carriage of passengers, mail and/or freight by air to or from the airport (in other words nearly all air operators). Self-handling is where an airport user directly provides for itself one or more categories of groundhandling services (and therefore concludes no contract with a third party for those services). For this purpose, among themselves airport users are not to be deemed third parties where one holds a majority holding in the other or a single body has a majority holding in each.

The Member State's right to limit the right to self handle to "no fewer than two airport users" in respect of certain categories of airside handling (baggage, ramp, fuel & oil and freight & mail) provided they are chosen on the basis of relevant, objective, transparent and non-discriminatory criteria (see Article 7 of the Directive) is removed. This, in theory, greatly widens the scope for airside self-handling by airport users. However, similar exemptions apply to those in the Directive (Article 9) allowing Member States to apply significant limitations on the numbers of self-handlers at airports where there are "specific restraints of available space or capacity" (see Article 14 of the Regulation below).

Groundhandling for Third Parties (Article 6)

Suppliers of groundhandling services shall have free access to the market for the provision of groundhandling services to third parties at any airport whose annual traffic has been not less than 2 million passenger movements or 50,000 tonnes of freight for the previous three years. The three year qualification is new and the passenger movements/freight tonnage threshold has been reduced from 3 million/75,000 and the previous-six-month qualification is removed (Article 1(c) of the Directive).

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Similar provisions apply in allowing Member States to limit the number of suppliers for certain categories of airside handling (baggage, ramp, fuel & oil and freight & mail) provided there are no fewer than two for each category. However, a new provision provides for this limit to be no fewer than three in each category for an airport whose annual traffic has been not less than 5 million passengers annually or 100,000 tonnes of freight for the previous three years.

Where the number of suppliers is limited, to two or three as above (or in certain cases under Article 14 below), at least one of the authorised suppliers shall not be directly or indirectly controlled by the managing body of the airport or airport user who carried more than 25% of the passenger or freight recorded at that airport during the preceding year or a body controlling or controlled by such managing body or user (Article 6.3 of the draft Regulation which reflects the provisions of Article 6.3 of the Directive).
Where the number of authorised suppliers is restricted (as above), a Member State must not prevent an airport user from having, in respect of each restricted category of groundhandling, an effective choice of at least two suppliers or three suppliers for certain airports (5 million passengers/100,000 tonnes freight for previous three years).

Exemptions (Article 14)
The exemption provisions are similar to those in the Directive (Article 9) but with a few significant changes.

Where "specific constraints of available space or capacity at an airport, arising in particular from congestion and area utilisation rate, make it impossible to open up the market and/or implement self-handling to the degree provided" in the proposed Regulation, a Member State may:

- limit to not less than two the number of suppliers for one or more categories of groundhandling services other than those in Article 6.2 (being baggage, ramp, fuel & oil and freight & mail) in all or part of the airport;
- reserve to a single supplier one or more of the categories of groundhandling services referred to in Article 6.2 (being baggage, ramp, fuel & oil and freight & mail) for airports whose annual traffic is not less than 2 million passengers annually or 50,000 tonnes of freight (this traffic qualification is not in the Directive);
- limit to one or two of the suppliers one or more of the categories of groundhandling referred to in Article 6.2 (being baggage, ramp, fuel & oil and freight & mail) for airports whose annual traffic is not less than 5 million passengers annually or 100,000 tonnes of freight; in the case of a limitation to two suppliers, Article 6.3 applies (relating to the independence of

remaining suppliers, see above, third paragraph of third-party groundhandling);

- reserve self-handling to a limited number of airport users, provided they are chosen on the basis of relevant, objective, transparent and non-discriminatory criteria. This provision is far less stringent than the Directive (which gave powers to "ban self-handling" or "restrict to a single use" for certain categories of airside handling).

There are a number of conditions to be fulfilled by a Member State before applying any exemption, including notifying the EU Commission, which is to publish it and invite comments and undertake a detailed examination after which it (and not the Member State) will decide whether or not to approve (or require amendment of) the exemption. The Commission will look in particular at whether the exemption is justified on the basis of the alleged restraints. There are also time limits of two or three years for such exemptions.

Selection of Suppliers (Article 7)

Where numbers are limited in accordance with Articles 6 (third-party handling) or 14 (exemptions) above, suppliers authorised to provide groundhandling services are to be selected in accordance with a "transparent, open and non-discriminatory tender procedure". The provisions in the Regulation are far wider and more extensive than those in the Directive, in particular laying down more specific requirements about the criteria for selection.

The tendering authority is to be the managing body of the airport providing it has no conflict of interest (see Article 7.2) in which case it is to be a competent authority independent of the Managing body of that airport.

The Member State concerned may include among the tender specifications a "public service obligation" (PSO) to be met by suppliers of groundhandling services in respect of airports serving peripheral or developing regions which are part of its territory, "where suppliers are not willing to provide groundhandling services without public support" but "where such airports are of vital importance as regards accessibility for the Member State". A similar provision is in the Directive and this, of course, reflects the position in the EU Regulation (1008/2008) dealing with the granting of operating licences to EU carriers where a Member State may, in similar circumstances, impose a PSO on a particular route.

An invitation to tender must be launched and published in the *Official Journal of the European Union*. The selection process has two stages: a qualification procedure to examine the suitability of applicants and an award procedure to select the successful supplier. That

supplier must meet certain minimum criteria (previously established by the tendering authority following consultation with the Airport Users' Committee). The criteria must include ensuring that the applicant has a valid approval (see Article 16 below) and that it "demonstrates its ability and commits in writing to apply the relevant regulations and rules" (including national labour laws, collective agreements plus rules of conduct and quality requirements at the airport).

The tendering authority must award the authorisation to a supplier selected from the short list (following consultation with the Airport Users' Committee and airport managing body if different from the tendering authority). Selection is to be based on a comparison of applicants' submissions against a list of "award criteria" which must be "relevant, objective, transparent and non-discriminatory".

The selection criteria must include such elements as a business plan plus information on the quality of operations, communication technology, organisational planning, environmental performance and human and material resources (see Article 9.3). Information about the weighting of selection criteria must be in the tender notice and relevant documents. The successful applicant will have reached the highest number of points and achieved any requirements for minimum number of points. The authorisation will normally last for a minimum of seven and a maximum of ten years. This is an increase on the "maximum period of seven years" laid down in the Directive. Where a supplier ceases his activity before the end of the period for which it was authorised, the supplier is to be replaced on the basis of the prescribed selection procedure.

The provisions above broadly reflect many of those in the Directive with some amendment and expansion. Below are areas of considerable change, in particular the approval process for those providing groundhandling.

GROUNDHANDLER APPROVAL (Articles 16 & 17)

Under Article 16, "at airports whose annual traffic has been not less than 2 million passenger movements or 50,000 tonnes of freight for at least three consecutive years, no undertaking shall be permitted to provide groundhandling services whether as a supplier of groundhandling services or as a self-handling user unless it has been granted the appropriate approval". An undertaking meeting the requirements shall be entitled to receive an approval. An "approval" is defined as an approval granted by the competent authority to an undertaking to provide groundhandling services as stated in the approval.

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Each Member State is to designate a public authority ("approving authority"), independent of the managing body of the airport, to be in charge of issuing approvals for groundhandling services. That approving authority must not grant or maintain approvals unless all the requirements are complied with.

This sets up a mandatory EU-wide, uniform system to be administered through each Member State. It is quite different from the optional power given to Member States in the Directive (see Article 14) allowing them if they so choose to apply an approval system within their state.

An undertaking is to be granted an approval by the approving authority provided that:

1. it is established and registered in a Member State;
2. its company structure allows the approving authority to implement the provisions stated;
3. it complies with the financial conditions in Article 18;
4. it complies with the proof of good repute in Article 19;
5. it complies with the qualification of staff in Article 20;
6. it complies with the requirements for an operations manual in Article 21;
7. it complies with the insurance requirements in Article 22.

However, conditions 1, 3 and 4 above do not apply to self-handling airport users which do not provide groundhandling services to third parties.
These conditions are both novel and significant: they not only go way beyond the limited and often discretionary provisions on approvals in the present Directive, but in their comprehensiveness reflect the requirements for an EU operating licence for commercial airlines. Nowhere is this better demonstrated than in the financial requirements specified in Article 18.

Financial Conditions (Article 18)
An undertaking applying for an approval must not be in insolvency or in similar proceedings or bankruptcy. It is the responsibility of the approving authority to "closely assess" whether an undertaking can demonstrate that:

1. it can meet at any time its actual and potential obligations established under realistic assumptions, for a period of 24 months from the start of operations; and
2. it can meet its fixed and operational costs incurred by operations according to its business plan and established under realistic assumptions, for a period of three months from the start of operations, without taking into account any income from its operations.

These two onerous requirements mirror exactly those to be met by an undertaking applying for an EU operating licence for commercial carriage. This is a significant change from the requirements of the Directive. It is, perhaps, surprising that a supplier of groundhandling services has to satisfy similar tests to that of a commercial airline. One result will certainly be to make entry into the market quite tough, at least, in financial terms. However, it will also create a more "level-playing field" (one of the Commission's objectives) by having uniform, mandatory requirements at all applicable airports across all EU Member States.

Other financial requirements include submitting a business plan showing various specified information for, at least, the first three years of trading. It must also detail the applicant's financial links with any other commercial activities in which the applicant is "engaged either directly or through related undertakings". The applicant should also submit audited accounts for the two previous financial years.

Proof of Good Repute (Article 19)
Proof of good repute, as identified in a number of specified criteria, is a mandatory requirement (which is not a requirement under the Directive).

Each applicant must provide proof of having paid its taxes and social security contributions (an interesting addition) and that the persons who will "continuously and effectively manage the operations of the undertaking are of good repute or that they have not been declared bankrupt".

Qualification of Staff (Article 20)
The applicant must demonstrate that its employees have the necessary "qualification, professional experience and length of service" for the performance of the relevant activities.

Manual of Operations (Article 21)
An applicant must provide a manual of operations containing certain information including an organisation chart of management personnel, quality management procedures, qualification and training requirements for personnel, the equipment policy, various safety information (including the emergency response policy), security management procedures and standard handling procedures.

Insurance Requirements (Article 22)
Again, similar to the EU Operating Licence requirements, there are to be insurance

requirements. Interestingly, earlier drafts of the Regulation specified requirements as to type and amount of cover but these have now been removed. In general terms, suppliers of ground handling services and self-handling airport users in the EU must be insured in respect of their groundhandling-specific liability for "damage caused on the territory of a Member State and for which a right to compensation exists". The Commission is empowered to provide further specific requirements by means of a delegated act: so there is more to come.

Yet again, it is clear that the intention is to ensure that, in future, those undertaking groundhandling services are well-ordered, responsible and financially secure organisations by creating whatever regulatory controls are deemed necessary to ensure compliance.

Validity of Approval (Articles 23 and 24)

An approval is to be valid for a period of five years. Considering the capital investment and level of compliance necessary to undertake groundhandling in accordance with these stringent rules, five years may be seen by some potential new investors as insufficient time to make such an enterprise worthwhile.

An approval may be withheld or revoked if the holder does not meet, for reasons of his own doing, the stated criteria. The approving authority is responsible for monitoring compliance and it must in any case review compliance in a number of situations, such as when a potential problem is suspected. It may at any time revoke an approval if the supplier of groundhandling services or the self-handling airport user does not meet, for reasons of its own doing, the criteria or has "knowingly or recklessly" provided false information on an important point.

Decisions on Approvals (Articles 25)

The approving authority must make a decision on an application as soon as possible and not later than two months after all the necessary information has been submitted. Reasons must be given for a refusal. All procedures for granting and revoking approvals shall be made public by the approving authority, which shall inform the EU Commission. There must be a right of appeal by any party with a legitimate interest against an approval decision or other specified decisions (see Article 41).

Mutual Recognition of Approvals (Article 26)

An approval given in one Member State shall allow the holder (whether as a supplier or self-handler) to provide such groundhandling services in all Member States.

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MANAGEMENT OF GROUNDHANDLING

Access to Centralised Infrastructures and Installations (Article 27)

These provisions only apply to airports whose annual traffic has been not less than 2 million passenger movements or 50,000 tonnes of freight for at least the previous three years.

The managing body of the airport must publish a list of centralised infrastructures at the airport, the management of which may be reserved for that airport managing body (or to another body) which may make it compulsory for handlers to use those infrastructures. The management of those infrastructures must be carried out in a "transparent, objective and non-discriminatory manner".

Groundhandlers (including self-handlers) must have open access to airport and centralised infrastructures and airport installations to the extent necessary to enable them to carry out their activities. This access may be subject to conditions. The space available for groundhandling must be divided amongst the various handlers to the extent necessary "for the exercise of their rights and to allow effective and fair competition". Both the conditions of access and the division of space must be done on a relevant, objective, transparent and non-discriminatory basis.

Fees (Article 28)

For airports whose annual traffic has been not less than 2 million passenger movements or 50,000 tonnes of freight for at least the previous three years, a fee may be charged for the use of the centralised infrastructures or airport installations. The managing body of the airport shall be entitled to recover its costs and to make a reasonable return on assets from the fees charged (which shall constitute consideration for a service). The level of this fee must be set according to relevant, objective, transparent and non-discriminatory criteria. In addition, there must be consultation with the Airport Users' Committee before the level of fees is set and the managing body must provide annually to the Airport Users' Committee and undertakings providing groundhandling services at the airport information on the components serving as a basis for determining the fees. This information is to include a number of specified items (Article 28.4), for example certain costs incurred and revenues received. The managing body of the airport must publish the fees and include a detailed list of the services provided.

Where the Airport Users' Committee disagrees with the set fee it can ask the independent supervisory authority of the Member State concerned to decide on the level of the fee.

Similarly, where the Airport Users' Committee disagrees with the decision of the managing body to centralise or not, or the scope of centralisation of, an airport infrastructure it can ask the independent supervisory authority of the Member State concerned to decide whether that infrastructure be centralised or not and to what extent (Article 27.5). Therefore, the Airport Users' Committee has some right of address in relation to centralisation and fees at an affected airport.

Legal Separation (Article 29)

At airports whose annual traffic has been not less than 2 million passenger movements or 50,000 tonnes of freight for at least the previous three years, the managing body of the airport (or manager of the centralised infrastructure) shall, if it provides groundhandling for third parties, establish a separate legal entity for the performance of these groundhandling activities. This entity must be independent in terms of its legal form, organisation and decision making from any entity related to the management of the airport infrastructure. Those persons responsible for the airport infrastructures must not participate directly or indirectly in the independent entity. At the close of each financial year, an independent auditor must officially declare that there has been no cross-subsidisation between the two entities.

Role of Airport Managing Body (Article 30)

The airport managing body is to be in charge of the proper coordination of groundhandling activities at its airport. In particular, it must ensure that the operations of suppliers of groundhandling services and self-handling airport users comply with the airport rules of conduct (see below). Significantly, the managing body of the airport must report to the national approving authority any problem with suppliers of groundhandling services or self-handling airport users at its airport.

Rules of Conduct (Article 31)

These are rules to be defined by the managing body of the airport (or other managing body where appropriate). They must be applied in a non-discriminatory manner, relate to the intended objective and must not, in practice, reduce market access or the freedom to self-handle to a level below that provided in the Regulation.

Minimum Quality Standards (Article 32)

These are to be "minimum quality level requirements for groundhandling services". At applicable airports (with annual traffic of not less than 5 million passenger movements or 100, 000 tonnes of freight for at least the previous three years) the managing body of the

airport must set minimum quality standards for the performance of groundhandling services. Significantly, airport users and suppliers of groundhandling services are obliged to "respect" these standards in their "contractual relations". In practice, this must mean that the standards are made part of the supplier/user contract to complete the sphere of enforcement. If this becomes EU law it could be considered truly "belt and braces" legislation.

Typically the set minimum standards must be "fair, transparent, non-discriminatory and without prejudice to applicable EU legislation" as well as "consistent, proportionate and relevant in relation to the quality of airport operations". Due account must also be taken of the quality of customs, airport security and immigration processes. The standards are to comply with specifications "set by the Commission in a delegated act" so more detailed regulation and due compliance would follow.

MISCELLANEOUS PROVISIONS

Training (Article 34)

Suppliers of groundhandling services and self-handling airport users must ensure that "all their employees involved in the provision of groundhandling services, including managing staff and supervisors, regularly attend specific and recurrent training to enable them to perform the tasks assigned to them". This is a considerable and continuing obligation. Further, every employee so involved is to attend at least two days of training relevant to the tasks they are assigned.

Where relevant, training must cover specified areas which include passenger, baggage, aircraft, cargo and mail handling; security; dangerous goods; airside safety and driver training; ground support equipment; load control; aircraft ground movement and turnaround; environment; emergency measures; reporting systems and outsourcing quality control. An annual report on "this training obligation" must be made to the managing body of the airport.

Subcontracting (Article 35)

With certain exceptions, suppliers of groundhandling services are allowed to engage in subcontracting. Self-handling airport users are only allowed to subcontract groundhandling services in a case where they are temporarily unable to perform self-handling due to force majeure. Subcontractors are not allowed to subcontract groundhandling services.

Groundhandling suppliers and self-handlers must ensure subcontractors comply with all the obligations under the Regulation and inform with managing body of the airport the name and activities of the subcontractors.

Relations with Third Countries (Article 36)
These are provisions to try and ensure that suppliers of groundhandling services and self-handling airport users from Member States receive comparable treatment in third country airports.

WHERE DO WE GO FROM HERE?
If this Regulation comes into force (and it is highly likely that it will with most, at least, of the provisions proposed) what happens to existing groundhandlers? Under the "Transitional Provisions" (Article 45) suppliers selected according to Article 11 of the Directive (selection process where numbers are limited) will continue to be authorised until that initial selection period terminates. Where approvals have been given under Article 14 of the Directive (granting approvals where applied) they will continue to be valid until their expiry but, in any event, at the latest two years after the date of application of the Regulation. It appears that in most other cases existing handlers at applicable airports will need to obtain an approval under the new Regulation.

Under a previous draft, the new Regulation would not have come into force until 365 days, in other words a year, from the date of publication in the Official Journal of the EU. Now it is proposed that it shall enter into force on the twentieth day following that of its publication in the Official Journal but it shall not apply for (probably – it is left vague) 18 months after the date of adoption whereupon the Directive would be repealed.

It should be noted that some airports will not be affected as they do not meet the appropriate annual traffic threshold. Interestingly though, CAA statistics for 2009/2010 on total passenger traffic at the top 40 UK airports show that some 17 airports have an excess of 2 million passengers for 2009 and 2010. So, the scope of application is potentially wide and is likely to include at the lower end Belfast, London City, Aberdeen, Leeds and Belfast City airports.

In conclusion, the main requirements of the proposed Regulation are not only mandatory but far more extensive and demanding than those under the under the present regime. They may arguably improve and protect competition in terms of access and enforcing a uniform regulatory regime across all EU airports. However, the stringent qualifying conditions applying to all groundhandlers (whether as suppliers or airport users) may discourage new entrants. The application procedure in itself will prove time-consuming and expensive. Once approved, the continuing obligations are considerable in terms of obeying rules of conduct, quality standards, training and reporting. Furthermore, compliance will be carefully monitored. This compliance must have a cost consequence which apart from discouraging new businesses

may result in higher charges for users of the services and ultimately, therefore, higher fares and rates for passengers and consignors.

Perhaps the key question is - will this proposed Regulation create better competition with more choice and improved services for users at attractive prices? The answer is not clear: maybe it will drown the entrepreneurial spirit under the burden of invasive and expensive regulation? Ultimately, the cost of uniformity and centralised control may prove a very expensive option in more ways than one. Time will tell.

The Regulation, as proposed, will now be before the European Parliament, and in practice with the governments of the Member States, for their consideration and final approval. Hopefully, this will take some months and meanwhile it is the last opportunity for interested parties to comment and challenge any issues of concern with their governments. It is vital that any such action is taken now.

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AIR TRANSPORT LIBERALIZATION/DEREGULATION AND RE-REGULATION. PUBLIC MEASURES AND REGULATORY THEORY: AN EU-US COMPARATIVE ANALYSIS

by Francesco Gaspari[1]

1. Air Transport Deregulation and Liberalization; 2. Re-regulation of Air Transport; 3. Operating Licence and Regulatory Theory; 4. Conclusion.

1. Air Transport Deregulation and Liberalization

With the onset of Community liberalizations, which were carried out in the late 1980s and the early 1990s[2], an out-and-out revolution in the field of air transport began.

Prior to liberalizations, the air transport sector had been subject to government controls. States intervened, either directly or by way of these government controls in the economy, enacting a strict and preventive public control of air transport.

The rationale behind this rigid policy and regulatory approach has defined the air transport field for many years and can be explained in a variety of ways.

Firstly, governments generally viewed the aviation industry as a sector of strategic importance. Air transport activity was operated by flag carriers, the delegated national airlines of individual states, and was regarded as public goods which belonged to those states.[3]

In such a scenario, air transport existed under a monopoly regime. Airlines were "traditionally a symbol of a State's sovereignty and the relevance of aircraft to States in times of war always justified the special status of airlines and aircraft".[4]

Moreover, the air transport market was traditionally regulated by European states, which – directly or indirectly – intervened, supplying services, or bearing upon air carriers through the imposition of public service obligations (PSO), or by the imposition of air transport rates.[5]

In addition, government controls were aimed at preventing a concurrence ruineuse among air carriers and, last but not least, "[l]e contrôle sur le système des transports constitue pour l'État, notamment pour l'État contemporain, un instrument de gouvernement de la société".[6]

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2 We refer to the well-known Three Packages of aviation liberalization issued by the EU Council between 1987 and 1992. *See* Anna Masutti, *Il diritto aeronautico. Lezioni, casi e materiali*, Torino, 171 ff. (2009).

3 In Italy, the Government at first did so directly, later controlled the air transport sector indirectly, through the IRI (Istituto per la Ricostruzione Industriale) – a public body established in 1933 as a consequence of the Great Depression of 1929. The IRI concluded its history on June 30, 2000, because of privatization programs carried out by the Government – and on the basis of the D.M. (Ministerial Decree) issued on June 21, 1963, held the majority of the capital of «Linee Aeree Italiane S.P.A.» Alitalia. *See* Silingardi, *Attività di trasporto aereo e controlli pubblici*, Padova, 242-43, (1984).

4 Berend J.H. Crans, *Liberalization of Airports*, XXI Air & Space Law, 10, 10 (1996).

5 Roland Bieber, Francesco Maiani & Marie Delaloye, *Droit européen des transports*, Genève, Bruxelles, Paris, 6 (2006).

6 Bieber, Maiani & Delaloye, *supra* note 4, at 6-7.

Aviation

Similarly, prior to 1978, American aviation was also heavily regulated. Indeed, a rigid public control was widely well-established in the USA. In the 1920s, a strict governmental regulation policy in the airline sector was adopted.

The first forms of public control in the field of US air transport (especially, with regard to commercial air services) were enacted by the *Kelly Act* of 1925 and by the *Air Commerce Act* of 1926.

As air traffic grew, Congress passed the Civil Aeronautics Act of 1938 (which was amended in 1940, in 1958 and in 1978), whereby jurisdiction over air space control was given to the Civil Aeronautics Authority (later the Civil Aeronautics Board or CAB).[7]

Until the late 1970s, most airlines in the US were subject to these public controls, which were enforced by the Civil Aeronautics Board.[8] The CAB comprehensively regulated virtually every "business decision" of interstate commercial air carriers. These included: air fares, entry and exit of air carriers from markets, methods of competition, merger and acquisitions, award subsidies and inter-carrier agreements.[9] Such regulation was considered indispensable by Congress, in order to protect the "infant industry" from the undue competition which arose during the Great Depression.[10]

Both the US deregulation[11] and the EU liberalization[12] experiences completely changed the previous legal and economic framework.

As a consequence, the deregulation (defined as "a political act of will"[13]) brought about a reduction in public interventions in the field of air transport, and the CAB (along with its "byzantine procedures"[14]) was phased out.[15]

Similar to the US experience of deregulation, the EU liberalization resulted in abolition of administrative controls on the air transport entry market, with the exception of controls needed to ascertain that an undertaking meets the requirements of technical fitness to carry out air services.[16] The US deregulation has been marked by a significant governmental

7 Paul S. Dempsey, *The Rise and Fall of the Civil Aeronautics Board – Opening Wide the Floodgates of Entry*, 11 Transp. L. J., 91, 92-96 (1979).

8 Andrew R. Goetz & Paul S. Dempsey, *Airline deregulation ten years after: something foul in the air*, 54 J. Air L. & C., 927, 929 (1988-1989).

9 Goetz & Dempsey, *supra* note 7, at 929.

10 *See* Goetz & Dempsey, *supra* note 7, at 929, especially n. 3.

11 The *Air Deregulation Act* (ADA) was enacted by Congress on October 24, 1978. The ADA was one of a number of pieces of legislation which the US Congress passed in the late 1970s and 1980s to reduce or eliminate governmental regulation of the economy. Among these acts, *see also* the *International Air Transportation Competition Act* of February 18, 1980.

12 We refer to the Three Packages of aviation liberalization, enacted by the EU Council between 1987 and 1992.

13 Brian F. Havel, *Beyond Open Skies. A New Regime for International Aviation*, Alphen aan den Rijn, 251 (2009).

14 Such expression is used by Havel, *supra* note 12, at 248.

15 John C. Reitz, *Legal and Administrative Problems of Airline Deregulation*, Am. J. Comp. L., Supp., 419, 421 (1994); Jacob W.F. Sundberg, *Airline Deregulation. Legal and Administrative Problems*, 39 Scandinavian Studies in Law, 439, 441 & 444 (2000); Kenneth Button, *The impact of US-EU "Open Skies" agreement on airline market structures and airline networks*, 15 Journal of Air Transport Management, 59, 59 (2009).
The CAB ceased to operate on December 31, 1984, and its remaining responsibilities were transferred to an executive branch agency, the US Department of Transportation (DOT): *see* Goetz & Dempsey, *supra* note 7, at 928.

16 Laurence E. Gesell & Paul S. Dempsey, *Air Transportation: Foundations for the 21st Century*, Chandler, 654-60 (2005).

withdrawal from regulation of the airline sector.[17] Indeed, a wide shift has occurred from early control of every phase of air transport activity, implemented by the CAB and its wide web of administrative measures, to different intervention methods, which feature public control carried out by the rules of competition, in an open and deregulated market.

1. Re-regulation of Air Transport

Although this liberalized regime involves the application of competition rules to air transport, in which airlines are free to compete on intra-Community routes, Community liberalization "is not a complete deregulation, in the sense that a residual amount of regulation continues to apply".[18] Both deregulation and liberalization imply (and are an expression of) a specific political choice upstream, in order to cut back on government intervention in the economy, at the same time, ensuring an opening of markets to competition and a wider market access. In the light of this, government intervention is not destined to be weeded out, even though they withdraw their actions, because public authorities (i.e. states) intervene in order to carry on activities limited to control the internal dynamics and external effects of the economic activities carried out freely in the system.[19]

Although air transport public regulations are perceived by economists as "*burdensome*" for airlines, and despite this regulation risks to pass as opposite to Community liberalizations in this field, it appears to be necessary.[20]

Thus, the air transport sector is still subjected to governmental controls - though within the frame of a regulatory regime - in which governmental interventions have different features with regard to the public control system before liberalizations. In the aftermath of liberalizations, government interventions are no longer direct and pervasive (covering market access, fares, etc.), but they are indirect, and are implemented by, *inter alia*, the application of competition rules.[21]

In general, the term "regulation" is an expression of a particular relationship between law and economics[22], and it presupposes a passage from a protectionist system to a regime opened up to competition.[23] Within this "picture", regulation has to be understood in a wide

17 Button, *supra* note 14, at 59.
18 Luis Ortiz Blanco and Ben Van Houtte, *EC Competition Law in the Transport Sector*, Oxford, 166 (1996).
19 *See* Loredana Giani, *Attività amministrativa e regolazione di sistema*, Torino, 137 (2002); Franco Gaetano Scoca, *s.v. Attività amministrativa*, in Enciclopedia del diritto, Aggiornamento, vol. VI, Milano, 75, 82-83, especially note no. 33 (2002).
20 Gesell & Dempsey, *supra* note 15, at 373, 435-36.
21 Sundberg, *supra* note 14, at 440 & 444-46. On the antitrust laws as a form of governmental intervention *see* Robert Bork, *The Antitrust Paradox*, New York (1978).
22 Loredana Giani & Aristide Police, *Le funzioni di regolazione del mercato*, *in* Diritto amministrativo, Torino, 513, 514 (Franco Gaetano Scoca ed., 2008).
23 Gabriele Silingardi, *I controlli sui servizi aerei*, Diritto e pratica dell'aviazione civile, 34 (1998).

sense, namely as an instrument by which governments intervene in the economy.[24]
In both the US and EU experiences, deregulation and liberalization, respectively, have involved a re-regulation by the antitrust laws in the field of air transport. However, the two experiences are different, because in the former, antitrust laws are considered an alternative to regulation. Hence, in this case antitrust legislation "typically accompanies the *absence* of the regulation".[25] In contrast, in the EU liberalizations, the re-regulation of air transport has been enacted, not only by the antitrust laws, but also by airport slots, CRS law, etc.[26]
It can be observed that both States[27] have experienced a sea change, and, within their new laws and economic legal order, public controls have - in a broad sense - become an instrument to ensure the proper application of the competition rules.
In other words, air transport witnessed a deep change of organizational formulas.[28] Air transport entry access is no longer based on a discretionary activity of public authorities, which had the power to decide whether to admit new air carriers into the local market. Likewise, it is untenable to view government intervention in the field of air transport as a contradiction after local liberalization policies, since government would carry on working within a frame of strong public interference.

1. Operating Licence and Regulatory Theory

Public controls in (liberalized) air transport may be explained in the light of the regulatory theory. After liberalization policies were enacted, the power of public authorities increased and their activities were aimed at regulating (but not "regolamentare"), air transport within the framework of the competition law.

As a matter of fact, public authorities carry out a preventive control process, consisting of two parts. They must: ascertaining whether the conditions defined by Regulation 1008 of 2008 exist. They also must verify whether the undertaking has professional and technical abilities, financial fitness and an organization that can ensure the safety of operations.
In the light of this, compared to the pre-liberalization regime, government interventions in the era of liberalization are different regarding the "object" of controls.

From an expression of direct regulation, also carried out by the traditional system of administrative concessions, public control turns into a market access "filter". Therefore it

24 OECD, *The OECD Report on Regulatory Reform. Synthesis*, Paris, 6 (1997), according to which "regulation refers to the diverse set of instruments by which governments set requirements on enterprises and citizens".
25 Stephen Breyer, *Regulation and its reform*, Cambridge (Mass.), 156 (1982).
26 Sundberg, *supra* note 14, at 441.
27 The term "state" is used in a wide and non technical meaning, because the EU is not a state.
28 *See* Guido Rinaldi Baccelli, *La terza fase della liberalizzazione del trasporto aereo nella Comunità Economica Europea*, 60 Trasporti, 35, 38 (1993).

is an instrument of legitimacy in order to operate an economic activity, which is carried out by the private beneficiary (i.e., air carrier) of the administrative measure. Above all, this latter form of control is developed through the administrative authorization system. Administrative authorization is viewed as a public instrument by which governments control private activities.[29]
In such a scenario, the tasks of regulators do not become easier, since "[t]he preparation of criteria that weed out unqualified applicants is usually not as difficult as selecting a winner from those who remain".[30]

In the Community legal system, the air transport entry market is subject to an operating licence[31], granted by the competent licensing authority[32] to an "undertaking established in the Community"[33], after verifying specific requirements and conditions that the applicant must have, according to Regulation 1008 of 2008 (as noted above).
The operating licence represents a prior approval, a regulatory form according to which "an individual or firm must seek a licence or permit from a regulatory body in order to undertake an activity".[34] In order to obtain the licence, the undertaking has to match specific requirements and conditions. In other words, the undertaking will be entitled to receive an operating licence if it demonstrates its "'suitability' for the activity"[35] to be carried out.

Hence, governments from direct actors in the economic system turns into market regulators, since in the current legal system the intervention is carried out in an indirect way, within the new Community economic Constitution, and through a multilevel safeguard of Community competition law.

1. Conclusion

Experiences on deregulation/liberalization have similar approaches in both the US and the EU. From an examination of these experiences, it can be argued that both of them have been heavily regulated. The US deregulation, on one side, and the EU liberalization, on the other side, have undergone a sea change with respect to their respective previous regimes.
Despite this revolution, which has resulted in a reduction of administrative controls on the air transport entry market, the air transport sector continues to be regulated. Compared to past government interventions, the current ones are limited to ascertaining that an

29 Elisabetta Cassese, *Le trasformazioni dell'autorizzazione amministrativa: autorizzazioni e concorrenza*, Archivio Ceradi, Roma, § 4 & *passim* (February 2004).
30 Breyer, *supra* note 24, at 78.
31 *See* Regulation 1008/2008, *supra* note 18, especially Chapter II, on "*Operating licence*".
32 Art. 2, at 1, Regulation 1008/2008.
33 Art. 3, § 1, Regulation 1008/2008.
34 Anthony Ogus, *Regulation: Legal Form and Economic Theory*, Oxford, 214 (2004).
35 Ogus, *supra* note 33, at 226.

undertaking holds the requirements of technical fitness in order to carry out air services. As a matter of fact, this apparent *breaking of the shackles* (according to economists' parlance) has not meant an abandonment of regulations; rather there has been a metamorphosis about "how" governments (re)regulate the economy. Far from recognizing the dominion of the economy, the US deregulation and the EU liberalization have implied a brand new regulation by the antitrust laws, though this regulation has been developed in different ways, namely according to each entity's respective antitrust laws and legal systems.

The current government interventions, by which public authorities carry out a preventive control in the air transport sector, can be "read" in the light of regulatory theory. Indeed, in the era of liberalization/deregulation, administrative permissions (or authorizations) have become public "tools" by which governments regulate private activities. In this way, it has forsaken the traditional system of administrative concessions, which has been replaced by a regulation system based on prior approval.[36]

To conclude, it is not difficult to foresee that the EU liberalizations are destined to failure. If (and when) this predictable event will happen, there will still be those (likely economists) who will defend the idea that unrestrained competition is healthy for air transport (no less than other sectors), as in the US experience. Economics is important, because it may envisage what might occur in a certain sector. However, when this prediction fails, the law and its regulation will remedy the "hole" left by economics.

Therefore, in order to avoid this unfortunate end, governments should be mindful of history. They should take the US experience into account, being advised that *laissez-faire* policy is a mythology in air transport.

36 Cassese, *supra* note 28, *passim*.

Space

A global legislation for space applications in the field of civil protection

By Mildred Trögeler [1]

1. Introduction

There[2] has been an increase in the number and severity of natural and man-made disasters within the last decade as demonstrated by the recent catastrophe in Japan or the Haiti earthquake. This development raises the need to establish a sustainable disaster management framework for the provision of assistance. Space-based technologies, such as Earth observation and telecommunication satellites have a vital role in responding to and mitigating disasters in a timely and efficient manner.

To make these critical space assets available to communities affected by disasters, an effective and sustainable regulatory framework must be put in place. In this respect, the International Charter Space and Major Disasters (the Charter) and the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation (the Tampere Convention) are the most important cooperative agreements in this field at international level. This paper will assess these international legal instruments as well as the European regulatory framework in their capacity to effectively meet the needs and requirements of the users of the Civil Protection community.

2. The International Charter Space and Major Disasters

Following the Unispace III conference in Vienna, the Charter was established on the initiative of ESA and CNES. Its purpose is to provide timely access to satellite-based data in the event of natural or man-made disasters, to promote cooperation between space agencies and space system operators and to allow participation in the organisation of emergency assistance or subsequent operations. Considering the different stages of disaster management, the Charter deals with the response phase.

The principle underlying the Charter is that images and data acquired by Earth observation satellites should be made available free of charge to the authorities responsible for organising relief operations in disaster areas. The Charter creates a unified and coordinated system of image and data acquisition and delivery to relief teams all over the world. The Charter is not a legally binding instrument imposing legal duties and obligations, but it builds on goodwill

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2 The views expressed in this article represent only those of the author. This article is derived from the ESPI Report 37 on "Space Applications for Civil Protection".

and best endeavours of the members.

On 1 November 2000 the Charter was declared formally operational. Since then, the Charter has been activated more than 300 times and is an exemplary use of space systems to facilitate the work of relief teams on the ground. The high number of activations is also a testimony to the success of the Charter and the trust of the parties in the efficiency of this instrument. However, the Charter itself is not free of shortcomings which need to be addressed. A major drawback is the lack of a binding nature of the charter. It is desirable to make compulsory the provision of remote sensing data and images at no cost, given that thus far Charter operations occur on a merely voluntary basis. Through the establishment of state practice and the confirmation by *opinion juris,* the Charter could become customary law over time and therefore binding.[3]

Another drawback is the desire of non-expert users to have not only the raw data but also the analysis of this data at their disposal.[4] Services under the Charter are provided on a best effort basis, meaning that the signatories of the Charter take necessary measures in the provision of aid, but do not guarantee certain results.
The Charter therefore includes a waiver of liability for the parties to the Charter with the consequence that the requesting party cannot take legal action against those providing the remote sensing data, for instance, when the use of erroneous data leads to damage or financial loss. Nevertheless, there are legal aspects remaining to be solved. Because of the limited spectrum of countries involved in the Charter, it does not include all potential disaster victims, and the question arises whether the unilaterally declared waiver of liability still applies to victims which are not in one of the signatory States during the disaster. In fact, the Charter only provides for a waiver of liability concerning cases arising between an affected State and those States party to the Charter.

There is a legal vacuum for cases concerning the potential liability of third-parties. Similarly, the injured party can not claim damages under the Liability Convention, as this would require compensation for physical damage directly caused by a space object's impact on Earth, which does not include damage from remote sensing activities. The misuse or misinterpretation of data provided through the Charter could not only lead to major damage but also to reluctance of the States to activate the Charter again due to a loss of confidence.[5]

3 Atsuyo, Ito, Report: IISL/ECSL Space Law Symposium 2006: Legal Aspects of Disaster Management and the Contribution of the Law of Outer Space, 45th Session of the UNCOPUOS Legal Subcommittee (Apr. 2006), note 41.
4 Voigt, Stefan, Kemper, Thomas, Riedlinger, Torsten, Kiefl, Ralph, Scholte, Klaas and Harald Mehl. "Satellite Image Analysis for Disaster and Crisis-Management Support." IEEE Transactions on Remote Sensing 45.6 (2007): 1520-1528.
5 Beets, Josie. "The International Charter on Space and Major Disasters and International Disaster Law: The Need for Collaboration and Coordination." The Air & Space Lawyer 22.4 (2010): 12-15.

The Charter is a well-proven instrument for the use of earth observation satellite services to mitigate the effects of disasters, but an effective disaster response also requires a pre-defined mechanism for the provision of other important satellite services such as SatCom during and after disasters.

3. The Tampere Convention

Even though the importance of telecommunication, in particular SatCom, in the event of an emergency has generally been recognised, prior to the enactment of the Tampere Convention its wider use by humanitarian organisations was restricted. While the deployment of satellite technology has been improved in recent years, regulatory barriers have hindered the transportation and utilization of telecommunication equipment by organisations in third-world countries stricken by disasters.

The trans-border use of telecommunication equipment by humanitarian organisations was often impeded by regulatory barriers, making it extremely difficult to import and rapidly deploy telecommunications equipment in an emergency without prior consent of the local authorities. Deficits in telecommunication can cause fatal delays, as the first few hours after the disaster has occurred are the most critical for saving lives. The Tampere Convention resulted from the need to address the predictable and prevalent barriers encountered by international disaster relief teams using telecommunication. Seven years after its adoption the Tampere Convention entered into force in 2005 shortly after the Asian tsunami devastated countries bordering the Indian Ocean.

The Tampere Convention is the first legally binding multilateral treaty facilitating the use of telecommunication resources for disaster and relief. The Convention recognises the essential role of telecommunication during and after emergencies because the reliable and expeditious availability of such sources are the basis of other mitigation and relief efforts. It calls on States to facilitate the provision of prompt telecommunication assistance to mitigate the impact of a disaster, and covers both the installation and operation of reliable, flexible telecommunication services.

To ensure effective implementation of this Convention, States shall inform signatories about measures taken for removing regulatory barriers and procedures available for the exemption of specific telecommunication resources for disaster relief. The implementation of this provision faced serious difficulties as States are generally reluctant to subordinate themselves to supranational regulatory framework as they fear that their sovereign rights could be affected.

Another concern is that foreign use of their telecommunication equipment can cause harmful interference into their domestic affairs.[6]

To alleviate these concerns, the Convention underlines that Member States are able to receive assistance without giving up their sovereignty, since States stricken by disasters maintain primary authority in relief coordination. The Convention allows the State requesting assistance to have control over the initiation and termination of telecommunications assistance.
In addition, all persons and organisations that are in charge of providing telecommunication assistance have a duty to respect national laws and regulations, and are obliged not to interfere in the domestic affairs of the State stricken by a disaster.
A State affected by disaster will benefit from the provision of prompt and effective assistance while having the right to direct, control and coordinate assistance provided under the Convention within its territory. In fact, the Convention aims at fostering the cooperation among State Parties by guaranteeing that States and organisations entering their territory respect their legal system and values.
One of the fundamental differences between the Tampere Convention and the Charter is that the latter provides no exchange of funds between the requesting State and the State providing the service. The rationale behind this could be that whereas remote sensing data and information for disaster management are expected to be provided at no costs, telecommunication assistance, in particular SatCom, can obviously not been provided without remuneration due to its commercial nature. To this end, the parties negotiate the conditions of the provided assistance beforehand.

4. Lessons learned at international level

The Tampere Convention itself has, in theory, significantly improved the situation for relief teams using telecommunication equipment, but the fact that important States in the field of civil protection have not ratified the Convention reduces its practical relevance. It can be assumed that non-ratifying States do not see the need for implementing the principles set up in the Convention. Given that non-ratifying States like Germany, United States or the Russian Federation have created telecommunication resources to meet their own needs, these States are self-sufficient in respect to the use of telecommunication equipment in cases of emergencies. Thus, they have no incentive in extending their networks to less developed States that are not in the position to return the investment.[7] Furthermore, most of

6 Rahrig, Allison. "Love Thy Neighbor: The Tampere Convention as Global Legislation." Indiana Journal of Global Legal Studies 17.2 (2010): 273-288.
7 Rahrig, Allison. "Love Thy Neighbor: The Tampere Convention as Global Legislation." Indiana Journal of Global Legal Studies 17.2 (2010): 273-288.

these developed States have their own disaster relief organisations and agencies to support reconstruction after disasters. For instance, the German Red Cross consists of over 4.5 million members including 160.000 solely responsible for medical service.[8]

In conclusion, the Tampere Convention is an effective means to promote international cooperation in the field of disaster relief and mitigation. Due to its binding nature, it is regarded as a milestone in the area of international law applicable to disasters. However, the Tampere Convention merely establishes a framework for facilitating resources and minimising obstacles to telecommunication assistance.
It contributes to the development of model agreement and best practices to improve negotiations and cooperation between State parties, but it does not oblige these States to follow those practices. One of the major shortcomings of this Convention is that it does not provide for a joint pre-approved chain of command and procedure during disasters. Its provisions do not translate into effective and practical arrangements for the delivery of capacity, which is left to the initiative of signatory States.
It also does not meet the needs of developed States in Europe which have the required telecommunication equipment during emergencies. These States are rather interested in the provision of assistance in the form of SatCom on a cost-effective basis. The best way to reach this goal is to federate the demand of national Civil Protection agencies to strengthen their bargaining position with respect to satellite operators.

Taking into account the differing economic, social and political circumstances, it will be rather difficult to federate the demand and to achieve joint procurement of satellite capacity on a global level. It is therefore recommended to focus on an area with the same level of development and similar needs and requirements. The way forward lies in the adoption of detailed and binding regulations at the European level, including a mechanism to coordinate procurement of satellite communication capacity and associated services for civil protection. The following section therefore analyses whether the current EU Civil Protection regulatory framework addresses this problem or whether the existing legal instruments can be changed in a way to regulate the provision of SatCom on a cost-effective basis.

5. EU Civil Protection regulatory framework

Disaster management is primarily the responsibility of the Member States. However, Article 196 TFEU provides for an EU role to encourage cooperation between Member States with the aim of improving the effectiveness of systems for preventing and protecting against natural

8 Ibid.

or man-made disasters. The involvement of the EU shall support and complement Member States' action in risk prevention and in responding to natural or man-made disasters at the local, regional and national level. The overall objective is to promote swift, effective cooperation between Civil Protection agencies in Europe and to promote consistency in international Civil Protection operations.

Since its creation in 2001, the Community Civil Protection Mechanism (the Mechanism) has managed the consequences of disasters in and outside the EU.[9] In case of a disaster, the affected country can avail itself of the option to call upon the solidarity of the EU Member States and other States participating in the Mechanism, with the effect that those States will provide their Civil Protection assistance. The Monitoring and Information Centre (MIC) as the operational heart of the Mechanism, operated by DG ECHO of the European Commission, is available 24 hours a day. It gives countries access to a platform, to a one-stop-shop of civil protection means available amongst all the participating states. Any country inside or outside the EU affected by a major disaster can make an appeal for assistance through the MIC. It acts as a communication hub at headquarters level between participating states, the affected country and dispatched field experts. Another important instrument in the field of disaster response is the Civil Protection Financial Instrument (CPFI) which regulates the funding of all operations based on the Mechanism. The scope of Civil Protection financial assistance has been extended to cover also preventive measures for all kinds of emergencies.[10]

During emergencies inside and outside the EU, the Commission also plays a key role in providing assistance to third countries affected by disasters. The provision of assistance includes a needs assessment, advising participating Sates on the required assistance and ensuring operational coordination of EU assets on the ground. Within the EU, national authorities ensure operational coordination, coordination with other policy areas such as humanitarian aid and consular support, and cooperate with other actors such as the EEAS.

6. The way forward

In 2009 the Commission revealed the results of a study which draws the conclusion that "*the Community Civil Protection Mechanism currently facilitates assistance without guaranteeing European assistance; but that several options exist that have the potential to reform the*

9 Council of the European Union. Council Decision of 23 October 2001 Establishing a Community Mechanism to Facilitate Reinforced Cooperation in Civil Protection Assistance Interventions. 2001/792/EC, Euratom, OJL 297 of 15 Nov. 2001, Brussels: European Union: 7

10 Council of the European Union. Council Decision of 5 Mars 2007 Establishing a Civil Protection Financial Instrument. 2007/162/EC, Euratom OJ L 71 of 10 Mar. 2007. Brussels: European Union: 9.

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Mechanism into a tool that guarantees European assistance".[11] In light of the increasing number and severity of disasters as well as the existing shortcomings of the European disaster response, the current EU Civil Protection legislation is under review to reinforce and increase the effectiveness of EU action through the Civil Protection Mechanism.
One of the most important instruments in disaster response, the CPFI, which finances the operations based on the Mechanism, will expire in 2013, and therefore must be renewed. The new CPFI should be placed in the framework of the new Multiannual Financial Framework 2013-2020. The revision procedure of the current regulatory framework is based, inter alia, on Article 196 TFEU which creates a new legal base for the EU to support and complement Member States' action in international Civil Protection work.

A qualitative shift from the current ad hoc response system to an arrangement within the EU Civil Protection Mechanism allowing for more pre-planning and predictability is of paramount importance. The new regulatory framework should include the development of a system based on a voluntary pool of pre-identified Member States' capacities on standby for deployment in EU operations, a so-called European Emergency Response Capacity. Human resources and assets would remain under national command and control, but Member States would commit to provide them for immediate action in EU civil protection operations. Member States may refuse these resources in case they need them for domestic emergencies.
Considering the importance of the use of SatCom in the event of emergencies, the new legislation should stress the need of rescue teams to have access to precise information so that they are able to provide adequate assistance. The most efficient tool to obtain precise information in a timely manner is through the use of SatCom, as conventional communication links and resources may be overwhelmed or destroyed during emergencies. Hence, the new legislation should enshrine the need to provide SatCom on a cost-efficient basis and should underline that SatCom is an indispensable element to ensure the rapid and effective response to disasters occurring inside and outside Europe.
The use of SatCom is crucial in response to emergencies due to the fact that SatCom is independent of fixed and potentially vulnerable wired infrastructure. Even though satellite capacity is generally available to European Civil Protection actors on a commercial market, and teams can deploy communication facilities on the field, emergency responders have no capacity pre-emption right over commercial use. Consequently, it is difficult to obtain sufficient bandwidth on short notice. In addition, the high costs of satellite communication services make these services unaffordable for many emergency response teams.

11 ECORYS. "Strengthening the EU Capacity to Respond to Disasters: Identification of the Gaps in the Capacity of the Community Civil Protection Mechanism to Provide Assistance in Major Disasters and Options to fill the Gaps – A Scenario-Based Approach." 17 Sept. 2009. European Commission - DG Environment 29 June 2011:10.

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The way forward therefore lies in the creation of a mechanism to coordinate procurement of satellite communication capacity and associated services for civil protection, with the overall intent being the guarantee of rapid and affordable availability during and after disasters. Due to economies of scale this approach would also lead to the provision of SatCom on a cost-effective basis. One way could be to pre-book SatCom capacity through provision and pricing arrangements with major satellite operators, starting with a small number of willing partners and building these arrangements in an incremental and standardised manner.

The European Parliament adopted a resolution in response to the Commission Communication on a stronger European disaster response and calls on the Commission to explore possibility of equipping the EU with a dedicated and secure telecommunications capacity and integrated crisis management solutions.[12] Within the resolution the importance of the collaboration with the European Space Agency, Member States and stakeholders is stressed. Building on this, the new regulatory framework should regulate bandwidth pre-emption, cross-border movement of equipment, integration with legacy systems and availability of spectrum in the event of disasters. One idea could be to establish a competitive Public Private Partnership (PPP) for a dedicated satellite communication for Civil Protections using the existing tools. The overall objective is thereby to increase efficiency of Civil Protection operations and to facilitate the development of services in the field of emergency response.

12 European Parliament, Resolution on „Towards a stronger European disaster response: the role of civil protection and humanitarian assistance“ (2011/2023 INI), Nr. 44, Brussels: European Union.

Case Law Commentary

THE COURT OF JUSTICE OF THE EU UPHOLDS THE EMISSION TRADING SCHEME

by Francesco Alongi

On 21st December 2012, the Court of Justice of the European Union rejected the claim brought by a group of American airlines, stating that the application of the EU Emission Trading Scheme to aviation does not constitute a violation of customary international law or of the Open Skies Agreement.

The Court in Luxembourg dismissed the argument, made by the claimants, that imposing the European Union's cap-and-trade program on flights to and from European airports infringes on national sovereignty or violates international aviation treaties.

The Court of Justice held that the European Union is not bound by the Chicago Convention, since it is not a party to it.

Moreover, the Court denied that the principle that a vessel on the high sea is governed only by the law of its flag state could be applied by analogy to aircraft. The Court of Justice also argued, somewhat less convincingly, that the application of the ETS to aviation does not infringe the principle of territoriality nor the sovereignty of third states, since it is applicable to operators only when their aircraft are physically in the territory of the EU.

According to the ruling, the ETS does not infringe the prohibition (enshrined in the Open Skies Agreement) to impose charges, levies and taxes on fuel, since the scheme is merely a market-based measure and no provision is made for charges for the acquisition of allowances. This argument is however not entirely persuasive, given the radically different stance taken by the Court in similar cases (such as the *Braathens* case - C-346/97).

The Court also argued that the Kyoto Protocol could not be invoked by the claimants as an argument against the application of the ETS to airlines, since nothing in the Protocol could lead us to believe that it has (or should have) direct application.

As (correctly) pointed out by Advocate General Kokott in her Opinion, "neither the Framework Convention nor the Kyoto Protocol contains specific provisions that could directly affect the legal status of an individual".

From a strictly legal point of view, this judgment is far from satisfactory, since it leaves essentially unanswered most of the questions raised by the claimants. It is particularly

interesting to notice how both the Court and the Advocate General adamantly refused to acknowledge that the ETS (like other EU measures, especially in the field of tax and competition law) *does* have extraterritorial application.

The cautious and rather reticent attitude of the Court largely reflects the highly political nature of the ETS debate and indeed of this judgment. And indeed, there was little chance that the Court could be persuaded to strike off what has been defined by Advocate General Kokott as "*one of the cornerstones of [EU] environmental protection policy*".

Climate Action Commissioner Connie Hedegaard expressed her satisfaction with the ruling, commenting that "A number of American airlines decided to challenge our legislation in court and thus to abide by the rule of law. So now we expect them to respect European law". However, this (largely expected) outcome has done nothing to assuage the critics of a highly controversial measure or to stave off the risk of retaliation by non-EU countries (retaliation which has already been threatened during the summer by China and the United States).

Among the few supporters of the scheme is the European Low Fare Airlines Association, since at least 80% of European Greenhouse Gas Emissions originate from long-distance flights to and from points outside the EU.

Given the growing international and domestic opposition to the scheme and the dramatic lack of support in the industry, the question now is whether the Court's ruling is going to be the final act of a long-drawn controversy or merely a Pyrrhic victory in a struggle which is far from over.

Miscellaneous Material of interest

THE 'SIBERIAN OVERFIGHTS' PRACTICE CLOSE TO AN END

by Elena Carpanelli[1]

An agreement to amend the system of the 'Siberian overflight' payments – the 'royalities' that EU/Asian air carriers pay in order to have the right to overfly Russia while in transit through the so-called 'Trans-Siberian' routes – was set out in an exchange of letters signed by the Russian minister for economic development, Elvira Nabiullina, and by the European Commissioners Karel de Gucht (trade) and Sim Kallas (transport) at the end of November 2011.[2] This development came as a follow-up of the EU-Russia aviation Summit held in Saint-Petersburg on October 12-13, 2011, during which Russia guaranteed that such an agreement would have soon been implemented as an essential step to accelerate its accession to the WTO.[3]

The 'Siberian overflights' payments have always raised many questions in terms of their legality under international air law[4] and, more recently, under EU competition law.[5] Their final destination – as they mainly go to Aeroflot – and their consequent anti-competitive effects have been particularly controversial points.

The 'Siberian overflights' practice finds its roots in bilateral air services agreements concluded between EU/Asian Countries and the Russian Federation. In particular, they contain a 'commercial agreement clause', according to which the exercise of specific traffic rights on the Tran-Siberian or other routes is subject to the conclusion of 'commercial agreements' between the designated air carriers. By not directly referring to the 'Siberian overflights' fees and by delegating the establishment of these 'royalties' to confidential agreements between designated air carriers, this clause favoured negative effects on competition among airlines. First, the fact that the 'Siberian overflight' fees are mainly paid by the designated foreign air carriers to their direct competitor, Aeroflot, that, in addition, does not have to pay any similar fees,[6] hinders competition between foreign carriers and the main Russian airline. Second, due to the fact that these payments are established in separate commercial agreements between distinct airlines, and thus they may differ with respect to their amounts, competition among foreign airlines involved in the practice might be distorted.

1 LL.M. (Adv.) in Air and Space Law, Leiden University; B.C.L. Università degli Studi di Parma.
2 *'Air Transport Commission: Commission Welcomes Agreement on Siberian Overflights'*, EU Doc. IP/11/149 (December 1, 2011).
3 *'EU-Russia aviation summit: 12-13 October 2011'*, EU Doc. MEMO/11/695 (October 12, 2011).
4 *See, in particular,* Article 15 of the Chicago Convention, according to which '(…) *no charge shall be imposed by any Contracting State solely for the right of transit over or entry into or exit from its territory of any aircraft of a Contracting State or persons or property thereon'. See also J. Baur, 'EU-Russia Aviation Relations and the Issue of Siberian Overflights', XXXV(3) Air and Space Law (2010)*, at 225.
5 *See, inter alia, 'Air Transport: infringements concerning bilateral aviation agreements with Russia'*, EU Doc. MEMO/11/167 (March 14, 2011).
6 *G. Baum and H. van Shyndel, 'Some remarks on M. Milde's "Some Question Marks about the Price of Russian Air"', 49/3 Zeitschrift für Luft – und Weltraumrecht 331 (2000), at 149.*

After a thirty-year-arm-wrestling in the attempt to reach an agreement on the abolishment of the 'Siberian overflight royalties' and in lack of EU Member States' initiative to bring the issue in front of the ICAO Council, at the end of 2010 and at the beginning of 2011 the European Commission launched infringement procedures against most of its Member States over their bilateral air services agreements with the Russian Federation. The Commission denounced their anti-competitive effects in breach of EU law and paved the way for a possible judgment of the Court of Justice of the European Union.[7] The current break-through in the negotiations seems to have greatly benefited from the European Commission's '*ultimatum*'.

The milestone agreement entered into force on January 1, 2012, following Russia's accession to the WTO on December 16, 2011.[8] According to an updated version of the 2006 'Agreed Principles',[9] it sets the terms for the progressive phasing-out of the 'Siberian royalties' mechanism. In particular, as from January 1, 2012 newly operated overflight frequencies on the Tran-Siberian route do not require the previous conclusion of commercial agreements between designated air carriers. Air carriers having already in place flight agreements with their Russian counterpart, on the other hand, can continue to be charged until 2014, but the amount charged cannot exceed the amount paid in 2006.[10] In addition, within six months from the entry into force of the agreement, bilateral air services agreements between Russia and EU Member States should be amended so to exclude that any payment or commercial agreement between designated airlines is needed in order to fly over Russia.[11] Finally, by January 1, 2014, at the latest, any charges to be paid by EU carriers in order to fly over Russia should be cost-related, transparent and non-discriminatory.[12] In practice, this means that, by that date, in line with Article 15 of the Chicago Convention, only ANSP fees should be requested to EU carriers in order to overfly Russia, thus setting the ultimate deadline for the complete abolishment of 'overflight fees'.
Such a phased system, however, virtually creates discrimination between carriers operating new frequencies, *ab initio* exempted from the payment of 'Siberian royalties', and those operating old frequencies, which can be charged until 2014. In order to cope with such a problem, the agreement will be notably accompanied by an equalization mechanism, according to which EU air carriers exempted from the payments on new frequencies shall contribute to a fund created to support those EU carriers that, during the transitional period before January 1, 2014, still have in place commercial agreements with their Russian counterpart.[13]

7 *See, inter alia*, '*Air Transport Commission launches infringement procedures against two member States over agreements with Russia on equal treatment of EU airlines and Siberian overflights*', EU Doc. IP/11/424 (April 6, 2011).
8 *See*: http://www.wto.org/english/thewto_e/acc_e/a1_russie_e.htm.
9 '*Council Conclusions on Siberia: 2721st Transport, Telecommunications and Energy Council Meeting*' (March 27, 2006). *See also 'EU and Russia agree on abolition of 300 million euros Siberian overflight payments*', EU Doc. IP/06/1626 (November 24, 2006).
10 Council of the European Union, '*Press release of the 3127th Council meeting: Transport, Telecommunications and Energy*' (November 24, 2011), at 21.
11 *Ibid.*
12 *See*, EU Doc. IP/11/149, *supra* note 1.
13 *Ibid.*

This mechanism will be approved by the Council of the European Union at a later stage.[14] Nonetheless, whether the guidelines elaborated with respect to the 2006 'Agreed Principles' are followed, it is likely that it would be organised by Country of destination with 'equalisation boxes' created in order to allow the equalisation on routes to different Countries.[15] Accordingly, any air carrier operating a new frequency free of charge should pay a base sum in the box on a seasonal basis and only for operated frequencies.[16] After each IATA season, all EU air carriers operating on the concerned routes would receive a pro-rata refund per box, corresponding to the number of frequencies operated by the air carrier in question.[17]

The agreement represents an historic turning-point and, if effectively implemented, will eliminate what is currently regarded as one of the major obstacles to the development of EU-Russia aviation relations. As correctly underlined by the European Commission Vice-President Siim Kallas "*Siberian overflight royalties have for decades been the single most important obstacle for further developing EU-Russia aviation relations to the detriment of airlines and passengers. Today's agreement is therefore a very important milestone towards strengthening closer cooperation in many areas of aviation*".[18] Both EU air carriers and passengers will benefit from the recent agreement as less expensive fares and an increase in EU-Asia relations should be following to the raising competition determined by its implementation.
Nonetheless, it is worth highlighting how, from a legal point of view, such an epoch-making political solution avoids an express condemnation of the international illegality of a practice that does not only concern EU air carriers and could be adopted by other Countries with large and strategic airspaces.[19]

14 *See:* http://www.rttnews.com/Content/MarketSensitiveNews.aspx?Id=1768388&SM=1.
15 [Confidential source] Council of the European Union, W. Doc. 2007/4 (AVIATION), 31 January 2007.
16 *Ibid.*
17 *Ibid.* The refund to a determined air carrier A would be calculated as follow: (Total sum in the box)/(total number of frequencies operated in the box) x (number of frequencies operated by carrier A) = (refund to carrier A).
18 *See* EU Doc. IP/11/149, *supra* note 1.
19 *See*, for instance, the case of Brazil and Canada that, like Russia, are not Parties to the International Air Services Transit Agreement, with which the contracting States have agreed to a multilateral exchange of first and second freedom rights.

AIRPORT CHARGES DIRECTIVE 2009/12/EC: THE NECESSITY OF A NON-DISCRIMINATORY AND TRANSPARENT APPLICATION

by Alessandra Laconi

Airport charges consist in amounts due for the use of airport facilities. They include charges for the processing of passengers and freight, aircraft landing charges and other charges deriving from the use of airport infrastructures.
Such charges are paid by airport users, in particular by airlines transporting passengers and freight.
It is evident that they are indirectly paid by passengers and freight customers as a portion of the ticket price of the freight forwarding fee.
Charges are calculated and then applied in many ways depending on the particular service: passenger charges are levied per passenger whilst other charges are due in relation to the landing or the take-off of an aircraft.

Airport charging systems are often imposed, calculated and administrated by the competent national authorities. Even if an airport concerned is privately owned, the charges have to comply with regulatory parameters set by those authorities.
It is thus evident that airport charges can also represent an organizational and promotional tool. By varying some charges, airports can try to increase and promote the use of airport infrastructures and/or decrease the environmental impact of aviation in a particular geographic area.

Charges for the use of an airport undoubtedly represent a significant and necessary expense for airlines. In the context of the Single European market, and also in the light of the rapid evolution of the actuation of the Single European sky, airport charges must be applied in a non-discriminatory manner, avoiding to detriment or to advantage certain carriers.
For a proper work of the aviation market, it is fundamental that minimum standards on the calculation of airport charges be ensured and applied in order to guarantee fair competition among all carriers using an airport.

The European Directive adopted on March 2009, which had to be implemented by all Member States by March 2011 at the latest, represents rather a prosecution than a complementation to the policies on airport and air navigation services charges drawn up by the International Civil Aviation Organization.
The core objectives of the Directive, which applies to all EU airports handling more than five million passengers per year and to the largest airport in each Member State,

are the following ones:

- Greater transparency on the costs which charges are to cover: this means that airports shall be obliged to share a detailed breakdown of costs with airlines in order to coherently justify the amount of airport charges;
- Non-discrimination: airlines receiving the same service shall pay the same charge. However, airports can differentiate their services if the criteria are clear and transparent, and they can vary charges on environmental grounds;
- Systems of consultation on charges between airports and airlines, already in place at many EU airports, became mandatory at all airports covered by the Directive;
- Member States must designate and set up an independent supervisory authority which effectively help to settle and solve disputes over charges between airports and airlines.

Austria, Germany, Italy and Luxembourg have anyway failed to notify the Commission of the necessary national laws they have put in place for this Directive, although they were required to do so by 15 March 2011.

To date, 19 Member States have indicated full transposition of the Directive, and the Commission is actually assessing the national laws which have been notified to ensure that they meet the standards set forth in the Directive.
Failing to properly implement the Directive means that passengers are paying more than they should for travelling by air, both within the EU and for long-haul destinations departing from EU airports.
It is thus evident that a correct implementation and a non-discriminatory and transparent application of the Airport Charges Directive could represent a concrete step in order to ensure a fair competition among airlines across the EU and to avoid that passengers have to suffer the practical consequences of a lack of necessary harmonization in such field.

Austria, Germany, Italy and Luxembourg have now to adequate their national laws in order to fully comply not only with the Directive, but also with the fundamental principles of non-discrimination and transparency.

"YOUR PASSENGER RIGHTS AT HAND": EU COMMISSION MOVES FORWARD ON AIR PASSENGER RIGHTS. TOWARDS A POSSIBLE REVISION IN 2012 OF REGULATION 261/2004?

by Alessandra Laconi

The European Commission has recently published a Communication (COM(2011) 898) which provides a general but complete overview of all passenger rights with the aim to promote a consistent and effective application of the mentioned rights across all modes of transport.
The Communication offers for the first time a horizontal view of the actual EU legal framework on passenger rights in all transport modes (air, rail, waterborne and road) towards a more effective and consistent application of the mentioned rules.
The explained air passenger rights cover the following fields:

- People with disabilities and people with reduced mobility;
- Denied boarding;
- Cancellation;
- Long delays;
- Baggage;
- Identity of the airline;
- Package holidays;
- Price transparency.

It must be said that some fundamental questions concerning the lack of uniform application and enforcement of the rights arise and remain to be solved, representing a sort of grey area in the field of air passenger rights.

The Commission will therefore boost enforcement action through reinforced cooperation with national competent authorities and a more systematic exchange of good practices, statistics and information, also with stakeholders.
In the meantime, the Commission will continue its necessary work aimed at increasing passenger's awareness of the rights they enjoy, respecting their fundamental right of information. Such rights can be affirmed in the particular case both bringing an action to the competent court of tribunal and choosing means of alternative dispute resolution (ADR) which, according to the writer's opinion and in the light of an ethic view, must be improved and promoted in order to ensure a more immediate and good value protection of passengers, particularly in cases when the passenger can be defined as a consumer.

In addition, the Commission launched a public consultation on air passenger rights which results will be used to revise the current legislation in 2012.
The consultation focuses on:

- the scope of the legislation, the rights in case of air travel disruptions (long delays and flight cancellation);

- issues related to baggage and additional services;
- how to reduce and share the cost of applying these rights for airlines;
- measures to improve the enforcement and the means of redress available to passengers.

Finally, it has prepared draft guidelines on the rights of disabled passengers and passengers with reduced mobility travelling by air, to be discussed with Member States and stakeholders. These guidelines will be adopted before the Paralympic Games which will take place in London in 2012.

A pro consumer (and passenger) view strongly characterizes the action of the European institutions and can be found in a growing number of occasions, like:

- the evolution of the jurisprudence of the ECJ (as in the recent *Souza-Rodriguez* case) towards a stronger protection of passengers;
- the publication of the Communication on passenger rights in all transport modes;
- the Commission's effort in order to increase passenger's awareness of their rights;
- the Commission's control and collaboration with national authorities;
- the public consultation to propose a modernization and a possible revision in 2012 of Regulation 261/2004.

Therefore, it can be affirmed that the awareness of air passenger rights at European level is improving and strengthening their protection, which is likely to be reinforced and modernized by a revision involving the uniformity of application and the enforcement of such rights.

EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION OF 27 OCTOBER 2011 ON A DRAFT COUNCIL DECISION ON THE CONCLUSION OF THE AGREEMENT BETWEEN THE EUROPEAN UNION AND AUSTRALIA ON THE PROCESSING AND TRANSFER OF PASSENGER NAME RECORD (PNR) DATA BY AIR CARRIERS TO THE AUSTRALIAN CUSTOMS AND BORDER PROTECTION SERVICE.

by Doriano Ricciutelli

1. Introduction

In the EU there exists a number of measures for the collection and exchange of personal data between the law enforcement and other authorities of the Member States, such as the Schengen Information System (SIS), the second-generation Schengen Information System (SIS II), and the Visa Information System (VIS). The aim of these systems is to give a response to threats posed by organised crime and terrorism.

The measures have proven to be useful, but they tend to focus on persons who are already suspected.

In its analysis of 2010 of the existing measures[1], the European Commission indicated that law enforcement authorities should enhance their cooperation when it comes to passengers on international flights to and from the Member States, and should make more use of PNR (Passenger Name Record) data.

The Stockholm Programme of 2009[2] had already asked the Commission to present a proposal on the use of PNR data in the fight against serious crime and terrorism.

2. What are these PNR data?

They are unverified information provided by passengers and collected and held by carriers in their reservations and departure control systems. They contain information on the travel dates and itinerary, contact details, travel agent, means of payment, seat number and baggage information.

If the PNR data concerning international flights could be collected, stored and used in a more systematic way, they might help the prevention, detection, investigation and prosecution of serious crime and terrorist offences, hence reducing security threats.

The use of PNR data, however, is not regulated in the EU at the moment. Hence the Commission proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL (on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime)[3] to harmonise Member States' provisions on obligations imposed on air carriers operating flights between third countries and Member States to communicate PNR data. The proposal does not require passengers to give, nor carriers to collect additional data.

1 COM(2010) 385.
2 Council document 17024/09 on 2.12.2009
3 COM(2011) 32 final2011/0023 (COD)on 2 February 2011

3. PNR agreements with third countries.

The European Union also has agreements on the exchange of PNR data with third countries, such as Australia, as well as Canada and the US. In May 2010, however, the European Parliament had postponed its vote consenting to the agreements with the US and Australia, which therefore continued to be applied on a provisional basis.

In a resolution, the EP demanded for new agreements to be negotiated with the US, Canada and Australia. Negotiations with the US and Canada are still on-going, whereas the agreement with Australia has been finalised[4] and was signed on 29 September 2011[5], replacing an older agreement from 2008. On 27th October 2011 the EP gave its consent to the present resolution and the Council is now expected to adopt a decision on the conclusion of the agreement which will be in force for seven years.

The main elements on the PNR agreement with Australia are:

- a limited purpose, i.e. the use of PNR data is restricted to the prevention, detection, investigation and prosecution of serious crime or terrorist offences;
- the Australian Customs and Border Protection Service is legally bound to provide the EU and its Member States with any relevant intelligence resulting from the analysis of PNR data
- a solid data protection regime;
- rights of access, rectification and deletion and administrative and judicial redress;
- storage of PNR data for a period of 5 and a half years, after 3 and a half years data enabling the identification of passengers are deleted.

4 With a Communication on the global approach to transfers of PNR data to third countries, and new negotiation mandates approved by Council, the Commission and Australia started new negotiations in January 2011. The Commission initialled the Agreement and sent a recommendation to Council on 19 May 2011 to sign and conclude the Agreement. Council adopted the Agreement on 22 September 2011, (and the Agreement was finally signed on 29 September 2011).

5 Brussels, 13 September 2011. Doc.10093/11

THE ITALIAN COMPETITION AUTHORITY AUTHORIZES A MERGER BETWEEN CARRIERS
(Italian Competition Authority, decision n. 22813, C11167)

By means of a recent decision, the Italian Competition Authority has authorized the merger between the Italian carriers MERIDIANA FLY S.p.a. and Air Italy S.p.a..
The Authority examined either geographical or air services market for all services involved in the merger, including scheduled flights, non-scheduled flights, cargo services and tour operator services.

According to the authority's analysis, on the basis of the city pair technique, the carrier resulting from the merger appeared to have a 70-80% market share on the Olbia-Napoli route and a quasi monopolistic position with a 90-95% market share on the Olbia-Torino and Verona-Napoli routes.

Nevertheless, the Competition Authority decided that the merger would not have affected the free competition in the marketplace because the dominant position of the carrier was contestable. The airports connected by the above mentioned routes have no congestion problems or barriers to the entry of new carriers. Therefore any air carrier could connect these airports by using its slots or by applying for new ones.

The authority has approved the merger as it does not jeopardize the free competition, permitting the market the entry of other carriers.

A.M.

ENAC CIRCULAR ON INSURANCE OBLIGATIONS FOR AIR CARRIERS AND AIRCRAFT OPERATORS

1. Introduction

Since many years the European Union has been working for setting up uniform and harmonized rules for insurance, in particular for aviation insurance.

The main provisions are contained in the Regulation 785/2004/EC which establishes the minimum requirements for air carries to obtain the licence to operate in the territory of a Member State.

The major rules of such regulation concern the compliance with the insurance obligations and the relevant power assigned to the aviation authority to deny the access to a route or the take-off to protect the passengers' interests.

On 24 April 2008, the European Commission stated that: "*Regulation 785/2004 has reached its objective to guarantee that all EU or non EU air operators, providing commercial or private flights within the EU territory, underwrite an insurance policy according to minimum uniform requisites*".

Although the European Regulation is immediately applicable in the EU Member States, ENAC has issued in the last few years some circulars to draw the attention on the main provisions of the Regulation for their correct interpretation and application.

The circular under exam analyses the main provisions of Regulation 285/2010/EC amending the Regulation 785/2004/EC as far as the minimum insurance requisites are concerned, as well as the relevant sanctions provided by the EU norms, the Italian Navigation Code and the legislative decree 197/2007.

In such a way ENAC establishes the criteria for the application of the new regulation while recalling the existing norms provided by international conventions, EU regulations and domestic law.

2. Application criteria and minimum insurance requisites

ENAC Circular EAL-17A, repealing the previous circular EAL-17 of 18.02.2009, has been published on 21 December 2011. From that date, **it is applicable to all EU and non-EU air carriers operating flights to and from the Italian territory**. Exemptions concern aircraft with MTOM below 500 kg and ultra light aircraft used for non-commercial purposes or for pilot training. **The circular is not applicable to flights crossing the Italian territory without landing**. Regarding the minimum insurance coverage the novelties concern the liability for baggage, goods and mail, while those relating to the liability towards passengers and third party have not been changed: 250,000 SDRs. According to Regulation 285/2010/EC the minimum insurance coverage for baggage has been established in SDR 1,131 per passenger for commercial operations. For mail and goods the minimum coverage is 19 SDRs per kg for commercial operations. The new minima have been established to comply with the Montreal Convention and considering the inflation rate from the date of entry into force of the same convention.

The insurance certificate has not been modified; it is released by an insurance company or by

an insurance broker and has to be stored on the plane and deposited care of ENAC, according to Article 771 of the Italian Navigation Code. ENAC may anytime dispose inspections to verify that all insurance obligations have been fulfilled.

3. Sanctions regime

The provisions of Regulation 785/2004/EC regarding sanctions for non-compliance with the obligations of the same regulation, have been adopted in Italy by the legislative decree 197/2007 and by some norms of the Navigation Code.

Recalling these provisions, the circular under exam imposes a fine from €50,000 to €100,000 in case no insurance cover has been underwritten, and prohibits the take off from the Italian airports until the operator had complied with Articles 798 and 802 of the Navigation Code, and Article 8, para 7 of the Regulation. Revising the provisions of the previous circular, in case the operator holds a licence, the absence of the insurance policy determines the suspension of the licence. The suspension of the licence may be applied also in case the operator has not adequate the insurance coverage to the amount established by the Regulation. Contrary to the provisions of Regulation 785/2004/EC, the licence is no more withdrawn but its validity suspended.

It is worth to note that for the first time the circular attributes to ENAC the right to suspend the licence on the basis of powers conferred to ENAC by Article 687 of the Navigation Code and compliant with Regulation 785/2004/EC which leaves the Member Stated free to adopt sanctions to guarantee the application of the insurance principles, provided that the community principles of efficiency, proportionality and dissuasion are taken in due consideration.

Another new provision concerns the reference of the infringement of the Regulation to the State which released the licence or where the aircraft is registered for both EU and non-EU air operators, in case no insurance policy has been stipulated.

The circular has been written with the main objective to prevent the case of no insurance coverage or insufficient insurance coverage for the protection of passengers, their belongings and third party.

A.M.