Chapter 11

EUROPEAN UNION

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The European Union comprises 28 Member States and its origins lie in the 1957 Treaty of Rome. For a long time, air transport was not addressed by the different European institutions. European air transport law emerged only in the early 1990s from the work of the European Commission, the European Parliament and the European Council.

European legislation comprises mainly Regulations, which are directly applicable, and Directives, which need to be transposed into national law. European aviation law today covers many aspects of the industry.

I PASSENGER RIGHTS

Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No. 295/91 (OJ, 17 February 2004) (the Regulation) is the main piece of legislation on passenger rights.

The Regulation entered into force in 2005 and aims at ensuring a high level of protection of air passengers, providing them with specific rights in the event of denied boarding against their will, flight cancellation or delay.

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i Scope

The Regulation applies to passengers departing from an airport located in the territory of a Member State (whether they travel with a European Union carrier or not), and to passengers departing from an airport in a third country to an airport situated in the territory of a Member State if they travel with a European Union carrier and under the condition that they do not receive benefits or compensation or are given assistance in the third country.

In its early decision *Emirates* of 10 July 2008 (C-173-07), the Court of Justice of the European Union held (in the case of a non-European air carrier) that the Regulation does not apply to the case of an outward and return journey in which passengers who have originally departed from an airport located in the territory of a Member State travel back to that airport on a flight from an airport located in a non-Member State. According to the Court, the fact that the outward and return flights are the subject of a single booking has no effect on the interpretation of that provision.

The Regulation also applies to any scheduled and non-scheduled flights, including package tours, except when the package tour is cancelled for reasons other than the cancellation of the flight.

ii Denied boarding

When an operating carrier reasonably expects to deny boarding, it will first call for volunteers to surrender their reservation in exchange for benefits commonly agreed and with at least a right to reimbursement or rerouting.

If no or insufficient passengers surrender, the operating carrier may then deny boarding to passengers against their will. In this situation, the Regulation provides that the air carrier will have to immediately compensate the concerned passengers according to the chart set out in Article 7 of the Regulation, which foresees fixed and immediate compensation between €250 and €600 depending on the destination. The air carriers will also be required to offer reimbursement or rerouting to the denied boarding passengers and to provide them with assistance, which may include free food, hotel accommodation and calls and emails.

Under the Regulation, denied boarding passengers are those who are obviously denied the right to board the aircraft against their will, but to fall within the definition of the Regulation they should also have a confirmed reservation on the flight and have presented themselves for check-in at the agreed time or, if no time was agreed, at least 45 minutes before the published departure time.

In the *Germán Rodriguez Cachafeiro* case of 4 October 2012 (C-321/11), the Court of Justice of the European Union held that the concept of 'denied boarding' includes situations where, in the context of a single contract of carriage involving a number of reservations on immediately connecting flights and a single check-in, an air carrier denies boarding to some passengers arguing that the first flight included in their reservation has been subject to a delay attributable to that carrier and that the latter mistakenly expected those passengers not to arrive in time to board the second flight.

On the same day, in the *Lassooy* decision (C-22/11), the Court of Justice of the European Union considered that this regime related not only to cases where boarding is denied because of overbooking but also to 'those where boarding is denied on

other grounds, such as operational reasons'. The Court noted that the occurrence of 'extraordinary circumstances' resulting in an air carrier rescheduling flights after those circumstances arose 'cannot give grounds for denying boarding on those later flights or for exempting that carrier from its obligation to compensate, [...] a passenger to whom it denies boarding on such a flight'.

The regime described above does not apply when there are reasonable grounds to deny boarding, for instance for health, safety, security or inadequate travel documentation reasons.

iii Cancellation

Cancellation is defined by the Regulation as the 'non-operation of a flight that was previously planned and on which at least one place was reserved'. In such a case, the Regulation provides that the affected passenger should be offered the choice between reimbursement and rerouting under comparable transport conditions; and also be given food, refreshments and calls, all free of charge. In the event of rerouting, when a stay of at least one night becomes necessary, the passenger should also be offered hotel accommodation and transport from and to the airport.

One particularity of this legislation consists in the automatic and standardised financial compensation offered to the passengers whose flight is cancelled. Article 7 sets this compensation at between €250 and €600 depending on the travel distance. These amounts may, however, be decreased by 50 per cent, in a rerouting situation, when the arrival time does not exceed the scheduled arrival time originally booked by two to four hours depending on the distance.

This automatic standardised compensation may nevertheless be avoided if the passenger is informed of the cancellation within a certain time limit or if the cancellation results from extraordinary circumstances.

The Court of Justice of the European Union (CJEU), in its *Rodriguez* decision of 13 October 2011 (C-83-10) ruled that the term 'cancellation' also covers cases in which a flight departs but then returns to the airport of departure and does not proceed further.

iv Extraordinary circumstances

The automatic standardised compensation in the event of cancellation of a flight does not need to be paid by an operating carrier if it can prove that the cancellation is the result of extraordinary circumstances 'which could not have been avoided even if all reasonable measures had been taken'.

The recitals of the Regulation indicate that such extraordinary circumstances may occur in situations of political instability, weather conditions, security risks, unexpected flight safety shortcomings, strikes or ATC decisions.

The Court of Justice of the European Union, in its *Wallentin* decision of 22 December 2008 (C-549/07) held that the 1999 Montreal Convention's rules on limitation and exclusion of liability were not decisive for the interpretation of the liability provisions of the Regulation. In its decision, the Court considered that a:

> *technical problem in an aircraft which leads to the cancellation of a flight is not covered by the concept of 'extraordinary circumstances' [...], unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control.*

The Court then ruled that the fact that an air carrier has complied with the minimum rules on maintenance of an aircraft cannot in itself suffice to establish that the carrier had taken 'all reasonable measures'.

Later, in the *Eglitis* case of 12 May 2011 (C-294/10), the Court ruled that since an air carrier is obliged to implement all reasonable measures to avoid extraordinary circumstances, it must reasonably:

> *at the stage of organising the flight, take account of the risk of delay connected to the possible occurrence of such circumstances. It must, consequently, provide for a certain reserve time to allow it, if possible, to operate the flight in its entirety once the extraordinary circumstances have come to an end.*

In the *McDonagh* decision of 31 January 2013 (C-12/11), the Court ruled that circumstances such as the closure of part of European airspace as a result of the eruption of the Icelandic volcano constituted extraordinary circumstances. The Court recalled on this occasion that the concept of 'extraordinary circumstances' does not release air carriers from their obligation to provide care as described above.

In the *Siewert* order of 14 November 2014 (C-394/14), the Court recently ruled that mobile stairs colliding with an aircraft does not automatically constitute extraordinary circumstances.

v Delay

The Regulation does not provide a definition of the concept of 'delay' as it does for 'cancellation'. It generally provides that when an operating carrier reasonably expects a flight to be delayed beyond its scheduled time of departure by a certain time, which varies depending on the travel destination, passengers shall be offered meals and refreshments, the ability to place two calls, and accommodation and transfer from and to the airport under certain conditions. If the delay is at least five hours, the concerned passengers should also be offered the choice of a reimbursement and of a return flight to the first point of departure.

Soon after the entry into force of the Regulation, these provisions were challenged before the Court of Justice of the European Union as they seemed to overlap and be contrary to the provisions of the 1999 Montreal Convention and the Regulation (EC) No. 2027/97 on air carrier liability in respect of the carriage of passengers and their luggage by air, as amended by Regulation No. 889/2002: in fact, this Convention was

duly approved by the EU and provides for what seemed to be an exclusive cause of action and liability related rules. In its *IATA* case of 10 January 2006 (C-344/04), the Court held that two different kinds of damage exist in cases of delay:

> *First, excessive delay will cause damage that is almost identical for every passenger, redress for which may take the form of standardised and immediate assistance or care for everybody concerned ... Second, passengers are liable to suffer individual damage, inherent in the reason for travelling, redress for which requires a case-by-case assessment of the extent of the damage caused and can consequently only be the subject of compensation granted subsequently on an individual basis (Point 43).*

On these grounds, the Court affirmed the validity of the Regulation with regard to EU law and the Montreal Convention.

The Court later ruled, controversially, in its *Sturgeon* decision of 19 November 2009 (joint cases C-402/07 and C-432/07), that passengers whose arrival at their final destination was delayed by three or more hours should be treated as passengers whose flight has been cancelled and therefore entitled to the same financial compensation:

> *passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled and they may thus rely on the right to compensation laid down in Article 7 of the regulation where they suffer, on account of a flight delay, a loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier.*

However, the Court underlined that:

> *Such a delay does not, however, entitle passengers to compensation if the air carrier can prove that the long delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances beyond the actual control of the air carrier.*

The Grand Chamber of the Court reaffirmed this position on 23 October 2012 in the *Nelson* case (joint cases C-581-10 and C-629/10). The Court held that there was no conflict between the Montreal Convention and the Regulation insofar as (in the Court's opinion) they covered two different situations.

On 26 February 2013, the Court ruled in the *Folkerts* case (C-11/11), regarding connecting flights, that the same compensation for delay is payable to passengers who have been delayed at departure for a period below the limits specified in the regulation, but have arrived at the final destination at least three hours later than the scheduled arrival time.

Lastly, the Court held in the *Henning* case of 4 September 2014 (C-452/13) that the concept of 'arrival time', in the context of computation of delay, referred to the time at which at least one of the doors of the aircraft is opened.

vi Further compensation

The Regulation provides that its application should not, except in cases of denied boarding 'volunteers', prejudice passengers' rights to further compensation, adding that the compensation granted under the Regulation may be deducted from such compensation. In the *Rodriguez* case of 13 October 2011 (C-83/10), the Court of Justice of the European Union ruled that the meaning of 'further compensation' must be interpreted to the effect that 'it allows the national court to award compensation, under the conditions provided for by the Montreal Convention 1999 or national law, for damage, including non-material damage, arising from breach of a contract of carriage by air'.

vii Time limitation

The Regulation does not stipulate any time limitation for action. In the *Moré* case of 22 November 2012 (C-139/11), the Court held that the time limits for bringing actions for compensation, under the provisions regarding cancellation and compensation are determined in accordance with the rules of each Member State on the limitation of actions.

viii Means of redress

Next to the 'extraordinary circumstances' means of defence mentioned above, the Regulation specifically mentions that it does not restrict the right of an operating air carrier, which complied with its obligations to indemnify passengers in cases of delay or cancellation, to seek compensation from any person, including third parties, in accordance with applicable law.

ix Revision of the Regulation

In its Proposal to amend Regulation 261/2004 (COM (2013) 130 final of 13 March 2013), the European Commission aims to promote a high level of air passenger protection in cases of disruption. The Proposal was voted on by the European Parliament on first reading on 5 February 2014.

In a certain number of key areas, the European Parliament has proposed a different approach from the one initially taken by the Commission.

The five-hour threshold for delay compensation proposed by the Commission was rejected and the European Parliament instead proposed a three-hour threshold. Furthermore, the European Parliament has suggested the height of compensation to be €300 for all journeys of 2,500 kilometres or less, instead of €250.

Although the European Parliament agreed with the Commission to define extraordinary circumstances outside the control of the air carrier in an unambiguous manner, it has taken a similar approach to the Court of Justice of the European Union in the *Wallentin-Hermann* verdict by considering that technical defects could not fall within the concept of 'extraordinary circumstances'. The Parliament has proposed an exhaustive list of extraordinary circumstances, contrary to the initial proposal of the Commission under which the concept was an open one, so as to possibly include exceptional events and their consequences, such as the ash cloud in 2010 or the Japanese tsunami in 2011.

The current Regulation does not provide for a limit to liability, even in extraordinary circumstances or major air traffic disruptions. The Commission hence

proposed the introduction of a three-night limit in circumstances of strikes, storms or snows. This has proven to be sufficient in most circumstances and allows air carriers to foresee the impact on their passenger rights budgets. The Parliament agreed to a limit but proposed to set the limit at five nights. A cap on the duty to provide for accommodation in cases of extraordinary circumstances also for persons with reduced mobility, pregnant women, unaccompanied children and other persons in need of special medical care was rejected by the Parliament in its entirety.

The Parliament rejected the proposal of the Commission on no-shows on the first leg of a multi-sector journey, and has proposed that it should not be possible for passengers to be denied boarding on a section of the journey of a two-way (return) ticket on the grounds that they have not travelled on every leg of the journey covered by the ticket.

Other proposals by the European Parliament include the imposition of bankruptcy insurance upon air carriers to ensure that passengers are, in cases of bankruptcy, assured of the reimbursement of costs and repatriation.

With regard to the issue of denied boarding, the Parliament proposed to extend the definition of denied boarding to include 'a flight for which the scheduled time of departure has been brought forward with the consequence that the passenger misses that flight shall be considered a flight for which the passenger has been denied boarding'.

The discussions on the proposal are currently suspended. The Commission has even indicated recently that it may withdraw the proposal in light of other agenda priorities.

x Passengers with reduced mobility (PRM)

The Regulation provides that PRM and the persons accompanying them should be given priority by the carrier. Additional requirements towards PRM are laid down in Regulation 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air. This legislation establishes that air carriers cannot refuse carriage to PRM, unless for specific safety requirements or if the size of the aircraft makes the embarkation physically impossible. Instead, the PRM and accompanying persons should be offered reimbursement or rerouting under certain conditions. Assistance without additional charge should also be offered by the managing body of the airport to PRM.

II LICENSING OF OPERATIONS

Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community deals with the conditions under which commercial air carriers established in one of the Member States of the European may start and carry out their activities.

Undertakings established in the European Union are not permitted to provide air services unless they have received an appropriate operating licence from the competent authority of a Member State. Undertakings meeting the requirements of the Regulation are entitled to receive an operating licence. Therefore, applications from such undertakings that meet the criteria cannot be rejected.

Simplified rules apply to carriers operating smaller aircraft and no licence is required when the concerned air services are performed by non-power-driven aircraft or ultralight power-driven aircraft and for local flights.

The holder of an operating licence must comply with these requirements at all times:

a its principal place of business must be located in the licensing Member State;

b it has an air operator's certificate (AOC) granted by the same licensing Member State;

c it has one or more aircraft at its disposal operated through ownership or dry lease (meaning that the air carrier must initially and at all times operate at least one aircraft under its own AOC);

d its main occupation is to operate air services or the repair and maintenance of aircraft;

e its company structure allows the competent licensing authority to control if it complies with the Regulation, notably in terms of majority ownership and effective control requirements;

f it must be majority-owned and effectively controlled by EU Member States or nationals of EU Member States, except as provided under agreements between the European Union and third countries;

g it meets certain financial and insurance requirements. These requirements notably include the ability to demonstrate that it can meet actual and potential (financial) obligations for at least the 12 months (or for a period of 24 months from the start of operations), the obligation to communicate audited accounts to the licensing authority on a yearly basis and to comply with minimum insurance requirements in respect of passengers, baggage, cargo, mail and third parties; and

h the physical persons who will compose the management of the air carrier must be of good repute.

The operating licence may be revised in certain circumstances. For instance, the licence needs to be resubmitted for approval when operations have not started six months after the licence has been granted, if operations have stopped for more than six months, if the licensing authority determines that changes affecting the legal situation of the European carrier require it (such as a merger or takeover) or in the event of significant change in the financial situation of the air carrier.

In addition, the air carrier is obliged to notify its licensing authority in certain cases: when it plans to make substantial changes to its activities, when it is involved in a merger or acquisition project or when there is a change in ownership of shares representing more than 10 per cent of the equity capital of the air carrier. Depending on the significance of the proposed change, the licensing authority may require a revised and updated business plan, decide that the licence has to be resubmitted for approval or suspend or revoke the licence, or grant a temporary licence.

Finally, the operating licence can be suspended and the air carrier prevented from continuing its operations when, in the opinion of the licensing authority, the airline cannot meet its obligations for a 12-month period, when the carrier's audited accounts

have not been communicated in due time, when the carrier has knowingly or recklessly provided false information, when the AOC has been suspended or withdrawn or when the conditions of good repute are no longer met.

Ownership and effective control requirements apply to European Union air carriers and are reflected in the Regulation. It is indeed a well-established principle of EU aviation law that an operator can obtain, and maintain, an operating licence in the EU only if it has EU nationality. Article 4(f) of the Regulation provides that Member States or nationals of Member States must own more than 50 per cent of the undertaking and effectively control it, whether directly or indirectly through one or more intermediate undertakings, except as provided for in an agreement with a third country to which the EU is a party. 'Effective control' is defined as:

> *a relationship constituted by rights, contract or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, and further possibility of directly or indirectly exercising a decisive influence on undertaking, in particular by (a) the right to use all parts of the assets of an undertaking; (b) rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking.*

A transaction by which a non-EU carrier acquires either ownership or control or both in a Community carrier would contravene this principle and result in the loss of EU nationality and the operating licence.

The ownership requirement has been interpreted to mean that at least 50 per cent plus one share of the capital of the air carrier must be owned by Member States or nationals of Member States. However, the scale of the third-country investment, as well as the distribution of the shares within each group of shareholders, needs to be taken into account in assessing compliance with the effective control requirement. Complications may arise where it is difficult to identify the beneficial owner (and therefore the nationality of ownership) of shares, for example through structures involving nominee shareholders on behalf of undisclosed persons. Equally, shares that do not have voting rights or otherwise different rights might be weighted differently. In practice, this difficulty can be avoided through more simple structures that clearly confer majority ownership in the EU.

As regards effective control, at issue is the question of who in practice is making a company's decisions. The *Swissair/Sabena* case[2] established that effective control cannot be exercised jointly between EU and non-EU persons. The non-EU person or persons must not have decisive influence over the carrier. The Commission has stated that the starting point of the national licensing authority would be to assume that

2 It was assessed under a previous version of the nationality rule in Commission Decision of 19 July 1995 on a procedure relating to the application of Council Regulation (EEC) No. 2407/92 (*Swissair/Sabena*). At the same time it was assessed by the European Commission under the old merger control rules in Case No. IV/M. 616 – *Swissair/Sabena* under Regulation (EEC) No. 4064/89 on 20 July 1995.

control would follow ownership. However, control may not be in direct proportion to ownership, for example if some shares have more votes attached to them than others, or if conditions in loan or lease agreements confer unusual powers on the lender or lessor. The licensing authority should examine the key legal documents including the statutes of the company and any shareholders' agreement and any powers of veto given to a third-country investor on matters that would normally within be within the powers of a company's board to decide.

In the *Swissair* case, the Commission concluded that EU nationals or Member States, individually or together with other EU nationals or Member States, must have the ultimate decision-making power in the management of the air carrier (in matters such as the appointment to the decisive corporate bodies of the carrier, the carrier's business plan, its annual budget or any major investment or cooperation projects). Further, this ability must not be substantially dependent on the support of natural or legal persons from third countries.

The Regulation also expands and clarifies the conditions for aircraft leasing, by providing for definitions of dry-lease and wet-lease agreements, by stating that EU air carriers can freely lease aircraft as long as they continue at all times to operate at least one aircraft under their own AOC (except for safety reasons) and by imposing a prior approval of the licensing authority when at least one of the parties to a dry-lease agreement is an EU air carrier and when an EU carrier wet-leases in (as a lessee) an aircraft. More stringent conditions apply for wet-leases in an aircraft registered outside the European Union, such as the obligation for the concerned carrier to demonstrate that the leasing is necessary to satisfy exceptional or seasonal capacity needs or to overcome operational difficulties.

Subject to EU competition rules (discussed in Section IV, *infra*) and any applicable safety requirements, the Regulation allows EU air carriers to combine air services and to enter into code-sharing arrangements with any other EU or third-country air carriers on intra-EU air routes as well as on air routes between Member States and third countries. Code-sharing arrangements between EU carriers and third-country air carriers on air routes between Member States and third countries may exceptionally be restricted by the Member State concerned in certain circumstances.

The Regulation provides clear criteria and a specific procedure for when air routes may be covered by public service obligations: routes to an airport serving a peripheral region; routes to an airport serving a development region; or 'thin' routes to any airport. The procedure involves the initiating Member State, the other (destination) Member States concerned (if any), the European Commission, the airports concerned and the air carriers operating the route in question. The Regulation also provides for Member States to restrict access to the route in question to a single air carrier and, if needed, to compensate its losses. A number of requirements need to be fulfilled to proceed to exclusive concessions and the concession must be tendered according to the procedures set out in the Regulation.

The other rules provided for under the Regulation are dealt with in other chapters of *The Aviation Law Review*.

III SAFETY AND SECURITY

Safety and security are mainly dealt with at European Union level through various regulations, which the present section will not list or review in an exhaustive manner.

Regulation 216/2008 aims, *inter alia*, to establish common rules on aviation safety to guarantee a high level safety and to ensure and enhance the efficiency of the certification process. It applies essentially to the design, production, maintenance and operation of aeronautical products, parts and appliances, as well as personnel and organisations involved. The European Aviation Safety Agency was established, and is based, in Cologne, Germany.

Alongside the certification process, the European Union has introduced, through Regulation 2111/2005, a list of carriers banned from operating to, from and within the European Union. This Regulation also establishes the right for passengers to be informed on the identity of the operating carrier.

Investigation and prevention of accidents and incidents in civil aviation are regulated by Regulation 996/2010. This Regulation aims to prevent future accidents and incidents by requiring, for each accident or serious incident, an independent safety investigation and an Investigation Report. This Investigation Report will, however, not seek to apportion blame or liability. This Regulation also aims to improve the assistance to the victims of air accidents and their relatives. In this perspective, the Regulation provides that airlines offer travellers the opportunity to give the name and contact details of a person to be contacted in the event of an accident before the name of the person on board is made publicly available. In the same context, EU carriers and third-country carriers operating flights from the EU are required to make available a list of all persons on board within the two hours following the notification of the accident. The Member States must establish a civil aviation accident emergency plan at national level. The Regulation requires them to ensure that all airlines established in their territory have a plan for the assistance to the victims of civil aviation accidents and their relatives. Note also Directive 2003/42 amended by Regulation 596/2009 on occurrence reporting in civil aviation was adopted with the objective of collecting, reporting, storing, protecting and disseminating all sorts of relevant information on safety.

European security legislation is voluminous. The aviation security legislation is essentially organised upon the framework of Regulation 300/2008 on common rules in the field of civil aviation security. This Regulation sets common rules and common basic standards on aviation security together with mechanisms for monitoring compliance. The common basic standards mainly refer to methods of screening, categories of articles that may be prohibited, access control and criteria for staff recruitment. The Regulation also provides that every Member State shall draw up, apply and maintain a national civil aviation security programme and a quality control programme. Equal requirements apply to airports and air carriers. This Regulation should be read in connection with its supplementing regulations, notably the regularly amended Regulation 185/2010 laying down detailed measures for the implementation of the common basic standards on aviation security, and its implementing regulations. Note, for example, the requirements on air carriers flying cargo and mail into the EU from non-EU countries to be designated, following a strict procedure, as an 'Air Cargo or Mail Carrier operating into the Union from a Third Country Airport'.

Directive 2004/82 imposes on Member States the obligation for immigration purposes to develop a system for collecting passenger data, known as 'Advanced Passenger Information', through air carriers. This information includes the number and type of travel document used, the nationality, the full names, the date of birth, the border crossing point of entry into the territory of any of the Member States, the code of transport, the departure and arrival time of the transportation, the total number of passengers carried on that transport and the initial point of embarkation.

On 26 February 2014, the European Parliament voted on the European Commission Proposal for a 'Regulation on the reporting, analysis and follow-up of occurrences'. This Regulation is aimed at facilitating and enhancing exchange of information on aviation safety incidents between stakeholders in the aviation industry as well as between Member States, with the objective of enabling a thorough analysis and ensuring that adequate action is taken to prevent the occurrence of similar accidents.

The proposed text was adopted and enacted in Regulation 376/2014 on the reporting, analysis and follow-up of occurrences in civil aviation, which amended Regulation 996/2010 and repealed Directive 2003/42.

IV COMPETITION

EU competition law applies to the aviation sector as to other sectors. The principal elements are:

a Article 101 of the Treaty on the Functioning of the European Union (TFEU), which prohibits anti-competitive agreements such as cartels;
b Article 102 TFEU, which prohibits the abuse of a dominant position;
c Articles 107 to 109 TFEU, which control state aid; and
d Regulation 139/2004, which creates an EU-wide system of merger control.

The regulatory framework of aviation influences how the competition rules are applied; for example:

a Regulation No. 1008/2008 provides that EU air carriers must be owned (by more than 50 per cent) and effectively controlled by EU Member States or nationals of Member States, directly or indirectly. This restricts the degree of foreign ownership of EU carriers and with it, the possibility of global airline consolidation; and
b the EU–US Open Skies Agreement, amended in 2010, significantly liberalised air traffic between those two regions, which in turn enabled competition authorities on both sides of the Atlantic to take a more lenient view of the BA/AA alliance within OneWorld.

i Article 101 TFEU and airline cartels

Airlines have been fined for cartel activity: the European Commission fined 11 carriers €799,450,000 in *Airfreight*; and the Commission closed its case on passenger fuel surcharge price-fixing for administrative priority.

ii Article 101 TFEU and airline alliances

The European Commission's alliance decisional practice includes:

a *SAS and Maersk* (1999): a cooperation agreement principally about code-sharing agreements and cooperation in periods of high demand led to a complaint of market sharing, which was upheld. The Commission fined the parties.

b *OneWorld* (2010): the American Airlines, Iberia and British Airways tie-up was found to be compatible with Article 101 TFEU subject to slot divestment remedies at London Heathrow or London Gatwick as well as various other remedies designed to facilitate new market entry.

c *Star Alliance* (2013): Air Canada, United and Lufthansa gave 10-year slot availability commitments in relation to their revenue-sharing joint venture on the Frankfurt–New York route.

iii Abuses of dominance

Market definition

Product markets for passenger air transport are generally defined on the basis of a route described as an origin–destination pair. At its narrowest, each origin–destination pair will be a separate market. More broadly, the market may include substitute airports and other modes of transport; and it may distinguish markets by passenger type, such as time-sensitive or non-time-sensitive passengers.

Abuse of dominance: predatory pricing

There are Commission decisions on airline predatory pricing. For an indication of how the Commission might approach this question, see the United Kingdom chapter in relation to the *Flybe/Air Southwest* investigation.

Abuse of dominance: other airline abuses

British Midland/Aer Lingus (1992) confirmed that refusal to interline was not normal commercial practice and could be a selective and exclusionary abuse restricting the development of competition.

Virgin/British Airways (2000) established that BA's bonus schemes for travel agents were illegal exclusionary rebates that had a loyalty inducing effect. BA was found to be a dominant buyer of travel agent services. The European Court of Justice upheld the decision and stated that a system of discounts or bonuses that constituted neither quantity discounts nor bonuses nor fidelity discount or bonuses could be abusive if it was capable of making market entry very difficult or impossible for competitors and if it made it more difficult or impossible for co-contractors to choose between different sources of supply or commercial partners. The Court also found that the scheme was not economically justified.

Airports abuse cases

In *Zaventem Airport* (1995), the threshold of monthly fees needed by an airline to obtain the highest level of discount was so high that only a carrier based at Brussels Airport could benefit from the discount, placing the EU carriers at a competitive disadvantage. In *Ilmailulaitos/Luftfartsverket* (1999), the Finnish airports operator had abused its dominant position in awarding a 60 per cent discount on landing fees at various Finnish airports for domestic flights but not for intra-EU flights, giving domestic

flights favourable treatment. Similar cases have been decided in relation to Portuguese, Spanish and Italian airports. In 2011, the Airport Charges Directive came into effect, a form of *ex ante* regulation requiring, *inter alia*, the setting of airport charges on a non-discriminatory basis.

iv Merger control

Ryanair/Aer Lingus (2007) was blocked: the Commission found that the merger would have combined the two leading airlines operating from Ireland and would have created a monopoly or a dominant position on 35 routes operated by both parties. The remedies were considered insufficient. The General Court upheld the decision.

Olympic/Aegean (2011) was blocked: the merger would have resulted in a quasi-monopoly on the Greek air transport market. Together, the two carriers controlled more than 90 per cent of the Greek domestic air transport market with no realistic prospect that a new airline of sufficient size would enter the routes to constrain the merged entity's pricing. The remedies were considered inadequate.

IAG/bmi (2012) was cleared, conditional on the release of 14 daily slots at London Heathrow to facilitate new entry and on IAG's commitment to carry connecting passengers to feed the long-haul flights of competing airlines at London Heathrow. Virgin is appealing this decision.

Ryanair/Aer Lingus (III) (2013) was blocked. The merger was found likely to harm consumers, and the remedies package, including two upfront buyers, was considered inadequate. The decision is under appeal to the General Court of the EU.

At the time of writing, the Commission is engaged in a second-phase investigation of *Aegean/Olympic* (II).

v State aid

In April 2014, the Commission published new Guidelines on State Aid for Airports and Airlines, replacing the 2005 Guidelines, which gave rise to around one hundred decisions while in force.

The aims of the new Guidelines are to permit investment aid in cases of a genuine transport need, to allow small airports a transition period, to establish a simple framework for the start-up of new routes, to provide flexibility with regard to isolated regions and to ensure the right use of state aid.

Four reforms have been declared critical by the Commission:

a to allow for the transition period for operating aid, to enable unprofitable airports to gradually adjust to market change;

b to ensure that public support better targets cases where it is truly needed;

c to simplify rules for start-up aid, to start using new airports and attract airlines to fly to new destinations; and

d to establish a clear framework for airport–airline agreements, to ensure that they are aid-free and help to contribute to the profitability of concerned airports.

The new guidelines simplify the conditions for start-up aid. Under these new rules, airlines will be able to receive aid that covers 50 per cent of the airport charges for new destinations during a period of three years. More flexibility as regards airport size and eligible destinations can hence be justified for airports in remote regions.

The effectiveness of the new Guidelines will be tested by their application as from 2014.

V OTHER DEVELOPMENTS

i Airport charges

On 19 May 2014, the European Commission issued its report on the application of the Airport Charges Directive (the Directive). The Directive establishes common principles for the levying of airport charges and aims to enhance transparency of the calculation of airport charges; ensure the non-discrimination between airlines in the application of airport charges; create consultation between airlines and airports on a regular basis; and establish, in each Member State, an Independent Supervisory Authority (ISA) in charge of dispute settlement on airport charges between airports and carriers, and which will supervise the correct application of the provisions of the Directive by Member States. Member States were required to transpose the provisions of the Airport Charges Directive into national law by March 2011. The report of May 2014 analyses the application of the Airport Charges Directive by Member States.

The Commission found that several of the main objectives of the Airport Charges Directive have been achieved. Air carriers raised concerns about transparency with regards to cost and other commercial information airports were to provide, as well as the efficiency of the consultation process established by the Directive. Furthermore, air carriers have complained about the large variety of differentiation in airport charges and the compliance with the criteria of relevance, objectivity and transparency. In particular, 'incentive schemes' and discounts to new entrants and low-cost carriers were identified as controversial. The controversy of 'incentive schemes' or discounts was also raised in relation to capacity constraints and access to tailored services and dedicated terminal (parts) but then on the side of airports. On the establishment of an ISA (Articles 6 and 11), controversial issues were its role and apparent lack of independence, and the absence of a statutory deadline for airlines to submit an appeal and the suspensory effects of such appeals. The Commission has initiated infringement procedures against certain Member States on the application of the obligations the Directive establishes. The Commission will furthermore organise meetings with ISAs to discuss the enforcement of the rules. It will also investigate and evaluate whether the Directive needs to be revised to better achieve its objectives.

ii Emissions Trading System (ETS)

The ETS of the EU, through Directive 2003/87/EC, puts a cap on carbon dioxide emissions in relation to the aviation sector. Under this system, air carriers could buy and trade allowances to compensate their emissions pursuant to a market-based system. Whereas initially air carriers were to pay for their emissions when their point of departure or destination lay in the territory of the EU, strong opposition, threats of retaliation

and trade war from third countries have caused the EU institutions to surrender to a temporary system in which only carriers operating intra-EU flights are subject to the EU ETS regime.

On 3 April 2014, at its plenary session, the European Parliament voted in favour of an extension of the exemption stipulating that only flights operated within the European Economic Area will be subject to the EU ETS, up to and including 2016. By virtue of this extension, until 2016, carriers operating into or out of the EU from or to a point outside the EU do not have to pay for allowances. Nevertheless, the Parliament urged the European Commission to consider all options and to put forward a further proposal to revise the aviation ETS following the International Civil Aviation Organization Assembly in 2016.

iii Passenger Name Record (PNR)

The EU institutions have been urged by the Member States to resume discussions on the 2011 proposal for a directive on the communication by the airline of the PNR data to national EU authorities to tackle terrorist threats. The draft proposal is now being re-examined by the European Parliament and the Council.

iv Ground handling

The Commission took the decision to withdraw its proposed Regulation to modify the legislation in the ground handling sector. The matter remains subject to Directive 96/67 and national legislation.

v Unmanned aircraft systems

In its recent Communication (2014) 207 and in the Riga Declaration of 6 March 2015, the European Union is taking a step forward in its political will to regulate the use of unmanned aircraft systems, commonly known as drones.

vi Package Travel Directive

The current Package Travel Directive (Directive 90/314/EEC) has been reviewed recently and should be recast in a new directive, which is likely to be published during the second quarter of 2015.

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