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CONTENTS

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Regional Safety Oversight Organisations – an overview[1]

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1. WHY REGIONAL SAFETY OVERSIGHT ORGANISATIONS?

The International Civil Aviation Organisation (ICAO) is organising a symposium on Regional Safety Oversight Organisations (RSOOs) later this year.[2] Although the RSOO concept is not new, it is attracting a lot of attention as the international aviation community is continuously striving to enhance its safety record.

Today there are over 10.000 standards and recommended practices (SARPS) adopted under the Convention on International Civil Aviation[3] - the majority of them concerning aviation safety. At the same time, the average worldwide level of implementation of these standards is estimated at only 57.7%, which is of concern given that a correlation exists between the level of implementation of SARPs and actual accident rates.[4]

In this respect, regional cooperation is seen as a promising approach towards increasing compliance with safety related SARPs, and ultimately the actual safety levels worldwide. It is for this reason that the latest ICAO Assembly directed the ICAO Council to "*promote the concept of regional cooperation for the purpose of enhancing safety and safety oversight, including the establishment of regional safety oversight organizations*".[5]

Although a number of examples of such cooperation already exist, there is still lack of comprehensive studies of the conditions under which they are able to provide optimal benefits for States and regions concerned. The objective of this article is thus to give a general overview of the different types of RSOOs functioning in various parts of the world.

1 The views expressed in this article are solely those of the author
2 ICAO State Letter of 15 May 2011, AN 20/8-11/36
3 Convention on International Civil Aviation, signed in Chicago on 7 December 1944, ICAO Doc 7300/9
4 Report on the implementation of the ICAO Universal Safety Oversight Audit Programme (USOAP) under the comprehensive systems approach and Evolution of the ICAO Universal Safety Oversight Audit Programme (USOAP) beyond 2010, 37th session of the General Assembly of ICAO, A37-WP/36, 27.07.10, http://www.icao.int/Assembly37/.
5 Assembly Resolution A37-8, 37th session of the General Assembly of ICAO (28th September - 8th October 2010, Montreal)

2. DEFINITION OF AN RSOO

Today RSOO is a very broad concept. The current edition of the ICAO Safety Oversight Manual[6], does not provide a definition *per se* of an RSOO, but rather focuses on the notion of a regional safety oversight system, outlining the various benefits of regional collaboration.

In practice, RSOOs differ a lot in the tasks they undertake, their legal status and organisational arrangements. The common denominator here seems rather to be the objective of RSOO, which is to strengthen the safety oversight capabilities of its member States. This role of "helping States to help themselves" is particularly important in regions with high accident rates, but where States cannot sustain a satisfactory national safety oversight system on their own.[7] Ultimately, the objective of the RSOO should be to improve States' actual safety performance – something which may be difficult to measure, but which needs to be demonstrated if the value of the RSOO is to be fully proven.

3. LEGAL STATUS AND ORGANISATIONAL FRAMEWORK FOR RSOOS

The legal solutions used to implement the RSOO concept vary considerably. This results from the fact that the needs of States in terms of strengthening their safety oversight capabilities differ, and therefore the RSOO concept has to be implemented in a tailor made, flexible manner. In addition, the legal solutions chosen do not always depend on safety considerations alone. For example, although from a safety perspective a solution calling for a safety agency with legal personality and strong executive powers could have a lot of advantages, this may not always be possible for policy, organisational or other reasons. At the same time, the legal status of an RSOO fundamentally influences the nature of its responsibilities and relationship with its member States.

The following paragraphs present three types of RSOOs, depending on their legal and organisational status. This categorisation serves only as an illustration for the purpose of the article and is by no means exclusive or exhaustive.

a. A REGIONAL SAFETY "NETWORK" WITH (OR WITHOUT) LEGAL PERSONALITY

A simple but also practical way of organising regional cooperation in air safety is through a network of aviation safety regulators. The most prominent example of this type of cooperation, although no longer existing[8], were the Joint Aviation Authorities (JAA) in

6 ICAO Doc 9734 ("Part B - The Establishment and Management of a Regional Safety Oversight System), First Edition - 2006
7 Symposium on Regional Aviation Safety Agencies, Livingstone, Zambia, 13-15 July 2009, http://easa.europa.eu/events/archived-events.php
8 The JAA system was disbanded as of 30 June 2009 following the extension of the competences of European Aviation Safety Agency to flight operations and crew licensing.

Europe. The main driver behind this, initially informal cooperation, was the common effort to develop a single certification standard for the "Concorde" project.[9] Over time, cooperation between the authorities matured and was formalised under so called "Cyprus Arrangements" signed on 11th September 1990, by 25 European aviation authorities.

From the legal point of view, JAA was not an international organisation ("Cyprus Arrangements" did not have the status of an international treaty). This was a pragmatic approach which allowed the organisation to be set up and developed without affecting the international rights and obligations of the States. At the same time, however, the organisation needed a budget and a more solid legal standing for the purposes of day to day administrative management and tax issues. Thus, in parallel to the "Cyprus Arrangements", a JAA foundation under the Dutch law was set up to enable the organisation to have a legal personality under the private law.

A similar solution was used by the 17 States in Western Africa when establishing the *Autorités Africaines et Malgaches de l' Aviation Civile* (AAMAC). This organisation was set up on the basis of a Memorandum of Understanding signed in December 2001 in Dakar by the participating aviation authorities. Subsequently however, and as an intermediate step towards a fully fledged regional safety agency with legal personality, AAMAC was transformed into an association of national aviation authorities of participating States, under the law of the Republic of Chad, which gave it a legal personality under the private law.[10]

b. AN INTERNATIONAL AVIATION SAFETY ORGANISATION

The next example of an RSOO is an international aviation safety organisation. This type of RSOO is established on the basis of an international treaty, has legal personality, and may exercise certain safety functions on the basis of a delegation from its member States.

An example of this type of RSOO is the East Caribbean Civil Aviation Authority (ECCAA), established by six Caribbean States in October 2003 as an independent body with a legal personality. [11] According to its founding treaty, ECCAA is authorized, *inter alia*, to develop and recommend adoption of harmonised regulations by the participating States, issue civil aviation documents with respect to persons or aeronautical products and enforce existing rules (including through imposition of administrative penalties). It can also accept delegation from participating States to regulate civil aviation activities on their behalf.

9 C. Frantzen Une expérience exceptionnelle d'harmonisation Européenne sans support juridique ou institutionnel (Transport Aérien et Activités Spatiales, Pédone Editeurs, 1995)
10 Autorités Africaines et Malgaches de l' Aviation Civile, Symposium on Regional Aviation Safety Agencies, Livingstone, Zambia, 13-15 July 2009
11 Agreement Establishing the Eastern Caribbean Civil Aviation Agreement, signed on 21st October 2003 by Antigua and Barbuda, The Commonwealth of Dominica, Grenada, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines

Another example of a regional safety body established under an international treaty is EUROCONTROL, originally set up with the intention to be a single provider of air navigation services for the European States. Already at the beginning however, it appeared that not all the States were ready to support such an innovative concept, mainly for reasons related to military airspace control issues.[12] The mandate of EUROCONTROL has been thus evolving over the following years. This is well illustrated by the numerous changes and revisions to its founding convention of 1960.[13]

Until recently, EUROCONTROL was the main driving force behind harmonization of ATM safety legislation in Europe, but today this regulatory role has been transferred to the European Union (EU). On the other hand, EUROCONTROL, due to its unique ATM expertise plays an increasingly important role in the implementation of the EU's Single European Sky (SES) project. Most recently, the European Commission has announced its intention to negotiate a high-level agreement with EUROCONTROL that would confirm EUROCONTROL's role as a "technical arm" for the SES. It remains to be seen to what extent this process will further alter the mandate of this organisation.

c. A REGIONAL SAFETY AGENCY WITH LEGAL PERSONALITY

The third category of RSOOs is a regional safety agency with a legal personality. In comparison with the previous categories, the main feature of these type of bodies is the fact that they evolve within the broader institutional and legal framework of a regional economic integration organisation or REIO.

Today the most prominent example of this type of body is the European Aviation Safety Agency (EASA) set up within the institutional framework of the EU. It has a broad range of responsibilities, including assisting the European Commission in development of common air safety rules, inspecting the compliance of member States, and, within the scope of its competence, issuing approvals and certificates for organisations and aeronautical products and overseeing their continuing compliance with applicable regulations.[14]

One of the specific features of EASA is the fact that it exercises with regard to the aeronautical products, on behalf of EU member States and other European States which have accepted EASA's competences, the functions and tasks of the state of design under the Chicago Convention. Of particular relevance is also the increasingly important role of EASA in safety

12 J.McInally, EUROCONTROL History Book, December 2010 (published by EUROCONTROL)
13 EUROCONTROL International Convention relating to Cooperation for the Safety of Air Navigation, signed on 13th December 1960
14 Regulation No (EC) 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC (OJ L 79, 19.3.2008, p. 1), and its implementing rules.

analysis, identifying key safety problems common to all EU member States and proposing solutions to address them. This last area of EASA's activities is expected to further develop in the years to come.

Another example of a regional safety agency which has evolved within the framework of a REIO is the Banjul Accord Group Aviation Safety Oversight Organisation (BAGASOO), established by seven African states on the basis of an international agreement signed on 30 June 2009, within the broader framework of the African Economic Community.[15] The predecessor of the BAGASSO was a COSCAP-BAG[16] – a technical cooperation project supported by ICAO for the purpose of enhancing safety oversight capabilities of the participating States.

BAGASOO was established as a self-accounting institution of the Banjul Accord Group with legal personality. The list of BAGASOO's functions under its founding agreement is quite broad, and includes development of harmonised safety requirements for adoption by the participating States, providing support to certification and surveillance of aviation activities, development and implementation of training programs for national authorities etc. BAGASOO can also evaluate the capabilities of its member States' aviation authorities, as well as accept delegation of the performance of certification and surveillance tasks.

CONCLUSIONS

RSOOs seem to have big potential in assisting States to meet their safety related responsibilities and enhancing the overall level of aviation safety globally. This is reflected by the increasing number of such organisations being established in different parts of the world, as well as considerable interest from ICAO and the international aviation community regarding this concept.

On the other hand, the conditions under which RSOOs can fully unleash their potential has scarcely been studied. It is clear however that the legal and organisational frameworks of those organisations are far from being uniform, reflecting the fact that they need to adapt to the different situations and needs of States.

In addition, although RSOOs may originate from technical cooperation projects, or start out as networks of aviation safety authorities, it seems that there is a clear tendency for them to evolve into more formal entities with legal personality and possibility to accept delegation of the exercise of certain safety tasks on behalf of their member States. It would thus seem

15 Banjul Accord Group Aviation Safety Oversight Organisation Agreement, signed on 30th June 2009 by the Republic of Cape Verde, the Republic of Gambia, the Republic of Ghana, the Republic of Guinea, the Republic of Liberia, the Federal Republic of Nigeria, and the Republic of Sierra Leone

16 Co-operative development of Operational Safety and Continuing Airworthiness Programme

important that further studies of RSOOs address, amongst other issues, the questions related to international responsibilities of States under the Chicago Convention on the one hand, and the delegation of tasks stemming from that responsibility on the other.

The evolution of air passengers' rights in european union law*

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The European Union, having initially concentrated its efforts on establishing a single market for air transport, has, during the last decade, turned its attention to passengers' rights so that the liberalisation of air transport is better regulated. The protection of passengers' rights in air transport in the European Union began in 1991 with the Regulation n°295/91[17], now replaced by the Regulation n°261/2004 of 11 February 2004[18]. The European legislation undeniably wished to ensure that the liberalization of air transport took place in a controlled manner and to protect the interests of those who use this mode of transport, by giving passengers travelling within, to or from the European Union a high level of protection of their consumers' rights from practices or behaviour that could become inconvenient or even harmful. It is for this reason that the private law rules under the Montreal Convention[19] on air carriers' contractual liability for personal injury or damage to goods caused during the journey were progressively included into European secondary legislation[20]. However these regulatory obligations for airline companies proved to be insufficient to properly protect passengers' rights in cases of over-bookings, delays or cancellations. The Regulation n°261/2004 therefore aimed to create a system in which assistance and the payment of compensation is "*standardised and immediate*"[21]. Issues such as assistance and financial compensation for passengers in the event of denied boardings ("overbookings"); long delays or cancellations of

17 * This paper is based on a previous presentation - "The progressive convergence of passenger's rights for air transport and rail transport in light of modal competition" - given at the European University Institute of Florence for the 1st Graduate Transport Regulation Seminar (GTRegS) on the 24th and 25th of May 2011. The author wishes to thanks the participants for their questions and useful comments.
Council, 4 February 1991, Regulation n°295/91 establishing common rules for a denied-boarding compensation system in scheduled air transport, OJEC L 36 of 8/02/1991, p. 5.

18 European Parliament and Council, 11 February 2004, Regulation n°261/2004 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 n°295/9, OJEU L 46 of 17/02/2004, p. 1; see, for example, M. FRAGOLA, "Prime note sul regolamento CE N. 261/2004 che istituisce nuove norme comuni in materia di "overbooking" aereo", Diritto comunitario e degli scambi internazionali, n°1, gennaio-marzo, pp.129-142; F. ROSSI DAL POZZO, Servizi di trasporto aereo e diritti dei singoli nella disciplina comunitaria, Milano, Giuffrè, 2008, 415 pp.

19 See Ph. DELEBECQUE, "La Convention de Montréal du 28 mai 1999 pour l'unification de certaines règles relatives au transport aérien international ou le nouveau droit du transport aérien", Journal du droit international "Clunet", 2005, n°2, pp.263-280; M.G. FOLLIOT, "De Varsovie (1929) à Montréal (2004): le nouveau régime de la responsabilité aérienne", Les Petites Affiches, 2005, vol. 394, n°148, pp. 3-21.

20 See A. MASUTTI, Il diritto aeronautico. Lezioni, casi e materiali, Torino, Giappichelli, 2004, 457 pp, p.300.

21 ECJ, 10 January 2006, The Queen on the application of International Air Transport Association, European Low Fares Airline Association v. Department for Transport, Case C-344/04, ECR 2006, p. I-403.

flights, which in the past were left to the discretion of the airlines' business policies, were now being progressively dealt with. In addition to these, a set of specific rights was progressively recognised for passengers with reduced mobility. It is now clear that there is a general and continuing increase in the protection of air passengers' rights (I), however questions may be raised about the future prospects of the evolution of air passengers' rights (II).

1. THE INCREASING PROTECTION OF AIR PASSENGERS' RIGHTS

In recent years the protection of air passengers' rights has been the subject of a significant amount of case law which has contributed to air passengers' rights being better protected. The European Court of Justice (ECJ) gave important guidelines on how the wording of Regulation n°261/2004 should be interpreted and showed that it clearly favoured a more "passenger-oriented" approach. Furthermore, as the recent White Paper "*Roadmap to a Single European Transport Area*" confirms, European legislation on passengers' rights intends to go further by ensuring transversal and transmodal rights to attain a high level of protection so as to develop "*a uniform interpretation of EU Law on passenger rights and a harmonised and effective enforcement, to ensure both a level playing field for the industry and a European standard of protection for the citizens*" [22]. Completing a process that began in 2002, the Regulation n°1371/2007 provides rights for rail passengers[23], in terms of liability, assistance, compensation or specific rules to protect the rights of persons with reduced mobility. Such rights are now also provided, *mutatis mutandis*, for passengers travelling by sea and inland waterways[24] or by bus and coach[25]. This amalgamation of regulations shows that there is a progressive convergence of the rights given to passengers that will lead to an increased legislative protection of air passengers' rights in the future (A), which will thus complete or clarify the passenger-oriented case law of the European Court of Justice (B).

a. THE PROGRESSIVE CONVERGENCE OF RIGHTS GIVEN TO PASSENGERS TRAVELLING BY AIR AND OTHER MEANS OF TRANSPORT

If we examine the rights given by European law to passengers travelling by air, rail, sea, bus or coach we can see that there is a general convergence of passengers' rights. However,

22 European Commission, 28 March 2011, White paper, "Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system", COM (2011) 144 final, 30 pp., p. 23.

23 European Parliament and Council, 23 October 2007, Regulation n°1371/2007 on rail passengers' rights and obligations, OJEU L 315 of 3/12/2007, p. 14; see Ph. DELEBECQUE, S. CALME, « Le règlement communautaire n°1371/2007 du Parlement européen et du Conseil du 23 Octobre 2007 sur les droits et obligations des voyageurs ferroviaires », Revue de droit des transports, n°3, March 2009, étude 4 ; D. BROUSSOLLE, "Les services de transports rail et route dans le "paquet" normatif européen du 23 octobre 2007, un libéralisme tempéré", L'Actualité Juridique Droit administratif, n°8, pp.393-398.

24 European Parliament and Council, 24 November 2010, Regulation n°1177/2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation n°2006/2004, OJEU L 334 of 17/12/2010, p. 1; see L. GRARD, "Consécration par l'Union européenne de nouveaux droits pour les passagers maritime et fluvial", Revue de droit des transports, n°2, February 2011, comm. 23.

25 European Parliament and Council, 16 February 2011, Regulation n°181/2011 concerning the rights of passengers in bus and coach transport and amending Regulation n°2006/2004, OJEU L 55 of 28/02/2011, p.1; see L. GRARD, "La protection européenne des droits des passagers : au tour des bus et des cars", Revue de droit des transports, n°4, April 2011, étude 4.

in spite of the objective set out in the recent White Paper to create "*a Single European Transport Area*", the modal restrictions are far from being overcome since the specificities of air and rail transport require appropriate and specific solutions. Therefore only the structure of the European Regulations and the types of rights that are protected may be said to be converging, but we can clearly see that the Regulations share a harmonious theory on passenger rights and obligations.

Regarding the protection of passengers' physical integrity there is a noticeable convergence which is understandable given the paramount importance of passenger safety. European secondary legislation has reproduced systems established by International Conventions which are now commonplace. For instance, air and rail carriers' liability is based in both cases on contractual liability under uniform conditions where the safety obligation is an obligation to achieve a set result. In case of damage, the carrier is presumed to have been negligent and the burden of proof therefore falls on the carrier. There is now also a convergence in the obligation for carriers to pay in advance in case of personal injury or death of a passenger.

The way the rights of passengers of reduced mobility are protected is also a shining example of how passengers' rights are converging. A person has a recognised right to transport and specific assistance in the same way whatever the transport mode, *mutatis mutandis*. More specifically, there is an identical definition in the Regulations of what considered to be a "person with reduced mobility", and the Regulations take an extensive approach including situations of temporarily reduced mobility or difficulties in getting around because of age. Moreover, it is forbidden to refuse to transport a person because of his/her reduced mobility and specific assistance, information and compensation for loss or damage of the specific mobility equipment must be provided.

Finally, the legislation on passengers' rights goes further than simply ensuring that the passengers are compensated for any loss or damage that occurs during transport, and tries to ensure a minimum quality of service for European citizens. These obligations to provide a "minimum quality of service" include the obligation to ensure that the passenger is fully and completely informed about the conditions under which the transport service will be provided and the duty to inform passengers of their rights. Although this has caused some conflict, some of these additional rights are intended to be a way of avoiding damage from occurring and ensuring that compensation is provided through "*standardised and immediate measures*". In this respect, European secondary legislation is more pioneering compared with both the relevant International Conventions as well as national law. Regulation n°261/2004 was the first to establish immediate measures to take care of passengers in the event of denied boarding, flight delays or cancellations, which were transposed, *mutatis mutandis*, into Regulations n°1371/2007, n°1177/2010 and n°181/2011. Now, there is a convergent obligation to provide material assistance, to reimburse passengers and to pay financial compensation, under certain conditions, for cancelled or delayed trains, flights, buses, coaches or maritime transport.

This convergence of passengers' rights must lead to an increased protection of air passengers' rights, as well as other passengers' rights. Although initially the aim was to try and find the

right balance between citizens' rights and carriers' liability, it is now clear that the balance is in favour of the citizens. The Regulation on rail carriage could, for example, be a source of inspiration in establishing the future rights of air passengers. This is confirmed by studies of later Regulations on the rights of passengers travelling by sea, bus or coach, that are inspired by the rail regulation. If the Regulation n°261/2004 is amended in the future, the rights of air passengers will not be reduced to align with those of rail passengers. For example, as regards the much disputed topic of financial compensation, it seems impossible to go from the current system, where compensation is a set amount for air carriers, to the "proportional system" that applies to rail carriers. In other words, it seems clear that any amendment to existing regulations will not result in the level of protection being lower than the existing system. The need to continue converging passengers' rights will probably lead to a general improvement of conditions for passengers, in harmony with the "passenger-oriented" case law of the European Court of Justice.

b. THE "PASSENGER-ORIENTED" CASE LAW OF THE EUROPEAN COURT OF JUSTICE

Since its enactment, the Regulation n°261/2004 has been frequently challenged by air carriers and is the source of a large number of disputes between passengers and air carriers before the courts. The ECJ is increasingly requested to give guidelines on how the Regulations n°261/2004 and n°2027/97 should be interpreted and without a doubt its rulings tend to favour the passengers. For example, in the *IATA and ELFAA* case[26], the ECJ ruled in favour of the validity of the Regulation n°261/2004 and its consistency with the Montreal Convention of 1999, thus rejecting the arguments presented by the IATA and ELFAA. In the *Emirates Airlines* case[27], the ECJ held that the word "flight" had to be interpreted "*as not applying to the case of an outward and return journey*" but that the assistance and the financial compensation of passengers must be granted for each individual flight, which implies that the Regulation n°261/2004 applies both for outward and return flights for a same journey. The ECJ also ruled that the concept of "extraordinary circumstances" which allows the carriers to avoid paying financial compensation should be interpreted strictly. In the *Wallentin-Hermann* case[28], the court held 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*". Furthermore, in the recent *Eglītis*

26 ECJ, 10 January 2006, The Queen on the application of International Air Transport Association, European Low Fares Airline Association v. Department for Transport, above n°3; see J. DE PAZ MARTIN, "El carácter complementario del Reglamento 261/2004/CE respecto del Convenio de Montreal para la unificación de ciertas reglas del transporte aéreo internacional (Comentario a la STJCE de 10 de enero de 2006, en el Asunto C-344/2004)", Diario La Ley, 2006, Año XXVII, n°6431; J.J. WEGTER, "The ECJ Decision of 10 January 2006 on the validity of Regulation 261/2004 : Ignoring the exclusivity of the Montreal Convention", Air & Space Law, 2006, vol. XXXI, n°2, pp.133-148.

27 ECJ, 10 July 2008, Emirates Airlines - Direktion für Deutschland v. Diether Schenkel, Case C-173/07, ECR 2008, p. I-5237.

28 ECJ, 2 December 2008, Wallentin-Hermann, Case C-549/07, ECR 2008, p. I-11061; see J. CROON, "Placing Wallentin-Hermann in line with continuing airworthiness, a possible guide for enforcers of EC Regulation 261/2004", Air & Space Law, 2011, vol. 36, n°1, pp.1- 6.

and Ratnieks case[29], the ECJ held that carriers must "*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*". This last case is a shining example of the "passenger-oriented" approach of the ECJ, since it obliges air carriers not only to be prepared for "extraordinary circumstances" but also to anticipate how much of a delay will be caused by those circumstances that "*may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier*"[30]. Last but not least, the *Sturgeon* case[31] is without any doubt another good example of how the ECJ favours a "passenger-oriented" approach. Although the Regulation n°261/2004 does not specifically provide for financial compensation for delayed flights, the ECJ ruled in this case that passengers arriving at their destination with a delay of three hours or more can be entitled to receive the financial compensation provided in the Regulation. The *Sturgeon* case also shows how the gap between the rights of passengers is progressively closing in that they are now all entitled to compensation for delays.

2. PROSPECTS FOR THE FUTURE PROTECTION OF AIR PASSENGERS' RIGHTS

The way in which air passengers' rights are increasingly being protected gives us an indication as to how the Regulation n°261/2004 may be amended in the future. First of all, despite the fact that the different legal systems to protect passengers' rights are converging, there are still obstacles to the creation of a single Regulation protecting the rights of passengers (a). Nevertheless, if one compares the different sets of rights granted to passengers it is clear that there is a need to amend the Regulation n°261/2004 to complete the rights granted to passengers (b). However, whilst any amendment of Regulation n°261/2004 would ensure a better protection of air passengers' rights for this protection to be effective, the issue of a uniform interpretation and enforcement should be dealt with (c). Although ensuring passenger safety is important, the EU should also take care not to impose too harsh obligations on European air carriers and take into account their interests (d).

a. THE LEGAL OBSTACLES TO A SINGLE REGULATION PROTECTING AIR PASSENGERS' RIGHTS

There are still differences between rights granted to passengers, depending on the means of transport they use. Those differences are remnants of the exclusively modal approach that

29 ECJ, 12 May 2011, Eglītis and Ratnieks, Case C-294/10.
30 Recital (14) of Regulation 261/2004.
31 ECJ, 19 November 2009, Sturgeon and others, Cases C-402/07 and C-432/07, ECR 2009, p. I-10923; see P. MENDES DE LEON, K. ARNOLD, "Regulation (EC) 261/2004 in the Light of the Recent Decisions of the European Court of Justice: Time for a Change?!", Air & Space Law, 2010, vol. 35, n°2, pp.91–112; G. POISSONNIER, P. OSSELAND, "Le retard de plus de trois heures d'un avion donne lieu à l'indemnisation du préjudice des passagers", Recueil Dalloz, 2010, n°23, pp.1461-1465; A. BOUVERESSE, "Interprétation des notions de retard et d'annulation", Europe, 2010, n°1, comm. 43; J. STUYCK, "Indemnisation pour les passagers de vols retardés en Europe", La semaine juridique édition générale, n°7, comm. 201 ; L. GONZÁLEZ VAQUÉ, "Reglamento n°261/2004 sobre asistencia y compensación de los pasajeros aéreos: el TJCE clarifica (ma non troppo) los conceptos de retraso y cancelación de un vuelo", Revista Unión Europea Aranzadi, n°3, pp.7 -17.

has, for a long time, influenced the legislation on transport. An intermodal legislation on passengers' rights would most certainly help overcome the criticisms of the different legal systems but, despite arguments in favour of such a solution, both international and national legal constraints and the specific nature of each mode of transport seem to form an obstacle to a single Regulation on passengers' rights in Europe. European law echoes the provisions of International Conventions which still prefer a modal approach. For instance, there are some significant differences between the systems for protecting air passengers' rights in the Warsaw and Montreal Conventions and the CIV Rules of the COTIF Convention relating to rail passengers' rights. The European Union is not party to the Warsaw Convention and therefore is not bound by its provisions but it is party to the Montreal Convention and plans to sign the COTIF, as most of the Member States have already signed it. These two Conventions, even though they have similar systems, have different schemes for the compensation of damage and loss. Any attempt at establishing a single multimodal legislation on passengers' rights in European law is therefore confronted with the modal approach used by international multilateral conventions. Modal divisions will probably therefore continue to be apparent as regards passengers' rights.

b. THE NEED TO COMPLETE THE SET OF RIGHTS GRANTED TO AIR PASSENGERS

When Regulation Nr. 261/2004/EC is amended, this may lead the way for a greater protection of air passengers, to complete the existing set of rights. The controversy caused by Regulation Nr. 261/2004EC led the ECJ to rule on the specific issue of whether it was valid as regards the principle of equal treatment between carriers. The principle of equal treatment implies that similar situations should be treated in the same way. In the *IATA and ELFAA* case, the Court stated that the different modes of transport are not interchangeable and therefore passengers using different modes of transport are not in comparable situations. However it is worth remembering that the issue of equal treatment between air transport passengers was raised in the Sturgeon case and served as a basis for the Court to rewrite the Regulation Nr. 261/2004/EC. Thus the principle of equality of treatment could, when applied to passengers, be used as an argument in favour of a coherent and comparable law on passengers' rights, without constituting a legal obligation, given the fact that the situations are not comparable. When we compare the rights granted to air passengers and those given to passengers using other means of transport, we can see that there is a need to amend the Regulation Nr. 261/2004/EC and correct its many imperfections. For example, Regulations Nr. 1371/2007/EC, Nr.1177/2010/EC and Nr. 181/2011/EC generally have a greater advantage over Regulation Nr. 261/2004/EC as they deal in one act with many legal situations that are treated by several acts of secondary legislation in air transport. Moreover, the EU laws do not cover all the situations which could affect passengers' rights. For instance, the issue of missed connection, dealt with in Regulation Nr. 1371/2007/EC for rail passengers, is still not completely addressed for air passengers. Finally, it is now

acknowledged that there is the need to protect air passengers' rights further, as regards the thorny issue of bankruptcy of airlines[32] for instance.

c. THE NEED TO ENSURE A UNIFORM INTERPRETATION OF THE REGULATION NR. 261/2004/EC

In order to implement and interpret the Regulation Nr. 261/2004/EC properly, Member States must appoint national enforcement bodies (NEB)[33]. This means that there are differences in the way passengers' rights are interpreted in each Member State. For example, there are differences in what are considered to be "*extraordinary circumstances*"[34]. Furthermore, the sanctions that can be imposed under national law on airline companies that breach the Regulation vary from one Member State to the next[35], both in terms of the amount and the way they are imposed, which creates a problem of competition within the internal market. The main problem is when there are no sanctions or when sanctions are not severe enough to be proportionate and efficient. This is why the European Commission wants to continue to work with the NEBs to ensure an effective enforcement and a "*common interpretation of the Regulation*"[36].

Regulation Nr. 261/2004/EC was the first of its kind and was therefore incomplete and quite unclear. The Regulation is not interpreted in the same way in the Member States and there is a need to clarify certain aspects. For instance, despite the interpretations given by the ECJ, there is still a need to define more precisely what may be considered to be an "*extraordinary circumstance*" or what constitutes a "*delay*". Which time period should be taken into consideration when determining whether a flight is said to be delayed upon its arrival: the time when the aircraft lands or when the passengers finally disembark? These very practical uncertainties may be important when claims are made for financial compensation for delayed flights, particularly when the delay is not quite or barely three hours. This again shows why the ECJ will have to interpret more aspects of the Regulation Nr. 261/2004/EC in the future and given the large number of pending cases and requests for preliminary rulings[37], these questions shall be addressed soon. The ECJ must clarify and identify precisely the

32 T. PANTAZI, "Airline bankruptcy and consumer protection in the European Union", Air & Space Law, 2010, vol. 35, n°6, pp. 409-421.

33 Article 16 of Regulation Nr. 261/2004/EC.

34 See G. POISSONNIER, P. OSSELAND, "La mise en œuvre perfectible des droits des passagers dont les vols sont annulés", Recueil Dalloz, 2011, n°14, pp. 962-966.

35 Steer Davies Gleave, "Evaluation of regulation 261/2004 - Final report", February 2010, http://ec.europa.eu/transport/passengers/studies/doc/2010_02_evaluation_of_regulation_2612004.pdf, p. 45 et seq.

36 European Commission, 11 April 2011, Communication on the application of Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, COM(2011) 174 final, pp.10-11 and 15.

37 ECJ, 11 February 2010, Reference for a preliminary ruling from the Juzgado de lo Mercantil de Pontevedra (Spain), Aurora Sousa Rodriguez y otros v. Air France S.A., Case C-83/10, 2010/C 113/37; ECJ, 13 December 2010, Reference for a preliminary ruling from the Amtsgericht Köln (Germany), Emeka Nelson, Bill Chinazo Nelson, Brian Cheimezie Nelson v. Deutsche Lufthansa AG, Case C-581/10, 2011/C 72/14; ECJ, 11 January 2011, Reference for a preliminary ruling from the Bundesgerichtshof (Germany), Société Air France S.A. v. Heinz-Gerke Folkerts and Luz-Tereza Folkerts, Case C-11/11, 2011/C 95/07; ECJ, 17 January 2011, Reference for a preliminary ruling from the Korkein oikeus (Finland), Finnair Oyj v. Timy Lassooy, Case C-22/11, 2011/C 80/30; ECJ, 21 March 2011, Reference for a preliminary ruling from the Audiencia Provincial de Barcelona (Spain), Joan Cuadrench More v. Koninklijke Luchtvaart Maatschappij NV (KLM), Case C-139/11, 2011/C 179/16; ECJ, 28 March 2011, Reference for a preliminary ruling from the Landgericht Frankfurt am Main (Germany), Condor Flugdienst GmbH v. Jürgen Dörschel, Case C-151/11.

obligations of the carriers and give them more legal clarity in their dealings with passengers whilst taking European air carriers' interests into account.

d. THE NEED TO TAKE EUROPEAN AIR CARRIERS INTERESTS INTO ACCOUNT

In light of the volcano crisis of April 2010 and the substantial additional financial burden resulting from the ECJ's decision in the *Sturgeon* and *Wallentin-Hermann* case, there is a growing awareness that air carriers' obligations should be more proportionate. The European Commission recently demonstrated its intention to launch in 2011 "*an Impact Assessment to assess the proportionality of the current measures in the light of experience and the costs of the regulation for stakeholders, with a view to propose further measures on Air Passenger Rights* [...]*, including of a legislative nature, in 2012*"[38]. However the protection of passengers' rights raises the issue of global competition. For example, the Regulation Nr. 261/2004/EC applies "*to passengers departing from an airport located in the territory of a Member State to which the Treaty applies*" and *"to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies* [...] *if the operating air carrier of the flight concerned is a Community carrier*". Therefore flights arriving into the EU by non-EU airlines are not subject to the same Regulation and there are still problems of enforcing EU law outside of the European Union, which may create another disadvantage for European carriers. For flights from outside of the European Union, European carriers have more obligations and a greater financial burden than non-European carriers that are only bound by International Conventions. In the future, the EU legislation should not forget this international dimension. It should therefore avoid applying rules that are justified from an intra-European point of view but are hazardous to global competition. Once again there is a continuous need to find a balance between the conflicting interests in EU law as well as to progress gradually to avoid the shortcomings of the Regulation from weakening the European industry.

CONCLUSION

The protection of air passengers' rights is progressively increasing and it may continue in the future. Nevertheless, the Regulation Nr. 261/2004/EC has faced and is still facing strong criticism from air carriers because it is considered to cause them a greater economic burden, even more so given the very restrictive approach taken by the Court in the *Wallentin-Hermann* case. There is also the issue of passenger safety. Because of punctuality requirements, airline companies could be led to make choices meaning, for example, that they do not comply with the requirements to check the airworthiness of the aircrafts before a flight[39]. More proportionate obligations for air carriers are needed so that the honourable objective to protect passenger-consumer rights should not obscure passengers' main right during transport, the right to be safely transported.

38 European Commission, 11 April 2011, Communication on the application of Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, above n°20, p. 8.

39 P.S. DEMPSEY, S.O. JOHANSSON, "Montreal v. Brussels: The conflict of laws on the issue of delay in international air carriage", Air & Space Law, 2010, vol. 35, n°3, pp. 207-224.

Space

The role of "integrated" financing in the development of Italy's space sector – focus on the applicability of ppp based project financing schemes to satellite systems.

THE ITALIAN SPACE AGENCY (ASI) AND ITS "INTEGRATED FINANCING" AND MARKETING POLICIES – ELEMENTS OF A PPP BASED PROJECT FINANCING SCHEME FOR A NEW SATELLITE SYSTEM FOR COMMUNICATIONS

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In our experience as a national Agency, while public budget restrains influence our activities, and in turn threaten the space sector in its capacity to keep the pace, the "Integrated" financing approach becomes crucial. It means aggregating outside resources (also in kind) from any type of partners on cooperative projects. This practice is valuable, apart from its economic purpose, for its "multi-stakeholder" approach, with the aim of a better project control during execution and its most effective outcome.
Strictly speaking, these practices have been in use at ASI for more than a decade now and the resulting "aggregated" resources could be valued in tens of M€ a year, although highly concentrated in two operations, that is the Ministry of Defence direct financing for Cosmo SkyMed and Athena Fidus satellite programmes. But the records show also a large number of medium and small size operations, under different patterns: tendered direct finance, market revenues, parallel finance (i.e. the support finance received by ELV to develop Vega's engine), equity in purpose companies and consortia (see the more recent subscription of majority private partners into e-Geos).

There's now at ASI a growing interest about the possible implementation of a downright "project financing" scheme toward a new national Satellite Telecommunication Mission, the so-called SIGMa (Satellite Italiano Guglielmo Marconi), mainly targeted to institutional and governmental services. It would be a new experience for Italy and an occasion to carry out within one single framework all the different types of "integrated financing" operations mentioned above.

1. EXPLORING THE VIABILITY OF A PPP BASED PROJECT FINANCING SCHEME FOR A SATCOM SYSTEM FOR INSTITUTIONAL SERVICES

As it is mostly the case for project financing schemes applied to public procurement of

infrastructures worldwide, the suited model for SIGMa would be the so-called "Build Own and Operate" (BOO), centered on a vehicle company established as a Public Private Partnership (PPP or NewCo). Of course a preliminary commercial and risk allocation benchmarking is necessary, before any official step is taken toward implementation, that is by a procedure to acquire equity subscription in the PPP and to award the relative Concession.

The SIGMa system, when completed, will be composed by two spacecrafts and the relevant ground segment, and will aim at providing a satellite infrastructure for broadband telecommunication services, in Ka and Ku band, that is respectively a frequency designed to support multimedia download / upload by a wide area of private and public customers (internet connection everywhere, dedicated applications, etc.) and a highly stable, weatherproof, performance guaranteed frequency designed for institutional services (telemedicine, rescue, emergencies, environmental monitoring, etc.), over the Italian territory and abroad. ASI has received a clear institutional indication about the need of such a system, specifically targeted to governmental services and the like.
Furthermore, ASI has been clearly advised, from a dedicated Working Group, with the participation of the main institutional potential customers, about the need to proceed with such a system. These indications originate from the fact that in the past Italy has had ownership of civil satellite telecommunications infrastructures, but no longer has.
We refer mainly to our own national Italsat1 and Italsat2 satellites and the relevant ground segment, which undoubtedly was a success story that allowed our national industry to develop a state-of-the-art technology in the field of Ka regenerative transponders and on board switching. However, after having deorbited Italsat F2 in 2002, no replacements were implemented and we had to rely for our institutional needs on foreign commercial regional systems.

Moreover, during the years, Italy has sold all shares in international Entities (formerly International Governmental Organisations, then transformed into private companies), owners of the vast majority of commercially available Ku-band and Ka-band space capacity, with suitable coverage of our national territory. Since then the space capacity required to fulfill national demand is bought from those subjects, implying a net disbursement on our international Current Accounts.

As a consequence, also consider that it is not possible in this condition to grant specific priorities or pricing schemes neither for the institutional customers nor for the strategic national initiatives. On the other hand the need of space telecommunication solutions, and therefore of space capacity, for institutional and governmental services has not decreased in time. Regarding this, the following issues have to be taken into account:

- the "digital divide" issue, especially in the South Regions, is far from solved. In fact, at present, about 12% of the Italian population is affected by this major problem, which

hampers the use of e-government, institutional and governmental on-line applications which, by definition, should be a "universal service" that cannot cut out a significant share of citizens. In this context, satellites can be the only effective "gap-filler", readily deployable, capable of ensuring the appropriate QoS, security and user bandwidth, while the alternative of a 100% landline coverage could be either not economical or even not feasible for the "telco" operators;

- the previous issue applies to a wide range of services, like interactive data, broadcasting data and broadcasting video and multimedia services;
  some new networking services can be effectively rendered via satellite only (e.g. internet on board of the trains, open sea and land emergency medicine and rescue);
- satellites are the most effective telecommunication technology for environmental monitoring and disaster recovery or similar contingencies, as well as for failures of landline networks, as they can overcome all physical obstacles and directly connect everywhere the user to the server point.
- there is a specific need for telecommunications supporting our "peace keeping" and "peace enforcement" national missions in foreign theatres, whereas, again, satellites are the only technology ensuring ad adequate level of service.

The abovementioned applications can be appropriately exploited either in Ku or Ka band, depending on the type of service. Generally speaking they require a TLC ground segment, implementing the WAN (Wireless Area Network), composed by:

- one or more (few) "master" stations on ground, whose location is optimized vs. the interconnection with the terrestrial network, the geographical coverage and the environmental monitoring priorities;
- a wide number of small-size (mobile) user terminals, easy to operate, and featuring state-of-the-art user LAN interface.

It's worth underlying that the space industry is perfectly able (and keen) to implement such a state-of-the-art system. In the last years Europe has been relying, for such a satellite networking, mainly on US technology. Therefore a mission like SIGMa can give a strong boost to competence and competitiveness of large enterprises as well as SMEs and allow to recover the current gap.

Coming to the legal and financial framework for the system implementation, a project financing scheme centered on a vehicle PPP company is envisaged here, as such models have generally and continuously proven to be more cost-effective and timely, in the field of large infrastructures, than traditional methods (i.e. tendered contracts for supplies, works and services). The economical advantages are found not only in the construction phase but over the full length of the operations, in terms of better quality, better maintenance, encouragement of innovation and technological advancement in design and delivery, flexibility to meet Community needs.

The reasons for this are to be traced in the intrinsic cooperative, practical and dynamic aspects of project financing, that could be summarised as follows: a longlasting relationship between public and private parties establishing a balance between State interests and commercial

viability (better value for money); wider outlook for financing, diversified allocation of risks while maintaining clear indentiy and responsibilities.

However all of the said benefits can be reaped only on condition that the Concession agreement and the downstream structure of long term contracts binding the various partners (public powers, private investors, clients and financers, etc.) are very well defined and based on a sound and sustainable business plan. That is why, as it's the case in our initiative, the exploratory phase can be rather long and complex and requires a significant definition effort. Shortly, no official negotiation can be started unless there's a tested level of commercial self sustainability for the project, and especially of its capacity to service the relative financial debt.
PPP based project financing is not new to the space sector, both in the commercial and in the military environment, where models of the so-called BOO (Build, Own, Operate) and BOOT (Build, Own, Operate, Transfer) have prevailed. Among the european experiences it is worth to mention Skynet5 and SatcomBW (military) and Hylas, Alphasat TerraSAR (respectively commercial and earth observation) to finish with the aborted initiative on Galileo, mainly because of an initial wrong evaluation of the overall risk profile (technical as well as economical). Galileo is in fact now a public-driven programme, under direct control of the EU.
Out of Europe we could mention the Canadian Radarsat2 (earth observation).

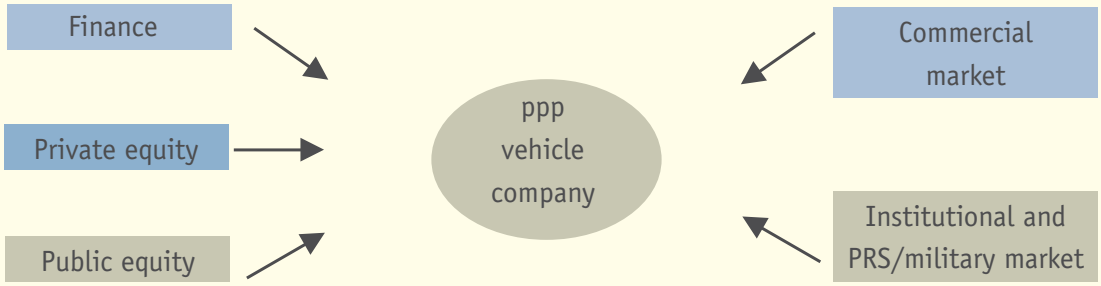
But also project financing schemes which did not have a PPP as a "vehicle company", but rather a fully private subject, as well as project financing components (mainly financial capital and the relative risk guarantees) have contributed to the positive records in the space sector. We might refer to Rapid Eye (earth observation), and earlier to Arianespace, and Sea Launch (launching services) which largely availed themselves of national and international banking and insurance institutions (EIB, World Bank. etc.).
Within this frame, ASI too has experienced the forerunners of PPP project financing. For instance with Italsat, the first telecommunication program managed directly by the Agency, which had a business model calling for a tight cooperation between the Agency (the public party) and Telecom Italia (the private party). In the Italsat programme ASI was responsible for the space segment, while Telecom was responsible for the launch of one of the two satellites, of the ground segment and of the service provision.

2. NEW OUTLOOK FOR PPP BASED PROJECT FINANCING INVOLVING THE COMMERCIAL AND INTERNATIONAL USERS

The approach chosen for SIGMa is then centered on a vehicle PPP company with a public majority share, expressed by ASI, without excluding the presence of other public entities. The overall model is represented in the figure below (fig.1).

The vehicle company (Newco) would be the investor for the infrastructure deployment (to be carried out in 3-5 years) and it would maintain the assets ownership throughout its

Fig.1 – SIGMa PPP based project financing structure



operational life, expected to be around 15 years. It will be as well responsible for the operations and the service supply. In order to fulfill its mission the company will have to stipulate contracts with the industry (rather than duplicating existing capabilities).
Approximately the public resources are expected to cover a part of the core infrastructure, leaving the rest to private funding: all the recurrent infrastructural costs and service components. Public support could include access to special public financing lines. The starting debt / equity ratio is set at 1/1 but subject to negotiation whereas the internal equity balance should be 51% in favour of the public investor.
The main aspects which are now being verified before incorporating the Newco are the following:

- a definition of the various public and private actors, maintaining the principle of a public majority share and control, due to the nature of the services supplied;
- an evaluation of the various funding possibilities, taking of course in due consideration the current financial situation nation-wide and Europe-wide;
- an evaluation of the implications of infrastructure ownership and, as a a consequence, the relative liabilities and industrial risk;
- an evaluation of the nature, activities and responsibilities of the vehicle company, taking into due account all the previous experiences, also within ASI.

A preliminary assessment of the Newco business plan demonstrated its viability, applying to the final users pricing schemes well in line with the current and expected market standards, as offered by international commercial satellite operators. Delta added values can be offered to the national institutional users, not only in terms of service price, but, much more important, in terms of Service Level Agreement and Security level of the services' range, not available commercially. In fact, a quota of the SIGMA services will be classified as PRS (Public Regulated Services), and therefore will be characterized by specific security, access control and user validation requirements.
In the table below, using percentage values, a preliminary, conservative and approximate cash – flow balance is estimated as positive. Although it has not been actualised – which ordinarily implies a downscaling of the surplus - and doublechecked with the standard

rentability indicators (NPV and IRR), there seems to emerge an encouraging balance as high as 120% over the investment cost (construction phase), forming the basis for further refining in view of project's take-off.

SIGMA EBDIAT based cash flow matrix – Values in % of Construction costs

Space segment(*)	-58
Ground segment	-13
Prog. mktg (terminals)	-3
Launch + insurance	-26
Constr. phase (**)	**-100**
Operat. phase(***)	**-29,2**
Turnover	**250**
Balance	**120,8**

(*) sat recurrent costs + sat non,recurrent + in-orbit

(**) Net of dedicated mobile terminals development investment.

(***) Terminals2 (12%) + Ins.(7%) + Infrastructure operat. (51%) + Company op. (22%) + Cost of sales (8%)

3. CONTEXT CONDITIONS, RISK COVERAGE AND ALLOCATION ASPECTS

The national sector of space research and industry is actually committed, under ASI's coordination, to develop fusion technologies of data from space, in their various acceptations, as well as applications. This means, respectively, to combine data from different technical platforms (different satellite technologies like Cosmo SkyMed or Galileo, stratospherical vehicles, on site sensors) and of different types (earth imagery, positioning, dedicated data handling). The ultimate goal is to create a range of innovative interpretation services of data from space, designed to meet the specific operational requirements of institutional and private users in the fields of environmental monitoring and protection, emergency and safety. Another programme is aimed at developing advanced precompetitive prototypes of light, low-cost, portable terminals for the Ka and Ku bands, that could trigger a large scale national production.

Some specific service centers and productive clusters are being promoted by the Agency, for this purpose, in the South, mainly by bidding for EU Structural Funds (jointly managed by the Ministries of Research and the Ministry of Economic Development) within wider national consortia: in Sicily, Puglia, Molise, Campania, etc. ASI is especially committed to support a diversified specialisation of each cluster, whether this is telemedicine or coastal and oil spill monitoring, land protection, user hardware or transport surveillance, in order to reach the

highest possible levels of subsidiarity, extension and effectiveness of the Italian offer.
It is obvious that the presence of such competencies could largely benefit the context of the envisaged investment enhancing symergies from the territory and economical gains. It could be mentioned for instance the promotional impact of having a customised low-cost terminal to offer along with band service.

On the other hand, there are context changes that, over such a long period of time and in such a complex technological area could play a negative role, and therefore must be carefully considered: commercial risks, new competitors with new technologies, technical failures, global factors, etc.

The area of commercial risk is normally offset and allocated by means of undersigned long term agreements between the Newco and the other stakeholders (on fixed terms of supplies, purchases, finance, etc.). In some cases private stakeholders can even take on minority equity in the vehicle company as a further guarantee of their commitment to the project.
But there is an area of technical and context risk that must be faced with different instruments, and mainly insurance coverage. The insurance cost incurred by the operating company is included in the cash-flow simulation in Fig.2 according to the standard policy of damage settlement relative to the cost of satellite in the event of a failure during launch or any time in the life of the system. The technical readiness of an additional launch if necessary, with a ready to fly replacement satellite, is a complementary obligation of the insured. Other types of insurance should be separately explored (customer quality, third party liability, commercial credit risk and political risk on foreign markets).

Financial instruments are crucial too, and especially the loans necessary to “integrate” the equity capital in covering up the investment cost (operational phase). This is because the quality (especially regarding interest rates’ adaptive profiles) and quantity of the “financial capital” going along with risk capital obviously widens the projects risk allocation and brings about better control through an extended commercial benchmarking. Some other financial instruments must be considered, especially when the international share of business is substantial, such as subordinated loans or futures, to compensate cash emergencies and possible fluctuations of interest and exchange rates.

Space Sustainability Fundamental to the Responsible Use of Space

(for The Aviation & Space Journal)

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INTRODUCTION

Preserving the space environment for future generations, often referred to as space

sustainability, is gradually appearing on the agendas of foreign and security policy decision-makers as space represents an important multiplier for many areas of sustainable development and security on Earth. Space-based systems help the people of the world internalize the view that we are all on this relatively small planet together and must exercise proper stewardship over nature and its resources if we are to sustain and grow our respective civilizations. Sustainable development cannot be achieved without a framework of peace and security, including in space.

It now goes without saying that space-based assets are essential for supplying a wide spectrum of critical civilian, commercial, and military-related services. The increasing number of space-faring nations and space aspirants, as well as new and emerging space technologies (e.g. microsatellites), complicates space surveillance and makes comprehensive Space Situational Awareness (SSA) a formidable task. In addition to the ever-present challenge of orbital debris, the proliferation of space technologies to a larger number of state and non-state actors enable them to develop more sophisticated, dual-use technologies, including counterspace capabilities.

There have been a number of efforts to advance space security, both of a top-down and bottom-up variety. The European Union's (EU) effort to promote behavioural norms in space through its draft Code of Conduct for Outer Space Activities is an example of the former as is the "long-term sustainability of space activities" agenda item within the Scientific and Technical Subcommittee of the UN Committee on the Peaceful Uses of Outer Space's (COPUOS). Others include the U.S. effort to cooperate in preventing on-orbit collisions via sharing SSA-derived information with commercial operators and other governments, the commercial initiative of the Space Data Association (SDA), and broader discussions on the need to create a more comprehensive SSA picture and share data and information internationally. These discussions are aimed at contributing to the improved security of space assets for all responsible space-faring nations. This paper will examine these initiatives and assess their contribution to the efforts to enhance space sustainability.

IN PURSUIT OF SPACE SUSTAINABILITY

Not surprisingly, the expanding number of space actors, objects and debris multiplies threats to safe and secure space operations. Accordingly, the norms established by the 1967 Outer Space Treaty (OST) are more relevant than ever. The ability of states, however, to ensure adherence to the OST and implement various provisions of the Treaty have been rather weak. Carefully-crafted transparency and confidence-building measures (TCBMs) that take into account operational characteristics of space can go a long way toward remedying this situation and bolstering space sustainability. For example, the adoption by the UN General Assembly of the Inter-Agency Debris Mitigation Guidelines in February 2008 is an example of a successful bottom-up approach and is perceived as one of the most significant contributions

to preserving the outer space environment since the signing of the OST.[40]

Another TCBM-related effort is the draft international Code of Conduct for Outer Space Activities, a revised version of which was introduced by the European Union (EU) in September 2010. This top-down initiative is an effort on the part of the EU to play a normative role in space security through the "principled" identity it seeks to achieve.[41] The EU Council Conclusions state that the Code includes TCBMs and will be open to all states for voluntary compliance. The general nature of the objectives outlined in the Code, however, leaves ample room for various, and even conflicting, interpretations. Accordingly, guidance on more concrete TCBMs could help substantiate formal initiatives such as the Code.

The sharing of Space Situational Awareness (SSA) data is likewise perceived as an important TCBM. It is now evident that SSA is a lynchpin for safeguarding satellites and spacecraft as it enables the tracking of objects, timely warnings of potential collisions, avoidance of radiofrequency interference and real-time information about "situations" in space. SSA-generated information is likewise necessary to detect irresponsible space behaviour and monitor the actions of potential adversaries. The U.S. has expressed the willingness to lead the effort to identify the most appropriate model for international SSA sharing. The U.S. SSA Sharing Program offers services to users and partners. The U.S. Department of Defense has also signed bilateral SSA statements of principles with Canada, France, and Australia, and seeks to expand cooperation with other countries as well.[42]

For its part, Europe recognizes that SSA is essential for the protection of critical European space infrastructure as well as for reliable and safe space-based operations and services. SSA capability is likewise viewed as an important element of Europe's extensive efforts to promote the peaceful uses of outer space. Accordingly, Europe is seeking to construct a Continent-wide SSA system that would support the safe and secure operations of European space assets.

Commercial operators constitute an important contributor to SSA as they share with each other, on a regular basis, information about their flight operations. Commercial firms can help fill in gaps or shortfalls in government capabilities as evidenced by the establishment of the Space Data Association (SDA). The SDA seeks to address the risks of collision and radiofrequency interference which costs them dearly in foregone annual revenues. This initiative is emblematic of the thirst for broader bottom-up support for space security.

40 William, J. Flynn. "Remarks on Space Policy." High Frontier February 2011: 40.
41 Robinson, Jana. "Enabling Europe's Key Foreign Policy Objectives via Space" ESPI Report 30. 2. Mai 2011 <http://www.espi.or.at/images/stories/dokumente/studies/ESPI_Report_30_FINAL.pdf5.
42 Rose, Frank. "U.S. Remarks on Space Security at UNIDIR Conference, April 2011" 4 Apr. 2011 Council on Foreign Relations. 2 Mai 2011 <http://www.cfr.org/defensehomeland-security/us-remarks-space-security-unidir-conference-april-2011/p24615>.

At the UNCOPUOS Scientific and Technical Subcommittee (STSC), the topics of space debris, space weather, near-earth objects, nuclear power sources in space and other topics closely related to space sustainability have been on the agenda for many years. A new item on the agenda of the STSC, originally initiated by France and introduced formally in February 2010, is entitled "long-term sustainability of space activities". It seeks to adopt a comprehensive approach to preserving space for the generations ahead. A Working Group was established, and met for the first time in June 2010, to advance establishment of practical measures, accompanied by voluntary guidelines, to enhance space sustainability.[43] The overarching goal is to formulate "best practices guidelines" for safer operations in space.

Many familiar with the consensus-based work of the UN argue, quite justifiably, that the evolution of space-related realities is proceeding faster than the UN's uneven pace. It has been pointed out that the UNCOPUOS is perhaps being sidelined by other initiatives such as that of the EU on the Code of Conduct or the SDA on data sharing. Moreover, UNCOPUOS has yet to address the question of involvement of private actors, whose role is increasingly relevant for deliberations on space activities, as the Committee is an intergovernmental organization with restrictions on such involvement. Nevertheless, the UNCOPUOS will remain an essential platform with global reach encouraging TCBMs and other space sustainability-related activities, including establishing a mechanism for improved SSA-sharing.[44]

TCBMs are already present in existing, legally-binding space agreements and related UN resolutions. The concept of TCBMs for space was adopted by the UN, for the first time, via Resolution 60/66, entitled "Transparency and Confidence-Building Measures in Outer Space Activities".[45] Space TCBMs were likewise introduced in a 2006 Russian and Chinese working paper (CD/1778) and led to a number of UN Resolutions on TCBMs.[46] Existing TCBMs for space carry benefits as well as associated baggage. Both Russia and China, which proposed the CD-related TCBMs, are proponents of a legally-binding treaty on banning space weapons. There is also a history of terrestrial TCBM disappointments, especially in the arms control and missile proliferation arenas. These mixed results complicate persuading some space actors of the benefits of TCBMs for non-binding agreements.[47] At the same time, various space-related TCBMs are currently being considered and while acknowledging their various limitations, including the issue of verification and compliance, TCBMs will almost certainly

43 Prunariu, Dumitru-Dorin. „Space Sustainability: Setting a Technical Baseline for New Regimes." UNIDIR Space Security Conference 2011: Building on the Past, Stepping Toward the Future.

44 Schrogl, Kai-Uwe. „Is UNCOPUOS Fit for the Future? Reflections at the occasion of the 50th session of its Legal Subcommittee 2011." German Journal of Air and Space Law (ZLW) (60,1) 2011, 93-102.

45 United Nations General Assembly. Resolution adopted by the General Assembly entitled "Transparency and confidence-building measures in outer space activities." UN Doc. A/RES/60/66 of 6 Jan. 2006. New York: United Nations.

46 Conference on Disarmament. "Working Paper: Transparency and Confidence-Building Measures in Outer Space Activities and the Prevention of Placement of Weapons in Outer Space." Doc. CD/1776 of 22 May 2006. 26 July 2007. <http://www.reachingcriticalwill.org/political/cd/papers06/22MayChinaRussia1.pdf>.

47 Robinson, Jana. "The Role of Transparency and Confidence-Building Measures in Advancing Space Security " ESPI Report 28. 2. Mai 2011 <http://www.espi.or.at/images/stories/dokumente/studies/ESPI_Report_28_online.pdf>: 30.

play an essential role in diplomatic venues.

CONCLUSION

Space is a strategic asset for most nations in the 21st century. More than four decades after the signing of the OST, countries are struggling to find a comprehensive approach to space sustainability. Research, scientific knowledge, and technological innovation in the information age are the foundation of space activities that enable operations in space, understanding of space phenomena, and the observation and monitoring of the Earth. At the same time, new dual-use technologies complicate establishing well-rounded measures that enhance stability and predictability in space. A number of space security-related global initiatives are already underway, including in the areas of orbital debris, collision and radiofrequency interference mitigation, SSA, TCBMs, and a code of conduct for outer space activities.

Space-related cooperation is becoming an essential component of foreign policy planning and decision-making. The rational for richer international cooperation in space is more compelling than ever, given the long lead times of most space-related efforts. Moreover, cooperation of this kind helps reaffirm the principle of the peaceful use of outer space. To cooperate meaningfully, however, countries need to share a common appreciation of the value that a collective approach to space security brings versus a go-it-alone policy. To achieve such a consensus is an increasingly delicate dance as not only the U.S., but also other countries, have come to understand the quality of space-derived products and services for their military capabilities.

Different efforts to address space security, both top-down and bottom-up, will likely continue to proceed in parallel. It is the responsibility of governments to educate their respective publics about the issues connected with safe and secure operations in space. For those engaged in these activities on a daily basis, there is a need to identify creative ways to strike a balance between multiplying the benefits of enhanced cooperation and affordability/security. Finally, for those charged with managing space security, there is an increasing need to take into account the inevitable and growing intersection of terrestrial conflicts and the space environment.

Legislative Commentary

Ireland's air travel tax overhaul: the commission welcomes the elimination of discriminatory charges

In a press release dated 16th June 2011, the European Commission welcomed Ireland's decision to amend the most discriminatory features on its air travel tax.

In March 2011, the commission has sent Ireland a letter of formal notice expressing its deep concerns with respect to its air travel tax, which violated EU Law by charging passengers on outbound flights more than passengers on domestic flights.

Regulation 1008/2008 forbids Member States from imposing higher charges or duties or stricter administrative requirements on air services which cross borders within Europe than on domestic services. This principle, which reflects almost half a century of consistent ECJ case-law, is the major underpinning of the internal market in aviation.

The air travel tax, put in place by the Irish government in March 2009, was levied at a rate of €10 on passengers whose destination was greater than 300 km from Dublin Airport, and of €2 on passengers on shorter flights.

The structure of this tax lead the Commission to express its concerns that the measure might create a barrier to the freedom to provide services within the internal market.

The Commission has expressed its satisfaction with this révirement and has therefore decided to close the case.

Francesco Alongi

The new amended version of the enac regulation on the certification of ground services providers

On 23rd March 2011, ENAC, the Italian Civil Aviation Authority, has issued an amended version of its Regulation on the certification of Ground Services Providers.

By means of this amendment, ENAC has introduced stricter criteria for the issuance of certificates and for the access to the market, which require a stricter cooperation with airport authorities.

Higher standards and guarantees are required from handlers which intend to operate in airports with a volume of traffic in excess of 5 million passengers per year, since they will have to prove to be financially sound and to have at least 3 years of experience in this field. Moreover, these handlers must prove that in the year before they filed their application, their capital was equal to (or in excess of) ¼ of the annual turnover for the activities they intend to carry out.

The certificates, which are valid for a period of three-years, will be issued only if an undertaking demonstrates to have sufficient capital and assets, adequate insurance coverage.

Moreover, since 23rd March, undertakings will be issued a certificate which will allow them

to carry out not one but a category of services. If however an handler intends to carry out activities which are not included in the category specified in its certificate, it will have to apply to ENAC for an extension or amendment of said certificate.

ENAC has also chosen to revise the provisions concerning groups of undertakings, in order to make it easier for the regulator to identify certified handlers. Moreover, while groups of undertakings can take part in a single bid or apply for the same contract, each member of the group must fulfil the mandatory requirements and must be certified.

National Civil Aviation Authorities will remain in charge of the standardization of the certification process.

The new Regulation will also streamline the certification process and ensure a more rigorous selection among ground services providers.

Stricter sanctions are intended to safeguard the compliance with procedures and operational standards, and will in due course contribute to raising the operators' awareness, so as to attain a full implementation of the Regulation.

Francesco Alongi

Case Law Commentary

Flight's cancellation and extraordinary circumstances

The purpose of this article is to examine Regulation 261/2004 in the light of the recent decision given by the Court of Justice in case no. C - 294/10, Eglītis vs Air Baltic Corporation AS, concerning flights cancellation due to extraordinary circumstances.
The abovementioned ruling case provides some guidance on the relationship between extraordinary circumstances and flights cancellation.
The legal context:
Regulation 261/2004 applies to both scheduled and non-scheduled air services providing a body of common rules in case of flight cancellation, denied boarding and delay.
In particular, pursuant to Article 5 of Regulation 261/2004, in case of flight cancellation, passengers can obtain the reimbursement of the full cost of ticket or a re-routing to the same destination and money compensation according to the distance of the flight.
However, according to paragraph 3 of Article 5, the carrier's compensation duty can be excluded if the flight had been cancelled in view of extraordinary circumstances.
The facts:
In July 2006 an air carrier cancelled a flight from Copenhagen to Riga because an electric

black-out had caused the temporary closure of Swedish air space.
For this reason the passengers did not receive any compensation.
The passengers brought a claim before the Consumer Protection Office which refused to grant any compensation.
This decision was subsequently confirmed by the Department of the Economy of the Republic of Latvia.
The claimants filed a civil action in order to obtain the payment of compensation, first before the District Administrative Court, then before the Administrative Court of Appeal
The Carrier has always refused any kind of compensation arguing that the flight was cancelled in view of extraordinary circumstances.
The claimants observed that the cancellation was not actually due to a temporary closure of Swedish air space but to the fact that the crew's working hours had expired by the time air space reopened.
In their opinion, the air carrier had to take into account the likelihood of this kind of extraordinary circumstances adopting all the reasonable measures in order to ensure the regularity of the flights.
The decision:
The Latvian Supreme Court, appealed by the passengers, decided to refer the case to the ECJ for a preliminary ruling on two questions.
Firstly, the claimants asked the Court to clarify whether an air carrier, pursuant to the Article 5(3) of Regulation No. 261/2004, is obliged to take all reasonable precautions in order to guarantee programmed flights in case of cancellation of scheduled flight caused by extraordinary circumstances. If that was the case, the claimants also asked the Court to provide some guidance on the minimum period of reserve time during which it should be possible for the carrier to provide an alternative programmed flight
Answering to the first question, the ECJ stated that Article 5(3) of Regulation No 261/2004 should be interpreted in the sense that "an air carrier, since it is obliged to implement all reasonable measures to avoid extraordinary circumstances, must reasonably, at the stage of organising the flight, take account of the risk of delay connected to the possible occurrence of such circumstances."
Therefore, in light of this principle the air carrier could not invoke, without distinction, any extraordinary circumstance in order to avoid the payment of compensation in case of flight cancellation.
Before the flight, in fact, the air carrier must consider also the possible occurrence of extraordinary circumstances which could prevent the departure of scheduled flight, organizing all its human resources in order to avert the risk connected to such circumstances.
So from ECJ's point of view not all extraordinary circumstances can be invoked by the air carrier to avoid the payment of compensation, but merely those which would not have been avoided.
This principle, on the other hand, had already been stated by the ECJ also in Judgment

C-549/07 Wallentine – Alitalia.
With regards to the technical problems invoked by the air carrier in order to exclude liability, the ECJ has preliminary observed that this kind of circumstances cannot be considered as extraordinary.
More generally the Judge has stated that the *" Community legislature intended to confer exemption from the obligation to pay compensation to passengers in the event of cancellation of flights not in respect of all extraordinary circumstances, but only in respect of those which could not have been avoided even if all reasonable measures had been taken"*.
With regard to the second question referred by the Latvian Supreme Court, the ECJ has ruled that it is not possible to provide guidelines on the identification of the minimum period of reserve time during which it should be possible for the carrier to provide an alternative programmed flight.
In particular Article 6 of Regulation No. 261/2004 can not be applied since the flight's delay had not been caused by extraordinary circumstances.
On this basis it has been argued that it is the duty of national courts, according to all the particular circumstances of the case, to distinguish between reasonable and unreasonable time in which the carrier is obliged or not obliged to provide an alternative flight.
Finally it is possible to observe that in light of the aforementioned ECJ's decision, it will be more difficult for Airlines companies to avoid paying compensation under the Regulations 261/2004.
From this point of view an exoneration for the air carrier will be possible only if it proves to have adopted all the reasonable measures to handle extraordinary circumstances occurring by arranging for an alternative flight.

Miscellaneous Material of interest

TOWARDS THE SINGLE EUROPEAN SKY: THE CREATION OF THE FUNCTIONAL AIRSPACE BLOCK – CENTRAL EUROPE (FAB CE).

On May 5 2011, Austria, Bosnia - Herzegovina, Croatia, Czech Republic and Slovenia signed an agreement to create the Functional Airspace Block – Central Europe (FAB CE).
This represents a very important step towards achieving the Single European Sky.
In fact, the FAB CE agreement is a momentous achievement towards ensuring an efficient cooperation and improve the provision of air navigation services.
The creation of the FABs strengthens cooperation possibilities for air navigation service providers, facilitating the accomplishment of the performance targets laid out by the Single European Sky legislation.
In particular, FAB CE involves the creation of a high density airspace with main traffic flows East-West, often crossing multiple air navigation service providers towards the northern side of the airspace.

The FAB CE agreement establishes the framework, general conditions and governance under which the contracting states intend to ensure air traffic management and the provision of air navigation services according to the Single European Sky legislation.
FAB CE will be governed by a Council which will express the interests of both civil and military aviation.
It will be divided into different sub-committees:
- Joint Civil Military Airspace Coordination Committee, for strategic coordination of national airspace management and airspace design policies, air traffic flow and capacity management processes and civil-military cooperation;
- The National Supervisory Authorities Coordination Committee;
- other bodies which the Council may consider as necessary for implementation, operation and further development of FAB CE.
The FAB CE will play a key role in the Single European Sky organization. The objective of the agreement is in fact "to achieve optimal performance in the areas relating to safety, environmental sustainability, capacity, cost-efficiency, flight efficiency and military mission effectiveness, by the design of airspace concerned regardless of existing boundaries".

Alessandra Laconi

COMMISSION LAUNCHES INFRINGEMENT PROCEEDING AGAINST ROMANIA OVER AGREEMENT WITH RUSSIA ON EQUAL TREATMENT OF EU AIRLINES.

Following the letters of formal notice sent in October 2010 to Austria, Finland, France and Germany, in January 2011 to Belgium, Denmark, Italy, Luxembourg, The Netherlands, Sweden and the UK, in February 2011 to Cyprus, Ireland, Poland, Portugal, Slovakia and Spain, in March 2011 to Estonia, Greece, Hungary, Lithuania, Malta and Slovenia and in April 2011 to the Czech Republic and Bulgaria, the European Commission launched an analogous infringement proceeding against Romania.
The proceeding concerns a Romanian bilateral air service agreement with Russia on equal treatment of EU airlines.
In fact, bilateral air service agreements between an individual Member State and a non-EU country must include an "EU designation clause" recognizing that the terms apply equally to all EU airlines, and not just the airlines of that Member State.
This is a core part of the Single European Aviation Market which was created in the early 1990s, which guarantees that airlines are entitled to operate under the same conditions anywhere in the EU.
The requirement of the "EU designation clause" was strengthened in the "Open Skies rulings" of the Court of Justice in 2002.
Provisions limiting the benefits of air service agreements to national airlines of the Member

State concerned are in breach of EU rules on freedom of establishment as laid down in Article 49 of the TFEU.
Russia is one of the few countries in the world that does not recognise that all EU carriers must be treated equally, and that the terms of any bilateral agreement must include a binding "EU designation clause".
This creates relevant practical problems and might in future jeopardise traffic rights for airlines taken over by a carrier from another EU Member State.
If Romania fails to answer satisfactorily to the letter of formal notice, the Commission will send a reasoned opinion formally requesting to amend the bilateral air service agreement with Russia.

Alessandra Laconi

EUROPEAN COMMISSION LAUNCHES INFRINGEMENT PROCEEDING AGAINST PORTUGAL REQUESTING THE CORRECT APPLICATION OF THE DIRECTIVE ON THE OPENING-UP OF THE GROUNDHANDLING MARKET.

The European Commission requested the correct application by the Portuguese authorities of Directive 96/67/EC concerning the opening-up of the ground handling market.
The Directive allows Member States to reduce the opening-up of the market to a fixed number of suppliers for ramp handling, baggage handling, air-side freight and mail handling and fuel and oil handling. Such a limitation must comply with certain criteria, guaranteeing a transparent and non-discriminatory European call for tender.
Moreover, one of the authorized suppliers has to be independent of both the airport operating company and the main airline operating in the airport.
Portugal decided thus to limit the number of ground handling service suppliers to two in Lisbon, Porto and Faro airports.
These airports are not fully compliant with the European rules on access to air-side handling services like baggage handling, ramp handling and freight and mail handling between terminals and aircraft.
In particular, the Commission considers that the procedure of selection of the admitted suppliers was not transparent and impartial, jeopardizing effective and fair competition.
Portugal did not publish a call for tender, avoiding the necessary consultation of the airlines and the establishment of a maximum market-access period of seven years.
In addition, in Lisbon and Porto the service suppliers are subsidiaries of the managing body of the airport and of the main airline operating in the airport, maintaining a long-term independence.
An ineffective competition for the provision of ground handling services in Lisbon, Porto and Faro could increase costs and decrease quality for airlines, consequently affecting passengers and freight carriers.
Commission's attention on ground handling services is due to the key role of all services

carried out on behalf of airlines, like check-in and transport of passengers, baggage handling, refueling and re-oiling of aircrafts, catering services, cleaning, de-icing and marshalling of aircraft, freight and mail handling.
They are not always brought to the attention of passengers, but they can directly influence their flight experiences.
If the situation does not change in compliance with the Council Directive 96/67/EC, the Commission's request will take the form of a reasoned opinion. Failing a response within two months, the Commission may refer Portugal to the European Court of Justice.

Alessandra Laconi

Forthcoming Events

SITA is pleased to invite you to the South Europe Airport Forum where you will have an opportunity to attend panel discussions on topics at the heart of the industry's current concerns. This will also be an excellent opportunity to network with members of the community and see the latest innovations SITA is bringing to the table in this ever changing industry.

Meet us on 23 September at Auditorium Via Veneto ROME

To register to the event and arrange hotel reservations* in Rome, please contact:
E-mail: sita@ideameeting.com
Phone: +39 06 58 52 30 24
Registration to the conference is free of charge.