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ATSSSA Victim Compensation Fund: a fair alternative to civil liability?

Giuseppe Contissa¹

Introduction

The traditional model of compensation for damages arising from air crashes is based on civil liability, coupled with the provision of insurances for involved stakeholders (ANSPs, Air Carriers, Airports, etc.). In this contribution I shall consider the ATSSSA act, adopted in the US after September 11, which established a mechanism for the compensation of victims or air accidents which departs from the model of civil liability.

In the immediate aftermath of September 11, the US airline industry appeared near to a collapse, as passenger travel dropped precipitously, while a large number of tort claims against air companies were going to be filled. In this scenario, the US Congress decided to bail out the airline carriers through subsidies, and established limitations on liability in their favour, while offering a *quid pro quo* to the air crash victims in the form of a compensation scheme.

The enactment of ATSSSA

On the 22nd September 2001, only few days after the terrorist attacks, the United States Congress enacted - and President George W. Bush signed - the Air Transportation Safety and System Stabilization Act (ATSSSA). The primary goal of the Act was to "*preserve the continued viability of the United States air transportation system*"². The "September 11 Victim Compensation Fund of 2001 (the "Victim Compensation Fund" or "VCF") was a key component of ATSSSA. The other two features were financial aid to the airline industry³, and creation of an exclusive Federal cause of action for damages arising out of the terrorist attacks.

The urgency in the creation of the Fund is explained by the perception that the American legal system itself posed a threat to the financial stability of the US air transportation industry and consequently to the stability of the US (and world) economy as a whole⁴. The number of potential claimants was indeed enormous: the victims were not only the passengers but also the thousands of people on the ground, including those in the World Trade Center or the Pentagon, plus the owners of the Twin Towers, the businesses in and around the towers and anyone else damaged. Potential claims, according to several calculations, could have easily exceeded \$100 billion. There was the risk that airline carriers, initially grounded for safety reasons, would stay on the ground

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indefinitely because their insurers would refuse to continue their coverage and capital markets would refuse to provide funds to the airlines in the face of potentially “unlimited” liability, or even worse, the danger that courts could order the liquidation of airlines if they were deemed liable for the catastrophic damage.

The September 11 Victim Compensation Fund was a reflection of past legislative fund solutions, adopted in similar emergency situations. Industry threats of withdrawal from critical areas of product manufacture and service provision under the menace of catastrophic tort liability, combined with the necessity compensate victims of mass torts, lead to the development of similar fund schemes in the past, such as the no-fault compensation scheme for childhood vaccine injuries⁵ and the quasi-no-fault coverage for nuclear energy-related accidents (under the Price-Anderson Act)⁶.

The Victim Compensation Fund

Title IV of ATSSSA established the Victim Compensation Fund stating that “[i]t is the purpose of this title to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001”⁷. Claimants were eligible to participate in the Victim Compensation Fund if they were injured or died at the World Trade Center, the Pentagon, or the site of the aircraft crash at Shanksville, Pennsylvania at the time of, or immediately following the attacks. Eligibility also extended to passengers and flight crew of the aircraft involved in the attacks, but excluded the terrorists. Relatives and representatives of individuals who died as a result of the events of September 11, 2001 also qualified to receive compensation.

The central concept of the Victim Compensation Fund was that claimants electing to participate in the Victim Compensation Fund waived their right to seek compensation through the court and the tort litigation system. Claimants had two years from the date of publication of the Victim Compensation Fund Regulations within which to make their choice between joining the fund and litigating. If a claimant opted in, he waived all litigation rights regarding the attacks of 11th September. If he opted out, then his cause of action was limited to a federal one created by ATSSSA that must have been brought in the U.S. District Court for the Southern District of New York.

Another key theme in the Fund was the resolution of claims without the delays and uncertainties that are typical of actions based on torts: under the Fund, all claims were to be determined within 120 days of filing, and payments were to be made within 20 days of determination.

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These determinations, along with all other guidelines for decision, procedural and substantive, were to be made by a Special Master, designated by the Attorney General to administer the Fund. Determinations by the Special Master were final and not subject to judicial review.

The Fund provided benefits for both economic and non-economic losses. Economic loss, as is defined in the Act is "any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable state law"⁸. Each award was adjusted for amounts received from collateral sources except for money received from charities. "Collateral source" is defined in the Victim Compensation Fund to mean "all collateral sources, including life insurance, pension funds, death"⁹. The Special Master established a grid applicable to the range of potential claimants: a "presumed economic loss" schedule based on age, size of family, and recent past earnings.

Non-economic loss, according to the Act, means not only physical or emotional pain and suffering, but also "all other non-pecuniary losses of any kind or nature"¹⁰. This is a peculiarity of VCF, since no-fault schemes typically do not provide for individualized pain and suffering loss, apart from optional or supplemental recourse to tort¹¹. The Special Master provided for scheduled non-economic benefit awards under the Fund, for each victim (\$250,000) and every surviving eligible family member (\$100,000 each). Thus, a surviving spouse with two children would have received benefits of \$550,000 for non-economic loss in a claim under the Fund.

Limitation of Liability and exclusive jurisdiction

The Act established a cap on tort liability of air carriers, providing that liability "shall not be in an amount greater than the limits of the liability coverage maintained by the air carrier." Moreover, Section 408 of the Act created the federal cause of action, stating that an exclusive jurisdiction to hear "all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes" was located in the federal district court for the Southern District of New York. For the purposes of the original Act, an "air carrier" was defined as "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation". Amendments in November 2001

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explicitly extended the limitation of liability to those engaged in airline security, aircraft and aircraft parts manufacturers, and airport owners and operators.

The limitations on liability in the ATSSSA created the possibility that there would not be sufficient funds available to pay all compensatory and, possibly, punitive damages awarded by the courts in the event of the airlines (and, subsequently, any other participant in the air transportation industry such as airline security firms) were considered to be liable in tort, having contributed through their negligence, to the losses suffered by individuals, corporations, and property owners on September 11.

The liability-limiting scheme most similar to the ATSSSA was the 1929 Warsaw Convention clause limiting international air carrier liability in cases of international aviation disasters¹². This clause capped air carrier liability at 16,600 Special Drawing Rights for each person killed or injured as a result of an airline disaster¹³. Although this scheme was analogous to the ATSSSA in limiting air carrier liability, it did so ex ante, giving both air carriers and potential passengers notice of future limits on recovery. Additionally, the Warsaw Convention allowed for unconstrained tort action against the airlines, but it established a higher burden of proof on the plaintiffs (the need to prove wilful misconduct of the air carrier)¹⁴.

The Tort Option

What were the real opportunities for a plaintiff choosing to seek recovery under the tort option after September 11? It is generally perceived that the crashes involved no significant negligence by airport security personnel or members of the planes' crews. Nevertheless, litigation discovery ultimately may have disclosed evidence of negligence in one form or another, for instance, a breach of a public carrier's duty to safeguard passengers could have been identified, such as failing to secure the cockpits adequately from forced entry, or inadequate screening for dangerous objects. The latter would have required extending vicarious liability to the airlines for alleged negligence of the security screeners, who were independent contractors. The inspectors/screeners could of course have been sued directly, and their liability in fact was not capped under the statutorily established tort remedy. But their solvency was dubious, and here too establishing negligence would have been problematic¹⁵.

If liability in tort could have been established, damages would likely have been higher than under the Fund, particularly for those victims who were very high-wage earners or had highly promising future job

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prospects. However, while in the typical air crash lawsuit the corporate defendant's has the ability to cover even a very large compensation, the huge scale of the 9/11 air crashes combined with the provisions of ATSA produced an atypical scenario. The plaintiff would have faced a hard damage recovery problem, for the following reasons.

(1) The potential number of victims was far more than the several hundred passengers on the four flights, since it included not only all the on-the-ground dead and injured who refused Fund compensation and chose to sue, but also all other potential plaintiffs, including an unknown number of plaintiffs who could not qualify as Fund claimants (e.g., 9/11 victims who suffered only property damage in the collapse of the Twin Towers).

(2) All plaintiffs were constrained to collect damages (including punitive damages) from a statutorily-limited source, namely the collective insurance coverage of the four planes. Assuming that each of the four aircraft carried the standard insurance coverage of \$500,000,000, all plaintiffs would have had only \$2 billion to share among themselves.

Moreover, as a practical matter, recovery under the tort option, if it was exercised, it might have been severely limited after all the outside property damage claims (which were excluded by the VCF). Finally, recovery under the Fund was far quicker and subject to far lower litigation costs than recovery in tort, even if the latter were ultimately successful.

In the end, recourse to tort was subject to a sufficient number of potential pitfalls and limitations to make the Fund option more attractive for most claimants.

Evaluation of the VCF: Analysis and Critics

The VCF was established with two distinct goals. One was to provide compensation to the families of those killed in the attacks and those who suffered physical injuries. The other was to provide an alternative to civil litigation in order to avoid lawsuits. Thus, the VCF was seen by many experts not merely a *quid pro quo* for the limitation of liability or an effort to protect the air transportation industry, but rather a form of alternative dispute resolution.

There have only been few assessments of the performance of the VCF, and they have mostly focused on the compensation and "alternative to lawsuits" goals to the Fund. Also the conclusion of the Special Master in this regards is on the same line: "*I am pleased to report that, in my view, the Fund was an unqualified success: 97 percent of the families*

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of deceased victims who might otherwise have pursued lawsuits for years have received compensation through the Fund. The Fund provided generously for those directly affected by the attack.”¹⁵

In such assessments, the success of the Fund is related to its success as an alternative to litigation for transferring money to the victims of the attacks and their families. Other studies, mostly appearing in law reviews, have also focused on the amounts awarded by the VCF as the criterion for evaluating the Fund as an alternative to litigation and the traditional tort system. These assessments are generally positive.

However, the VCF received also a number of criticisms concerning both on the way it was designed and its purposes and results.

The jurisdictional limitation and the related waiver of tort remediation have received much criticism, and much of the public debate surrounding the Fund has focused on constitutional issues concerning the limitation and the renunciation of this right, and the consequences for the recovery of damages¹⁶.

The deduction of collateral sources from the awards has been a major source of controversy, with some claimants objecting, arguing that they should not have been penalized because they were receiving benefits from other sources benefit programs, and payments by federal, state, or local governments¹⁷.

Another source of criticism was related the fact that many of the World Trade Center victims were highly compensated financial professionals. Families of these victims felt that the compensation offers were too low, and, had a court considered their case on an individual basis, they would have been awarded much higher amounts. This concern had to be balanced against the time, complications, and risks of pursuing an individual case, and the real possibility that the airlines and their insurers could go bankrupt before paying the claim¹⁸.

Other critics warned against the adoption of the VCF as a model for possible similar events in the future: according to such critics, while the Fund worked as a retrospective remedy for a discrete tragedy for which deterrence of future calamities was inconsequential, a reform proposal designed to compensate harms ex post would need to be mindful of the ex ante deterrence incentives it would create¹⁹.

Finally, another kind of criticism was related to the fact that previous

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evaluations of VCP (being they positive, or negative) considered it as a means of distributing losses, without regard to accountability. Therefore, the VCP mechanism does not share the distinctive nature of the civil justice system as a democratic institution, namely its fundamentally normative function as a branch of government available to private citizens to participate in resolving disputes and adjudicating rights and wrongs.

According to such criticisms, the civil justice system does not only provide money to those who suffer losses: that function may be covered by a social insurance system. In fact, in a social insurance system losses suffered by some are shared among the community as a whole, which is appropriate for those losses that are non-normative, namely, that do not result of blameworthy conduct. On the contrary, in the civil justice system, if money is transferred from the defendant to the plaintiff it is, specifically, because of a prior determination that the defendant was accountable for the loss suffered by the plaintiff²⁰.

The Victim Compensation Fund's reduction of the interests of those injured by the September 11th attacks to monetary terms would then be linked to the reduction of tort law, to "greed" and "outrageous and arbitrary" jury awards. It is only framing litigation as a "money grab" that the choice between the VCF's payments and pursuit of a legal action was reduced to the issue of which produces more (appropriate) money more quickly.

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Footnotes

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² ATSSSA—Air Transportation Safety and System Stabilization Act of 2001 Pub. L. No. 107- 42, 115 Stat. 230 (2001) (codified at 49 U.S.C. §§ 40302-44306).

³ The Act's opening provision, Section 101, provides that:

"The President shall [...]: (1) [...] issue Federal credit instruments to air carriers that do not, in the aggregate, exceed \$ 10,000,000,000 [...] (2) Compensate air carriers in an aggregate amount equal to \$5,000,000,000 for [...] direct losses incurred [...] as a result of any Federal ground stop order [...] and the incremental losses incurred [...] by air carriers as a direct result of such attacks".

⁴ Sen. J. McCain, during the debate on the Act in the Senate stated that "...The vast uncertainty of our litigation system posed significant challenges to crafting reasonable limitations on airline liability ... [it was not] the intent of the fund to duplicate the

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arbitrary, wildly divergent awards that sometimes come from our deeply flawed tort system". 147 Cong. Rec. S9589-01, 2001 WL 1703925 (Cong. Rec.)

⁵ The National Vaccine Injury Compensation Program (NVICP) created under the National Childhood Vaccine Injury Act (NCVIA) of 1986 (42 U.S.C. sections 300aa-1 to 300aa-34); and the National Swine Flu Immunization Program, established by the National Swine Flu Act of 1976 (42 U.S.C. sections 247j to 2471).

⁶ The fund created under the Price-Anderson Nuclear Industries Indemnity Act (42 U.S.C. section 2210).

⁷ Air Transportation Safety Act Section 403.

⁸ *Id.* Section 402(5).

⁹ *Id.* Section 405(b)(6).

¹⁰ *Id.* Section 402(7).

¹¹ Rabin, R.L., *The Quest for Fairness in Compensating Victims of September 11*, p. 584

¹² Convention for the Unification of Certain Rules Relating to International Transportation by Air, 12 October 1929, now replaced by the Montreal Convention of 1999 which abolished the cap on tort liability as foreseen in the Warsaw Convention.

¹³ *Id.* ch. III, art 22 (as amended by art 2 of the Montreal Additional Protocol No. 2, 25 September 1975).

¹⁴ *Id.* ch. III, art. 25.

¹⁵ Feinberg, K.R., *Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001 (Volume I)* (November 2004), p. 1.

¹⁶ Holt, E.G., *The September 11 victim compensation fund: Legislative justice sui generis*, *NYU Ann. Surv. Am. L.*, 59:513, 2003 p. 543

¹⁷ Priest, G.L., *The Problematic structure of the September 11th victim compensation fund*. *DePaul L. Rev.*, 53:527, 2003 p. 542

¹⁸ Dixon L., and Stern R.K., *Compensation for Losses from the 9/11 Attacks*, available at <http://www.rand.org/publications/MG/MG264/>, p. 36

¹⁹ Copland, J.R., *Tragic Solutions: The 9/11 Victim Compensation Fund, Historical Antecedents, and Lessons for Tort Reform*, available at http://www.manhattan-institutue.Org/pdf/clpwp_01-13-05.pdf, p. 24

²⁰ Hadfield, G.K., *The September 11th Victim Compensation Fund: An Unprecedented Experiment in American Democracy*, *University of Southern California Legal Studies Working Papers Series*, n. 3, 2005, pp. 11-18

THE FUTURE SINGLE EUROPEAN SKY: CHALLENGES AND OPPORTUNITIES

*Fabio Ruta*¹

1. INTRODUCTION

Fragmentation of airspace, absence of common standards, obsolescence of the current air traffic management infrastructure/assets and significant air traffic increase forecast drove the European community to define a new air transport system, able to accommodate more air traffic flow, to guarantee an adequate environmental sustainability, to increase the safety level and reduce in the meantime the associated air traffic management costs. In few words, the Single European Sky is a big challenge that will realize a “revolution” in how users will fly and in how they will be controlled and managed.

Winning these challenges implies to increase the current Air Traffic Management (ATM) capability, but also the ability to consider, in a concrete way, that the current and the future airspace is a resource for different users. Characterised by different needs in terms of operations and system/technologies, we can mention low cost airlines, general aviation, business aviation or even military users that, for defence reasons, need to fly the airspace, as well as new promising products such as unmanned aircraft systems that, in the near future, will support the community expectations.

In future air traffic systems the challenge will be to accommodate the aircraft diversity without (or with limited) impacts on the overall system performance. To guarantee the coexistence between military and civil air traffic is a high added value for the community, as well as assuring the best exploitation of ATM benefits that the SESAR project is going to develop, while maintaining at the mean time the necessary safety levels.

2. TOWARD A SINGLE EUROPEAN SKY

In the last decades a great progress has been achieved in the creation of a borderless area inside of Europe, but in spite many land frontiers have been removed airspace ones still exists. As a consequence of this the European Commission (EC) adopted a set of measure with the aim of realizing a Single European Sky, i.e. “a unique flight information re-

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[obtained] by merging all the national regions into a single portion of airspace within which air traffic services will be provided according to the same rules and procedures”².

During the realization of the SES, the aim will be to increase the air traffic control capacity while improving the safety level, and assuring that the same rules will apply throughout all the countries. Great attention will also be put on the integration between military and civil air traffic management systems.

Today, thanks to the pressure from the international community, among them mainly ICAO, the SES is becoming a reality but facing significant and important difficulties in the European contest in consideration of the complexity and multidisciplinary nature of ATM domain as well as the geo-politic diversity that characterise the Europe.

In spite of all these difficulties, Europe, through its operational arm, the European Commission, is spending significant resources to progress in the definition, development and implementation of the SES, according to the international indications. A progress in this direction is not only a commitment with the international community but it is also a great opportunity for Europe. Important benefits can result to the entire community, from air transport users, with additional safe, low cost and green services, to industries and Service Providers.

Up to now, the effort put in place by the EC can be summarised in two main milestones: the definition of the global framework of SES, with special attention to SES package I and II regulation, under which the new SES concept will work; the SESAR programme arrangements, under which the SES will realise the technological, operational and standardisation parts.

Focusing on the SESAR programme, the new air transport system has been conceived through the “definition phase” whose main deliverable was the ATM Master Plan, a document that details the investment plan for modernising the current ATM, including the R&D activities to be launched. In line with the outcome of the ATM Master Plan, the subsequent “development phase” was launched in 2009 with the aim to design in detail and to develop systems, procedure and standards necessary to comply with SES. Today the SESAR Joint Undertaking (SESAR JU), a public body through a PPP (Private Public Partnership) scheme, is in charge the SESAR development phase. SESAR is progressing well, and is

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concretely demonstrating the capabilities that the new ATM will be able to reach, but more mature indications will be available at the end of SESAR JU mandate, in 2016.

The initial results available in the SESAR Development phase were promising, thanks to several verification and validation campaign performed in real operational environment and using real systems prototype developed during the programme, hence the EC was encouraged in its work in the subsequent phase of the programme, the “Deployment”, that will be aimed at industrialise and put in a operational condition the new ATM system by using a stepped approach.

The European Commission is fully engaged in the preparatory actions for defining the new framework of the deployment phase, that is expected to be launched on 2014. A crucial role in this work is the support offered by the SESAR Joint Undertaking in identifying the most promising and mature systems to be deployed, according to the indication of the development phase.

Among the several activities where EC and SESAR Joint Undertaking are engaged, one of the most important is the collaboration with other countries in view of maximise the interoperability aspects of the SES with other world airspace regions and the relevant ATM. In this framework a key-activity, crucial for the success of the SES, is the collaboration with Nextgen, the equivalent to SESAR in the United States, that under the ICAO guidelines will assure the interoperability between the two systems, while coping with standardisation aspects.

At the end, the success of the SES will depend on the ability of Europe in realising tangible benefits for the users, in demonstrating to airspace users a solid cost-benefit analysis to justify further investments, in allowing access and fair usage of airspace to all the stakeholders without forgetting the global dimension of air transport and with special attention to interoperability aspects.

3. INDICATIONS FROM SESAR: OPPORTUNITIES AND CHALLENGES

What will it mean to airspace users to fly the SES? What will they need to comply with? Which will be the new rules and regulations under this new framework?

Existing activities are progressing well but, of course, they are not mature enough to give clear answers up to now. In spite of this some

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Interesting considerations can be made.

The new SES will offer more services to airspace users, if compared with the current ones, in the view to guarantee more benefits to them. This will be possible only if users will be in condition to improve their system performances through the acquisition of new capabilities with some investments that requires a positive cost-benefit-analysis. Continuing to simplify the concept that is behind the new SES, implementing new system performances will imply more flexibility for airspaces users, that will be in condition to fly routes closer to their needs, while reducing the current rigidity that is characterising the airspace structure and its management.

The concept under the SES, or at least its summary, is “simple” but its implementation is complex considering the diversity of airspace users that will populate the SES, that is a common resource for everybody. “Diversity” means different variety of users that can fly the SES, but also different initial system capabilities and different reference operational scenario. In fact, the air traffic is composed of many transport airlines, with some differences (e.g. mainline vs regional aircraft), general aviation, an important part, business aviation, rotorcraft, military aircraft and other flying objects such UAS (Unmanned Aircraft System) that are becoming more and more important stakeholders in the SES.

The question is how to assure the coexistence of these users in the same airspace, under the same regulations and with equivalent system capabilities that, for some of them, may require a negative cost-benefits balance (e.g. for military aircraft or low cost aircraft). The answer is not simple if we consider that it will not be possible to upgrade all airspace users to comply with the new SES, but in the meantime we need to understand which of them can provide a significant negative impact to the system, in terms of performances, if not upgraded. So, the question should be reformulated, trying to reach the most appropriate balance between upgraded and not upgraded fleets. Such a balance will be a compromise that should be reached while evaluating the cost-benefit analysis for the whole air traffic and not for single categories. Anyway, this kind of balance needs to be regulated by institutional stakeholders, considering the times for the modifications and for the transition of the fleets to the final regime, while taking into account the necessary retrofit and forward fit activities.

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3.1 The military users

Military users belong to a special and important category of air traffic that is necessary to assure the defence and security of the European airspace, the current and the future SES. So in this special case, the question is not if we need to integrate them in the future SES or not, but how to do it while limiting as much as possible the potential impacts on the civil air traffic.

As highlighted in the SESAR Definition Phase, the diversity in user types (civil, business, military and general aviation) is expected to increase over the next 20 years, with a potential increase in the utilisation of UASs.

Military users have objectives linked to the maintenance of national security defence of national interests; therefore they require a highly flexible access to the airspace. Objectives of civil airspace users are to guarantee financially and commercially viable operations while ensuring safety. In order for the ATM controllers to ensure satisfaction to all users, capacity of the airspace has to be maximised as well as interoperability. Eurocontrol studies³ found that “there is significant scope for improvement in civil military cooperation” and increasing the airspace capacity would allow ATM to satisfy requirements of both users without the need for a trade-off.

The implementation of the concept of FUA (Flexible Use of Airspace) is responsibility of the single States and is therefore dependent on National Authorities and the type of relations existing in the National between Civil and Military stakeholders. A better coordination at pre-tactical (from one day to few hours before operations) and tactical level (after pre-tactical phase and during operations) is required to make further airspace capacity available and improve operations of all stakeholders. Military booking of the airspace is sometimes imprecise and lead military-booked airspace not being used half of the time. Also, when unused military-booked airspace is released for civil usage, only 50% of the potentially interested civil traffic actually uses it. Better coordination could be improved at all stages by e.g.: developing and defining routes for best usage of shared airspace when available to users (strategic level); establishing joint civil-military units for airspace management at pre-tactical level, where this solution is implemented a more efficient negotiation process is in place; similarly, at tactical level, integrated solutions with e.g. co-located military and civil ATC could contribute to operational effectiveness while maintaining good safety levels; the requirement for harmonisation of FUA operations across Europe and better communication means and collaborative

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decision making processes between civil and military stakeholders are required, in order to maximise the use of shared airspace.

If not addressed today, these restrictions will limit the ability of the European Airspace to meet future demands (e.g. 3-fold increase of capacity, as targeted by SESAR) and likely hinder the increased use of UAS for civil applications. Therefore, it is in the interest of the various aerospace stakeholders, including civil operators, institutions and industries, to support quick resolution of these issues also in consideration that for the future, due to changes in the geo-political environment (e.g. post 11/09) the need of coexistence among civil and military air traffic is more compelling. In other hand, for defence and security reason, the military aircraft need to fly the civil route in General Air Traffic (GAT) conditions instead of the classical Operational Air Traffic (OAT) relegated only to some specific and dedicated operational mission.

The SESAR Joint Undertaking, with a strong participation and contribution of the Member States and EDA, is working heavily on this direction in order to assess the existing military fleet and ground assets capabilities versus the need required by the new ATM under development. The idea is to maximise the reuse of the existing capabilities that military assets can offer identifying clearly the gaps that should be covered and the relevant associated benefits. At the end, the SESAR JU would like to provide to the military users an instrument that can show them the opportunity and weakness to invest for the future.

The direction taken is a good choice but different difficulties need to be faced considering that today, in Europe, there is a strong fragmentation in the military field without a unique European strategy and political agenda also consequence of the strong sovereignty exercised by the single member states in matter of defence.

3.2 UAS: the special case

⁴The development of UAS started in the 50's. UAS have been used by armed forces since decades and recent conflicts in the Middle-East allowed them to demonstrate their operational capacities and led to a quasi-exponential increase of military applications. Now civil applications are emerging as well, driven by both state and commercial applications and if their full potential is unleashed, they are expected to bring important benefits to European citizens and the European economy as a whole. The impact of UAS technology in the civil area is expected to be broad.

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An emerging market of innovative aerial services is expected to be supported by UAS thanks to its capabilities. UAS can perform dull, dirty and dangerous tasks that manned systems would not be able to perform. They are well suited to perform long monitoring tasks (e.g. 24 hours flights) or risky flights into ash clouds or over contaminated areas like damaged nuclear power plants. UAS can efficiently complement existing infrastructure (manned aircraft or satellites) to support governmental applications like crisis management, law enforcement, border control or fire fighting. UAS can also deliver affordable commercial aerial services in various areas. For instance, applications are emerging in precision agriculture and fisheries, power/gas line monitoring, infrastructure inspection, communications and broadcast services, wireless communication relay and satellite augmentation systems, natural resources monitoring, media/entertainment, digital mapping, land and wildlife management, air quality management/control. Hundreds of potential civil applications have been identified. Many more are expected to emerge once the technology is widely disseminated. Creativity, innovation and entrepreneurship will need to play a major role in the development of commercial aerial services.

The expansion of this new market will support not only the growth and the creation of highly qualified jobs in the UAS manufacturing or applications development but it will also foster the emergence of a totally new service industry offering UAS operations and aerial work to commercial and state customers. This service industry could generate revenues even bigger than the UAS manufacturing industry itself.

Market analysis performed by experts in this sector indicates great opportunities for the community to exploit technologies derived from the military sector in civil applications (spill-over process). At European level, these initial indications have been analysed and endorsed by the European Commission with the scope to better understand and explore the real opportunity that this sector can offer to the European community, as well as the obstacles that can prevent their fully exploitation.

This European process can be summarised as follows:

- 1/07/2010 - "UAS High-Level conference" (organised by EC and EDA). During the event it was agreed that UAS can be a great opportunity for the community, with a number of applications in civil sector and emerging market perspectives, huge industrial interests in the development of UAS related technologies, with spill-over effects on other industrial sectors (sensors, optical equipment, sense & avoid etc.). Nevertheless, it was also pointed

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out that, unfortunately, a significant numbers of obstacles exists (e.g. flight in non-segregated airspace, regulations, etc.) to prevent the access to the market

- 2/05/2011 - Establishment of an UAS Panel under the EC leadership, and with the participation of the major European Institutions and Industries, that coordinates five public workshops with the scope to analyse strength and weakness of the sector: UAS industry and market, UAS insertion into airspace, UAS safety; societal impacts of UAS applications and research and development needs. Overall, workshops were attended by more than 600 participants. The outcome of this phase was the Commission Staff Working Document “Towards a European strategy for the development of civil applications of Remotely Piloted Aircraft Systems (RPAS⁵).
- 6/07/2012 - Establishment of the “European RPAS Steering Group” (ERSG), under the EC leadership and with the participation of the major European Institutions and Associations, that, starting from the needs identified by the UAS Panel, will define a comprehensive European roadmap for ensuring a safe insertion of RPAS in the airspace. Such a roadmap will be organized in a phased approach, taking into account the evolution of the international regulation orientations, mainly at ICAO level, and the real community expectations. The first important intermediate roadmap milestone will be in 2016 with the RPAS insertion in non-segregated airspace, in a basic configuration. One of the most important tasks of ERSG will also be the steering and monitoring of the roadmap implementation, according to the identified schedule.

Taking a look at the barriers identified by the UAS Panel to insert RPAS in non segregated airspace, we are aware that the activities to be done are important and that Europe needs to face important challenges in a limited timeframe, but this is mandatory to take this great opportunity. The main barriers on which the community needs to work are relevant to the wideness of the field and the great number of relationships that must be considered, in particular:

- **regulations**, that need to modified and complemented to consider the specificities and peculiarities of these kind of aircraft;
- **operational aspects**, considering that dedicated operational procedure are needed for complying with safety aspects;
- **technological gaps**, that need to be covered in order to acquire the necessary capability to fly non-segregated the existing airspace today and the SES tomorrow;
- all the **complementary measures**, that will be needed to gain the

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Acceptance by the EU citizens, to assure the privacy data protection, and to manage those liability and insurance aspects that need to be adapted to the specific field of application.

It is important to highlight here that a key-point in this evolution process will be liability, as special attention will be due to the introduction of new technologies, that will guarantee more automation to the systems, with respect to the present solutions, and will lead to a change in roles and the responsibilities.

For most of the above challenges the community will not start from scratch, as several activities have been done and others are ongoing, so a good and solid basis will be available.

In the regulation and standardization field, a lot of work at National and European level is coming both from the civil and military field, with a strong contribution of EASA, that is working at European (e.g. E.Y01301- “Policy Statement Airworthiness Certification of UAS”) and international level for modifying the ICAO annexes (e.g. 2 and 7) to reflect RPAS peculiarities in a joint and in harmonized way with FAA. A similar approach is valid also for standardization activities, where EUROCAE, together with the RTCA, are working in an harmonised way.

In the R&D field, different assessment activities of the capabilities have been performed at the National and European level and, for some key-topics, dedicated development have been launched reaching valuable results. In this field, several stakeholders are actively working such as EC, EDA, ESA, Eurocontrol, Industries and Research Centres. In the field of complementary measure, it has been organized a dedicated network and forum, to explore the weakness of the existing regulation framework when applied to RPAS, while identifying the areas that need a revision.

Now the “European Engine” is running, but the success in catching the real opportunities that RPAS can offer will depend on the ability to have a balanced approach, to have a direct involvement of all the competent key-stakeholders, and to have an adequate commitment in the whole roadmap period to achieve the identified milestones.

Footnotes

¹ R&D New Programs—Head of SESAR Project and new Military Programs, AleniaAermacchi, a Finmeccanica Company.

² “Air Traffic management: Organization and use of airspace in the Single European Sky” - http://europa.eu/legislation_summaries/transport/air_transport/l24046_en.htm

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³ Status of Civil–Military Co-ordination in air traffic management, Phase I—fact finding, October 2001; and Evaluation of Civil/Military Airspace Utilisation, Report commissioned by the Performance Review Commission, November 2007

⁴ Commission Staff Working Document “Towards a European strategy for the development of civil applications of Remotely Piloted Aircraft Systems (RPAS)

⁵ New Nomenclature for UAS adopted by the ICAO and endorsed by EASA at European level

NEW SPACE COMPETENCE OF THE EUROPEAN UNION AND RELATIONS WITH ESA

*Gabriella Catalano Sgrosso*¹

I. The Lisbon Treaty and a new shared competence

The **Lisbon Treaty** reorganized the contents of European constitutional law through two fundamental Treaties: the **EU Treaty**, containing the EU basic principles, key competences and institutional organization, and the **Treaty on the Functioning of the European Union (TFEU)**, containing the basic legal framework to further regulate competences and institutions. The Lisbon Treaty amended the two basic EU papers: the Treaty on the European Union and the Treaty establishing the European Community².

The Treaty had a long “gestation” period before entering into force on December 1, 2009: it was first signed by Member States on October 29, 2004, and had to be ratified at a national level; however, France and the Netherlands rejected it, and a new simplified version of the Treaty was signed on December 13, 2007, which was, once again, rejected by Ireland. The ratification process, which had been ongoing since 2007, was finally completed with the deposit of the Irish instrument of ratification on October 23, 2009 and the Czech instrument on November 13, 2009. Italy ratified the Treaty on July 31, 2008.

The Lisbon Treaty is the new constitutional Treaty of the EU, introducing a number of institutional amendments.

The EU, moreover, aims to strengthen and increase its scientific and technological knowledge by creating a **European research space** where there is free movement of researchers, as well as knowledge and technology. The Lisbon Treaty introduces, for the first time ever, the so-called **space competence**, which aims to develop a **European space policy** to support research and coordinate efforts to use outer space.

Art. 189.2 of the Treaty on the Functioning of the European Union (TFEU), title XIX Research and technological development of space, sets out that:

- 1. To promote scientific and technical progress, industrial competitiveness and the implementation of its policies, the Union shall draw up a **European space policy**. To this end, it may promote joint initiatives, support research and technological development and coordinate the efforts needed for the exploration and exploitation of space.

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- 2. To contribute to attaining the objectives referred to in paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the necessary measures, which may take the form of a European space program, excluding any harmonization of the laws and regulations of the Member States.
- 3. The Union shall establish any appropriate relations with the European Space Agency.
- 4. This Article shall be without prejudice to the other provisions of this Title³.

This new competence falls within the **shared competence** and there is no pre-emption, i.e. member States and the EU can make decisions on space matters.

The scope of EU competences is limited to those expressly set out in the treaties and, as regards non-exclusive competences, they shall be exercised based on the principle of subsidiarity and proportionality. Moreover, the regional and local dimension of subsidiarity is acknowledged (Article 3b of the EUT).

With reference to Article 2 of the Treaty on the Functioning of the European Union on shared competence, when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area.

In reality, the nature of this so-called *sui generis* competence is not clear, since it can't harmonize space regulations.

In fact, art. 189.2 of the Treaty on the Functioning of the European Union identifies three sectors regarding competence:

- Competence to create a European Space Program;
- Ability to develop a space policy;
- A legislative competence which, however, excludes "any harmonization" of space law⁴.

We can deduce from the interpretation of this article that the EU cannot impose binding laws, as it may only draw up a European space policy and program.

Despite its rulemaking inability, the EU implements space programs, such as **Galileo**, the European navigation satellite system providing the necessary infrastructure for the EU road transportation and air traffic policy, as well as **GMES**, an Earth monitoring system having ground- and space-based components designed to support environmental protection and emergency services. In both cases a binding regulatory framework was created which often incorporates other existing regulations on services in Europe.

This means that, as regards space applications and services, sometimes

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also considering other EU competences, such as the research, transportation and industry sectors, the new space competence introduced by the Lisbon Treaty may be concretized in specific regulations.

II. Further EU regulations pertaining to outer space

We should not forget, moreover, some EU regulations not specifically covering space matters, which are, however, applicable to and often indispensable for space activities. The development of commercial applications and services has already posed the first problems and conflicts at the regulatory level.

The impact of such regulations on the development of the space sector and relevant services is significant and cannot be ignored by space authorities.

Database regulation - One of the most controversial issues is that of **data regulations**. Remote sensing and telecommunications data, as well as that regarding inventions made in outer space often pass through IT systems. Specifically, “primary” remote sensing data, having features that make it hard to subject this data to intellectual property protection law, falls within software protection, and shall be regulated as such.

Problems have arisen in finding the appropriate legal protection for software, as it is an intellectual product of an intangible nature. On the other hand, there is widespread use of IT technology in the modern society and technology producers want to protect themselves from competition and the increase in computer hacking.

The United States resolved the problem many years ago, as software can be copyright protected; actually, the 1980 Computer Software Amendment Act introduced copyright protection with respect to works protected under the US Copyright Act.

Europe addressed this problem ten years later by issuing **Directive 96/9/ EC** of the European Parliament and Council, of March 11, 1996, on the **legal protection of databases**, which, as regards intellectual property, requires Member States to either copyright protect databases or to protect them under a “*sui generis*” right regulating the extraction and/or re-utilization of the contents of a database. This twofold protection has been criticized by legal experts in favor of a specific global protection, at least covering all the satellite productions, based on investment protection⁵.

The Munich Convention on the Grant of European Patents of October 5, 1973, which was revised in Munich on November 29, 2000 (CBE 2000) and entered into force on December 13, 2007, regulating patent use at

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the EU level, excludes, under art. 52, patentability of programs for computers “as such”.

The expression caused great confusion, which led to the need to harmonize EU regulations by issuing a directive, but the work is still ongoing⁶. According to some experts, an analysis of the *Procès verbaux* of the Munich Conference confirms that the expression “programs as such” was clearly and evidently used to leave room for a flexible interpretation of the provision excluding software patentability. In addition, Italian judicial interpretation, recapped in a judgment of the Supreme Court of Cassation (no. 3169 of May 14, 1981), although it doesn’t directly address the problem pertaining to the **patentability** of programs “as such”, sets out the principle of patentability of a combination procedure (the so-called *combination invention*) in which a computer appropriately equipped with software is used.

The industrial application requirement would be met by applying computers, and, consequently, software, to industrial production, the materiality requirement would be represented by hardware, as a physical support, while the originality requirement would be met in case the activity involves an inventive step rather than being of a merely executive nature. Therefore, the three requirements (industrial application, originality, materiality) imposed by art. 2584 ff. of the Italian Civil Code for the granting of patents would be met⁷.

Even though the Munich Convention establishes a single procedure for granting patents, no Community patent has yet been created. A single, European Union-wide patent would allow Europe to draw success, from an industrial and commercial standpoint, from research results and new scientific and technical knowledge. It would also enable Europe to close the time gap vis-à-vis the US and Japan with respect to private investment in R&D (research & development)⁸.

There is still widespread debate among European decision-makers over the delicate issue of creating a Community patent, which, however, has come to a stalemate. For example, the proposal presented by Michel Barnier, Internal Market and Services Commissioner, which was opposed in Rome and Madrid, aims to cut costs by establishing that patent translations in all EU languages shall no longer be required in order for the patent to be legally binding, but it shall only be required in the three EU official languages: English, French and German. Lastly, the Proposal for a Directive of the European Parliament and Council (COM final 2002 92) on the patentability of computer-implemented inventions and the Common Position (EC) no. 20/2005 adopted by the Council on March 7, 2005 are worthy of note⁹.

The matter is also of particular interest to remote sensing data, which is only generally, rather than specifically, regulated and falls within

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intellectual property or environmental law. An attempt was made by commercial players and space agencies to hold intellectual property of remote sensing data and opt for a free pricing policy with respect to users, to reap the benefits of investments; however, this clashes with Observed States' right to information and free access on a non-discriminatory basis, as set forth by the UN Resolution on Remote Sensing.

Granting free access to this data would favor the development of European Earth observation and weather forecast services. It would, in any case, reduce the market price of these images, with the entry of new users. The phenomenon is closely linked to RS data standardization. In fact, integrating satellite data with Earth-based data would allow a higher definition. The EU **INSPIRE** (i.e. **IN**frastructure for **SP**atial **IN**fo-**R**mation in **E**urope) Directive is an example of an attempt to create comprehensive standards for spatial information in Europe, which entered into force on May 15, 2007¹⁰.

The Directive aims to create, thanks to common implementing rules supplemented with Community measures, a common infrastructure that makes different States' spatial information compatible and usable in a Community and transboundary context, in order to resolve the problems regarding the availability, quality, organization and accessibility of data. Once fully operational, it will theoretically allow to combine data from different Member States in a consistent way and share it between applications and users.

The document on the European Space Policy, which we will deal with later on, also underlines the need to develop a **consistent data policy** including access and pricing data that may contribute to the rapid development of services in the space sector.

The EU Draft Code of Conduct for Outer Space Activities and Security - Considering, on the one hand, the problems associated with drafting a real treaty and, on the other hand, the urgency to take steps toward an international regulation, Italy, in 2007, presented, at the European level, a perhaps less ambitious but certainly more feasible project regarding an "**International Code of Conduct on space objects**". Italian experts fine-tuned a proposal designed to fill the existing lacunae, most of which were due to the absence of regulations addressing both the civil and military sectors.

The 2007 Italian initiative was accepted by the EU and adopted by the European Council on December 18, 2008. The European negotiation proposal contains specific debris control and mitigation measures, provisions on the timely notification of outer space activities and registration of space objects, and introduces specific international

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consultation mechanisms. This initiative attracted interest from key players in the space sector, including Russia and the US, and once they are ready to start negotiations, this code could be the basis on which to build new international consensus¹¹.

The European Union recently addressed **security** in a general manner. On **April 14, 2010** the **European Parliament's** Commission for Foreign Affairs issued a Draft Opinion addressed to the Committee on Industry, Research and Energy on the mid-term review of the European satellite navigation programs: implementation, assessment, future challenges and financing perspectives. After stressing its support to Galileo, the European global satellite radionavigation program, and appreciating the fact that the Commission and ESA are engaged in a dialogue and cooperation with providers of other Global Navigation Satellite Systems (GNSS), namely the US, Russia, China, India and Japan, with a view to ensuring the interoperability of the GNSS systems, the Parliament stresses that under no circumstances should European space policy contribute to the overall militarization and weaponization of space, and reaffirms its commitment to the principles laid down in the UN Outer Space Treaty, in particular:

- The use of outer space for exclusively peaceful purposes;
- The promotion of international cooperation in the exploration and use of outer space;
- The liability of the launching authority in the event of damage being caused to a third State, as further specified in the UN Convention on International Liability for Damage Caused by Space Objects;

Enhancing space security has now become a prerequisite to encourage the expansion of public and private activities. However, only few States have so far developed a system for the continuous monitoring of near-Earth space and the assessment of on-orbit events. Initially created for defensive purposes, this system is now crucial in order to protect European assets by developing an information system.

The creation of a **European Space Situational Awareness Capacity (SSA) on the monitoring of Europe's space environment** began in the late 1990s. In 2008, ESA's Director General, in his opening speech, suggested that Member States develop space surveillance programs. In light of this, ESA prepared an SSA program chiefly designed to provide surveillance of space debris, monitoring of space weather and detection of Near-Earth Objects (NEOs) as well as other objectives to be specifically defined in the program aimed to provide ESA with an operational surveillance capacity by 2009-2011¹².

III. Resolution on the European Space Policy - ESA and the EU

The **Green Paper**, prepared by the European Commission in cooperation with ESA in 2003, aims to raise key issues and determine medium- and long-term options; comments made by interested parties will help draw up an action plan, outlined in the **White Paper**. The Green Paper defines the European Security and Defense Policy (ESDP) as a policy designed to provide the EU with the ability to act and decide autonomously, with a view to a global approach to crisis management, including conflict prevention by means of civil and military tools¹³.

Space projects currently implemented at the EU level include the Galileo and Kopernikus (former GMES - Global Monitoring for Environment and Security) programs, as well as research activities financed by Technological Research & Development Programs (TR&D). Specifically regarding the period 2007-2013, funds are granted in accordance with the Seventh Framework Program (FP7).

While Green Papers set out a range of ideas presented for public debate, White Papers are documents containing proposals for EU action in a specific area, such as space, and aim to harmonize the different national policies. The 2003 White Paper's key objective is to elaborate, in collaboration with ESA, a **European Space Program** in two phases: 1) Phase 1 (2004-2007), which consists of implementing the topics covered by the Framework Agreement between the European Community and ESA. The two organizations will therefore be able to set common objectives and undertake joint initiatives, whilst retaining their respective rules. ESA should be the implementing agency for the EU on space matters. 2) Phase 2 (2007 onwards), which has begun after the entry into force of the proposed European Constitutional Treaty, establishing space as a shared competence between the EU and Member States. ESA, at this point, should be positioned within the EU framework and its Convention modified accordingly. At the moment the legal community is pretty skeptical about implementing the last measure.

The **Seventh Framework Program (FP7)** was launched in January 2007; for the first time ever, the Framework Program will run for seven years, from 2007 to 2013, in line with the period covered by the EU Financial Perspectives (2007-2013).

Funds are not to be considered "grants" to businesses or research centers; only specific projects or research activities conducted by consortia composed of participants from different Member States and/or associated countries and / or associate candidate countries shall be eligible to apply for funding under these schemes.

The **European Space Policy (ESP)**, which started being developed in 2004 based on an ESA/EC Framework Agreement (F/W), was

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established on May 22, 2007, when the Fourth Space Council (i.e. the joint and concomitant meeting of the EU Council and the ESA Council) adopted the *Resolution on the European Space Policy* outlining ESP principles. The Resolution was based on a proposal jointly put forth by the European Commission and ESA's Director General. A Framework Agreement was signed between ESA and the European Commission regulating ESA-EU relations and defining the objectives and fields of cooperation between the Parties; moreover, two resolutions on the adoption and implementation of a common European Space Policy (ESP) were adopted. A common policy framework for space activities was created for the first time in Europe¹⁴.

Through this document, the European Union, ESA and its Member States all commit to increasing, where possible, coordination of their activities and programs as well as to organizing them based on their respective roles, avoiding unsustainable duplication.

The European Space Policy (ESP) establishes a vision and a general strategy for the space sector and addresses issues such as security and defense, access to space and exploration. The two organizations commit to coordinating their activities and programs and to organizing them based on their respective roles regarding space. The document highlights the rapid growth of the satellite-based navigation and telecommunication applications market and the fact that Europe is among the leading space-faring nations in the world. Europe shall make an effort to maintain its position by strengthening intra-European and international cooperation, obviously by ensuring complementarity of Member States' national programs. Space activities shall fully comply with the principles laid down in the United Nations "Outer Space Treaty", in particular: the use of outer space for the benefit and in the interest of all countries, for exclusively peaceful purposes and as a province of all mankind. It welcomes the combined efforts of ESA and the European Union to implement large user-oriented initiatives such as **GMES** and **Galileo**, as well as the beginning efforts for increased development and exploitation of space-related integrated applications, including in particular satellite communication services.

Europe commits to establishing a commercially sustainable global civil navigation satellite system under European Union control. Following the implementation of EGNOS, Galileo was jointly developed by the EU and ESA.

Annex 1 is dedicated to identifying final users of GMES services and their needs, developing an integrated and customized offer, also determining the conditions under which satellites belonging to Member States and their data and services will be made available to GMES and the treatment of the contributions of national programs to EU

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initiatives. The space component will be co-funded by ESA and the EU, implemented by and managed under the coordination of ESA.

As regards **security and defense**, it affirms the need to set up a structured dialogue with the competent bodies of Member States and within the EU Second and Third Pillars and the European Defense Agency within the framework of existing attribution of competences. The use by any military users of Galileo and GMES must be consistent with the principle that **Galileo and GMES are civil systems under civil control**, and consequently any change to this principle would require examination in the framework of Title V of the TEU and in particular articles 17 and 23 thereof, as well as in the framework of the ESA Convention.

The Council recognizes the need for Europe to take advantage in a coherent way of the launcher assets under its control, pursue long-term competitiveness of the **European launcher sector** with the objective to maintain and increase the presence in the commercial market. A series of launches from the Guiana European Space Center will progressively take place following the development of the VEGA launcher and the Russian Soyuz launcher in connection with Ariane-5. As regards the **International Space Station**, of great political and scientific importance, the Council calls on the international partners to the ISS to continue their support to ensure that the objectives of ISS partnership are maintained in their entirety.

It supports the continuation of the Framework Agreement beyond May 2008 as the basis for cooperation between the European Community and ESA, in the understanding that the Framework Agreement and its implementation will be periodically assessed and improved, if necessary. It recognizes the valuable contribution to the European Space Program made by **EUMETSAT** and invites the latter to keep participating in future meetings of the Space Council as an observer.

Section G of the document on the European Space Policy deals with the **industrial policy**. It recognizes that ESA has a flexible and effective industrial policy based on cost-efficiency, competitiveness, fair distribution of activities and competitive bidding, which secures adequate industrial capacities worldwide.

It emphasizes in particular the political and economic dimension of ESA's **fair return principle**, inviting to assess and improve, when necessary, the implementation of the fair return principle in view of the future challenges for industry to remain competitive in a changing environment worldwide while maintaining, and possibly increasing, Member States' motivation to invest in space.

It therefore invites the European Commission to develop adequate instruments and funding schemes for Community actions in the space sector. The European Commission, the Director General of ESA and

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Member States are encouraged to develop and pursue a joint strategy and establish a coordination mechanism on international relations. This policy should aim to attract international partners to European conceived programs, like in the case of Galileo, and reinforce the contribution of Europe to global initiatives, like in the case of GMES. Regarding the distribution and management of **Galileo**, the best quality/price ratio must be guaranteed and public/private partners must be effectively encouraged to participate in it. Many non-EU countries are seeking to become partners in the program. The partnership shall be based on the principles of non-discrimination and fair collaboration and shall ensure fair access, as well as service continuity and safety. It's essential to ensure that Galileo will be deployed without further delays.

As regards Earth observation, autonomous access to information on environment, climate change and security is of strategic importance to Europe, due to the substantial economic and social benefits associated with it. **GMES** will improve the EU environmental policy's monitoring and assessment capacity and contribute to addressing security needs. As regards the Global Earth Observation System of Systems (GEOSS), which aims to achieve global synergy in Earth observation, GMES is Europe's main contribution.

The plan, moreover, envisages full use of the potential of space systems for sustainable development, in particular in support of Africa. **Satellite communications**, driven by private sector investments, chiefly from the broadcast and telecommunications sector, represent 40% of the European space sector's current revenues.

To tackle the current threats to **national security**, the EU must create synergy between civil and military players. Many civil programs, such as Galileo and GMES, may be used for both civil and military purposes, thereby increasing the necessary **interoperability** between them.

Science and Technology studies will be conducted, focusing on the conditions for life and planetary formation, as well as the origins and fundamental laws of the Universe. The Commission must attract the interest of young people, who are currently showing low levels of interest, in the **Science, Engineering and Technology (SET)** program¹⁵.

The proposal jointly drafted by ESA's Director General and the European Commission, issued on April 26, 2007, invites Member States to make effective use of satellite-based tools to foster the development of key economic sectors. Space-based systems provide improved weather forecasts, satellite broadcasting and communications, which open up new opportunities in teleeducation, telemedicine and advanced navigation services, which are key to country growth.

Space also offers great opportunities for high-technology innovation in selected areas, opening the possibility for the development of lead

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markets. Space is a 90 billion euro market worldwide, growing by 7% on an annual basis. European companies secure 40% of the commercial markets for satellite manufacturing, launch and satellite services. Global markets for satellite navigation equipment and services are estimated to reach 400 billion by 2025.

The European Space Policy should enable the EU, ESA and its Member States to increase coordination of their activities and programs, and organize their respective roles relating to space, providing a more flexible framework to facilitate EU investment in space activities.

IV. Latent conflict of laws between ESA's industrial policy and the EU regulatory framework

The old but still unsolved problem regarding the conflict of laws between the basic regulatory framework of ESA's industrial policy and some basic EU rules is also found in this document on the European Space Policy.

Initially, the **principle of fair return** mostly helped find the significant amount of money needed to fund space activities. In fact, when space research provided no return in terms of commercial and financial applications, States were encouraged to participate in space programs, most of which were optional, by means of a return mechanism based on the ratio between a Member State's percentage share of the total value of all contracts awarded among all Member States and its total percentage contributions. This industrial policy is essential to the ESA system, and its detailed arrangements are set out in Annex V and in rules which shall be adopted by the Council by a two-thirds majority of all Member States. Some consider the principle of fair return a sort of development aid. Art. IV of Annex V to the Convention sets out the general rules governing the geographical distribution of all the Agency's contracts, i.e. in accordance with the so-called **overall return coefficient**.

A Member State's overall return coefficient is the ratio between its percentage share of the total value of all contracts awarded among all Member States and its total percentage contributions. If, for example, a State's participation in ESA programs is equal to 15% of total cost, the weighted value of contracts awarded to its companies shall be equal to 15% of the total value. Therefore, there seems to be a sharp contrast between the geographical distribution principle and the discriminating effects of the application of the "fair return" principle and EU law. Significant interferences could exist between the scientific and technological cooperation between EU Member States with ESA framework and EU law. In fact, these States have problems meeting the

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needs associated with the implementation of the ESA industrial policy based on the fair return principle and at the same time complying with EU obligations.

The conflict of laws can be seen from different standpoints. Art. 2 of Annex V to the ESA Convention, with respect to the principle of preference granted to Member States' industry contained in art. 7 of the Convention, sets out that, within each optional program, particular preference shall be given to industry and organizations in the participating States. Art. 4 of this Annex establishes that geographical distribution shall be based on the abovementioned principle of "fair return". In accordance with this distribution criteria, companies of other nationalities shall not participate in the distribution of contracts to be granted to the companies of a certain State and the latter shall not participate in the distribution of other contracts, if the State has met the overall return coefficient.

As the principle of "fair return" tends to favor companies of a State participating in the program (moreover, ESA's optional programs are the most relevant) as well as those within the same State, it's clearly contrary to the **free competition** rules set out in art. 101 (former art. 81) of the Treaty on the Functioning of the EU, as well as to operations competitiveness and cost-effectiveness. Another unlawful act that could occur is an **abuse of a dominant position** on the market or a significant part of it by one or more companies. This is with special reference to Arianespace, a French company whose shareholders are entities and companies of certain Member States, which is responsible for all the operations associated with building and using Ariane rockets. It uses, on an exclusive basis, assets owned by Member States in a situation of monopoly, and imposes contractual conditions that could fall within the notion of abuse of a dominant position.

Some argue that the ESA mechanism for placing contracts could be considered a sort of aid granted by States, envisaged by art. 107 (former art. 87) ff. of the TFEU, as the winning bidder shall start construction only if it can benefit from government grants. In reality, contracts would be paid with ESA rather than national funds, however, considering that ESA, as most international organizations, operates based on national contributions, they would fall within "State resources in any form whatsoever", which are prohibited by art. 107 (former art. 87).

Art. 107 of the TFEU sets out that, save as otherwise provided in the Treaties, any aid granted by States or through State resources in any **form whatsoever** which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market. To tackle the problem and find a solution, the

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starting point should be the issue regarding the signing, by States, of subsequent agreements containing rules that are in contrast to those contained in previous agreements. The ESA Convention, which was signed on May 30, 1975 and entered into force on October 30, 1980, was signed after the Treaty Establishing the European Community, which was signed on March 25, 1957 and entered into force on January 1, 1958. In accordance with international law, and specifically art. 30 of the 1969 Vienna Convention on the Law of Treaties, those EU States that are members of both organizations shall comply with both treaties; therefore, complying with the rules contained in one of the treaties could entail violating the rules contained in the other. Art. 4, para. 3 of the Treaty on the European Union sets out that States shall “refrain from any measure which could jeopardize the attainment of the Union’s objectives”. Clearly, this chronological element shall not apply to those countries that have become EU member States only after the ESA Convention was signed.

At this point, art. 351 (former art. 307) of the Treaty on the Functioning of the European Union becomes relevant, as it could be the solution to the problem under discussion. Art. 351, governing the attitude States should adopt with respect to the obligations arising from previous agreements, sets out that «to the extent that such agreements are not compatible with the Treaties», Member States «shall take all appropriate steps to eliminate the incompatibilities established ». As the two entities concerned, i.e. the EU and ESA, are autonomous and independent international organizations, they cannot suffer from mutual interferences in their relevant institutional powers, except for whatever may arise from **collaboration agreements and MOUs** aimed at coordinating the relevant activities. This seems to be the right solution, which should be adopted at the earliest, in light of various considerations. We can’t, in fact, wait until a European company is excluded, in accordance with ESA rules, from a contract bid pertaining to space activities and files an appeal with the Court of Justice claiming a violation of competition rules or of the prohibition of granting State aids. The Court, which would not be able to take into account the tolerance shown so far or any ongoing negotiations, could rule authoritatively but in a manner that could hinder the solution to the problem.

On the one hand, we can no longer draw a sharp distinction between the two systems - which could, in this way, autonomously coexist - due to the increasingly close cooperation between the two organizations and the increasing number of joint programs implemented. On the other hand, granting a share of space activities to the industry of Member States is an ESA principle of a chiefly political nature, which is at the basis of space cooperation between EU States and has enabled

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many States to participate in space programs.

We have to find a legal solution to this problem through a legislative act at the EU level or an agreement between the two organizations.

We could also opt for a solution **sector by sector**. For example, since the EU Treaty envisages cooperation with third countries and international organizations in the field of scientific and technological research, welcoming the political-economic reason of the “fair return” principle as a driver of scientific and technological research, we could deduce that this principle does not fall within those aids that are deemed to be incompatible with the provisions of the Treaty. We could also argue that the contributions granted to national companies by ESA (which are considered indirect State aids) are unlikely, at least for now, to distort competition, which would justify the prohibition of aids, as competition in this sector in Europe is non-existent.

The 2007 Resolution on the European Space Policy (ESP) only sets out that a competitive ESP is of strategic importance and that an effective industrial policy should cover many aspects, including regulation, public procurement and R&D. Unfortunately, we missed a good opportunity to clarify the issue, as it keeps getting put off¹⁶.

Footnotes

¹ Professor of International Law—University of Rome “La Sapienza”

² In «Official Journal of the European Union», 2007/C, 306/01.; TFEU in «Official Journal of the European Union», 9.5.2008 IT C 115/131. For the text of the two Treaties, see: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:IT:HTML> and http://it.wikipedia.org/wiki/Trattato_di_Lisbona and for the key amendments made by the Lisbon Treaty, see: http://www.senato.it/documenti/repository/lavori/affarieuropei/schede_informative/il%20trattato%20di%20lisbona.pdf

³ See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:IT:PDF>

⁴ See the Lisbon Action Programme for Growth and Employment, “Working and Jobs Together for Growth and Jobs: a New Start for the Lisbon Strategy” COM(2005) 24, 2 February 2005

⁵ Directive 96/9/EC of the European Parliament and Council on the “Legal Protection of Databases”, March 11, 1996, in «Official Journal of the European Union» L77/20, March 27, 1996

⁶ Article 52, paragraph 2, point c, expressly excludes software patentability

⁷ See: http://it.wikipedia.org/wiki/Convenzione_di_Monaco_sul_brevetto_europeo

⁸ Proposal COM(2000) 412 final., in «Official Journal of the European Union» no. C337 of 28/11/2000, consultation procedure CNS/2000/0177

⁹ Directive 2001/29/EC on the “*Harmonization of certain aspects of copyright and related rights in the information society*” may also be of interest.

See: <http://www.european-patent-office.org>

¹⁰ The directive is available online at the following link: http://eur-lex.europa.eu/LexUriServ/site/it/oj/2007/l_108/l_10820070425it00010014.pdf

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- ¹¹ See: <http://www.affarinternazionali.it/articolo.asp?ID=1291>
TREZZA, Draft Code of Conduct for Outer Space Activities. As approved by the Council on December 8-9, 2008. Annex to the European Working Paper on “PAROS” (February 12, 2009). Conference on Disarmament Part I, Geneva, January 19 - March 27, 2009.
- ¹² See: www.europarl.europa.eu/meetdocs/2009_2014/.../sede/dv/.../811205it.pdf
See: European Space Policy Institute (ESPI) security reports:
REMUSS, Space and Internal Security - Developing a Concept for the Use of Space Assets to Assure a Secure Europe, ESPI Report, September 20, 2009.
See also: SANCHE ZARANZAMENDI, Economic and Policy Aspects of Space Regulations in Europe. Part 1: The Case of National Space Legislation - Finding the Way Between Common and Coordinated Action, ESPI Report, September 21, 2009.
- ¹³ Green Paper - European Space Policy - document prepared in cooperation with ESA, Brussels 21/1/2003, COM (2003), 17 final, Green Paper, May 30, 2003, p. 24. White Paper - Space: a new European frontier for an expanding Union . An action plan for implementing the European space policy, approved by the Commission in Brussels on November 11; 2003, COM(2003) 673 final.
- ¹⁴ Framework Agreement between the European Community and the European Space Agency, adopted by Council Decision (12858/03 RECH 152 7 October 2003); it entered into force in May 2004. For the text of the Resolution on the European Space Policy (ESP) adopted by the Fourth Space Council on May 22, 2007, and the Resolution on the implementation of the ESP adopted by the Council on September 26, 2008, see: http://esamultimedia.esa.int/docs/BR/ESA_BR_269_22-05-07.pdf
- ¹⁵ See: “Europe’s Space Policy becomes a reality today”. ESA. 22 May 2007. http://www.esa.int/esaCP/Pr_21_2007_p_EN.html
- ¹⁶ Paper from the manual: GABRIELLA CATALANO SGROSSO. “ International Space Law”, LoGisma ed. 2011, pp.512, ISBN 978-88-97530-08-4, € 58,00, it is visible and purchasable directly to the editor site: www.logisma.it or in Casini Libri: www.torrossa.it

The European Court of Justice upholds a broad interpretation of the concept of “denied board”

Anna Masutti and Monia Stanev

It is well known that, according to Regulation (EC) no. 261/2004, where a passenger is denied boarding the air carrier has the duty to provide him with assistance and flat-rate compensation. Pursuant to Article 2 of the abovementioned Regulation, “denied boarding means a refusal to carry passengers on a flight, although they have presented themselves for boarding (...) except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation”.

But is this definition to be considered as a strict one?

The dispute at issue arises from a strike by staff occurred at Barcelona Airport on 28th July 2006, following which the scheduled 11:40 flight from Barcelona to Helsinki had to be cancelled by the air carrier Finnair.

Consequently, Finnair decided to reschedule its flights, so that some of the passengers of the cancelled flight could arrive to Helsinki on the 11:40 flight of the following day, 29th July 2006, and some others on a specially arranged 21:40 flight the same day.

As a consequence of that rescheduling, some of the passengers who had bought their ticket to Helsinki for the 11:40 flight on 29th July 2006 were compelled to board on the 11:40 flight on 30th July 2006 and on another specially arranged 21:40 flight. The same occurred to passengers who had bought their ticket for the 11:40 flight of 30th July 2006, like Mr Lassooy, who arrived to Helsinki on the special 21:40 flight.

Mr Lassooy therefore brought an action before Finnish courts, seeking an order for Finnair, which has denied him boarding, to pay him the flat-rate compensation of €400 provided for by Article 4 of Regulation (EC) no. 261/2004 for all intra-Community flights of more than 1.500 km.

Having doubts as to the correct interpretation of the concept of “denied boarding”, the Finnish Supreme Court seeks a ruling from the Court of Justice in this regard.

In its judgment, rendered on October 4th 2012, the Court holds that “the concept of ‘denied boarding’ relates not only to cases of overbooking but also to those concerning other grounds, such as operational reasons.”: in fact, limiting the scope of ‘denied boarding’ exclusively to cases of overbooking would have the effect of substantially reducing the protection afforded to passengers in the situation of Mr Lassooy.

Indeed, if Mr Lassooy were regarded as not having been denied boarding, he could not rely either on the provisions relating to cancellation

of flights or on those relating to delay. Thus, he would not fall within any of the categories entitling him to protective measures for air passengers, which would be totally contrary to the objective of the relevant European legislation. The interpretation adopted by the Court is based not only on the wording of the regulation, but also from its ratio, namely that of ensuring a high level of protection for air passengers.

Furthermore, as also highlighted by Advocate General Bot in his Opinion, it would be easy for an air carrier to use a rescheduling of its flights (or a similar measure) rather than an overbooking, in order to deny a passenger boarding without paying him any compensation.

The Court also argues that denied boarding cannot be justified by grounds relating to rescheduling of flights as a result of extraordinary circumstances, such as a strike at an airport: the Regulation in fact lays down the cases where there are grounds for denying boarding, in particular for reasons of health, safety or security, or because of inadequate travel documentation.

In this case, the Court highlights that the denial of boarding such as that in question “is not comparable to those specifically mentioned in Article 2(j) of Regulation No 261/2004, since it is in no way attributable to the passenger to whom boarding is denied”.

On the other hand, the Court says that even if the decision of rescheduling flights was taken by Finnair in order to avoid the passengers affected by the flights cancelled having excessively long waiting times, that situation is comparable to a denial of boarding due to initial overbooking by the carrier for economic reasons. Finnair had in fact reallocated Mr Lassooy’s seat in order to be able to carry other passengers, itself choosing which passengers to carry.

In any case, the Court reminds that, even if the air carrier has no duty to pay compensation to passengers in case the flight cancellation or delay is due to extraordinary circumstances - as long as it had no control over those events -, nevertheless this exemption does not apply in case the air carrier decides to reschedule its flight due to extraordinary circumstances. This way, in fact, the measure of denied boarding affects one or more arbitrary selected passengers: the harm caused to the latter is therefore entirely attributable to the air carrier, which shall be required to pay compensation for the denied boarding.

The Court has also confirmed that, if the situation, which caused denial of boarding, cannot be attributed to the air carrier, the latter has the right to seek compensation against the person liable for the occurrence, including third parties.

The concept of “optional price supplements” and flight cancellation insurance (European Court of Justice, case C-112/2011, judgment of 19th July 2012)
Alessandra Laconi

In the case at issue, the reference for a preliminary ruling concerns the interpretation of Article 23(1) of Regulation (EC) No 1008/2008 establishing common rules for the operation of air services in the EU.

The reference has been made in proceedings between ebookers.com and the BVV, a federal union of consumer organisations and associations.

Ebookers.com is an online seller of airline tickets through a dedicated portal, and the BVV complains about the lawfulness of the aforementioned selling system. Namely, BVV maintains that the defendant’s selling system does not provide complete and reliable information on the final price to be paid to consumers.

In essence, the German court made a reference for a preliminary ruling asking if the concept of “optional price supplements” as laid down at Article 23(1) of Regulation No 1008/2008 includes the range of all possible costs related to air services, like the travel cancellation insurance.

In this case, the travel insurance is supplied by a party other than the air carrier but it is globally charged to the customer by the seller of the travel as a part of the total air fare.

Such a commercial method can be reasonably found to be in violation of provision set forth at Article 23(1) of Regulation No 1008/2008, the aim of which is to guarantee adequate transparency and information concerning the price of air services, thus protecting all the potential consumers.

In particular, the judgment focuses on the concept of “optional price supplements” as laid down at Article 23(1), explaining that it is intended to include optional and eventual price supplements for extra and avoidable services, which can be accepted or refused by the final consumer.

If the consumer is to make an informed choice, such price supplements must be notified in a clear, transparent and unambiguous way at the start of any booking process, and their acceptance by the customer must be on an opt-in basis, as laid down in the last sentence of Article 23(1) of Regulation No 1008/2008.

In other words, the consumer must be aware of the features and of the real necessity of any proposed service before purchasing and paying the price supplement.

The core question is thus that both the service and the corresponding price are offered in relation to the flight itself during the flight booking process.

The necessary protection of the customer as set forth in the above-mentioned provisions cannot be reduced depending on the status of the provider of the optional additional service connected with the flight.

In light of all these considerations, the concept of “optional price supplements”, pursuant to Article 23(1) of Regulation No 1008/2008, must be interpreted as including amounts arising from air services, such as the flight cancellation insurance at issue in the main proceedings, supplied by a party other than the air carrier and charged to the customer by the person selling that travel, together with the air fare, as part of a total price.

According to this ruling, travel insurance cancellation costs must be communicated in a clear, transparent and unambiguous way at the start of any booking process, and their acceptance by the customer must be on an opt-in basis.

From a global perspective, such a coherent interpretation by the European Court of Justice reflects Article 38 of the Charter of Fundamental Rights of the European Union, which is intended to ensure a high level of consumer protection.

*Observations on the Commission's report of
24th July 2012 on the state of transport
security in the European Union
Doriano Ricciutelli*

On the 29th of April 2010, Regulation (EC) 300/2008 and its implementing provisions entered into force. This new regulatory framework can be considered as a second generation instrument, in that, through consolidating and repealing, it brings clarity, harmonization and simplification of the EU legal acts which were approved in the wake of the tragic events of 9/11, such as Regulation 2320/2002.

Pursuant to Article 15 of Reg.300/2008, the Commission has to carry out inspections of the aviation security authorities in the Member States (as well as Switzerland) and EU airports.

According to Article 16, based on the results of these inspections, the Commission has to transmit to the European Parliament, the Council and the Member States an annual report on the application of the rules and their effect on the improvement of aviation security. On the 24th of July 2012¹ the Commission published its report for last year.

As far as the inspections of appropriate authorities (10 in all) are concerned, the report notes there are 'significant improvements'² compared to the past, even if in some Member States the national compliance monitoring activities suffered from the economic crisis. In some cases shortcomings were not corrected in a timely fashion and the necessary sanctions not applied. In the case of airport inspections (19 in all), non-compliance arose, apart from manual controls, in relation to screening methods and standards.

There is good news, however, about the follow-up inspections which the Commission carries out. In fact, according to Article 13 of Regulation 72/2010/EU³, the Commission systematically performs a limited number of inspections, mostly because several serious deficiencies were found during the initial inspection.

To a lesser degree, the Commission also carries out random inspections to verify the accuracy of national compliance monitoring activities and reporting.

Point 18 of the Annex to Commission Regulation 18/2010/EC deals with

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the Members States' own evaluations. It requires the Member States to present to the Commission an annual report on the results of the national compliance monitoring. The Commission indicates that all Member States have punctually filed their national reports, but that there is room for improvement as far as the number of national control activities and full respect of all requirements are concerned.

In this document, the Commission points out that the legislation approved by the European institutions in this sector relates essentially to security scanners (Regulations 1141/2011/EC and 1147/2011/EC), cargo (Reg. 859/2011/EU) and controls of liquids (Reg. 720/211/EU).

A great legislative innovation is the regulated agent and known consignor database, which, since the 1st of June 2010, reinforces the security chain of cargo and air mail, and harmonizes the system of qualified operators in the cargo sector in the EU. By the 31st of December 2011, 8500 operators had registered.

Another interesting part of the report deals with trials. A number of countries ran trials in 2011 with handheld detectors for screening passengers' religious headgear for traces of explosives. As far as studies are concerned, the report mentions scientific studies into various types of technology, such as equipment for the controls of liquids and Threat Image Projection (TIP).

Finally, the report refers to the cooperation with international organizations (ICAO and ECAC) and third countries, as foreseen by Articles 8 and 20 of Reg. 300/2008/EC. In particular within ICAO, a debate on the security of cargo has started, and a bilateral working group has been set up. With the US, the EU has working contacts on the recognition of cargo, which will be finalized by the end of 2012.

The report concludes that the security level in the EU is high, even if the inspections bring to light a number of shortcomings. These, in a nutshell, relate to the screening of staff and cargo as far as the traditional measures are concerned⁴, and, for the supplementary measures, to non-conformity of airport patrols, risk analysis and the screening of in-flight and airport supplies.

For the future, the Commission has declared its commitment to improve aviation security even further, by introducing a peer review system, as well as by issuing recommendations for corrective measures,

or even, if necessary, by starting formal infringement procedures.

In light of the above, I would like to make some brief reflections. It is a basic fact that transport security policy, especially aviation security policy, has been incident-driven⁵, i.e. has followed after the events rather than anticipate them. I refer to legislative initiatives, and developments in infrastructure and technology, which are adapted each time to respond to ever-changing threats. We witness in fact a proliferation of legal texts (suffice it to refer to EU Regulation 185/2010/EU⁶, which has undergone 12 changes, the latest of which on the 3rd of August 2012⁷, as well as the technological evolution of the equipment used. This is sure to have an impact on air transport, especially if we take into account the steep increase in passenger and freight traffic over the coming years (it is due to double in the next 15 years). This obviously means that reacting to an incident, as was the practice so far, becomes more costly, but it also means that measures will need a longer technical implementation time and will be more intrusive than if they were planned well ahead. Therefore, in order to improve standards and avoid the appearance of gaps, more investments are needed in the human factor, in terms of professional training of staff at airports and on board aircraft, so that they are always up to date with security risks and their countermeasures.

In order to counteract the threat of illicit interference with civil aviation in a more efficient way, work needs to focus on control and supervision activities, as is also stated in the White Paper⁸. Furthermore, a concrete cooperation at European level in the form of an exchange of information, experience and know-how between Member States and the competent European agencies, must ensure a permanent and systematic flow of aviation information, in order to enhance risk-analysis.

Footnotes

¹ COM(2012)412 final

² See the previous report COM (2011) 649 final of 19th October 2011

³ Commission regulation (EU) n° 72/10 of 26 January 2010 laying down procedures for conducting Commission inspections in the field of civil aviation security

⁴ Measures are defined as “traditional” if already applicable under the legal framework of Regulation (EC)2320/2002)

⁵ See the Commission staff working document on transport security del 31/05/2012

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⁶ Commission Regulation (EU) N. 185/2010 of 4th March laying down detailed measures for the implementation of the common basic standards on aviation security

⁷ COMMISSION IMPLEMENTING REGULATION (EU) No. 711/2012

⁸ COM(2011) 144 final (1.3 Secure Transport)

Commission adopts three decisions about state aid in the aviation field

Alessandra Laconi

It is a well known fact that, the main goal of state aid control is it to ensure the maximum level of both fair competition and respect for passengers needs.

The liberalization of air transport in the EU removed commercial restrictions for airlines flying within the EU; in 2011 the European Commission issued a public consultation in order to adequately review its guidelines in the aviation sector a global view of the actual situation and thus adapting the legal framework to different business models inspired by the growth of low-cost airlines. The new guidelines would emphasize the important role of regional airports in the light of objectives of economic growth and territorial cohesion.

The Commission should adopt new guidelines in 2013, evaluating the linkage problems between the financing of airport infrastructures and airlines.

In the meantime, it is interesting to analyze three recent decisions.

On the 25th July 2012 the European Commission affirmed that financial agreements between Ryanair and the airport of Tampere Pirkkala (Finland) do not constitute state aid according to EU law. In this particular case, the Commission recognized that financial agreements aimed at implementing a low cost strategy at Tampere Pirkkala airport, such as the one signed with Ryanair, are based on terms which are undoubtedly acceptable for a private investor operating under market conditions.

In particular, these agreements provided for an ex ante business plan capable to adequately show profit forecasts excluding economic

advantages to Ryanair.

In another case, the Commission ruled on investment aid in favour of the Greek airport of Chania considering it as compliant with relevant EU state aid rules, in particular for being proportionate and tailored to the goal to be pursued.

In other terms, the investment aid of the amount of € 77.7 million allocated to Chania airport was in line with the minimum necessary sum.

The Commission coherently considered the crucial role of this regional airport both for reaching the island of Crete and for implementing local development, guaranteeing the due equilibrium between fair conditions of competition in the aviation field and the needs of the transport sector.

Moreover, with a third decision adopted on the 25th July 2012, the Commission ordered Ireland to recover unlawful state aid in the form of preferential airport taxes for some short-haul destinations from the airlines advantaged from this measure.

The evident ratio of such a decision is the distortion of competition between airlines. In detail, in 2009 Ireland introduced an air travel tax for flights departing from Irish airports. The established tax was established at € 2 for destinations at maximum 300 km from Dublin and at € 10 for all other flights. The Commission argued that the lower rate of € 2 evidently advantaged flights within Ireland and to nearby parts of the UK, distorting the competition of the internal market because of the economic benefit over their competitors.

In order to guarantee fair competition between airlines, the Commission ordered Ireland to recover the sums from all the airlines, which had benefitted from the main ones being Ryanair, Aer Lingus and Aer Arann.

Commission Regulation EU No 748/2012 of 3 August 2012 laying down implementing rules for the airworthiness and environmental certification of aircraft and related products
Alessandra Laconi

Commission Regulation EU No 748/2012 of 3 August 2012 lays down implementing rules for the airworthiness and environmental certification of aircraft and related products, parts and appliances, as well as for the certification of design and production organisations.

The aforementioned Regulation was prompted by the need of clarity following the several substantial amendments concerning Regulation No 1702/2003 of 24 September 2003.

In a nutshell, as of 10th September 2012 Regulation No 1702/2003 and its seven following amendments are replaced by Regulation No 748/2012, consolidating all the existing rules for evident exigencies of legal certainty.

As known, Regulation 216/2008 established common essential requirements to provide for a high uniform level of civil aviation safety and environmental protection.

Such Regulation required the Commission to adopt the necessary implementing rules to ensure their uniform application. It established the European Aviation Safety Agency (EASA) to assist the Commission in the development of such implementing rules.

It was thus necessary to set out and adopt common technical requirements and administrative procedures to ensure the airworthiness and environmental compatibility of aeronautical products, parts and appliances, subject to Regulation No 216/2008.

Such requirements and procedures are intended to specify the conditions to issue, maintain, amend, suspend or revoke the appropriate certificates.

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With this new Regulation the Commission takes steps to implement the common essential requirements in the field of airworthiness, taking into due account the unavoidable reflection of the state of the art and the best practices, worldwide aircraft experience and scientific and technical progress. The provisions of Regulation 748/2012 are thus intended to represent a prompt and updated reaction to established causes of accidents and serious incidents.

The need to ensure uniformity in the application of common airworthiness and environmental requirements for aeronautical products, parts and appliances requires that common procedures be followed by the competent authorities of the Member States and, where applicable, the EASA to assess compliance with these requirements. EASA should provide certification specifications and guidance material to facilitate the necessary regulatory uniformity.

Moreover, in order to ensure a high and uniform level of aviation safety in Europe, the commented Regulation elaborates practical rules and indications concerning the ascertainment of the concrete compliance with the type-certification basis and environmental protection requirements, introducing the possibility to choose to comply with later standards for changes to type-certificates.

The new legislative binding act includes important changes, as a result of four opinions released by EASA and other changes introduced by the Commission in the field of airworthiness and environmental certification of aircraft and related products, parts and appliances, as well as certification of design and production organisations.

A new Annex II is introduced to indicate the regulations, superseded a new Annex III provides for a table relating the numbering of the new Regulation with the provision repealed.

The evolution of the open aviation area between the EU and Israel

Alessandra Laconi

In order to establish an open aviation area between the EU and Israel, the European Commission adopted in November 2007 a Communication concerning the development of a common aviation area with the mentioned Middle East country.

On that occasion, the Commission requested the necessary mandate to the Council to negotiate a global Euro Mediterranean aviation agreement establishing a gradual market opening and the maximum possible level of regulatory uniformity in the fields of aviation safety, security, air traffic management, competition, state aid, environmental and consumer protection and research.

Israel already was a likely and strong candidate for the Euro-Mediterranean aviation agreement because of its high regulatory standards considered in the light of an evolving aviation policy.

We must consider the rapidly increasing air traffic between the EU and Israel in the recent years (approx. 5.5 M passengers to/from the EU in 2007, more than half of all passengers to/from Israel), which makes further demand for air transport nowadays incompatible with the scheme of a traditional bilateral framework.

The negotiations of the agreement started on December 2008 in Brussels; a dossier issued by the Commission shows that more than 220.000 additional passengers could be expected in the first year alone after the opening the aviation market between EU and Israel.

A comprehensive aviation agreement could ensure further fundamental and appreciable results, like the creation of more than 1000 job units in both territories and consumer benefits up to 96 million of euros deriving from new services and lower fares.

On the 9 December 2008, a horizontal air transport agreement with Israel was signed: it was the first step in order to ensure the compliance

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with EU law of all surviving bilateral air service agreements between EU Member States and Israel.

Furthermore, all nationality restrictions set forth in the various bilateral air service agreements have been removed, granting to all EU airlines the possibility to operate flights between any EU Member State where they are established and Israel in case of availability of traffic rights under the single bilateral agreement.

On 30th July 2012 the EU and Israel initialled a comprehensive aviation agreement, which will gradually open up and integrate the respective markets, strengthen cooperation and offer new opportunities for industry and consumers.

This agreement will replace bilateral air services agreements between EU Member States and Israel.

After the signature of the agreement both sides will now start their respective internal procedures for formal signature and entrance into force.

*Developing fully integrated networks in the
Single Market: air transport sector
Isabella Colucci*

In October 2012 the Commission presented a second set of actions (Single Market Act II) to further develop the Single Market and exploit its untapped potential as an engine for growth. With regard to air transport the objectives of the Act are to accelerate the implementation of the Single European Sky to improve safety, capacity, efficiency and the environmental impact of aviation.

The Commission evaluated that the absence of a single integrated European airspace management has significant negative repercussions on airspace users resulting in aircraft flying unnecessary detours rather than direct routes and suffering from air traffic delays, which produces significant economic and environmental damage. The fragmentation of the European airspace causes high additional costs to airlines which are ultimately borne by air passengers and the European economy.

Accelerating the implementation of the Single European Sky through a new package of actions, including legislative actions, will address the persisting barriers and will bring about large gains in performance and efficiency. The Commission holds that with a suitable implementation plan, it will possible improve the safety of aviation in Europe, reduce transport costs for citizens and businesses and lower greenhouse gas emissions from individual flights through more direct routing.