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Securing Strategic Autonomy for EU Airlines. An Assessment of Foreign Investment Exposure in the Air Transport Industry*

*by T.N. (Niall) Buissing, LLM ***

Abstract

This article examines the EU's pursuit of strategic autonomy as applied to the EU aviation sector and the regional and national interests it serves. It focuses on ownership and control regulations as tools to protect EU airlines from foreign influence. Initially, the strategic autonomy concept was driven by security and defence concerns, but global developments have broadened this scope to include economic resilience through enhancing competitiveness. EU Regulation 1008/2008 mandates that EU airlines remain majority-owned and effectively controlled by EU nationals, ensuring their access to key operational rights and preserving EU economic and strategic interests. Although foreign investment offers growth opportunities, it also carries risks of shifting control outside the EU, potentially compromising essential services and weakening EU resilience in times of geopolitical or economic instability. To address these risks, the article evaluates whether the EU's protective regimes, such as the Foreign Direct Investment (FDI) Regulation, the Critical Entities Resilience (CER) Directive, and airline's strategic shareholding schemes maintain the EU's leadership in aviation by securing that control stays with its airlines and preventing undue dependencies on or exposure to third-country airlines. This layered regulatory approach not only supports EU competitiveness but also reinforces the autonomy of the EU's aviation sector amid evolving global dynamics.

1. Introduction

This article discusses Europe's transition towards 'strategic autonomy' as it is developing in the current era. It places this position in the context of providing air transport services and links it with pursuing other interests, such as connectivity and environmental objectives.

Since the European Green Deal was approved in 2020, the EU has made significant strides towards environmental sustainability, prioritising policies aimed at reducing greenhouse gas emissions and promoting clean energy transitions. While there is a large consensus that the air transport industry must play its part, since the adoption of sectoral environmental measures applicable to air transport,[1] concerns have existed that the additional costs for EU airlines lead to competitive distortion globally.[2] While the balance previously tipped in favour of green policies, by 2024, the world has changed and these competition concerns have become more widespread, shifting the EU's focus toward enhancing Europe's global competitiveness.

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* This article is part of a series for the PhD study on the governance of airlines: "Managing airlines through a progressing legal and air policy environment in the 21st century" – An analysis of airlines' governance in light of evolving perceptions on ownership and control conditions and sustainability objectives in the European and international airline industry.

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1 I.e. the "Fit for 55" legislative package, including for air transport, among others, "ReFuelEU Aviation" to boost the use of Sustainable Aviation Fuels (SAF) and adapting the EU Emissions Trading System (ETS).

2 See, for instance, Niall Buissing, 'EU Air Transport and the EU's Environmental Agenda Struggle: A Leap of Faith or Can a CBAM Level the Playing Field?'. Air & Space Law 47, no. 6 (2022): 1–24.

In the presentation of his report on the future of European competitiveness, Mr. Draghi paints a grim picture:

> *"Europe is facing a world undergoing dramatic change. World trade is slowing, geopolitics is fracturing and technological change is accelerating. It is a world where long-established business models are being challenged and where some key economic dependencies are suddenly turning into geopolitical vulnerabilities. Of all the major economies, Europe is the most exposed to these shifts"*[3]

Mr. Draghi's report reflects the growing recognition of the need to balance environmental ambitions with economic resilience, especially considering geopolitical challenges, potential supply chain disruptions, and technological competition from global powers such as the US and China. As a result, the EU's agenda is centering on fostering innovation, securing strategic autonomy, and maintaining its leadership in key industries while continuing to support sustainability goals through advanced technologies and efficient infrastructure.[4]

Applying this mantra to the provision of air services raises the question of whether the EU has the tools to maintain a certain level of strategic autonomy in the EU's air transport industry, more specifically, whether it can protect and maintain ownership and control of airlines within the EU and to exert influence on EU airlines. This question will be central to this article's analysis.

In the in-depth analysis and recommendations (Part B), Mr. Draghi underscores that "transport is a clear example of a European public good providing essential services to EU citizens and businesses fostering the EU's global economic competitiveness and productivity",[5] for which an extensive body of regulations already exists in this sector. Moving forward, he recommends:

> To retain a leading position in [the] face of growing global competition, EU policies must:
> - Ensure infrastructure development and the harmonisation of rules to achieve an integrated and intermodal market across the EU.
> - Secure the resilience of infrastructure and routes, services and the industry.
> - Lead decarbonisation and the adoption of digital and automated solutions.
> - Secure a leading manufacturing industry and a level playing [field] internationally for the EU's industrial operators.[6]

In the responses following the report's publication, for air transport, most attention has gone to the calls for action to harmonise rules to achieve an integrated market across the EU, i.e., the implementation of the Single European Sky 2 Plus package,[7] accelerate air traffic management technologies, and lead decarbonisation through the production of alternative fuels and fuel efficient and zero-emission aircraft.[8] Many of these proposals are nothing new, and while that does not make them less important, they just reflect the industry's development over the past decade or mirror the sector's lobby for more harmonisation. However, this article will focus on the call to secure resilient networks and services in the air transport industry, particularly the proposal on levelling the playing field through, among other means, foreign direct investment screening and the assessment of foreign investment exposure in air transport generally.[9]

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3 Address by Mr. Draghi – Presentation of the report on the Future of European competitiveness, 17 September 2024, available at: https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en#share (accessed: 29 Oct. 2024).
4 See, "The future of European competitiveness, Part A | A competitiveness strategy for Europe" (hereafter: Draghi Report, 2024), Foreword.
5 Draghi Report, 2024, Part B | In-depth analysis and recommendations, p. 218.
6 Ibid.
7 See, Position of the Council at first reading with a view to the adoption of a Regulation on the implementation of the Single European Sky (recast), adopted by the Council on 26 September 2024, at: https://data.consilium.europa.eu/doc/document/ST-8311-2024-REV-1/en/pdf (accessed 29 Oct. 2024).
8 Ibid, pp. 220-2021, see proposals 3-5.
9 Ibid, p. 222.

More specifically, this article seeks to bring together the trends to pursue strategic autonomy for the EU and its application to the provision of air transport services (section 2) and the development in aviation moving away from the wave of liberalisation of the last couple of decades towards increased attention to aviation's potential role in preserving and promoting EU and national interests and why airline's nationality retains its importance therein (section 3). The last part assesses airlines' foreign investment exposure by analysing whether the EU's regulatory frameworks offer sufficient protection against undue foreign investments in airlines (section 4).

2. Strategic autonomy of the EU

Strategic autonomy has been defined as the ability of a State or a jurisdiction to pursue and protect its national interests and adopt its preferred foreign policies without heavy dependence on external entities.[10] The concept of strategic autonomy in the EU encompasses the capacity of the EU to act independently in strategically important sectors from other market powers, most notably, the US and China.

2.1. The evolution of strategic autonomy in the EU

Although pursuing European strategic autonomy has gained momentum over the last few years (2017 – 2024), the idea has slumbered since the start of the 21st century and widened in scope in several waves.[11] At first, strategic autonomy primarily focused on security and defence matters, reflecting concerns over the EU's ability to protect itself and its member states.

As of 2017, this focus broadened to include defending European interests in a shifting geopolitical landscape marked by significant events such as Brexit, the Trump presidency, and China's growing assertiveness. The onset of the COVID-19 pandemic in 2020 further shifted the debate towards reducing economic dependencies on foreign supply chains, emphasising the need for economic resilience.[12] Since 2021, the concept of EU strategic autonomy has expanded to cover virtually all EU policy areas, including infrastructure and transport.[13]

The increasingly entrenched geopolitical environment, with the economic and technological rivalry between China and the US, the Russian aggression in Ukraine, and tensions rising in the Middle East, underscores the need for and importance of the EU's strategic autonomy. Countries increasingly use economic influence as geopolitical leverage, prompting the EU to adopt a more interest-based approach directed towards increasing its economic autonomy and fine-tuning its mantra of 'an open market economy with free competition' laid down in the TFEU.[14]

On March 28, 2023, Josep Borrell, the EU High Representative for Foreign Affairs and Security Policy, emphasised the need for a "paradigm shift". While the EU has traditionally fostered open trade, "the weakening of the WTO and the increasing weaponisation of trade" has forced the EU "to re-establish a 'level playing field' and to reduce excessive dependencies which could be weaponised."[15] The Draghi report alluded to in the introduction has amplified this call.

2.2. Strategic autonomy and EU air transport

Aviation serves strategic EU and national interests, such as maintaining connectivity and high EU standards in safety,

10 B. Lippert, N. v. Ondarza, & V. Perthes, (Eds.), European strategic autonomy: actors, issues, conflicts of interests (SWP Research Paper, 4/2019), at p. 5.

11 N. Helwig & V. Sinkkonen, 'Strategic Autonomy and the EU as a Global Actor: The Evolution, Debate and Theory of a Contested Term', European Foreign Affairs Review 27, Special Issue (2022).

12 European Parliament Briefing, EU Strategic Autonomy Monitor, EU strategic autonomy 2013-2023: From concept to capacity, July 2022.

13 Ibid., Annex 1, The 360° strategic autonomy wheel.

14 See, Art. 119 TFEU "the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition." (italics added).

15 Address Josep Borrell on March 28, 2023, Geopolitics of the green transition and improving EU's economic security, at: www.eeas.europa.eu/eeas/geopolitics-green-transition-and-improving-eu%E2%80%99s-economic-security_en (accessed: 29 Oct. 2024).

security, the environment, social issues and passenger rights,[16] but the relevance of an autonomous EU air transport sector has not often been raised in the context of the strategic autonomy debate. For some time, the EU and the US have been committed to combating unfair practices that undermine the competitiveness of their carriers. However, as the next section demonstrates, the necessity for safeguarding EU and national strategic interests through aviation extends beyond merely ensuring fair competition for EU air carriers.

In the context of this paper, the concept of strategic autonomy in aviation revolves around the ability to offer protection against dependency on non-EU countries and their carriers, not only for the more commonly referred to critical transport infrastructure and technology but even more so for the provision of air services, while maintaining competitive global trade relationships. The next sections will delve into the EU's and national strategic interests in air transport and the essential services it provides, emphasising the importance of reducing dependencies and the relevance of securing and maintaining control over the EU's aviation infrastructure and air transport services.

3. Preservation of interests and autonomy of aviation

In an era marked by globalisation, contrary to what the name suggests, national interests have become more, not less, important. As one author convincingly put back in 2006:

> "The question of national interest arises in situations and actions related to other countries that affect the home country's well being. One might argue, for example, that eliminating dependence on Middle-Eastern oil is in the national interest of democratic states. National interest, therefore, is *defined* by international relationships or challenges"[17] (emphasis added)

The same still holds true, perhaps even more so in the changing world of 2024, in which international relations are under increasing pressure, geopolitics is fracturing and economic dependencies can become geopolitical vulnerabilities.[18] While the *Realpolitik* observation "*that States are rational actors and should behave in their own best interests as they engage with other States in the international aviation system*" is very applicable to this international canvas, the continuation that "*paradoxically, those interests are best pursued by ensuring the success of a cooperative international system*"[19] is, in this author's view, *gratuit*. In an entrenched geopolitical landscape with diverging relationships and priorities, successfully pursuing a cooperative international system is ever more distant.

This section concerns the strategic EU and national interests that aviation serves, emphasising the importance of preserving the EU aviation sector, its control, and the strategic implications of airline ownership and control generally. The nationality of airlines plays an important role in this context, as it fosters the link between the EU and a State to the airline, enabling the exercise of control over access to air transport markets and the attainment of political, safety, and strategic objectives.

3.1. The interest in keeping control of airlines in an international context

In negotiating Air Services Agreements (ASAs), the requirement for a State, or a combination of States as is the case in the EU, or its nationals to 'own and control' an airline remains prevalent in most designation practices. These practices serve various purposes: they enhance safety, support political and strategic objectives, such as using access to a State's airspace as a trade or political bargaining tool, and protect commercial interests. By controlling airline ownership, States can regulate access to their air transport market and determine which airlines benefit from the State's traffic rights,

16 See, for instance, the Commission's "An Aviation Strategy for Europe" of 7 December 2015, (COM(2015) 598 final, and Ulrich Schulte-Strathaus, 'Is the European Commission Fulfilling Its Ambitious Aviation Strategy?', 42(6), Air and Space Law (2017).
17 Erwin von den Steinen, National Interest and International Aviation (2006), at p. 21.
18 As described in the Introduction.
19 See, Brian F. Havel, 'Book Review: Erwin von den Steinen, National Interest and International Aviation', 32(1), Air and Space Law (2007).

which have been exchanged with third countries in such ASAs. These ASAs ensure that the strategic and economic interests of the State are safeguarded while maintaining oversight of airlines operating within its borders.[20]

The importance which States keep attaching to ownership and, more importantly, control of airlines is exemplified in the discussions around a proposal for a *Draft Convention on Foreign Investment in Airlines*,[21] first initiated at the 37th Session of the ICAO Assembly in 2010,[22] but still relevant to this day. The proposal's objective is for each party to generally waive limitations on airline ownership and control in the designation clauses of ASAs with other parties to the Draft Convention.[23] However, persistent discussions revolve around the potential misuse of a flag of convenience by 'free riders' and 'bad actors' with illegitimate intentions gaining backdoor access to a State's air transport market. At the root of the problem lies the 'hardcore' interlock between nationality designation and access to traffic rights.[24] While States party to the Draft Convention may agree to relax nationality requirements between them, the determination of ownership and control, and consequently a change in the nationality of a carrier, can lead to significant repercussions and exposure to third States' acceptance of the designation. A US delegate unequivocally declared:

> " [..] the United States would advise other States who would be interested in entering into such a Convention that doing so could potentially place their air carriers at risk *of not having their designation accepted by the United States* under the applicable designation criteria."[25] *(italics added)*

It is this author's view that the above example underscores the complexities and potential risks of altering traditional airline ownership and control frameworks. Nevertheless, developments towards the liberalisation of nationality requirements have taken place and are taking place, of which the EU carrier concept and negotiations to accept the EU carrier clause in ASAs is a unique and remarkable achievement, but that trend or its limitations is not the focus of this article.[26]

3.2. Promotion of EU interests and strategic autonomy of aviation

The next sections support this author's opinion that the promotion of EU interests in aviation aligns with broader objectives of strategic autonomy, particularly in the face of rising competition from non-EU carriers and the debate on foreign investment versus the need to safeguard the provision of specific services, such as air transport connectivity and reduce dependencies thereof from non-EU States. It will also become apparent why the nationality of an airline, that is, both the EU nationality and the nationality of an EU State, is important in this context.

The next subsections are designed to demonstrate the importance of maintaining a certain level of strategic autonomy of the EU air transport sector through a number of measures that have been adopted by the EU to underpin its autonomous and continued operation. Relevant areas in which the EU has adopted this policy pertain to competition between EU and non-EU airlines, the preservation of connectivity within the EU, including via the instrument of Public Services Obligations (PSOs), and support of the aviation sector, and other industries, at times of crises and other exceptional circumstances.

a. The EU as a regulatory hub to even the level-playing field

The EU serves not only as an operational and logistical hub, but also as a global regulatory and policy leader in upholding certain democratic and trade values.[27] In aviation, the EU spearheads the promotion of economic and transport-relat-

20 ICAO Doc 9626 Manual on the Regulation of Air Transport, 3rd edition (2018).
21 Henceforth also referred to as the Draft Convention.
22 A37 WP/190, Facilitating Airline Access to International Capital Markets (2010).
23 ATRP/15-WP3, Draft Multilateral Convention on Foreign Investment of Airlines, 28-02-2019.
24 Also called the 'double-boulted locking mechanism', see World Economic Forum, A New Regulatory Model for Foreign Investment in Airlines, (2016).
25 ATRP/15-WP3, Appendix C.
26 See, for instance, P.P.C. Haanappel, 'Airline Ownership and Control, and Some Related Matters', 26(2) Air and Space Law (2001), I. Leleur, Law and Policy of Substantial Ownership and Effective Control of Airlines (2016), and B. Humphreys, The Regulation of Air Transport: From Protection to Liberalisation, and Back Again (2023).
27 See, for instance, I. Hadjiyianni, '*The European Union as a Global Regulatory Power*', 41(1) Oxford Journal of Legal Studies (2021).

ed policies with a strong focus on consumer rights, safety and security, labour conditions, environmental protection, and a level playing field, both within the EU's internal air transport market and vis-à-vis third States when it adopts air transport agreements.[28] The 'genuine' EU home-based airlines, both network carriers and low-cost carriers (LCCs), are well-acquainted with these policies, actively participate in their development, and are adept at managing their implementation. Whether non-EU airlines can and want to adapt to these comprehensive conditions, reflecting a holistic approach to operating air services in alignment with the "European way", is, in the author's view, questionable.

While the EU States support European undertakings to compete internationally, they seek to protect them from anti-competitive practices or arrangements, abuse of dominance, Stata aid and subsidies.[29] In international air transport, this move is exemplified by, among others, the enactment of EU Regulation 2019/712 on *safeguarding competition in air transport*,[30] dealing with foreign government subsidies.[31] Such practices are deemed to distort the level playing field as agreed upon in ASAs,[32] which distortion of competition between EU and non-EU airlines could affect the competitive position of EU carriers and, subsequently, make the EU more dependent on carriers from outside the EU for, inter alia, its connectivity, as to which see also the next section.

Like its predecessors, EU Regulation 2019/712 has not been applied, at least not yet. This author questions whether the enforcement measures enshrined in the Regulation sufficiently empower the Commission to apply the Regulation extra-territorially versus third States and how such a third State would react to that.[33] Whether or not this Regulation can meaningfully contribute to maintaining a competitive EU air transport sector and indirectly safeguard EU interests, as referred to above, will depend on a successful demonstration. However, if such a show of force is without repercussions, the Regulation and fair competition clauses in ASAs appear toothless.

The level playing field is not only affected by external threats, such as foreign subsidies to airlines; EU Member State's and the EU's additional taxation measures and supplementary regulations burden its carriers from within, for example, in terms of safety and environmental requirements compared to airlines from third countries with less stringent regulations in these areas.[34]

b. Connectivity and Public Service Obligations

The autonomy of the EU is also exemplified by its measures to ensure connectivity within the EU. A notable instrument in this regard is the provisions on PSOs in EU Regulation 1008/2008.

Applying EU Regulation 1008/2008, the CJEU acknowledges, rightfully so, national airlines' significant role in a State's economy and trade but also highlights their role in providing connectivity, including to regions with whom they have historical and cultural ties, as highlighted in the TAP Air Portugal case.[35] Similarly, it is understandable from the same historical and cultural perspectives that States like Portugal, the Netherlands, France, and the UK would be reluctant to depend on third-country airlines to provide connectivity between them and their overseas territories.

In terms of connectivity to remote regions, the 'open market' conditions outlined in EU Regulation 1008/2008 are significantly influenced by the instrument of Public Service Obligations (PSOs). PSOs are designed to ensure connectivity to

28 See "An Aviation Strategy for Europe" of 7 December 2015, (COM(2015) 598 final.
29 See, for instance, Scott Schneider, 'An EU Perspective of 'Fair Competition' in Global Air Transport', 45(4), Air and Space Law (2020).
30 Regulation (EU) 2019/712 of 17 April 2019 on safeguarding competition in air transport, and repealing Regulation (EC) No 868/2004.
31 See, Art. 44(7) of EU Regulation 2022/2560 on foreign subsidies distorting the internal market, the Foreign Subsidies Regulation (FSR): "This Regulation is without prejudice to the application of Regulation (EU) 2019/712. Concentrations [..] involving air carriers shall be subject to the provisions of Chapter 3 of this Regulation".
32 See, for instance, the EU-Qatar Air Transport Agreement (2021), Article 7.
33 See also, Magdalena Kucko, 'The EU-Qatar Air Transport Agreement: Bound to Succeed?', 45(3), Air and Space Law (2020).
34 For instance, measures concerning aviation emissions and noise-related restrictions; see also section 3.3. below.
35 As an 'overriding reason of public interest' for providing air services to and from other Portuguese-speaking countries, Portugal is entitled to implement measures to safeguard these traffic rights by ensuring that TAP's principal place of business remains based in Portugal. See, CJEU, Case C-563/17, Associação Peço a Palavra and Others v Conselho de Ministros, decision of 27 February 2019. For further discussion of this concept (PPoB) see also, T.N. Buissing, The Unique Link between an Airline and a State, Aviation and Space Journal, 2023(1).

remote EU regions by financially supporting routes that might not be commercially viable under standard competitive conditions.[36] A detailed regime ensures non-discriminatory access to these routes for EU air carriers, however:

> *"…. the number of PSOs and their restrictive nature had also increased significantly. Subsidy levels for PSOs had also been increasing, with significant country variations as to the average subsidy level per passenger. There was thus growing concern over an excessive or non-harmonised recourse to PSOs by some Member States. At the same time, the PSOs rules did not always attract a sufficient number of competitors in the tender procedure, for example because the concession period was too short to write off route-specific equipment."*[37]

The PSO scheme could become more complex if EU carriers with 'mixed nationality,' backed by significant foreign interests and resources, were allowed to access these routes and compete in tender procedures. In addition, the continued interest of third-country undertakings and their nationals in maintaining PSO routes may be questioned as they often lack a cultural, historical or national tie or sense of responsibility to the remote regions these routes serve.

Further research is needed to understand the potential impacts of such a relaxation on the effectiveness and fairness of the PSO mechanism. However, it is this author's view that it is in the EU's and national long-term and strategic interest to provide connectivity to remote regions that such PSO routes are served by EU airlines instead of depending on non-EU actors for these services.

c. Support in times of crises

During the COVID-19 pandemic, the CJEU reaffirmed the importance of a 'genuine link' between State support and the airline's Principal Place of Business (PPoB) in the granting State. At the time, aid granted by, for instance, France to airlines having their PPoB in France was deemed justified due to the "stable" and "permanent link tying the airlines to the French economy."[38] Similarly, in a Swedish case, the CJEU determined that the 'genuine link' was established through the need to maintain continuous connectivity within Sweden, necessitating that beneficiary airlines have a 'stable presence' in the granting State.[39]

Although States have, at times of such unprecedented crisis, good reasons to limit the recipients of financial support and wish to favour airlines that have the most significant contributions to that State's economy or working population, limiting the qualification, for instance, to "identify airlines that have a link with Sweden and play a role in securing the connectivity of Sweden …"[40] to only those with their PPoB on your territory is a very narrow interpretation and disregards, for instance, the LCC business model. Hence, it was no surprise that in 2023-2024, the General Court overturned several decisions of the EU Commission's approving State aid measures to flag or other 'national' carriers during the Covid pandemic for being selective and discriminatory towards other EU airlines providing connectivity.[41]

Nevertheless, the willingness of States to support their airlines and the recognition of the relationship between the PPoB of an EU air carrier and the connectivity it provides underscores the 'public service' nature of international air transport, particularly in times of crisis and highlights the strategic importance of international and regional air connectivity to national economies. The Covid crisis has also demonstrated States' reluctance to provide financial support to airlines that do not bear its nationality, which would likely be even more problematic if such support to non-EU airlines were necessary to maintain connectivity.

36 See, "Study on the practice of Public Service Obligations in Europe", European Regional Airliens Association (ERA), available at: https://cloud.3dissue.net/9237/9242/9271/113009/index.html?26309 (last visited: 26 July 2024).
37 See, EC and Ricardo, Ex-post evaluation of Regulation 1008/2008 on common rules for the operation of air services in the Community (2018), at 2.3.2.2, point 4.
38 See, par. 40 of Case T-259/20, Ryanair v. EU Commission (2021).
39 See, par. 40 and 45 of Case T-238/20, Ryanair v. EU Commission (2021).
40 Ibid. par. 3.
41 See, for instance, the Judgments of the General Court in Cases T-146/22, Ryanair v Commission (KLM II; COVID-19) and T-268/21, Ryanair v. Commission (Italy - aid scheme - COVID-19).

d. Increased vulnerability at times of natural disasters, war or political unrest

Due to the articulated cross-border nature of international aviation, the air transport industry exhibits unique dynamics that distinguish it from most other sectors. Consequently, airlines are particularly susceptible to external events. These events include geopolitical crises such as the Russian invasion of Ukraine, health crises like the COVID-19 and SARS pandemics, political unrest in the Middle East (e.g., the Qatar diplomatic crisis) and military conflicts in this region, which render overflights hazardous, and environmental disruptions such as the 2010 eruption of the Icelandic volcano. The Russian invasion provides perhaps the most illustrative example; had the EU permitted Russian investors to acquire a significant share of an EU airline in 2017, under the then-supposed relaxed ownership and control conditions, the current sanctions would have prevented the Russian/EU airline from operating.[42]

Hence, this author argues that it is in the strategic interest of States and the EU to maintain limitations on who controls national or EU carriers to ensure continuity of operations and allow for a more rapid response to crises. A similar reasoning applies to the execution of repatriation flights where national carriers have often supported their home state to retrieve its nationals from precarious situations abroad, such as at the start of the COVID-19 pandemic or when large numbers of nationals are stranded due to a sudden bankruptcy of an airline.[43]

3.3. Considerations of other interests

In addition to the more strategic interest of the previous section (3.2), the ability to exert influence on EU or national airlines through EU or national policies and regulations can also drive other interests, including higher labour standards and the adoption of sustainable practices, such as reducing emissions and promoting the production and use of Sustainable Aviation Fuel (SAF).[44] Third-country carriers are not always covered by the same rules or to the same extent as EU carriers, and attempts to mitigate this differentiation may prove difficult.[45] Hence, environmental objectives for air transport, as laid down in EU legislation, can more easily be achieved working with and enforced vis-à-vis EU airlines to whom these EU rules apply directly.

In the context of safeguarding strategic and other interests, this author opines that this is another argument in favour of keeping connectivity through EU airlines, i.e., protecting their EU nationality and maintaining internal control so as to serve other interests, such as pursuing environmental objectives. The creation of dependencies on non-EU airlines does not aid this cause.

In certain EU Member States, like the Netherlands, there is a trend of national and local governments moving away from a predominant focus on the economic benefits of aviation and increasingly focusing on balancing the interests of different stakeholders, including those from residents around the airport regarding noise,[46] and for the community at large to reduce emissions and provide cleaner air. The debate on aviation taxation also resurfaces sporadically; in September 2024, the Swedish government announced it would scrap an aviation tax, while one month later, the French government plans to raise its aviation taxes.[47]

This observation signalling the reset of EU and national strategic interests in terms of environmental, social and economic objectives as well as accompanying taxation measures, fits with the finding in Mr. Draghi's report that "EU countries are already responding to this new environment with more assertive policies, but they are doing so in a fragmented

42 See, EU Council Regulation 2022/334, amending EU Council Regulation 833/2014, and EU Council Decision (CFSP) 2022/335, which amends again Decision 2014/512/CFSP, in particular banning any Russian air carriers from flying into, over or out of the territories of the EU States.

43 See, for instance, European Parliament Briefing, "Repatriation of EU citizens during the COVID-19 crisis" of 01-04-2020, and CJEU Case C-49/22, *Austrian Airlines (Repatriation flight)*.

44 See, Regulation (EU) 2023/2405 of 18 October 2023 *on ensuring a level playing field for sustainable air transport* (ReFuelEU Aviation).

45 See, for instance, Niall Buissing, '*EU Air Transport and the EU's Environmental Agenda Struggle: A Leap of Faith or Can a CBAM Level the Playing Field?*', 47(6) Air and Space Law (2022).

46 See, Niall Buissing, 'Challenging the 'Balanced Approach to Aircraft Noise Management' Principle: Will the Dutch Approach Stand or Will the Principle Prevail?', 49(1), Air and Space Law (2024).

47 See, respectively, https://www.theguardian.com/world/2024/sep/19/sweden-cuts-flying-tax-emissions and https://www.bloomberg.com/news/articles/2024-10-02/french-plans-to-raise-taxes-disastrous-for-aviation-iata-says (accessed: 29 Oct. 2024).

way that undermines collective effectiveness." His warning that "Uncoordinated national policies often lead to considerable duplication, incompatible standards and failure to consider externalities",[48] should, in this author's view, resonate strongly in the EU air transport sector, where EU airlines operate in a competitive global market and whose competitiveness is not served by fragmented rules.

3.4. Concluding remarks on the preservation of interests and autonomy of aviation

On the international level, the interlock between nationality designation and access to traffic rights, as bartered in Air Services Agreements, allows States not only to protect commercial interests by regulating and restricting access to their air transport markets but also to keep control of airlines to, among other things, enhance safety, support political and strategic objectives, and pursue national or collective EU interests. Some authors argue that the persistence of this traditional airline ownership and control framework has barred the airline business from 'normalising' as compared to other industries:

> *... while the overall aviation industry has matured and, in many cases, achieved long-term viability, the core of the industry, the airlines themselves, has not done so. […] Restrictions on ownership and control have resulted in a failure to create truly global companies, despite the international focus of most carriers.*[49]

In this author's view, this commercial approach is too market-oriented. If anything, the increasingly entrenched geopolitical environment has added another layer of complexity to changing the ownership and control framework and exposes the risks of doing so. In the field of air transport, promoting EU and national interests, most notably ensuring connectivity, goes hand in hand with protecting the sector's autonomy in a global changing landscape.

The EU's recent emphasis on strategic autonomy, as described in section two above, has evolved significantly, extending from security and defence to encompassing economic resilience. Although aviation has not yet been mentioned explicitly in this context, it is this author's strong belief that reducing vulnerability and dependencies on third countries and their carriers that could be exploited geopolitically, especially during natural disasters, war, or political unrest, fits well in this approach to safeguard EU and national interests. Accordingly, it provides another argument in favour of protecting EU nationality and keeping control of airlines internally.

The relationship between an airline's nationality and its home State, or the EU for that matter, appears not only to ensure the ability to respond more rapidly to crises but also serves strategic interests, most notably connectivity, and can help to protect from external dependencies, in this case, depending on non-EU airlines for such connectivity. This line of reasoning could even be further exploited to include promoting the EU's environmental sustainability objectives for aviation, which can more easily be achieved working with and enforced vis-à-vis airlines bearing the EU nationality, but that advocacy role is outside the scope of this article.

4. Protection of aviation's strategic autonomy in the EU

Turning to securing strategic autonomy for EU air transport services and Mr. Draghi's call to assess foreign investment exposure,[50] the exposure of EU airlines to foreign investment, which this article examines, is inextricably linked to ownership and control conditions as laid down in EU Regulation 1008/2008.[51] Foreign investment in EU airlines, while beneficial for increasing access to capital and operational expansion, may risk shifting the control outside of the EU, which,

48 Draghi Report, Part A | A competitiveness strategy for Europe, p. 11.

49 B. Humphreys, The Regulation of Air Transport: From Protection to Liberalisation, and Back Again (2023), Chapter 13, Summary, COVID and the Future, at p. 234; see also, CAPA – Centre for Aviation, "Airline ownership and control rules: at once both irrelevant and enduring" (2017), published at: https://centreforaviation.com/analysis/reports/airline-ownership-and-control-rules-at-once-both-irrelevant-and-enduring-345816 (accessed 29 Oct. 2024) and B. Havel & G. Sanchez, *"Restoring Global Aviation's Cosmopolitan Mentalité"*, 29(1) Boston University International Law Journal (2011).

50 Draghi Report, 2024, Part B | In-depth analysis and recommendations, p. 222.

51 Regulation (EC) No 1008/2008 of 24 September 2008 on common rules for the operation of air services in the Community (EU Regulation 1008/2008), Art. 4(a) and (f).

in theory, could lead to loss of nationality and undermine the region's ability to safeguard its economic, security and strategic interests in aviation and the services it provides.

In short, and generally, airline nationality requirements laid down in licensing (see EU Regulation 1008/2008) and designation conditions (in ASAs) confirm that EU carriers remain majority-owned and effectively controlled by EU nationals, which is vital for maintaining market access and operational licenses within the EU.[52] Hence, by requiring airlines to comply with nationality requirements and enforcing these restrictions, the EU protects its airlines from foreign takeovers or undue foreign investments and ensures that EU carriers' nationality and operational autonomy are preserved even in the face of cross-border investments or mergers.

The following sections will explore whether the relevant EU regulatory frameworks that apply to or are linked to foreign investment exposure sufficiently safeguard EU airlines' nationality and, by extension, the autonomy of the EU air transport sector.

4.1. Airlines' nationality protection schemes

In a previous publication, this author analysed the protection of airline nationality through ownership and control conditions of selected EU airline groups, specifically in their corporate governance structures. The analysis established that these groups utilise various corporate governance strategies to maintain compliance with nationality requirements. These strategies include using shareholding structures, such as holding companies or foundations, issuing priority shares, limiting shares with voting rights, and structuring boards to ensure effective airline control.[53]

These methods are tools through which an airline or group can construe and manage its corporate setup to protect individual airlines' nationalities. The next sections deal with other measures and frameworks that offer additional protection for airlines against unwanted foreign investment. They are designed to protect the airline's (EU) nationality, which, by extension, safeguards the preservation of strategic EU and national, as described in section 3. These frameworks thus contribute to the autonomy of the EU air transport sector, which is in the EU's strategic interest.

4.2. Other forms of protection through shareholding

a. Golden shares and State measures

A 'golden share' allows the owner to maintain control over the company, for instance, to prevent hostile takeovers. These shares grant special rights, such as managing changes in ownership, structuring shareholder arrangements, and setting authorisation requirements. They can also provide indirect control through mechanisms like veto and appointment rights. Golden shares, typically held by the government of the state where the company has its principal place of business, allow governments to control vital national companies after privatisation.[54]

In the late 1990s, the use of golden shares in the EU was significantly restricted through a series of cases before the EU Court of Justice (ECJ), scrutinising the State's role as a shareholder. The EU Commission found that the State's possession of golden shares distorted competition in the EU internal market and restricted the free flow of capital.[55] In the *Dutch Golden Shares* case, the Dutch State effectively used a veto to block a bid by the Spanish company *Telefónica* for the Dutch telecom company KPN.[56] Even though the State took the decision to block the bid in the capacity of a private shareholder, the ECJ concluded that the introduction of the golden share in the course of the privatisation of KPN by the

52 For an analysis, see Niall Buissing, *'Navigating Airline Nationality: European Perspectives on Airline Shareholding and Corporate Governance'*, 49(6), Air and Space Law (2024).
53 Ibid.
54 See, for instance, B. Werner, "National responses to the European Court of Justice case law on Golden Shares: the role of protective equivalents" 24(7), Journal of European Public Policy (2016).
55 Ex Article 63 TFEU (ex Article 56 of the EC Treaty). See also, I. Antonaki, *Privatisations and golden shares: bridging the gap between the State and the market in the area of free movement of capital in the EU. Meijers-reeks. (2019).*
56 See, Joined cases C-282/04 and C-283/04 Commission v The Netherlands (golden share), para 22.

Dutch State could be classified as a State measure.[57] The golden share was found to be an unjustified restriction likely to deter other investors.

A State cannot grant itself 'special rights' in the capacity of a normal shareholder; as a legislator, it must consider various interests when exercising its shareholder rights. Although golden shares, in theory, can safeguard (EU) nationality and, thus, by extension, help secure the strategic autonomy of the EU air transport, since EU governments no longer hold golden shares in airlines,[58] this avenue is not further explored here. Golden shares in airlines still exist in other parts of the world; the Malaysian government keeps its golden shares in Malaysian Airlines because "national interests supersede corporate considerations"[59].

b. The Takeover Directive

EU Directive 2004/25 *on takeover bids*, in this section also referred to as the Takeover Directive or the Directive, is another form of protection designed to limit the actions of 'hostile investors' in the targeted undertaking. The principal goal of this directive concerns the protection of shareholders, particularly those with minority holdings when a person or entity acquires a certain level of securities *carrying voting rights* or control in their undertaking.[60] The Directive requires States to regulate that in such a case, the investor is obliged to make an offer to the holders of the remaining securities "at an equitable price."[61] With regard to this *mandatory bid rule*, no distinction is made between public bodies and private undertakings as 'offerors", and no exemptions are made when governments take over a company in accordance with the Directive's procedures.[62]

Each EU State may set its own threshold for acquiring voting rights that confer control of a targeted companies that have their registered office in that State and "the conditions under which the board of the offeree company may undertake any action which might result in the frustration of the bid."[63] While that percentage must be laid down in national law, the Takeover Directive dictates that where an investor acquires 90% or 95% of the equity capital of the targeted undertaking, the holders of the remaining securities must sell those to the investor.[64] Meanwhile, the directors and/or the controlling shareholders of the targeted companies are limited under the Directive regarding the defensive measures they can employ to repel a hostile bid.

The mandatory bid rule has not yet been applied in aviation. The French State's 28% investment in the holding company AF KL is close to the currently applicable threshold of 30% in France.[65] An investigation into whether the French double voting rights for 'loyalty' shares or whether the French and Dutch States could arguably be considered to act in concert may potentially cross the threshold to launch a mandatory takeover bid is outside this article's scope.

The Directive is also relevant in the context of the airline 'majority ownership' rule in international and EU air law. Hypothetically, in a liberalised foreign investment environment in the EU, when foreign investors purchase that nationally fixed percentage of the equity capital carrying voting rights or more, an offer must subsequentially be made to acquire all voting rights of the airline undertaking. Since such a change of control would alter the airline's nationality, which could have serious implications for the airline's operations, investors with the airline's best interest at heart would, therefore, think twice before making such an investment.

57 Ibid, para 22.
58 For an aviation-related case, see Case C-98/01, *Rights attaching to the United Kingdom's Special Share in BAA plc*.
59 See, "Govt unlikely to abandon golden share in MAHB" in The Malaysian Reserve of 17 February 2022, at https://themalaysianreserve.com/2020/02/17/govt-unlikely-to-abandon-golden-share-in-mahb/. (accessed 29 Oct. 2024). Brazil also holds a golden share in the Brazilian manufacturer of Embraer aircraft; see, "Brazil's Bolsonaro approves Embraer-Boeing tie-up" in Financial Times of 10 January 2019, at https://www.ft.com/content/bf0e473e-1525-11e9-a581-4ff78404524e (accessed: 29 Oct. 2024).
60 Directive 2004/25/EC of 21 April 2004 *on takeover bids* (Takeover Directive), Art. 2.1(e).
61 Ibid., Art. 5.4 in conjunction with Art. 15(5).
62 Ibid., Art. 2.1(c), and As confirmed in C-74/16, par. 42 : "… the public or private status of the entity engaged in the activity in question has no bearing on the question as to whether or not that entity is an 'undertaking'".
63 Ibid., Art. 4(2)(e).
64 Ibid., Art 15, called 'the right to squeeze out'.
65 See, Article L. 433-3(I) of the French Monetary and Financial Code (*Code Monétaire et Financier*), see also Article 234-2(1) of the AMF General Regulation (*Règlement Général de l'Autorité des Marchés Financiers*).

4.3. Protection of critical entities and against foreign investment

As variously mentioned, the EU is increasingly concerned about its relationship with the outside world, and the focus has shifted towards its interdependence and autonomy. From this perspective, and to the extent relevant for preserving national or EU interests, as described in sections two and three above, the EU has laid the foundations for two sets of frameworks to ensure the resilience of critical entities and infrastructure while protecting its undertakings against foreign investment.

The next section introduces the relevant regimes and concisely studies their applicability to the air transport sector and whether they offer additional protection for airline nationality, which, in turn, can help secure the strategic autonomy of the air transport sector.

a. Critical entities and infrastructure

As early as 2008, the EU enacted Directive 2008/114 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection.[66] An evaluation of the Directive in 2019, highlighting the increasingly interconnected and cross-border nature of operations using critical infrastructure,[67] and changing dynamics on the world stage, provided a new impetuous to shift the approach towards a focus on ensuring the resilience of critical entities and led to the Critical Entities Resilience (CER) Directive of 2022.[68]

According to the CER Directive, critical entities "play an indispensable role in the maintenance of vital societal functions or economic activities in the internal market in an increasingly interdependent Union economy." In conjunction with sector-specific legislation, the Directive creates an overarching framework that addresses their resilience "in respect of all hazards, whether natural or man-made, accidental or intentional"[69] The CER Directive defines "resilience" in this context as the "ability to prevent, protect against, respond to, resist, mitigate, absorb, accommodate and recover" from an "event which has the potential to significantly disrupt, or that disrupts, the provision of an essential service […]."[70] The Annex to the Directive and its Supplement specifically lists, among others, the energy and transport sectors, including air transport, as essential services.[71]

Recognising the need to increase the critical infrastructure protection capabilities in Europe and help reduce vulnerabilities concerning critical entities is a first step toward enhancing the protection of these EU undertakings. The CER must be implemented into national law, whereby the Member States must "adopt a strategy for enhancing the resilience of critical entities" by 17 January 2026 and "identify the critical entities for the sector listed in the Annex by 17 July 2026.[72]

b. Screening of foreign investors

In 2019, the EU adopted Regulation 2019/452, *establishing a framework for the screening of foreign direct investments into the Union*.[73] This Regulation on Foreign Direct Investment (FDI) allows the EU and its Member States to implement restrictive measures on FDI based on security or public order concerns, in line with specific requirements of the Regulation and World Trade Organization (WTO) commitments. Where it concerns investment into airlines, WTO rules do not apply to the air transport sector regarding foreign investment and the operation of traffic rights.[74]

66 Council Directive 2008/114/EC of 8 December 2008 *on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection.*
67 Commission, Impact Assessment accompanying the Proposal for a Directive on the resilience of critical entities, Brussels, 16.12.2020, SWD(2020) 358 final.
68 Directive (EU) 2022/2557 of 14 December 2022 *on the resilience of critical entities and repealing Council Directive 2008/114/EC* (Critical Entities Resilience (CER) Directive).
69 Ibid, recital (1) and (4).
70 Ibid. Art 2(2) and (3).
71 See, CER Directive and Commission Delegated Regulation (EU) 2023/2450 of 25 July 2023 supplementing Directive (EU) 2022/2557 by establishing a list of essential services.
72 CER Directive, Arts. 4(1) and 6(1).
73 Regulation (EU) 2019/452 *establishing a framework for the screening of foreign direct investments into the Union* (FDI Regulation).
74 See General Agreement on Trade in Services, Annex on Air Transport Services, Art. 1.3.

Under the FDI Regulation, EU States must assess whether an FDI, such as leading to significant changes to the ownership structure or key characteristics of a company, is likely to negatively affect the EU's security or public order. They must consider all relevant factors, including:

> *"in particular whether a foreign investor is controlled directly or indirectly, for example through significant funding, including subsidies, by the government of a third country or is pursuing State-led outward projects or programmes*[75]*"*.

Other factors that may be considered include the FDI's potential effects on, inter alia, critical infrastructure, whether physical or virtual, including, amongst others, energy and transport, as well as land and real estate crucial for using such infrastructure.[76] Whether the EU States will classify air transport undertaking as 'critical infrastructure' under this regulation will be based on the security and public order considerations of each State and their political agenda. The Netherlands, for instance, has adopted a law pursuant to which Schiphol Airport and KLM qualify as providers of essential air transport services important for maintaining economic activities and vital societal functions under the heading of protecting the economic security of critical infrastructure. [77]

In January 2024, as one of five initiatives to strengthen economic security,[78] the EU Commission proposed repealing the FDI Regulation and replacing it with a Regulation on the screening of foreign investments.[79] The proposal's explanatory memorandum sets out the relationship between the screening mechanisms of foreign investments with other relevant Union policies, including the appropriate measures to protect legitimate interests under the EU Merger Regulation,[80] as well as countering the impact of foreign subsidies on fair competition in the internal market under Foreign Subsidies Regulation. As regards the overlap with the CER Directive, identifying an EU target as a critical entity should be included in the assessment of foreign investments. A full analysis of the relationship and consistency of these policies is not possible here and not yet timely.

4.4. Concluding remarks on the protection of airline nationality in the EU

Securing strategic autonomy for EU air transport services and managing airlines' foreign investment exposure can be tied to regulating ownership and control conditions with a view to maintaining and protecting the nationality of EU airlines. The protection of nationality within the EU's air transport sector is a multifaceted issue involving various regulatory regimes at the EU and national levels. To start, EU airlines have set up strategic shareholding schemes using holding companies and differentiating between shares for economic interest and those carrying voting rights to maintain the nationality of their daughter companies or subsidiary airlines.

Although other shareholding measures, such as 'golden shares' and the Takeover Directive, are currently not applied to the air transport sector, the existence of, for instance, the mandatory bid rule and the consequences of acquiring all voting rights for an airline's operations provide an extra layer of protection to changes in an airline's control and against hostile foreign takeovers.

The EU's increasing focus on its autonomy has led to, among other things, the Critical Entities Resilience (CER) Directive and the Foreign Direct Investment (FDI) Regulation. Both frameworks increase protection capabilities in Europe, and, depending on their implementation, the classification of 'critical infrastructure' and political agendas may provide, where and if necessary, additional tools to preserve airline nationality and, by extension, the interests they serve.

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75 FDI Regulation, recital (13).
76 Ibid., Art. 4(1)(a).
77 See, Art. 7(3), *Wet veiligheidstoets investeringen, fusies en overnames* (Wet Vifo).
78 See https://ec.europa.eu/commission/presscorner/detail/en/ip_24_363 (last visited: 24 July 2024).
79 Proposal for a Regulation *on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452*, Brussels, 24.1.2024, COM(2024) 23 final.
80 Council Regulation (EC) No 139/2004 of 20 January 2004 *on the control of concentrations between undertakings (the Merger Regulation), repealing Regulations 4064/89 and 1310/97*.

These regimes, in conjunction with other regulatory frameworks such as the Merger Regulation and the Foreign Subsidies Regulation, as referred to above, strategic shareholding measures and airline nationality protection schemes already in place, and designation arrangements in international aviation agreements with non-EU States, provide a comprehensive toolset for EU States to safeguard 'their' airline's nationality and competitiveness, including the operation of traffic rights and protection against foreign influence.

Whether the sector-specific EU Regulation 2019/712 on *safeguarding competition in air transport* can be seen as part of this toolset remains to be seen pending its successful application.

5. Concluding remarks

Securing the strategic autonomy of EU air transport in order to preserve the interests of the EU and its Member States implies the reduction of their dependencies on third countries for the provision of air services and raising the competitiveness of the sector. This author believes managing the exposure of EU airlines to foreign investment is an important element thereof. It is closely tied to the ownership and control requirements mandated by, among others, EU Regulation 1008/2008 and nationality requirements in Air Services Agreements (ASAs). This framework ensures that EU airlines remain majority-owned and effectively controlled by EU States, and/or their nationals. It is essential not only for maintaining the nationality of airlines, which, inter alia, grants access to markets and operational licenses, but also for safeguarding the EU's economic, security, and strategic interests in aviation.

While foreign investment can provide capital and opportunities for growth, it can also pose risks, particularly when it leads to a loss of control over EU airlines. Such a shift could undermine the EU's ability to protect its interests, such as connectivity, especially in times of geopolitical tension, economic instability, or crises. By enforcing ownership and control rules, the EU and its Member States ensure that their carriers are protected from undue foreign influence, preserving both their autonomy and their ability to contribute to the EU's broader strategic goals, as well as broader national interests.

Maintaining a competitive EU air transport sector, both within the EU, where airlines of different nationalities compete and of the sector in the global market, contributes to ensuring long-term economic growth and financing the EU's broader environmental and social objectives. Furthermore, pursuing such interests is more easily achieved by working with carriers of the EU nationality, who share an intrinsic and holistic approach to follow the 'European way' of providing air services and everything that is part of that. Looking through this lens could warrant a re-evaluation, or even reappreciation, of maintaining a controlling link between airlines and States. In this way, airline nationality is not just a restriction but also an attestation of the link with a State, including the rights and, perhaps more importantly, the obligations that come with it.

The evolving geopolitical landscape and the EU's increasing focus on economic resilience and reduced dependency on non-EU actors have provided new impetus to this debate. The EU's recent regulatory developments, including the Critical Entities Resilience (CER) Directive and the Foreign Direct Investment (FDI) Regulation, offer additional tools for safeguarding airline nationality and autonomy. In conjunction with strategic shareholding schemes of airlines and other shareholding measures, they form a comprehensive system for protecting EU airlines from unwanted foreign investment while securing the region's interests in air transport services. Whether securing the strategic interest in the sector will be successful depends on the political willingness to apply these tools; experiences with past regulations to safeguard competition in air transport have not been promising, but perhaps now times are really changing.

How effective have been the measures taken by European airlines to control the ability of passengers to bring compensation claims under EU261 via third parties?

*by Patrick Bettle**

Abstract

In recent years, airlines across Europe have adopted measures to enhance direct claim handling between passengers and airlines, and to regulate the ability of third-party claims management companies to seek compensation for passengers under Regulation (EC) No. 261/2004. The recent decision in *Bott & Co Solicitors Limited v Ryanair DAC* [2022] UKSC 8 demonstrates the effectiveness of those measures and suggests they have had a significant impact on the business models of claims management companies. However, the decision also highlights the limits to the effectiveness of the method adopted, including in particular with respect to claims brought by claims management companies operated by solicitors in common law jurisdictions.

1. Introduction[1]

Air passengers travelling within the EU, the UK and beyond are granted extensive rights under Articles 4 to 9 of Regulation (EC) No. 261/2004 ("**EU261**"). These rights, which include the right to financial compensation in the event of flight cancellation, lengthy delays and denied boarding, may not always be understood properly by passengers. As such, in recent years an industry has developed across the EU and the UK, of third party claims management companies ("**CMCs**"), who usually act on a 'no win, no fee' basis, assisting passengers to obtain financial compensation from airlines under EU261.

In many cases, the assistance provided by CMCs is limited to simply contacting the airline to request the compensation owed to the passenger. CMCs typically do not provide detailed legal advice to passengers and, because airlines usually accept liability, they typically do not represent their clients in litigation.[2] CMCs are active in all jurisdictions covered by EU261 as well as in the UK, which has implemented its own materially identical version of EU261 under the Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019 ("**UK261**").

Airlines across the EU and the UK, in particular low-cost carriers ("**LCCs"**), have taken steps to enhance direct claim handling between passengers and airlines, and to limit the impact of CMCs claiming compensation for passengers under EU261/UK261. Since 2016 the Ryanair Group plc ("**Ryanair**"), for example, has adopted a combined approach of bypassing CMCs and paying compensation directly to passengers while simultaneously using new contractual provisions in its general terms and conditions of carriage ("**GTCCs**") to prevent passengers from engaging third parties to pursue claims until they have engaged with the airline directly first.[3] This approach has also been adopted by a number of other LCCs, including easyJet plc ("**easyJet**") and Wizz Air Hungary Ltd ("**Wizz Air**").

This paper considers the effectiveness of these measures with particular reference to the recent decision of the UK Supreme Court in *Bott & Co Solicitors Ltd v Ryanair DAC* [2022] UKSC 8. The testimony given by Bott & Co during the proceedings in question demonstrates the considerable effectiveness of Ryanair's measures, and therefore the similar methods adopted by other airlines, to date. As this paper will show, the UK Supreme Court's decision also confirms that,

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1 This paper received the European Air Law Association essay prize for 2024

2 Bott & Co Solicitors Ltd v Ryanair DAC [2019] EWCA Civ 143, §58

3 Ibid, §20 - 26

for the moment at least, the contractual restrictions adopted by Ryanair, as well as by other airlines, are compliant with UK and EU law, and that airlines can continue to bypass CMCs when paying compensation, albeit only if they are not operated by solicitors. This suggests that, with some limitations, the measures implemented by Ryanair and other similar airlines are likely to continue to be effective into the future.

2. EU261: passenger compensation rights

EU261 applies to all passengers departing from airports located within the territory of an EU Member State. It also applies to passengers departing from airports located beyond the EU, provided both that the operating carrier qualifies as a 'Community Carrier' for the purposes of EU261 and that the final destination of the flight is located within the EU. Similarly, UK261 applies to all passengers departing from airports located within the UK and to all passengers travelling to the UK from an airport located beyond the UK, provided that the operating carrier is considered to be a 'UK carrier.' As noted above, the provisions of EU261 and UK261 are materially identical and, at present, there is little divergence between the two liability regimes in the EU and the UK: for the sake of convenience references to EU261 in this paper should therefore also be read as references to UK261.

Articles 4 to 9 of EU261 provide passengers with extensive rights in the event of denied boarding, cancellation or the lengthy delay of a flight. In the context of claims brought by third-party CMCs, the most relevant Articles of EU261 are Articles 5, 6 and 7. These articles relate to the compensation payable to affected passengers in the event of a flight cancellation or lengthy delay, which are the types of incident with which third-party CMCs are most likely to be involved. In short, following the decision in decision in *Sturgeon & Ors v Condor Flugdienst GmbH* (C-402/07), passengers whose flights have been cancelled or subject to a lengthy delay are able to claim fixed amounts of financial compensation that are calculated depending on the length of the delay and the distance of the affected journey. The only defence available to airlines in these circumstances is if the delay or cancellation was caused by 'extraordinary circumstances' that could not have been avoided even if they had taken all reasonable measures.

Importantly, the compensation rights afforded to passengers under EU261 are protected by Article 15 of the same regulation, which provides that any obligations imposed on airlines regarding passengers cannot be limited or waived, including by restrictive clauses within the contract of carriage. The practical effect of Article 15 is that it is not permitted for any carrier to attempt to restrict the compensation rights afforded to passengers under EU261 through the operation of any clause in their GTCCs. This provision is naturally significant for carriers seeking to limit the way in which passengers might seek to exercise their compensation rights to compensation, including by engaging third-party CMCs to claim them.

3. EU261: the third-party claims industry

Since the decision in *Sturgeon,* the CMC industry has developed significantly across the EU, with companies "*vigorously and sometimes aggressively*" pursuing cases for consumers.[4] In 2018, the EU's Court of Auditors found that some airlines were reporting that up to 50% of claims received for financial compensation were brought by CMCs. Given the amount of money at stake, the extensive involvement of third-party CMCs is not surprising. By way of example, during the *Bott & Co* litigation it was revealed that the CMC in question (which is operated by solicitors) was obtaining, on average, £100,000 per month from Ryanair alone, and that Bott & Co had recovered over £62,000,000 for its clients across all airlines.[5] According to Bott & Co's website that total now stands at over £80,000,000.[6]

Whether the growth of this industry is beneficial to passengers is not clear. On the one hand, the existence of CMCs has

4 Pablo Mendes de Leon, Introduction to Air Law, 11th (Wolters Kluwer, 2022) 321

5 James Jordan, "Airlines vs. Claims Agencies… the EU261 fight continues" (HFW, 2019) <https://www.hfw.com/insights/airlines-vs-claims-agencies-the-eu261-fight-continues-november-2019/#:~:text=In%20response%2C%20airlines%20have%20encouraged,EU%20are%20from%20claims%20agencies> accessed on 29 July 2024

6 <https://www.bottonline.co.uk/flight-delay-compensation> accessed on 14 November 2024

clearly helped to increase passengers' awareness and knowledge of the rights afforded to them under EU261. Moreover, the work of CMCs has helped to secure millions of GBP and EUR in compensation for passengers who might otherwise have lost out. However, it can also be argued that the practices of CMCs are actively detrimental to the interests of consumers. In particular, although CMCs typically charge their clients on a 'no win, no fee' basis, the prices they charge consumers are proportionately very large and can sometimes amount to over 50% of the total compensation obtained from the airline.[7] A summary overview of the fees charged in respect of flight delay cancellation claims by selected CMCs operating in the UK market is set out in Annex A. The fees charged by CMCs have given the EU Commission and the EU Court of Auditors cause for concern, as they have the potential to outweigh the benefits otherwise brought by CMCs in terms of facilitating the increased recovery of financial compensation for consumers, leading the EU Commission urging passengers to take their claims directly to airlines in the first instance.

It is also arguable that the fees charged by CMCs are disproportionate to the services they provide to consumers. In most cases, the only role played by the CMC is to assess whether a passenger has a claim under EU261 (which can be done quickly by checking the passenger's flight number against a central flight database) and then to present that claim to the airline involved, which may be through the airline's dedicated portal. By way of illustration, in 2022 the UK's Department for Transport assessed that it would take the average passenger 30 minutes to apply for compensation using an airline's dedicated webpage, and only 15 minutes for the airline to process the claim.[8] Where the necessary criteria are satisfied, airlines typically do not dispute liability and so the process is largely administrative in nature. On that basis it is not immediately clear that CMCs are doing anything that passengers are not capable of doing themselves. The situation may differ in circumstances where an airline disputes liability, in which case it may be necessary to commence legal proceedings to recover financial compensation, but such cases are rare. In the UK, only solicitors are permitted to conduct legal proceedings and this means in those circumstances that CMCs either need to instruct lawyers on the passenger's behalf, or they need to be qualified solicitors themselves.

4. EU261: the airlines strike back?

The growth of the CMC industry is naturally undesirable from the perspective of airlines. Most obviously, it has led to the growth of claims for financial compensation faced by airlines. Beyond that airlines also report that the involvement of CMCs creates additional problems for them in the shape of an increased administrative burden and the introduction of an unnecessarily adversarial element to the passenger-airline relationship. Consequently, many airlines, including LCCs who may be disproportionately affected by EU261 claims, have taken steps to streamline the process of passenger compensation by enhancing direct communication between passengers and airlines, and to regulate the ability of CMCs to bring claims on behalf of affected passengers. Ryanair, in particular, has been at the forefront of these measures. Since 2016 onwards, its primary method of dealing with CMCs has been to bypass CMCs and pay financial compensation directly to affected passengers, thereby depriving the CMCs of the ability to deduct their fees from the compensation recovered. Given that, as Annex A shows, the majority of CMCs operate on the basis of a 'no win, no fee' charging model, this has the potential to cause significant damage to the CMC business model. On 26 July 2016 Ryanair supplemented this approach by implementing a new clause at Article 15.2 of its GTCCs that aimed to manage passengers in engaging with CMCs to bring claims for EU261 compensation, ensuring that certain conditions had been fulfilled first.[9] The precise wording of Article 15.2 is set out at Annex B.

The most important sections of Article 15.2 of Ryanair's GTCCs for the purposes of managing claims made by CMCs are Articles 15.2.2, 15.2.3 and 15.2.8. The practical effect of these provisions is that passengers must first engage with Ryanair by submitting a claim directly to the airline and then allowing 28 days, or lesser if permitted by local law, be-

7 Special Report of the European Court of Auditors, "EU passenger rights are comprehensive but passengers still need to fight for them" (2018) 30

8 *UK Department for Transport, "Aviation Consumer Policy Reform: Compensation for delays to UK domestic flights (Regulation EC 261/2004) – Impact Assessment" (2019) 12*

9 *Bott & Co Solicitors Ltd v Ryanair DAC [2018] EWHC 534 (Ch), §46*

fore engaging a CMC to bring their claim. Given that most requests for compensation are capable of being dealt with by airlines within a matter of days at most, this ensures sufficient time for Ryanair to properly deal with any claims for compensation it receives. If passengers fail to abide by this procedure then Ryanair will not engage with any claims for compensation brought by a CMC because the passenger has breached its contract of carriage with Ryanair. Finally, Article 15.2.8 formalises Ryanair's practice of paying compensation directly to passengers by expressly specifying that all compensation will be paid directly to the card used to make the flight booking in the first place.

Following Ryanair's introduction of Article 15.2 to its GTCCs, easyJet and Wizz Air have both adopted very similar contractual provisions with materially identical practical effects; namely, that refunds and compensation are to be paid directly to the payment card used to make the booking, and passengers are required to engage with easyJet and Wizz Air respectively first and can only instruct CMCs to claim compensation after a certain period has elapsed. It is not clear precisely when Wizz Air adopted this wording, but easyJet appear to have adopted their formulation in or around September 2019.[10] Interestingly, with the exception of Air France, it appears that the major European legacy carriers are yet to adopt similar wording in their GTCCs.

5. Bott & Co Solicitors Ltd v Ryanair DAC [2022] UKSC 8

Data concerning the success rate and number of compensation claims brought by CMCs is necessarily confidential to the airlines and CMCs involved. To assess how successful the attempts of airlines have been in thwarting the activities of CMCs it is therefore necessary to look at other sources. The most obvious other source is the reaction of the CMCs themselves, including in particular litigation brought by affected CMCs in response to the measures introduced by airlines. In this respect the recent litigation brought by Bott & against Ryanair in the UK High Court is particularly instructive: it demonstrates both the significant effect that Ryanair's measures have had on Bott & Co's business to date and further suggests how effective those measures will be in curtailing the efforts of Bott & Co and other CMCs in future.

Bott & Co's claim against Ryanair was brought on two grounds. The first ground was that Bott & Co was entitled to a solicitor's equitable lien over the compensation funds paid out to its clients by Ryanair. Bott & Co therefore required Ryanair to reimburse it in respect of its costs in respect of all claims it had paid directly to passengers since instituting that policy in 2016, and to pay Bott & Co its costs in respect of all claims going forward. The second ground was that certain aspects of Article 15.2 were invalid, either as a result of Article 15 EU261 or because they were 'unfair' within the meaning of Article 3 of Council Directive 93/13/EEC (the "**Unfair Contract Terms Directive**"). During the first instance hearing Bott & Co revealed that Ryanair's policy of paying passengers and bypassing Bott & CO entirely posed an existential threat to the CMC's business: because it no longer received its costs directly from Ryanair, Bott & Co was forced to request payment of its fees from its clients after they had been paid by Ryanair. Bott & Co confirmed that it was only successful in obtaining its fees in this way in 70% of cases, resulting in significant losses for the company. This is a clear demonstration of the effectiveness of the measures adopted by Ryanair, since adopted by other airlines, in seeking to prevent CMCs from bringing EU261 compensation claims on behalf of its customers.

Ultimately, Ryanair was successful in defeating each of Bott & Co's grounds both at first instance and in the Court of Appeal of England and Wales. The Court of Appeal upheld that the contractual restrictions in Article 15.2 (now widely adopted by other airlines) were consistent Article 15 EU261 and, further, that Bott & Co had no equitable right to receive its costs from Ryanair because it had not provided its clients with 'litigation services.'[11] Ryanair was therefore free to continue paying compensation directly to passengers without facing the risk of double exposure to Bott & Co in respect of their costs. Although the Court of Appeal did not find it necessary to rule on this specific point, it did not overrule the High Court's findings that Article 15.2 of the GTCCs did not breach the Unfair Contract Terms Directive on the basis

10 <https://web.archive.org/web/20190801000000*/https://www.easyjet.com/en/terms-and-conditions> *accessed on 7 January 2024*
11 Bott & Co Solicitors Ltd v Ryanair DAC (n i) §58

that it did not create significant imbalance in the rights and obligations of the parties.[12] The obvious effect of the Court of Appeal's decision was that Bott & Co and, by extension, other CMCs, faced being deprived of a significant amount of their revenue, as airlines would be free to continue bypassing them to pay passengers directly without the risk of being forced to pay CMCs their costs. This led some legal commentators to conclude that a decisive blow had been struck against the business practices of CMCs.[13]

However, such conclusions were premature. In 2022 the UK Supreme Court overturned the Court of Appeal's decision and ruled that Bott & Co was, in fact, entitled to a solicitor's equitable lien over its costs. This decision was reached on the basis of an extension of the lien following another recent decision by the UK Supreme Court in *Gavin Edmondson Solicitors Limited v Haven Insurance Company Limited* [2018] UKSC 21. In the Supreme Court's view, to qualify for a solicitor's equitable lien, a solicitor simply needed to show that it contributed significantly towards the recovery of a fund on behalf of a client. The threshold for the solicitor's 'significant contribution' was left deliberately unclear, albeit very low. The Supreme Court did not, however, offer any view on the legality of Article 15.2 of Ryanair's GTCCs, meaning that this part of the Court of Appeal's judgment was left intact. Additionally, the Supreme Court did not provide a binding view on whether the solicitor's equitable lien might be available to other forms of CMC not operated by solicitors.[14]

6. Bott & Co v Ryanair: far-reaching implications?

6.1. *Compensation payments: bypassing CMCs*

The first important implication of the UK Supreme Court's decision in *Bott & Co* is that Bott & Co is entitled to its costs incurred in bringing claims for compensation for affected passengers under EU261. The decision puts airlines on notice of Bott & Co's equitable lien over those costs, which exposes them to the risk of double payments in the event that they choose to pay compensation directly to passengers. In the UK at least, this principle can be extended to cover all claims brought by CMCs operated by solicitors. In that respect, it can be said that Ryanair's practice of paying passengers directly is no longer as effective to prevent passengers from using third party CMCs to bring EU261 compensation claims.

On the other hand, the decision of the UK Supreme Court is clearly limited in its application. First, it does not affect CMCs not operated by solicitors, and this means that there is nothing to prevent Ryanair and other airlines from continuing to bypass those CMCs, which constitute the majority of CMCs, when paying out compensation. Given Bott & Co's evidence regarding the significant difficulties it experiences in recovering costs from passengers, it is likely that this method will continue to be effective in limiting the ability of third parties to bring EU261 compensation claims, as it is clearly highly damaging to the business models of the majority of CMCs, which operate on a 'no win, no fee' charging model. One of the reasons for the UK Supreme Court's decision to recognise Bott & Co's equitable lien was to bolster access to justice by protecting the ability of solicitors to bring claims on a 'no win, no fee' basis, safe in the knowledge that they will be able to recover their costs. However, one unintended consequence of the decision is that non-solicitor CMCs operating in the UK may be motivated to change their charging models either to increase costs or so that passengers are forced to pay some kind of fee up-front, as those CMCs cannot have the same confidence that they will eventually be able to recover their costs. Such an outcome would constitute a further barrier to passengers claiming EU261 compensation through CMCs, and would clearly be contrary to the UK Supreme Court's intention of assisting affected passengers to vindicate their legal rights. To prevent this eventuality it would be necessary for the UK government to legislate to entitle CMCs to similar protective measures over their costs.

It is, however, important to recognise that the decision of the UK Supreme Court is only applicable in the UK. Additional-

12 Bott & Co Solicitors Ltd v Ryanair DAC (n ix) §137
13 Charlotte Thijssen and Lisa. Williams, "Could Confirmation from the UK Court of Appeal Allowing Airlines to Compensate Passengers Directly Help Stamp Out Ambulance-Chasing over Passenger Rights claims in the EU?", in Air & Space Law, Vol. 44 No. 4&5 (2019) 459
14 Bott & Co Solicitors Ltd v Ryanair DAC [2022] UKSC 8 §129

ly, because the concept of the solicitor's equitable lien arises in equity, is does not apply in most European jurisdictions, with the exception of the Republic of Ireland, in any event. This imposes a significant geographical restriction on the decision's impact. The practical effect of this is that *Bott & Co* is unlikely to alter the effectiveness of the practice of airline's paying compensation directly to passengers in the majority of European jurisdictions.

6.2. *Airline GTCCs: restrictions on the use of third-party CMCs*

The second important implication of the decision in *Bott & Co* is that it left untouched the finding of the lower courts that Article 15.2 of Ryanair's GTCCs does not breach Article 15 EU261. This means that, in the UK at least, the contractual restrictions imposed by Ryanair and other LCCs do not infringe upon passengers' EU261 compensation rights. The decisions therefore confirm that airlines are legally entitled to insist that passengers engage directly with them first before they can engage a third party to claim for them. Although the decisions are limited in their application to the UK, it is possible that, given the thoroughness of the Court of Appeal's ruling on this point, European local courts and even the Court of Justice of the European Union might, in future, adopt a similar approach when considering whether Article 15.2 of Ryanair's GTCCs infringes Article 15 EU261. At present the only major legacy carrier that has adopted a similar contractual provision in its GTCCs is Air France but, now that their legality has been confirmed in the UK, it is perhaps likely that other legacy carriers in the UK and the EU will look to introduce similar measures.

Although the UK courts have confirmed that there is no issue with Article 15 EU261, it should be remembered that the question of whether Ryanair's contractual measures infringe upon the Unfair Contract Terms Directive has not been answered definitively. In *Bott & Co* both the High Court and the Court of Appeal found that they did not need to answer this on the facts in front of them, although the High Court did speculate that if it did have to decide the matter then it would have found Article 15.2 to be compliant.[15] It is therefore possible, albeit perhaps unlikely in light of the High Court's comments, that another claimant could be successful in challenging the validity of a contractual provision like Article 15.2 on the basis of there being a significant imbalance in the rights and obligations of the parties for the purposes of Article 3 of the Unfair Contract Terms Directive. Whether the outcome of any such action would be any different is open to speculation: again, the reasoning provided by the Court of Appeal in *Bott & Co* is thorough and there is no obvious reason to presume another court would decide differently, particularly because, in Ryanair's case, the amount of time that passengers now have to wait before instructing a third party CMC has been reduced by 14 days. However, one advantage that a new claim would have is that it could deal with the issue of standing: in *Bott & Co* the Courts recognised that the claimant was not in fact a party to the contract of carriage, and so the claimant's position in challenging the validity Article 15.2 of the GTCC was questionable. If an affected consumer were to bring the claim then there could be no question as to standing, and it is perhaps foreseeable that the court hearing the claim might also then be more sympathetic to allegations of unfairness. Until then, the net result of the decision in *Bott & Co* is that contractual restrictions on the way in which affected passengers may bring EU261 claims akin to those found in the GTCCs of Ryanair and other GTCCs are effective in law.

15 Bott & Co Solicitors Ltd v Ryanair DAC (n ix) §137

Conclusion

Following the growth of the CMC industry in recent years, LCCs like Ryanair have been at the forefront of efforts to increase direct claim handling between passengers and airlines and to regulate the ability of third parties to bring claims for EU261 compensation on behalf of passengers. In the case of Ryanair in particular, the primary method used to combat CMCs has been a combination of paying compensation directly to affected passengers, regardless of whether a claim has been brought by a CMC, and the implementation of contractual requirements that encourage passengers to engage directly with the airline before bringing claims using third parties. These methods have been adopted by other LCCs and, in at least one other case, by a major European legacy carrier.

The evidence given by Bott & Co in the recent litigation before the courts of the UK reveals that these measures have historically been very effective in limiting the revenues of CMCs and, consequently, in threatening their viability as business models. The recent decision of the UK Supreme Court in *Bott & Co* has largely vindicated Ryanair's method of paying compensation directly to passengers, and it has also confirmed the legality of the contractual restrictions imposed in Ryanair's GTCCs. Although the recognition of Bott & Co's right to a solicitor's equitable lien has made some inroads into the ability of airlines to pay compensation directly to passengers, bypassing CMCs, those inroads are themselves limited. First, the decision of *Bott & Co* is only strictly relevant to CMCs operating in the UK, and as a result it should have no impact on the effectiveness of CMCs operating in civil law systems in EU. Second, the recognition of the solicitor's equitable lien is not applicable to CMCs not operated by solicitors, and so airlines are still perfectly capable of bypassing non-solicitor operated CMCs. On that basis it is currently possible to conclude that the measures taken by European airlines, in particular LCCs like Ryanair, are still effective to restrict the ability of affected passengers to claim EU261 compensation using third parties.

It is, however, possible that this situation may change again. Although the Court of Appeal of England and Wales has speculated that there is no breach, the decision in *Bott & Co* has not answered definitively the question of whether the contractual restrictions imposed by Ryanair and other LCCs may be contrary to the Unfair Contract Terms Directive. It is possible, albeit arguably unlikely, that a claim brought by a consumer, rather than by a CMC, before another Court in either the UK or the EU, might reach a different conclusion.

Annex A – CMC charging models and fees

CMC	Charging model	Fees charged
BOTT+CO	'No win, no fee.' Flat fee.	Under 1,500km and delayed more than 3 hours: GBP 93 Internal EU flights over 1,500km and delayed by 3 hours or more: GBP 150 Non-internal EU flights between 1,500km and 3,500km and delayed by 3 hours or more: GBP 150
AirHelp	Choice of 'No Win, no fee' or 'AirHelp Plus' (annual subscription to AirHelp). 'No Win, No Fee' based on percentage of compensation recovered.	'Standard Fee' corresponds to 35% of compensation obtained. 'Legal Action Fee' corresponds to an additional 15% of amount of compensation obtained (i.e., a total of 50%). 'AirHelp Plus' annual charge of GBP 34.99.
FlightRefunder.	'No win, no fee.' 'No Win, No Fee' based on percentage of compensation recovered.	'Success Fee' corresponds to 20-30% of compensation obtained. If necessary to instruct lawyers, additional fee of 14% of compensation obtained is deducted (i.e., a total of 34-44%).
flightclaimer.com	'No win, no fee.' Flat fee.	Under 1,500km and delayed more than 3 hours: GBP 92 1,500 to 3,500km and delayed more than 3 hours: GBP 106 Over 3,500km and delayed between 3-4 hours: GBP 133 Over 3,500km and delayed more than 4 hours: GBP 187
AirAdvisor	'No win, no fee.' 'No Win, No Fee' based on percentage of compensation recovered.	'Success Fee' corresponds to 30% of compensation obtained. If necessary to instruct lawyers, additional fee of 20% of compensation obtained is deducted (i.e., a total of 50%).
TRAVELREFUND	'No win, no fee.' Flat fee.	Under 1,500km and delayed more than 3 hours: EUR 75 1,500 to 3,500km and delayed more than 3 hours: EUR 115 Over 3,500km and delayed between 3-4 hours: EUR 185 Over 3,500km and delayed more than 4 hours: EUR 165

1. <https://www.bottonline.co.uk/flight-delay-compensation/fees> accessed on 14 November 2024
2. <https://www.airhelp.com/en-gb/our-fees/> accessed on 14 November 2024
3. <hhttps://www.flightright.co.uk/hp3> accessed on 14 November 2024
4. <https://www.flightclaimer.com/how-it-works> accessed on14 November 2024
5. <https://airadvisor.com/en/pricelist> accessed on 14 November 2024
6. <https://travelrefund.com/prices/> accessed on 14 November 2024

Annex B – Article 15.2 of Ryanair's GTCCs introduced on 26 July 2016 (emphasis added)

15.2

15.2.1 EU261 Compensation Claims This Article applies to claims for compensation under EU Regulation 261/2004 .

15.2.2 Passengers must submit claims directly to Ryanair and allow Ryanair 28 days or such time as prescribed by applicable law (whichever is the lesser) to respond directly to them before engaging third parties to claim on their behalf. Claims may be submitted here.

15.2.3 Ryanair will not process claims submitted by a third party if the passenger concerned has not submitted the claim directly to Ryanair and allowed Ryanair time to respond, in accordance with Article 15.2.2 above.

15.2.4 Articles 15.2.2 and 15.2.3 above will not apply to passengers who do not have the capacity to submit claims themselves. The legal guardian of a passenger who lacks capacity may submit a claim to Ryanair on their behalf. Ryanair may request evidence that the legal guardian has authority to submit a claim on the passenger's behalf.

15.2.5 A passenger may submit a claim to Ryanair on behalf of other passengers on the same booking. Ryanair may request evidence that the passenger has the consent of other passengers on the booking to submit a claim on their behalf.

15.2.6 In any event, save for Article 15.2.4 and 15.2.5 above, Ryanair will not process claims submitted by a third party unless the claim is accompanied by appropriate documentation duly evidencing the authority of the third party to act on behalf of the passenger.

15.2.7 Passengers are not prohibited by this clause from consulting legal or other third party advisers before submitting their claim directly to Ryanair.

15.2.8 In accordance with Ryanair's procedures, any payment or refund will be made to the payment card used to make the booking or to the bank account of a passenger on the booking.

15.2.9 Ryanair may request evidence that the bank account is held by the passenger concerned.

Drones above Türkiye: deciphering drone operator's liability for third-party damages

by Serap Zuvin, Simge Esendal** & Ege İrem Yenmez***

Introduction

In an era marked by remarkable technological advancements, unmanned aircraft systems ('UAS') (also known as drones) have become a common sight in the skies. While it is common knowledge that the term 'drone' is now widely used to describe uncrewed aircraft, fewer people are aware that its original definition refers to a male honey bee,[1] a fitting association given its exceptional mobility and distinctive buzzing sound. In the legal framework, however, they are commonly referred to as UAS.

UAS have their origins in the early 19th century, evolving from military operations, such as the need for unmanned aircraft for reconnaissance and combat purposes. However, over the past few decades, the use of UAS has gained extensive popularity in civilian settings and have become readily accessible both for commercial and recreational purposes. According to a study published on Statista,[2] in 2024, the revenue in the unmanned aerial vehicle ('UAV') market worldwide amounts to 4.3 billion U.S. dollars. This figure demonstrates the rapid expansion in the use of UAS. In fact, UAS are nowadays used in various fields, including delivery and agriculture,[3] as well as for recreational activities, such as photography and filming.

On the other hand, the rapid growth of UAS activities introduces a range of safety and security concerns as well. As the prevalence and the scope of UAS usage in our skies increases, so does the potential risk of UAS-related accidents, leading to the responsibility of the UAS operators. Consequently, many countries have implemented specific regulations governing UAS operations, along with a liability regime for accidents arising from UAS. In Türkiye, this legislative work is still in its early stages, primarily addressing the regulatory matters, such as registration requirements and compulsory insurance obligations for UAS. However, a comprehensive legal framework covering other aspects of UAS operations, most notably a specific liability regime for UAS-related damages, has yet to be introduced.

This article examines how operator liability for third-party damages caused by UAS is determined under Turkish law in the absence of specific regulations on this matter. Yet, this article limits its analysis to damages caused by 'civil' UAS and the resulting operator liability only, excluding discussions on governmental UAS and UAS used in military settings, which fall under distinct rules and regulations under Turkish law and would require a separate, in-depth review.

1. Establishing the applicable legislation under Turkish law

1.1. International treaties

In establishing the applicable legislation under Turkish law to operator liability for third-party damages caused by UAS, the initial step would be to review if the international treaties, which are signed and duly ratified by Türkiye, address this matter; since they constitute an integral part of Turkish law.

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1 David Hodgkinson, Rebecca Johnston, Aviation Law and Drones: Unmanned Aircraft and the Future of Aviation (2018) Routledge, 1.

2 'Drones - Worldwide', (statistica.com, June 2024) < https://www.statista.com/outlook/cmo/consumer-electronics/drones/worldwide> accessed 7.11.2024.

3 'Commercial Drones Poised To Disrupt Global Supply Chains', (*markets.businessinsider.com*, April 2023) <https://markets.businessinsider.com/news/stocks/commercial-drones-poised-to-disrupt-global-supply-chains-1032220850> accessed 7.11.2024.

Over the decades, the international community has made several attempts to establish treaties aimed at harmonizing the regulatory and liability frameworks for civil 'aircraft' operations across jurisdictions, a broad definition which typically includes UAS as well. Needless to say, many international treaties are drafted with conventional passenger-carrying aircraft in mind, limiting their applicability to UAS.[4]

The Convention on International Civil Aviation, signed in 1944 ('Chicago Convention') stands as a foundational international treaty that established the principles and framework for civil aviation. While Article 8 of Chicago Convention refers to UAS under the historical term 'pilotless aircraft', it makes no further distinction between the manned and unmanned aircraft, and only stipulates that such aircraft must comply with the same civil aviation principles that apply to manned aircraft. Therefore, it does not set out a unique liability regime specific to the operations of pilotless aircraft.

Similarly, conventions ratified by Türkiye in the field of international air carriage, such as the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed in 1929 ('Warsaw Convention') and the Convention for the Unification of Certain Rules for International Carriage by Air, signed in Montreal, signed in 1999 ('Montreal Convention') fall short in addressing the operator liability for damages caused by UAS, typically because they focus specifically on liabilities for passenger injury, death and damages to baggage or cargo either onboard or in the course of embarking or disembarking, arising from the contractual relationship between the passengers, consignors and air carriers. In other words, they do not set forth a liability regime for damages to third party, who is not engaged in a carriage contract with the operator or damages occurred on the ground. Therefore, the liability framework established by those conventions is not well-suited to UAS operations, given that UAS typically do not transport passengers. Indeed, it is stated in legal doctrine that the direct applicability of these conventions to UAS-related damages is limited under current technological conditions.[5]

Another significant international treaty relevant to this article's subject is the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed in 1952 and as amended by the Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed in 1978 (hereinafter collectively referred to as the 'Rome Convention'), which regulates operator liability for third-party damages caused by aircraft, regardless of whether they carry passengers. However, Türkiye, like many other nations, has not ratified the Rome Convention. Thus, its provisions do not govern UAS operator liability under Turkish law.

In the absence of an international treaty to which Türkiye is a party that governs the liability regime for UAS operators in the event of third-party damages, the domestic legal framework discussed in the following sections remains the primary reference on this matter.

2. Applicable legislation to operator liability for third-party damages caused by UAS under Turkish law

Turkish Civil Aviation Law No.2920[6] ('TCAL') neither provides a definition of UAS nor includes specific regulations regarding their operation. However, a definition is provided under the Instruction on the Unmanned Aerial Vehicle Systems[7] ('Instruction') published by the Directorate General of Civil Aviation of Türkiye ('DGCA'). Accordingly, UAS means "*the entirety of separate system components necessary for the operation of the flight, such as the unmanned aerial vehicle, control station, command and control data link, and takeoff and landing system*", and the UAV means "*an aircraft operating as a component within an unmanned aircraft system, capable of sustained flight through aerodynamic forces without an onboard pilot, either remotely controlled by a UAV pilot or autonomously following pre-determined plans set by the UAV pilot*".

4 David Hodgkinson, Rebecca Johnston, 'Guiding Principles For Drones: A Starting Point For International Regulation' (2018) 3 Perth International Law Journal 163.
5 *Ibid*, 164.
6 Published in the Official Gazette dated 19.10.1983 and numbered 18196.
7 Published by the DGCA on 22.02.2016 and further revised on 12.07.2020.

Although the Instruction defines what qualifies an UAS, it does not provide comprehensive and specific regulations governing operator liability for damages to third parties. Instead, the Instruction primarily sets out regulatory requirements for UAV under Turkish law, such as import, sale, registration, airworthiness, operational conditions. The only provision on operator liability is Article 10, which broadly states that all UAV and UAS operators and owners shall be liable for any damage caused to third parties. However, beyond this general provision, the Instruction lacks detailed liability framework, leaving the questions of the nature and the scope of the operator's liability unanswered.

On the other hand, although the TCAL does not provide a distinct definition for UAS and/or UAV, Article 3(b) offers a comprehensive and inclusive description of aircraft as "*all types of vehicles capable of taking off and navigating in the air*". Based on this broad definition, the sole criterion for classifying a vehicle as an aircraft is capability to take off and navigate in the air; whether the vehicle is manned or unmanned is irrelevant. Consequently, both autonomous UAS, which can operate with an automatic flight control system without pilot control, and those controlled remotely by pilots qualify as aircraft under the TCAL, as they inherently possess the necessary capabilities to take off and navigate.

Therefore, in terms of operator liability for third-party damages caused by UAS, both the Instruction and the TCAL must be implemented together. In cases where the Instruction falls short, the general liability regime under the TCAL will apply. Furthermore, since the TCAL is a superior norm compared to the Instruction, in cases of conflict between the two regarding the elements that establish liability, the TCAL will prevail in accordance with the hierarchy of norms.

3. Operator's liability for the damages caused by UAS to third parties

Pursuant to Article 134 of the TCAL, the operator of a civil aircraft is liable for the damage caused by this aircraft to third parties. Correspondingly, as explained above, Article 10 of the Instruction stipulates that the operators or owners of all UAV and UAS are liable for any damage caused to third parties. As evident, the liability of operators is explicitly and broadly defined under both the TCAL and the Instruction.

Given these provisions, it is essential to analyze distinct definitions established under the foregoing provisions, categorized under four headings: (i) civil aircraft, (ii) operator, (iii) damage and (iv) third parties. As the definitions of UAS, UAV and civil aircraft under Turkish law have already been discussed above, the following sections will refrain from making repetitive explanations on the same. Instead, the following sections will focus on examining the remaining three elements of liability —operator, damage, and third parties—to comprehensively understand the scope and conditions under which UAS operator liability is triggered.

3.1. Definition of operator

The term 'operator' is defined under both the TCAL and the Instruction, with the TCAL providing a broader interpretation compared to the Instruction.

3.1.1. Definition of the operator under the Instruction

Under the Instruction, for an individual or entity to qualify as an operator and consequently bear liability for third-party damages, they must be "*the real person or legal entity who owns the UAV or the UAS*". Thus, the Instruction ties the designation of an operator explicitly to ownership of the UAV and/or UAS.

3.1.2. Definition of the operator under the TCAL

In contrast, the TCAL introduces broader criteria for qualifying as an operator and due to the hierarchy of norms, the definition of operator under the TCAL will prevail. Under Article 133, an operator is defined as "*a real person or legal entity who either personally uses a civil aircraft on its own behalf or delegated its use to its agents*". Thus, this broader definition under the TCAL captures not only owners but also those who have operational control over the aircraft, thereby expanding the scope of liability.

The same article further stipulates that "*a real person or legal entity who has acquired the right to use the aircraft, whether directly or indirectly, and exercises control over its flights shall be deemed the operator".* Additionally, the TCAL establishes a presumption that any individual or entity listed as the aircraft's owner in the civil aircraft registry, maintained by the DGCA, is considered the operator unless evidence to the contrary is provided.

Thus, contrary to the Instruction and as per the TCAL, holding the ownership of the UAS is neither a prerequisite nor the sole condition for being considered an operator of the UAS.

Considering that the designation of 'operator' status is crucial in determining the liability framework for UAS operators, the aforementioned explanations regarding the criteria for qualifying as a UAS operator will be discussed in further detail in the following subparagraphs.

(i) **A person who uses the UAS on its own behalf or through its assistants**

In legal doctrine, an individual who operates a UAS is characterized as someone who creates a risk by introducing the aircraft into air traffic, possesses it, and continuously derives benefit from its use.[8] The concept of 'benefiting from the UAS' entails having a vested interest in the aircraft and bearing its associated costs. Indicators of 'using the UAS on one's own behalf' include actions such as securing liability insurance, paying the premiums, and covering expenses related to maintenance, repair, and storage. These factors collectively establish the individual as an operator of the UAS.[9]

Additionally, a person who performs these responsibilities through an assistant, such as a pilot or flight engineer, is also deemed an operator. The operator's assistants are individuals who aid in the operation of the aircraft, acting on behalf of the operator and delegating the practical use of the UAS to them.[10]

Notably, the TCAL does not mandate a specific purpose for the use of the UAS in order to qualify as an operator. Therefore, whether the UAS is utilized for commercial or recreational purposes is irrelevant in determining the operator's status.[11]

(ii) **A person who has transferred the right to use the UAS while it retains control of the UAS's navigation**

Even if a user transfers its above-explained right to use the UAS to another person, so long as it retains control of the navigation, it is still considered an operator under the TCAL.

What is important here is that for the purposes of this clause, the right to use the UAS must have been transferred by the operator consensually. In the event that the UAS is used by someone else without the operator's consent, Article 135 of the TCAL becomes applicable and the operator will partially or completely be relieved of its liability, as the case may be. This will further be discussed below under the sections titled 'Causal link' and 'Joint liability'.

(iii) **A person who is registered as the owner of the UAS**

According to both the Instruction and the TCAL, a natural or legal person registered as the owner in the civil aircraft registry is presumed, by default, to be the operator of the UAS. Those asserting a different status must substantiate their claim.

While the scope of this article focuses on the liability regime of UAS -related damages, it is important to note that under Turkish law certain UAS are subject to a registration requirement with the civil aircraft registry. The Instruction, in particular, imposes weight-based criteria to determine eligibility for such registration. Consequently, the presumption of operator status for registered owners is applicable only to UAS that exceed a specified weight

8 Kemal Şenocak, 'İnsansız Hava Aracı (Drone) İşletenin Sorumluluğu ve Sigortalanması' [Liability of the Unmanned Aerial Vehicle (Drone) Operator and Insurance] (2020) Banka ve Ticaret Hukuku Dergisi, 72 (Şenocak).
9 Ibid, 72.
10 Gülnur Erol, Sivil Hava Aracı İşletenin Sorumluluğu [Liability of the Civil Aircraft Operator] (2020) Master's Thesis Ankara University, 55.
11 Ibid, 54

threshold and are therefore mandated to register under the Instruction, which underscores the importance of above-mentioned additional criteria to qualify as a UAS operator.

3.2. Damage

Neither the TCAL nor the Instruction provides for a limitation of scope on the third-party damages that can be claimed from the UAS operator. Thus, a third party can claim indemnification for both personal injuries and damage to property.

Personal injuries may occur in the form of physical injury or death, or in the form of impairment of mental health or violation of personal rights.[12] In practice, violations of personal rights involving UAS often occur through intrusion into private life during aerial photography or surveillance. Thus, since Turkish law does not differentiate between types of damage in this context, third parties may seek compensation both for pecuniary damages and non-pecuniary damages arising from violations of their personal rights.

Damage to property may occur in the form of destruction or impairment of the intended functioning of the property.[13] According to legal doctrine, the third party may also seek indemnification of its pure asset damage (*e.g.* financial losses incurred by the airport operator caused by the temporary suspension of flight operations due to misguided UAS).[14]

3.2.1. Whether the damage to have occurred during the flight or operation of the UAS

Under Turkish law, a significant debate exists regarding whether the operator's liability for damages to third parties depends on the UAS being in actual flight or operation, and how the term 'operation' should be interpreted. Neither the TCAL nor the Instruction provides a specific provision on this matter. Nevertheless, Article 5 of the Regulation on Civil Aircraft Third Party Liability Insurance[15] ('Insurance Regulation'), which outlines the principles and procedures for compulsory liability insurance covering third-party damages, has prompted scholarly discussion and various interpretations in the legal doctrine.

Article 5 of the Insurance Regulation stipulates that "*the aircraft is considered to be in operation if it is activated for the purpose of a flight, irrespective of whether it is in the air or on the ground, or whether it is stationary or moving*". The foregoing provision has sparked a scholarly debate in the Turkish legal doctrine, dividing opinions into the following two main schools of thought:

Some scholars extend the scope of applicability of the foregoing provision and argue that the operator's liability for damages to third parties is not contingent on the UAS being in active flight or operation at the time the damage occurs. They suggest that liability under the TCAL could be triggered even when the aircraft is not in motion or engaged in a flight activity.[16] For instance, according to these scholars, if a firefighter is injured while attempting to retrieve a UAS that has become lodged in a tree, the operator could still be held liable due to the injury of the firefighter.[17]

Other scholars emphasize the context in which this provision is established, arguing that its primary purpose is to expand the scope of the Insurance Regulation, which is designed to benefit third-party victims. They argue that the provision ensures that the liability insurance for UAS operators covers not only instances where the UAS is airborne or moving but also situations where it is stationary or on the ground, thereby offering protection to third parties even when the UAS is

12 Erol, 72; Şenocak, 64.
13 Şenocak, 66.
14 Şenocak, 67; Sinan Sami Akkurt, Sivil Havayolu ile Yolcu Taşımacılığından Kaynaklanan Hukuki Sorumluluk [Legal Liability Arising from Civil Aviation Passenger Transport] (2014) PhD Thesis, Selçuk University, 332.
15 Published in the Official Gazette dated 27.07.2017 and numbered 30136.
16 We understand that this approach deviates from the customary practices in other jurisdictions. According to Şenocak, under Swiss law, in order for the operator to be held liable under the country's aviation legislation, the damage caused to a third party by UAS must have occurred while the UAS is in flight. Similarly, under German law, for the operator's liability to arise, the accident causing the damage must occur during the operation of the aircraft.
17 Şenocak, 79.

not actively engaged in flight operations.[18]

Since no publicly available court decision has yet been rendered on this matter by the Turkish courts, it is fair to say that the theoretical debate outlined above remains relevant and ongoing.

3.3. Definition of third party

To establish the liability of an operator for damage resulting from the operation of UAS, it is essential that the damage be inflicted upon an individual qualifying as a 'third party'. However, both the TCAL and the Instruction lack a clear definition of third party, leaving the term open to broad interpretation. This ambiguity requires defining the concept by analogy, using related legal frameworks and concepts.

In Turkish legal doctrine and in the context of aviation law, a third party is generally defined as anyone who is not physically on board the aircraft, does not have baggage or cargo on board, and lacks any contractual relationship with the operator, such as a contract of carriage or service.[19]

From the perspective of UAS operations, the pilot operating the UAS remotely is not considered a third party, as they will have a contractual relationship with the operator and therefore, cannot claim indemnification based on the provisions of TCAL. Conversely, an individual who has no connection with the UAS but is injured by it while passing by can claim for compensation from the operator for their damages. Since neither the TCAL nor the Instruction states otherwise, a third party can either be a real person or a legal entity.

4. Liability regime under the TCAL and general provisions of tort law

In the absence of specific regulations under Turkish law governing the liability of UAS operators for damage to third parties, the general liability provisions set forth in the TCAL and principles of tort law become applicable. This section will provide an analysis of these provisions to better understand the Turkish legal framework in place.

In accordance with the principles of tort law, for a tortious act to give rise to liability on the part of the wrongdoer—in this context, the UAV/UAS operator's liability for damages inflicted on third parties—the following conditions must be satisfied: (i) an unlawful act, (ii) fault, (iii) damage and (iv) a causal link. The elements of an unlawful act and damage have already been discussed in the preceding sections. Therefore, the following section will specifically address the concepts of fault and causal link as they pertain to the liability framework.

4.1. Fault of the operator

The TCAL establishes a unique form of strict liability with respect to the fault of the operator, whereby the liability is established solely by the occurrence of a danger, irrespective of any fault or operator's fulfilment of an objective duty of care. Consequently, even if the operator is not at fault for the damage sustained by a third party or has exercised the level of care expected of a competent operator, liability will still be imposed as long as the other conditions specified under the TCAL are satisfied.

In accordance with this strict liability framework, Article 137 of the TCAL stipulates that the operator may only be released from liability if the damage was caused or exacerbated by the negligence of the injured party or its agents. Unlike standard tort liability under Turkish law, *force majeure* and the fault of a third party (*i.e.,* someone other than the operator or the injured party) do not constitute grounds for relieving the operator from liability.

18 Mücahit Türkmen, '*İnsansız Hava Aracı İşletilmesinden Doğan Sorumluluğun Sigortalanması*' [Insurance of Liability Arising from the Operation of Unmanned Aerial Vehicles] (2024) Adalet Yayınevi, 138.

19 Şenocak, 79.

4.2. Causal link

In accordance with the general principles of tort law, there must be a clear and direct causal link between the 'UAS' and the 'damage' for the operator's liability to be established. Additionally, in certain instances, this causal link may be interrupted by intervening events, where a new and independent series of causes may contribute to consequences exceeding the damages initially triggered by the UAS incident. For instance, according to an example given in legal doctrine, if the individual injured in a UAS crash later dies in a separate traffic accident while being transported to the hospital by ambulance, the UAS operator would not be held liable for the individual's death.[20]

Furthermore, Article 137 of TCAL provides that if the operator can demonstrate that the damage occurred or was exacerbated due to the negligent conduct of the injured party or its agents, the causal link shall be deemed interrupted, thereby fully or partially be relieving the operator from liability to compensate. However, for this to happen, the fault of the injured party or its agents must be sufficiently significant to break the causal link. If the negligence does not reach this level of intensity, it will merely result in a reduction of the compensation owed by the operator.

An example provided in legal doctrine illustrates that if the operator fails to comply with applicable legislation or air traffic rules during the operation of the UAS, this will preclude the operator from invoking Article 137. In such a case, the operator's fault would be deemed greater than that of the injured party or its agents, thereby disallowing a reduction of or relief from liability.[21]

As noted above, *force majeure* and the fault of a third party (*i.e.* someone other than the operator or the injured party) are not included under Article 137 as grounds for relieving the operator from liability. Nevertheless, Article 135 of TCAL provides a specific exemption for cases involving third-party fault, applicable only when a third party causes damage by using the aircraft without the operator's consent (for example, if the aircraft has been stolen). In such situations, the operator will not be held liable under Article 133 unless the operator's negligence contributed to the unauthorized use (such as failing to take adequate measures to prevent theft). In this case, the unauthorized user would bear sole liability for the damage caused to third parties. Otherwise, if the operator is found at fault, it will be jointly and severally liable with the unauthorized user, as elaborated in the following section.

4.3. Joint liability

The TCAL outlines two distinct cases in which joint liability arises for damages caused by the UAS to third parties. The first case is the one under Article 135, which has been discussed previously as an exception that interrupts the causal link. As explained above, the operator can only be exempt from liability if it proves that it was not at fault for losing control of the UAS. If the operator is found to be at fault, it will be held jointly and severally liable with the unauthorized user.

The second case falls under Article 136, which stipulates that if damage is caused by two or more civil aircraft, the operators of these aircraft will be jointly and severally liable. In this case, joint liability arises only when multiple aircraft contribute to causing the same damage.

In accordance with the principles of tort law under Turkish law, in the case of joint liability, the third party may seek full compensation for all its damages from either one or both of the liable parties. If one party satisfies the entire compensation claim, that party is entitled to seek reimbursement from the other liable parties. This recourse must be in proportion to each party's respective degree of fault and must also account for the level of danger each party's actions generated.

20 *Ibid*, 68.
21 *Ibid*, 71.

5. Compulsory third-party liability insurance

In order to ensure aviation safety, as is the case in other jurisdictions, operators of aircraft in Türkiye, as well as UAS, are under the obligation to insure their aircraft against potential damages to third parties that may occur during flight operations. This requirement is stipulated under Article 138 of the TCAL, which reads as follows: "*for Turkish and foreign civil aircraft flying in Turkish airspace; it is mandatory for the operator to take out a financial liability insurance as coverage for damage to third parties*".

The principles and procedures applicable to this liability insurance are further covered under the Insurance Regulation. According to Article 5 of the Insurance Regulation, the obligation to take out third-party liability insurance applies to all registered aircraft and operators, all foreign registered aircraft and operators using Turkish airports or airspace, and UAS registered in the online UAS registration system or the civil aircraft registry. This difference regarding the registration of UAS to different platforms (*i.e.*, either to the registration system of the civil aircraft registry) arises from the provisions set forth in the Instruction, which outlines *inter alia* the principles and procedures governing their registration.[22] The Instruction sets forth that UAS below a certain weight threshold are exempt from such registration requirements and, consequently, also exempt from the obligation to secure third-party liability insurance.[23]

Article 6 of the Insurance Regulation defines the scope of third-party liability insurance to include risks associated with war, terrorism, hijacking, sabotage, unlawful seizure, and civil unrest. Additionally, all indirect damages, such as loss of profit or rent incurred by third parties, are explicitly excluded from the coverage of this insurance. The Insurance Regulation further sets out the minimum coverage amount per incident per aircraft.

As per Article 138 of the TCAL and Article 9 of the Insurance Regulation, aircraft that do not fulfil the insurance obligation will be banned by the Ministry of Transport and Infrastructure of Türkiye from flying in Turkish airspace. In addition, administrative fines specified under the TCAL will also be imposed on the operator of the aircraft.

6. Conclusion

With the expanding use of the UAS both in commercial and recreational settings, the potential for disputes arising from the liability of UAS operators for third-party damages is becoming increasingly significant. However, from the perspective of Turkish law, neither the international treaties ratified by Türkiye nor the domestic legal rules provide specific regulations on this matter. Therefore, operator liability for third-party damages caused by UAS is governed by the general liability principles under the TCAL, and, where appropriate, principles of tort law.

Given the continuously evolving nature of UAS technology, it is crucial for both domestic legislators and the international community to prioritize legislative efforts in this area, addressing specific operational, risk management, and liability concerns that differ from those of manned aircraft.

22 According to the Instruction, UAS with a maximum take-off weight between 500 grams (including) and 25 kilograms are registered with the online UAS registration system, whereas the UAS with a maximum take-off weight of 25 kilograms or more are registered with the civil aircraft registry.

23 While the Instruction excludes UAS with a maximum take-off weight below 500 grams for commercial purposes and below 25 kilograms for non-commercial civil purposes from the requirement for third-party liability insurance, relevant articles of TCAL concerning the liability of the operators for third-party damages, does not make such distinction in terms of its applicability. Therefore, the maximum take-off weight of an UAS does not make any difference in terms of the scope of the operator's liability for third-party damages.

Space

The space of the new European Defense and Security.
Launching the EU Commissioner for Defense & Space and beyond
by Luisa Santoro

The Draghi Report: It takes a village
by Matija Rencelj & Sara Dalledonne

The Space of the new European Defense and Security. Launching the EU Commissioner for Defense & Space and beyond

*by Luisa Santoro**

Abstract

The new configuration of the European Commission proposed by Ursula von der Leyen for the period 2024-2029 envisages, for the first time ever, a "Commissioner for Defence and Space", as well as two additional new Commissioners dealing with "security" (other than the one already present in the expiring EU's executive arm and known as the Foreign and Security policy Commissioner): the Tech Sovereignty, Security and Democracy Commissioner and the Trade and Economic Security Commissioner.

This article focuses both on the space-and defense-related innovations and the new approach and main objectives that will characterize the 2024-2029 mandate of the European Commission, providing considerations on some space-related aspects shared as a common thread by the new Commissioners.

1. Introduction

After her re-election for a second term, on 18 July 2024 European Commission President Ursula von der Leyen announced her Political Guidelines for the new European Commission 2024-2029, and later, on 17 September, consistently with such Guidelines, she also presented her proposed list of Commissioners-designate, along with their respective portfolios. The recommended team includes some new Commissioners whose mandate explicitly refers to space, defense and security, in an ultimate (re-)aspiration to peace that echoes the incipit of the Schuman Declaration [(1).]

2. The Space of the new European Defense and Security

The new configuration of the European Commission proposed by Ursula von der Leyen last September for the period 2024-2029 envisages, for the first time ever, a "*Commissioner for Defence and Space*".

The mission Letter to the Commissioner-designate for Defence and Space correlates the two concepts in terms of "*European security architecture*" [(2)], requiring "*to invest in our own security and defence, in close cooperation with our partners and with NATO*", which reflects "*the increasingly contested nature of space and the links with our overall security and defence*"[(3)].

Such approach to defence entails – as stated in the Letter - identifying the resources necessary "*to deliver full-spectrum European defence capabilities based on joint investments, readying the EU and Member States for the most extreme military contingencies*" [(4)]; enhancing "*Europe's civilian and military preparedness and readiness.*"; and further strengthening the dual-use transport infrastructure corridors across the Trans-European Network, promoting "*a whole-of-government approach to the swift movement of military personnel and their materiel.*", identifying and harnessing "*the EU's dual-use and civil-military potential across all relevant domains, fully exploiting legal and regulatory margins*"[(5)].

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The opinions expressed in this article are purely the views of the author, and thus may not in any circumstances be regarded as an official position of the institution the author belongs to.

1 "*World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it*."
2 https://commission.europa.eu/document/1f8ec030-d018-41a2-9759-c694d4d56d6c_en.
3 Ib.
4 Ib.
5 Ib.

In addition, the mission Letter to the Commissioner-designate for Defense and Space expressly focuses on the creation of a "*Single Market for Defence products and services*", in order to increase "*production capacity and fostering joint procurement of European equipment*", thus contributing to specialisation and improving the integration of SMEs in supply chains, so as to "*create a true Single Market for Defence products and services"* and *"increase the aggregation of demand for defence assets between groups of Member States* […] *to pursue the further standardisation and harmonisation of defence equipment* […] *notably to promote and incentivise common procurement of European equipment"*.

After the passage referring to defence and security, the Mission Letter continues by focusing on space, with an emphasis on the need to "*further invest in high-end defence capabilities in critical areas such as naval, ground, air combat, space-based early warning and cyber* […] *to pave the way for a more ambitious future defence programme*", helping "*to ensure that our cooperation with NATO continues to cover all threats, including those linked to cyber, hybrid or space*".

In addition, as indicated in the Letter, the new Commissioner for Defence and Space will be expected to ensure the implementation of the EU Space Strategy for Security and Defense by fostering "*a strong and innovative space industry, maintaining the EU's autonomous, reliable and cost-effective access to space*"[(6)], focusing on the "*development, deployment and use of EU space assets, including the Earth observation programme Copernicus, the EU's global and regional satellite navigation systems Galileo and EGNOS, and communication satellites GOVSATCOM and IRIS²"(7);* whereas, regarding the cooperation with the European Space Agency, he will have to pursue "*cost efficiency, innovation, merits-based competition and an effective internal market for space products and services*", introducing also "*common EU standards and rules for space activities",* harmonising licensing requirements and proposing a "*Space Data Economy Strategy to tap into the potential of space-derived data, products, and technology*".

So, while in the Mission Letter of the mentioned new Commissioner no new great space program is announced, another evident novelty in the new College proposed by Ursula von der Leyen to the European Parliament is represented by the introduction of two additional new Commissioners who will deal with "security" other than the one already present in the expiring EC structure and known as "*Foreign and Security policy Commissioner*":

1. the Tech Sovereignty, Security and Democracy Commissioner and
2. the Trade and Economic Security Commissioner.

Furthermore, in both cases, the respective Mission Letter of the two new Commissioners is much longer than all of the others: 9 pages (the average is around 7), 5 of which are dedicated to their specific and detailed tasks. In the first case the mission is described by using the terms security (27 times), threat and defense (9 times each), challenge (8 times), resilience/resilient (6 times); while in the second case it is described by resorting to: trade (21 times), security (17 times), partnerships (11 times), strengthen (9 times), transparency (6 times) and sustainable/sustainability, rule and agreement (5 times each).

But, beyond the characterizations of each mandate obtainable from the semantic fields related to each respective portfolio, specific considerations can be made regarding:

1) The Country of origin of the proposed Commissioner [(8)] who will be dealing with "*Tech Sovereignty, Security and Democracy"*: Finland, i.e. a Country where everything reflects the defense and security concepts[(9):]

- urban planning: every building exceeding a certain size - including all condominium units and public structures - must be equipped with an air-raid shelter; the capital city itself rests on a system of tunnels that can accommodate up to nine hundred thousand people - more than the current population;

6 Ib.
7 IRIS² is "*the troubled secure communications network that aims to rival Elon Musk's Starlink*", worth €2.4 billion (https://www.politico.eu/article/andrius-kubilius-defense-space-commissioner-budget-european-space-agency-cooperation/).
8 https://commission.europa.eu/about-european-commission/towards-new-commission-2024-2029/commissioners-designate-2024-2029_en.
9 https://www.linkiesta.it/2024/03/finlandia-guerra-russia/.

- supplies: emergency measures can be activated at any time;
- the social resilience of the population, according to an approach based on the constant hypothesis of a prolonged conflict.
- The defense industry: capable of constantly increasing its production capacity;
- the Country also boasts one of the best artillery arsenals in Europe and an equally solid air force. In 2011, Finland also purchased long-range missiles from the US, thus becoming the only State - together with Poland and Australia - to have such weapons outside the United States;
- the navy, which is specialized in shallow-water operations (e.g., the Baltic ones, archipelagos, etc), with exceptional capabilities in the use of naval mines, and which operates in close collaboration with Sweden (mixed units).

2) The mandate of the Commissioner who will take on the role of "*Trade and Economic Security; Interinstitutional Relations and Transparency*"[10], from which it is possible to get an idea of the priority geographical areas of intervention that will polarize attention and resources in the period 2024-2029, i.e.: UK ("*strengthen relations*"); China ("*de-risking,* […] *not decoupling,* […] *reciprocity*"); India ("*new Strategic EU-India Agenda*"); Indo-Pacific, Latin America and Caribbean Countries ("*strengthen our economic links*"); Africa ("*facilitate trade and promote sustainable investments*").

3. Conclusions

In a global context marked by crises, growing tensions, re-emerging paradigms and challenges, Ursula von der Leyen's second term clearly appears to be aimed at strengthening defence, security as well as cost-efficiency, investments and innovation, with a College of Commissioners whose composition reflects the ongoing changes in the European political domain, i.e. the consolidation of the political right - with the European People's Party-EPP which, in addition to the Presidency, will be represented by thirteen portfolios vs the five assignments to the Socialists and Democrats group[11] .

So, in conclusion, following the above observations, it is natural to expect that, in any case, the role of space (which is mentioned twice in the aforementioned Mission letter to the Commissioner for Tech Sovereignty, Security and Democracy) cannot but re-affirm its essential strategic value, both as a tool of foreign policy and as a fundamental domain for achieving the objectives set in the socio-economic as well as in the defense/security fields, not only at the national level, but - above all - in terms of European autonomy.

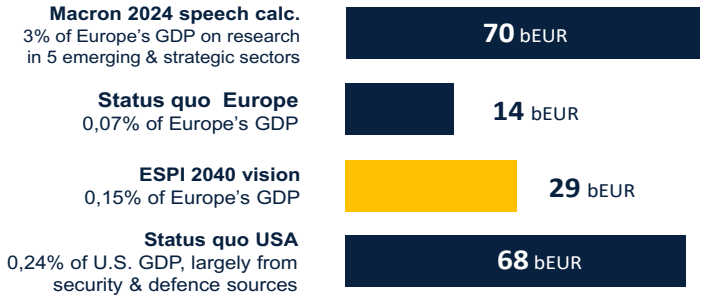
10 https://commission.europa.eu/about-european-commission/towards-new-commission-2024-2029/commissioners-designate-2024-2029_en.
11 https://iari.site/2024/10/28/verso-un-nuovo-esecutivo-le-nomine-dei-commissari-europei-e-le-loro-implicazioni-sul-futuro-dellue/.

The Draghi Report: It Takes a Village

Matija Rencelj, Sara Dalledonne***

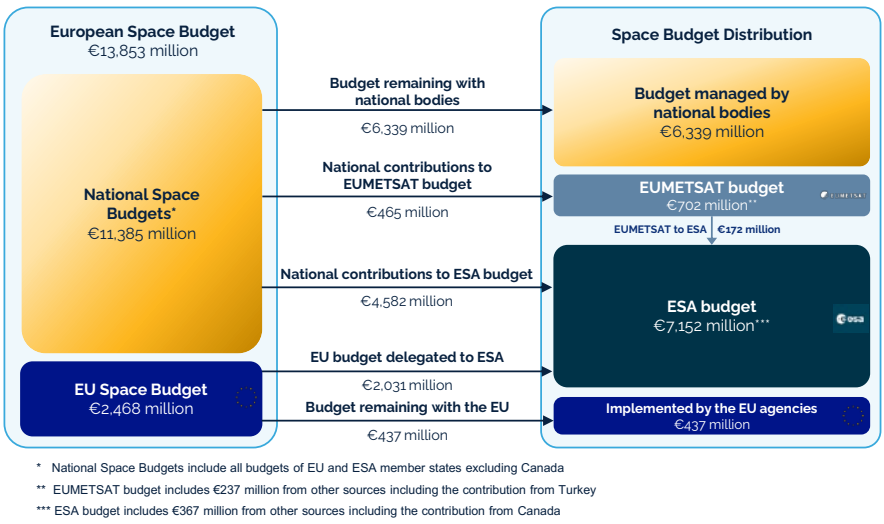
1. Space: A pillar of Europe's future prosperity and peace

A report on the future of European competitiveness, prepared by Mario Draghi to guide future EU strategy recognises space as a key strategic sector that will define Europe's prosperity for decades to come.[1] This recognition is well aligned with the recent speech of Emmanuel Macron on the future of Europe, where space was among the five most strategic sectors, along with AI, quantum computing, biotech and new energy.



Levels of current funding for space and proposed ambitions (ESPI) 2024

Despite this recognition, Europe today lacks the political will at the true scale of its economic power and talent to become a full space power. While this goal is still within reach, the gap is widening,[2] and clear funding commitments (CM25, MFF, CM28) and strategic direction are preconditions to avoid Europe being pushed further down the global competitiveness scale, not only in space but across all sectors of the economy enabled and transformed by it.



Consolidated European Space Budget in 2022 (Credit: ESPI Yearbook, 2024)

It also resonates with ESPI's policy vision holding that if the gap in the space sector between Europe and existing and emerging global space powers is allowed to widen further,[3] Europe risks losing the heritage and excellence it acquired over past decades, and become increasingly dependent similar to what happened in digital and semiconductor industries, where Europe has not been able to reap the commercial benefits of industries it once helped innovate and build.

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1 Draghi, The future of European competitiveness – A competitiveness strategy for Europe, September 2024 (Link).
2 ESPI Perspective, Success Within Political Boundaries – but Widening the Gap, November 2022 (Link).
3 ESPI, ESPI2040: Space for Prosperity, Peace and Future Generations, 2023 (Link).

2. An in-depth analysis in-vacuum

While the Draghi report identifies the long-term effects of current inertia with pinpoint precision (deepening strategic dependencies, erosion of the industrial base, missing out on commercial opportunities), the analysis of root causes and resulting proposals targeting space, fail to deliver impact, at scale and with a schedule of urgency.

The outlook on Satellite communications, the key pillar in sustaining the European space sector until the late 2010s (in both satellite manufacturing and launch services, mostly for GEO orbits) and currently the key transformative driver of the global LEO space economy, do not develop the enormous potential of public-private partnerships in stimulating a commercial market as a first priority. Instead, IRIS2 is described as a linear evolution of GOVSATCOM, focusing on governmental services like other components of the EU space programme, rather than a catalyst for a paradigm shift and a space programme leveraging market forces.

Similarly to parts of the report addressing the digital sector,[4] the space-related chapter fails to recognise the power of B2B and B2C markets, requiring incentivising policies and market creation measures, in segments where Europe can further leverage its established commercial operators (e.g. EUTELSAT Group, SES, Hispasat) and manufacturing powerhouses (e.g. Thales Alenia Space, Airbus Defence and Space, OHB, Beyond Gravity) operating in global markets, as well as SMEs and the emerging NewSpace ecosystem.

Other parts devoted to the success of the EU Space Programme fail to recognise the symbiotic relationship and interdependence between the EU & ESA in implementing Copernicus and Galileo, as leading application infrastructures. While lauding technological leadership in Copernicus, the report neglects failures to develop commercial EO markets on par with the U.S.,[5] also exemplified by low patent filings in space-borne sensing compared with the U.S. and China.[6]

Without nitpicking on numerous contentious data points, the claim of direct support to 250,000 jobs by the EU Space Programme (which would amount to less than EUR 10,000 of direct impact per job, given the limited size of the EU Space Programme) stands out as it serves as an epitome of a systematic confusion that fails to distinguish between the EU Space Programme and Europe's space ecosystem at large, acknowledging national, commercial, ESA, EUMETSAT and EU programmes.

3. A continued clash between terrestrial and space: Satellite services at WRC-23

The Draghi report provides a loud wake-up call on challenges facing Europe; the innovation gap, decarbonisation and reducing dependencies, and proposes a set of relevant horizontal policy measures following a clear logic. From leveraging national development banks for PPPs,[7] and facilitating the emergence of pension funds, to directing FP10 towards European strategic priorities, and assessing security and resilience in M&A assessments.

When moving onto the space sector, the report does highlight key areas for future policy but tends to overlook alternative options and fails to address the complexity of funding, governance, and growth drivers in the sector when designing proposals.

The proposals seem to be a product of short-term policy goals and predetermined programmatic action. While the Report, in general, rightly calls for greater ambition and clearer direction, the three identified new large space programmes focus on launchers, Earth observation, and In-orbit services, which hardly stand at the core of the space economy. This predetermined focus misses the opportunity to provide pathways for greater integration of space vertically across sec-

4 Brugel, Draghi disappoints on digital, September 2024 (Link).
5 EUSPA< GNSS and EO market report (Link).
6 EPO & ESPI, Space-borne sensing and green applications, October 2022 (Link).
7 ESPI, ESPI2040: Space for Prosperity, Peace and Future Generations, 2023 (Link).

tors,[8] and fails to propose a larger ambition in security & defence and human exploration, key drivers, next to broadband constellations, for innovation in any space power.

While ESPI is continuously addressing these and similar ideas in more depth and detail, an initial reaction to the recommendations is provided in the remainder of this Brief.

3.1. Reform the European space governance framework to reduce complexity, fragmentation and overlap (Medium- term)

Recognising the global transformation of the space sector, it is crucial to examine how the revolution happening around Europe compares to the evolution within Europe, and how European space governance may need to adapt for Europe to play a leading role in this shift.

It is a no-brainer that EU and European space governance are complex, involving multiple organizations each with distinct programmatic priorities and policies and operating under various funding models for their programmes. However, an inclusive governance system for space, embracing and federating national, EU and tailored entities like ESA all in their individual strength, can counteract the effects of homophily, reinforce the resilience of a European solution, foster the exchange of knowledge, and formation of partnerships.[9] More broadly, only such a constructive structure can compensate for the weakness of the static MFF cycles, responding to the urgencies of the time, and leveraging the greater reactivity of national support, including via ESA.

The proposal to reform the European space governance framework in a medium-term schedule will only prolong an already long-lasting conversation (with very limited success). Instead of once again challenging the role and responsibility of existing actors, like done over the last 20 years or more, Europe should better deal with and (on the contrary) leverage the realities and strength of its multi-stakeholder environment, with pragmatic implementation of existing provisions. This would most urgently require a definition of a clear and compelling policy and strategic direction between ESA, EU and respective member states, jointly identifying ambitious goals pursued in concert and leveraging them as partners at the global level. These goals should be mapped to respond to the megatrends correctly identified by Draghi. In this context, a reinforced role of the EU in ESA (e.g. investigating the possibility of establishing a European Chamber to further coordinate activities between the EU and ESA related to the EU space programme), and a more prominent role of ESA in the COMPET Council are welcomed.

3.2. Remove the ESA's geographical return principle to reduce the fragmentation of the EU's industrial base and modernise EU procurement rule (Short-term)

The report calls for a deeper alignment of procurement rules between ESA and the EU, suggesting the removal of ESA's geographical return policy in favour of a more competitive approach, and more agile procedural approach in the EU through a modernisation of procurement rules.

Acknowledging its boundaries, the ESA's approach remains a crucial mechanism in attracting substantial funding, fostering intra-European competition, and shaping a diverse space ecosystem across Europe, which also strengthens Europe's resilience in a critical technology field through diversifying supply chains. ESA has shown awareness of the competitiveness challenges surrounding its industrial policy model and has initiated internal reforms. These include expanding the fair contribution policy, which adjusts contributions based on the actual market share gained by national industries in industrial competitions, particularly in telecommunications. Other measures are also being explored, such as relaxing the global guaranteed return level and making adjustments within programme families.

Recommendations to eliminate this principle do not adequately address the risk of losing Member State's funding or the need to balance ESA contributions with investments from "emerging" Member States. Drastically altering this scheme

8 ECA, pecial Report 07/2021: EU space programmes Galileo and Copernicus: services launched, but the uptake needs a further boost, 2021 (Link).
9 Beaumier et al, Hybrid organisations and governance systems: the case of the European Space Agency, 2023 (Link).

could undermine operational flexibility and resilience. Notwithstanding, as highlighted in the Report, modernising this approach should also focus on its implementation, particularly in addressing underperformance, which affects project timelines and costs, and improving agility and industrial autonomy in supplier selection.

At the EU level, the limitations of EU procurement practices have become evident. The procurement process for the IRIS2 programme allowed it to proceed with very limited competition, relying on one single consortium, and facing significant direct political pressure from governments, resulting in significant delays and increased pricing to the European taxpayer.

In both ESA and the EU, policymakers should broaden their view of competitiveness beyond procurement rules, contextualising it in line with other aspects such as market direction, market creation, aggregation, anchor roles, and the transition from innovation to commercialisation. Only such a broader framework can ensure a more comprehensive and effective approach to fostering competitiveness in the space sector.

3.3. Establish a functioning Single Market for space, through a common EU legislative framework (Short-term)

The ambition to develop and implement a single market for the space sector through an EU Space Law is well known within the space community. The primary objective of the EU Space Law revolves around actions necessary to improve competition within the EU space industry. With a common legislative framework, the EU aims to tackle these diverse national legislations among Member States and create a more level playing field. However, 13 ESA member states (including 11 EU members, Norway, and the UK) have their own space-related legislation. It remains to be seen how already existing national space laws and national best practices will be considered in the formulation of the upcoming EU Space Law.

From a security standpoint, proper implementation of the tenets of the Law will also foster the resilience of space assets through capacity-building initiatives and best practice exchanges. Vulnerability of space systems to physical and cyber threats from both Earth and space—standardising baseline resilience measures and response protocols will strengthen European space assets and extend their operational lifespans.

Moreover, cross-border issues such as taxation, export controls, and labour laws pose additional challenges for businesses operating across multiple EU jurisdictions. It remains unclear whether the EU Space Law will address these critical concerns, which may require separate legislation beyond the scope of the Space Law. Yet it is crucial to acknowledge that a Law alone will not resolve the need to beef up and diversify the internal market for space services, which is a precondition for discussing the establishment of a truly unified space market.[10]

3.4. Establish a multi-purpose EU Space Fund at the EU level (Medium- term)

3.5. Improve access to finance for EU space SMEs, start-ups and scale-ups to ensure they can grow in the EU (Short-term)

While over the past years, private funding reached new heights across the European space startup landscape, the trend is currently facing an unsurprising slowdown.[11] Despite relatively successful EU initiatives such as CASSINI, and the EIC Accelerator, the United Kingdom continues to lead the way in terms of invested amounts and the number of deals.

Irrespective of national differences, access to finance, particularly to scale, is a well-known struggle across the European deep tech landscape, with the risk of companies fleeing to other markets, or losing strategic assets altogether. In tightening markets, public action is crucial in maintaining a pipeline of innovation and providing a scaleup route, where deemed strategic.

10 ESPI, EU Space Law Contribution, 2023 (Link).
11 ESPI, Space Venture Europe 2023: Investment in the European and Global Space Sector, May 2024 (Link).

This dynamic is exemplified in parts of the space sector due to a high CAPEX and long development timelines. Increasing the risk-taking ability of the EIB lending is therefore highly relevant, and welcome in tackling the woes of both emerging and established actors alike, along with other financing structures beyond VC.

Ultimately, access to capital is to a high degree a function of the low demand by Europe's institutional and commercial markets, which will ultimately define the RoI of an investor. In this context, a multi-purpose Space Fund, if implemented well, is therefore a welcome proposal, aligned with ESPI's preliminary blueprint for such a vehicle.[12] However, the fund needs to act upon a strong well-defined strategic direction, either targeting a critical capability area or a bold (long-term) public programme, rather than spreading its portfolio across the sector.

Sound implementation will also consider functionally separating the vehicle financing multi-country projects from the vehicle acting as an anchor customer, helping to measure the success of each scheme and providing greater transparency, crucial to crowding in private investments.

With the latter point in mind, while fully recognising the importance of economic security and FDI screening, the ability to acquire strategic and critical companies on the European market could raise grave concerns among investors as a potential high-stake exit might be ruled oout, in favour of a sale to a pre-identified buyer.

3.6. Introduce targeted European preference rules for the space sector to support the scale up of European companies (Short-term)

A procurement process for space-based systems or services that includes the possibility of a preference clause as an award criterion, could positively impact the European space market. Such a measure would help ensure critical mass for European industry, enhance competitiveness in the global market, and support technological autonomy.

Indeed, without actively promoting a level playing field with international competitors that allows the European space industry to continue expanding, Europe's competitiveness risks slipping further. Other space-faring nations have enacted various policies, either directly or indirectly, to bolster their domestic space industries, preventing European companies from accessing parts of their markets. This is most evident in Chinese, Indian and U.S. policies, such as the U.S. Buy American Act, though similar practices can also be found in African countries.

In contrast, Europe consistently supports fully open international competition, advocating for mutual recognition and benefits with foreign competitors, thereby placing itself at a disadvantage in comparison to others.

Europe should maintain international cooperation and trade flows while implementing policies that empower the European space industry. The concept of a "Buy European Act" has been under debate for at least two decades. Notwithstanding, the establishment of a European preference principle to secure Europe's non-dependence and sovereignty should be tailored for specific target areas, finding its most relevant applicability in strategic domains. Additionally, a preference clause should be balanced with the fact that, after decades of globalisation, many European companies have become de facto global enterprises, heavily dependent on access to international markets.

3.7. Define joint strategic priorities for space R&I, to be supported by increased coordination, funding and the pooling of resources at the nat. and EU levels (Long-term)

On the back of Space Council Conclusions calling to reinforce the ESA-EU strategic coordination for the development of the overall European Space Policy,[13] Draghi's recognition of the lack of strategic cooperation between EU Member States in space policy-making comes as no surprise. However, its classification as a long-term proposal fails to recognise the urgency and raises immediate concerns. Cooperation on common strategic goals is urgently required and needs to occur simultaneously at three institutional levels:

12 ESPI, Bridging the Financing Gap in the European Space Sector: Alternative Funding Pathways in Tightening Markets, March 2024 (Link).
13 Council of the EU, Council adopts conclusions on the contribution of space to Europe's competitiveness, May 2024 (Link).

- nationally, where some Member States, e.g. Italy through the creation of the COMINT, have made great strides over recent years;
- at the EU level, where the COMPET setup can indeed serve as a relevant platform; and
- in a wider European context, including ESA and EUMETSAT;
- as well as considering the industrial ecosystem.

These processes, while at different levels, should not imply subordinacy but rather recognise the interdependence and accept also overlap of national, EU and wider European priorities and the inherent resilience of a joint European solution, as perhaps epitomised by the UK's bail-out of Copernicus in December 2023.

Despite the acute need to improve coordination and define joint strategic priorities, this proposal is the only one defined in a long-term implementation timeframe of <5 years. Europe simply cannot afford to wait until the 2030s to understand its priorities and only then start acting on them. It must make use also of national flagships such as IRIDE or the Atlantic Constellation (and not dismiss all national efforts as small national research projects), be interested in their follow-up and sustainability, leverage existing programme mechanics (EU Space Programme, ESA optional programmes) and strengthen the reinstated Space Council setup with a deepened political mandate.

In a broader context, policy should also focus on improving the transition from R&D and innovation to profitability and job creation, ensuring a smoother pipeline from innovation to commercialisation —a challenge that Europe currently struggles with, and well addressed in the Horizontal part of the Report.

3.8. Further exploit the synergies between space and defence industrial policies (Medium-term)

Since the Cold War, space has consistently been a key element of U.S. national security spending exemplified by the Space Force's FY2024 spending of $29 billion. The strategic importance of space defence is also supported by a robust institutional framework through the National Space Council.

In contrast, despite a war on its borders, European funding in this area remains very modest, as Europe is only beginning to respond to the geopolitical shifts. As an example, the European Defence Fund (EDF) has a budget of 8 billion with 10% - i.e. approx. 800M€ - on space-related projects (as little as 50M in the 2024 call).[14] The European Defence Investment Programme (EDIP) through 2027 allocates just €1.5 billion, which is only 1.5% of the €100 billion goal set up by Commissioner Breton in February 2024.[15] The incoming European Commission is likely to prioritise geopolitical goals, including developing its statecraft to ensure economic security and defence.

While the role of space in security and defence has gained unprecedented recognition at the policy level, the institutional and programmatic scale of support is still missing, and the industrial dimension is still undervalued. The challenge requires more serious attention, calling for a coherent Europe-wide defence industrial policy, including space. The European Defence Industrial Strategy marks a valuable first step in this direction, yet without a clear route of implementation.[16]

Be this as it may, the industrial aspect of defence is only one facet of the broader geopolitical and foreign policy agenda. While the Report argues for a medium-term implementation, the new commissioner for Defence and Space represents the impulse for urgently changing scale, bringing space higher on the political agenda - but also showing the need for a realignment of responsibilities within the constraints of EU treaties and national sovereignty.

EU funding alone will not be sufficient to respond to the urgencies of the time to raise Europe's investment in space for security and defence to levels comparable to the U.S. and China, with related global public spending in this sector estimated at $50 billion annually. Only a combination of EU, national, ESA (leveraging more reactive funding cycles), and

14 EDF | Developing tomorrow's defence capabilities (Link).
15 ESPI Perspective, Space industry, security & defence need for institutional reform: projects and funding (Link).
16 EDIS, Our common defence industrial strategy (Link)

private funding can effectively secure the future of Europe's space industry in the global space race, strengthen supply chain resilience, drive the necessary innovation, and support its security & defence objectives.

3.9. Define an EU policy framework for launchers aiming to ensure autonomous access to space (Short-term)

The European launcher sector is clearly far from its glory days when Ariane dominated global markets. While improved governance and project management are a welcome discussion with improvements underway, the future of the launch sector will be defined by disruptive capabilities that can change the economics of launch at scale. The push for developing these will, however, not originate in the launcher itself, but rather in its intended use and purpose.[17]

Therefore, this proposal tackles the wrong end of the stick. While autonomous access to space is indeed strategically significant, it will be the overall ambition and the subsequent level of institutional and commercial demand for European launch services that will define whether a paradigm shift and consequently European competitiveness can be (re) attained. If such conditions are met, autonomous access to space will become a routine capability.

To this end, institutional demand aggregation indicated in the report is a crucial and welcome element of such a demand-driven future. On the other hand, the inclusion of commercial demand in the aggregation sticks out and would need to be further elaborated, as commercial operators with a responsibility to their shareholders would need to prioritise availability & price, rather than leaving time-to-orbit, cost-to-orbit and overall negotiations to a publicly driven framework.

3.10. Promote further access to international space markets (Medium-term)

Compared to competitors like Japan, Europe has so far utilised economic diplomacy less effectively to support its companies in global export markets. Alongside domestic-focused tools, services and products intended for export for European space industries, along with support mechanisms for export market access, should be a fundamental component of industrial policy. This should include a larger involvement of space actors in economic diplomacy networks. Institutional backing for foreign markets could be strengthened through integration with other EU policies, such as development and trade policies and mechanisms (e.g., targeted Export Credit, especially in a time of high capital costs).

These instruments can help partially offset the limited domestic demand by addressing access asymmetries, maximising market access, and promoting European companies' presence in emerging space markets. Effective coordination among Member States and EU stakeholders (e.g., EEAS, DG DEFIS, DG TRADE) is essential to identify export opportunities by leveraging synergies between various EU directorates and their respective policies.

Beyond space diplomacy, it is important to recognise the role of space as a tool of diplomacy and the value of fostering close, long-lasting cooperation beyond the space sector. In this context, Europe needs to be actively involved in major international programmes and establish leadership roles and strong partnerships with global collaborators.

4. Navigating rough waters between competition, innovation, resilience and protectionism

More broadly, the debate will have to centre around two opposing narratives one advocating for consolidating internal governance and protecting national champions or monopolies to maintain global leadership; and the other acknowledges that (quasi)monopolies often fail to sustain dynamism and deliver breakthrough innovations.[18] Protecting innovation from monopolies is critical.

In the long-term, the logic of consolidation can transform into a strategic weakness as seen in other sectors such as defence and semiconductors. A diversification of actors, including in geographic terms, strong antitrust enforcement,

17 ESPI, More Than a Rocket: Complexities of European Decision Making, July 2024 (Link)
18 Khan, America Has a Resilience Problem, 2024 (Link).

and lowering barriers for innovation are essential in fostering a future-proof and resilient environment. Embracing complexity by acknowledging the need for a multi-stakeholder approach is beneficial, particularly in reinforcing resilience.

Yet, the report also proves that the broader political and economic context in which space policy finds itself will inevitably impact the sector's future. Proposals targeting more integrated capital markets, systematised joint debt, or the 5th freedom on R&I proposed earlier this year by Enrico Letta, could imply the necessity of a Treaty Reform,[19] consequently taking years. Finding the political will and alignment across all Member States will not be easy, given the asymmetry and prolonged surfacing of symptoms in the competitiveness crisis.

Yet, the competitiveness and innovation gap across the European space sector needs to be acutely addressed here and now. The outlook is exacerbated, given that national budgets are heading towards fiscal consolidation. With crucial programme and funding decisions within the 2025-2028 period (ESA CM25, ESA CM28, EU MFF) on the horizon, the European space ecosystem, starting with policymakers, needs to ensure the competitiveness slip is reversed by:

- Providing an integrated European space policy with clear strategic direction; and
- Responding to the most urgent challenges, including in security & defence and climate adaptation

fully leveraging the mechanisms and frameworks at hand of all stakeholders, and accelerating the long-term ambitions presented in the Draghi report.

The Mission Letter for the new Commissioner-designate for Defence and Space already provides an opening beyond the Draghi Report, for a more engaging way forward, including the security & defence dimension and, as a joint effort, leveraging the capabilities of all European actors in space.

19 Lindseth, Leino-Sandberg, Democratizing Draghi: Why the "Competitiveness Report" Demands Treaty Reform, September 2024 (Link).

Miscellaneous Material of Interest

Book review: Fundamentals of International Aviation Law and Policy
by Anna Masutti

Teaching International Air Law in China: an empirical study at China University of Political Science and Law
by Luping Zhang & Chen Kou

Towards a new legal framework of the Italian Space Economy
by Giulia Zucca

Book review: Fundamentals of International Aviation Law and Policy

by Anna Masutti

This second edition of the *Fundamentals of International Aviation Law and Policy* by Benjamyn I. Scott and Andrea Trimarchi offers the reader a comprehensive and exhaustive overview of the international civil aviation. The book is divided in different chapters, 14 in total, each touching on a specific aspect of international aviation law.

The book is an easy read, easy to understand and very informative. The authors have ensured that the book is not overly simplistic but still very accessible, even to readers with limited knowledge of the aviation field. As a result, this textbook is not only appropriate for an introductory course on international aviation law but also for more advanced students or professionals.

The authors have decided to use a variety of learning tools, differentiating themselves from more traditional textbooks on the topic. For instance, they illustrate their discussion with some 'did you know?' sections, which contain key facts or figures. Those sections also render the book accessible to readers who might not necessarily have any legal knowledge. The book also includes 'case report', although not in every chapter. In addition to the learning tools already mentioned, the authors also provide practical examples to clarify some theoretical points or aspects which might be controversial. The authors have also tried to avoid a European-centric approach by including national examples. As one of the target audiences of the authors is students, each chapter starts with a 'learning objectives' and finishes with a carefully curated list of recommended literature and 'points for further research'. The book contains a range of longer and shorter chapters.

The two first chapters, 'Foundations of Aviation Law' and 'Early Developments', provide a concise overview of the history and developments in aviation law. Chapter 2 has also been reorganized compared to the 1st edition. Chapter 3, 'Convention on International Civil Aviation' covers the Chicago Convention in detail. The section on the 'applicability of the Chicago Convention' will be particularly helpful for students as it not only contains definitions but also illustrations. Chapter 4 relates to the International Civil Aviation Organization (ICAO) and its functioning, the annexes to the Chicago Convention and finishes with a brief summary of the external cooperation. I, personally, found that the authors could have better linked the last part of Chapter 3 with the first part of Chapter 4.

The book further discusses the Chicago Convention in Chapter 5, 'International Air Transport', by exploring and explaining the various articles of the Convention. Air service agreements are analyzed in some detail, first through their history, their key theme and then commercial cooperation.

Chapter 6, 'Criminal law', as its title indicates is dedicated to criminal law and is a bit shorter compared to the next chapter on contractual liability. Chapter 7, 'Contractual liability', provides a good overview of the Warsaw and Montreal Conventions. It also contains a section on passengers' rights focusing on the European example. In my opinion and with the global trend towards the enactment of passenger's rights regulations worldwide, this section could have benefits from other examples, such as the Canadian regulations, or even become a standalone chapter as Chapter 7 is the lengthiest. This last section also seems to be a bit oddly placed at the end of the chapter rather than following the discussion on carrier liability in case of delay.

Chapter 8, 'Third-party liability and damage on the surface', is a shorter chapter which mainly focuses the Rome Convention of 1952. The mid-air collisions section could have been expanded a bit more by linking it to the next chapter on insurance for instance. Chapter 9, 'Insurance', provides a good discussion. As it is a shorter chapter, the authors could have included a discussion on other legal regimes regarding compulsory insurance, rather than limiting the analysis to the EU Regulation 785/2004.

Chapter 10, 'Competition law', actually includes a detailed explanation of the European and American systems as well as the role of both ICAO and WTO- which is a new addition. This chapter is quite informative without being too theoretical. It contains mainly useful 'did you know' as well as some important definitions, making it a very easy read even for people without a legal background.

Chapter 11, 'Environmental protection', contains useful graphs and tables. The authors incorporated sufficient technical information to provide a good discussion without going overboard. Chapter 12, 'Aircraft financing', offers a good overview of the different types of lease agreements as well as an introduction to the Cape Town Convention. This chapter is a new addition compared to the first edition of the book.

Chapter 13, 'Unmanned aircraft systems', was also not present in the previous edition of the book. This inclusion ensures that the book covers the main areas of public aviation law. Yet again, the effort of the authors to facilitate access to a broad range of readers is demonstrated by the inclusion of figures to illustrate their discussion. Compared to other chapters, Chapter 13 might feel a bit more introductory. However, if this book is used as a textbook in an introductory course, the analysis will be more than sufficient to ensure a good understanding and discussion with students.

The last chapter, 'Suborbital transportation and space law', bridges international aviation with suborbital and space law. The inclusion of this chapter ensures that the book also discusses current trends and relevant topics to the study of international aviation law, making it a key addition to any library or reading list.

Teaching International Air Law in China
An Empirical Study at China University of Political Science and Law

Luping Zhang Chen Kou***

Teaching international air law is an important and integral part of air law education. This article conducts an empirical study of teaching international air law at the China University of Political Science and Law (CUPL), particularly in light of an English course designed by the author for undergraduates.

The structure of the article can be summarized into the following main sections. First, the framework outlines the background of the Research Team for Air and Space Law at CUPL and provides an overview of the air and space law courses offered at different levels by the team and other law schools such as at Leiden University and McGill. Second, the Case Study of the "Introduction to International Air Law" Course introduces the skeleton of the course, including its syllabus and summary of teaching evaluations. The third section provides reflections on the aspects of teaching mode, evaluation mode, and proposed course reform to put forward suggestions based on the development of global competence. At last, the article concludes with the meaning of international air law education against the backdrop of Chinese development in international legal education.

1. Orientation

The aviation sector in China is witnessing exponential growth and innovation, securing significant achievements within the domestic sphere and increasingly asserting its influence on the global stage. To keep pace with these advancements, the field of international air law must evolve in tandem. As international air law undergoes rapid transformations, so too must its educational curriculum. The integration of air law into academic curricula not only mirrors these developments but also contributes to their refinement from an educational standpoint. CUPL serves as a prime incubator for this evolution, with its "Introduction to International Air Law" course exemplifying the strides China is making in the domain of international legal education.

2. The Framework of Air Law Courses at CUPL

Air law education is typically grounded in a robust research foundation in air law. CUPL is one of the few leading law schools in China that has a specialized stream of research team dedicated to air and space law. The Research Team for Air and Space Law was established on March 14, 2007, and it was derived from the School of International Law.[1] The Team was the first to be devoted to both teaching and research at the same time for Air and Space Law. The Air and Space Law team at CUPL offers a series of courses on air and space law in Chinese and English at both the undergraduate and graduate levels, including Air and Space Law and Introduction to International Air Law for undergraduates, Air and Space Law for graduate students, and Introduction to Air Law for international students. This series of courses is

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1 CUPL Aerospace Law, CUPL Official Account of the Research Team of Air and Space Law at CUPL.

in line with learning from top air law institutions such as Leiden University and McGill. The Leiden Law School offers an Advanced Master's program in Air and Space Law, which combines public air law, private air law, and space law, which include specific titles such as Air Transport Competition Law, International Space Law and Policy, European and Commercial Perspectives of Space Law, Finance and Procurement of Aerospace Activities and Space Law & Policy: Case Studies.[2] This program has both a clear European and international dimension, with opportunities to explore national law, and is unique in the world whereby it balances both academic and practical dimensions. McGill Law School also offers a specialized LLM, including Space Law: General Principles, Law of Space Applications, Government Regulation of Space Activities, Government Regulation of Air Transport, Airline Business and Law.[3] McGill focuses on different perspectives from international conventions, the relationship between economic regulation and safety regulation to interdisciplinary examinations of the commercial and legal issues facing airlines.

3. Case Study of "Introduction to International Air Law" Course

3.1. Course Skeleton

This article takes the example of an English course, namely "Introduction to International Air Law" as a case study. Designed to pave the way for students eager to delve into the vanguard of international legal studies—international air law. China has made rapid developments in space technologies and space activities in the last few years, however, it still lags in the legal arena. To provide guidelines for and promote further development of space activities, China should speed up its national space legislation process.[4] The field of international air law is not only dynamic but also burgeoning, posing intriguing challenges. A key aspect of this course is to equip students with the expertise to adeptly apply international legal principles to protect China's sovereignty and interests in an era defined by rapid technological advancement. The course aims to immerse students in the complexities and dynamics of this burgeoning legal domain. It addresses pressing legal issues such as the suspension of flights between China and the United States amidst the COVID-19 pandemic and the significant air law challenges posed by incidents like MH370. From the macro to the micro level, this course will answer these diverse legal questions. There are no prerequisites for the course, but the study of public international law, private international law, and civil law is useful. In addition, the textbook for the course is the classic textbook on air law, *Introduction to Air Law*, revised by Professor Pablo Mendes de Leon[5], which is the most recent edition (11th) of the textbook is required as preparation materials.

In terms of teaching methodology, a blend of lectures and case studies is used to enhance student interaction. The lecture format is utilized to elucidate the principles of substantive law, ensuring a comprehensive understanding. At the same time, for the advantage of a small class, students can be divided into different groups to discuss cases according to different issues.

In addition to the objective statements above, the following subjective supports, also have a significant impact on the long-term development of the course. For the teachers who run the courses, overseas experience and language proficiency are crucial to the level of the courses taught. The author studied and worked overseas for seven years before joining CUPL, and had internship experiences in two international organizations, the United Nations Commission on Trade and Development (*UNCTAD*, Geneva) and the International Civil Aviation Organization (*ICAO*, Montreal), dealing

2 Air and Space Law (Advanced LL.M.) -Leiden University https://www.universiteitleiden.nl/en/education/study-programmes/master/air-and-space-law
3 LLM in Air and Space Law (Thesis and Non-Thesis) Faculty of Law–McGill University https://www.mcgill.ca/law/grad-studies/masters-programs/llm-air-and-space-law
4 Yun Zhao, National Space Law in China: An Overview of the Current Situation and Outlook for Future, Brill Nijhoff, 2015.
5 Pablo Mendes de Leon, Introduction to Air Law, 11th Edition, Wolter Kluwer, 2022.

with matters related to international trade and international air law. In terms of teaching abroad, she has experience in lecturing at several foreign universities. This lays a certain foundation for this course. Another special feature of the course offered by the author is that it is supported by an important research center in this field which has been mentioned before - The Air and Space Law Research Team of China University of Political Science and Law. The Team actively carries out foreign exchanges and cooperation while integrating the existing teaching force of aviation and space law. The teaching of international air law is also an important part of promoting the specialization of aerospace law education. In this sense, it also supports a long-standing problem of educators, namely, the relationship between teaching and scientific research. It is only when teaching and research form a mutually reinforcing relationship that both students and teachers can become the greatest beneficiaries.

3.2. Syllabus

The English syllabus serves as a more direct guide for student learning compared to its Chinese counterpart.[6] In the course "Introduction to International Air Law", the syllabus is designed to provide one compulsory reading and one recommended reading each week, in addition to a textbook. Interspersed with this is the study of classic cases. The English syllabus also provides a simple list of knowledge points for each lesson, which provides a roadmap for students to follow.

The main body of the English syllabus is designed as follows. Course Description (32 teaching hours, 2 credits): subjects such as the Chicago Convention, aviation security and safety, and aviation liability will be investigated. The angle of study will be comparative, with examples and cases drawn from international legal systems. Evaluation: class attendance and performance (40%) and term paper (60%). The students may be allowed to ask leave for the class for two times in total based on justifiable grounds. Materials: the recommended textbook for this course is Pablo Mendes de Leon, *Introduction to Air Law*, 11th Edition, Wolter Kluwer, 2022.[7]

3.3. Summary of Teaching Evaluations

"Introduction to International Air Law" Course has been offered for three semesters since 2021 and has garnered feedback from the students who enrolled. Because of the small size of the international course, the maximum number of students in this class is 30. In the 2021 semester, 13 students joined this course while the number increased to 27 in 2022 and 30 in 2023. According to the teaching quality assessment report, 63 students answered the questionnaire in total.[8] From the reports and daily communication with students, most of the students were satisfied with the quality of "Introduction to International Air Law". From the subjective feedback, the satisfaction mainly came from the students' preference for interaction, the clarity of the course logic system, and the learning pleasure of relevant extended knowledge such as public international law and environmental law. However, some students said that although the knowledge involved in the lecture is rich, as a law undergraduate who mainly studies other courses in Chinese, the obstacles to the understanding of many English professional vocabularies had affected the absorption of the substantive content of the course to a certain extent. Also, some students suggested that the teacher needed to provide some guidance for English essay writing in the future. In addition, more group activities and other activities like moot were also mentioned in the suggestions. Selective suggestions can be classified as follows.

6 Luping Zhang, Preliminary Discussion on International Course Teaching from the Perspective of Cultivating Talents in Foreign-Related Law, China University of Political Science and Law Education Review, 2022..

7 For students who are new to air law, a more accessible textbook is Benjamyn Scott, Andrea Trimarchi, Fundamentals of International Aviation Law and Policy, 2nd Edition, Routledge, 2025. .

8 Updated teaching feedback provided by Luping Zhang, 2024

Classification	Specific Suggestions
Content and Structure	- Provide an introduction to the overall framework at the beginning of the course. - Provide an overall review or comparative summary after learning a block.
Teaching Mode and Interaction	- Reduce the volume of lessons or divide students into study groups. - Organize teaching activities such as moot debates.
Language and Writing	- Provide outline instruction in English essay writing. - The language of instruction may need to be adapted or additional language support may be required, taking into account the English level of the student.

Table.1

Above all, student satisfaction is high (>98.5%), and so is student interest in taking the course (30/30 for all repeat courses). Feedback from students is diverse: there are positive comments about the breadth of knowledge covered and the ability to practice English, as well as concerns about participation in English writing and speaking. The course is still lecture-based, with an English dissertation as the form of the ending of the course. Based on the feedback above, the course has already been optimized year on year. In 2023, it provided feedback on the written papers which was written by each student; and in 2024 it set a Best Air Law Award for students who had a passion for English essay writing.

4. Reflections

4.1. Teaching Mode

At the beginning of the course, the author presented all course materials and verbal explanations in English. After consulting the students after the first class, the following adjustments were made in the second class: firstly, Chinese translations were attached to the English expressions of proper nouns and important points in the courseware; secondly, important points in the oral expressions were repeated in Chinese. In the subsequent courses, to facilitate a deeper comprehension of the subject matter within an English-language framework, the syllabus of the three lessons was also unified in the first lesson and then explained. Due to the limitation of students' English level and the numerous terminologies in air and space law, the interactive effects in the class were not as satisfying as imagined. To explore a better way of teaching, before a certain lesson, the author assigned students in advance a certain piece of English news related to aviation law and selected individual students to present it before the lesson. This proactive approach resulted in improved oral proficiency during the designated presentations, as students were afforded ample time for preparation.

4.2. Evaluation Mode

The usual examination set in this course is a one-page case analysis and an English aviation law paper of about 3,000 words. Before completing the corresponding assignments, the author explained how to analyze the case in English and how to write the paper in English respectively. Judging from the quality of the assignments submitted by the students, they answered the short case study better, while there is still much room for improvement in their ability to grasp the ability to write an essay in English. Some students also wrote in the questionnaire that they found it hard to write an English essay in an unfamiliar field. However, the learning curve demonstrated by the students is gratifying. The author believes that there will be a more appropriate way to teach Chinese students to perform better in English essay writing.

4.3. Proposed Course Reform

Looking ahead, the author aims to integrate the concept of global competence into this course's development. The concept of global competence was first introduced in 1988 by the American Association for International Educational Exchange (*AAIEE*). In 2018, the Organization for Economic Co-operation and Development (*OECD*) released the PISA Global Competence Framework, which further clarifies "global competence" in terms of four dimensions: knowledge, skills, attitudes and values, i.e. the ability of young people to be able to analyze cross-cultural issues locally, nationally, and globally; to be able to understand and appreciate the values and worldviews of others; to be able to the ability to communicate and interact openly and effectively with people from different cultural backgrounds, and the ability to take the necessary actions for collective and sustainable development.[9] Focusing on the development of global competence for undergraduate students who can cultivate it from an international course generally encompasses the following three levels: global perspectives and foreign language skills (level 1); academic literacy and critical thinking (level 2); and value output and debating skills (level 3).

Foreign-related law talents have a fundamental position and role in foreign-related law work, and accelerating the cultivation of foreign-related rule of law talents is the key to doing a good job in foreign-related law work. Against this background, the author, based on exchanges with front-line substantive staff of the Ministry of Foreign Affairs and the United Nations, came to the preliminary conclusion that the traditional international law curriculum could not fully meet the needs of foreign-related law personnel training. Taking "Introduction to International Air Law" as an example, it was taught at the first or second level to some extent, with limited value to students in terms of global competence, and a particular lack of development of output capacity at the third level.

It is planned to carry out key reforms in the teaching method and evaluation mode discussed above, supplemented by projects to enhance students' reading skills; improve their ability to analyze practical problems, etc., to complete the shift from an input-based to an output-based mode of training, and ultimately to achieve the third level of fostering global competence (output of values and debating skills).

On the one hand, in terms of the teaching mode, this course will be gradually changed from the traditional lecture-based system to a combination of lectures and tutorials. Based on the comparison between the Socratic cross-examination teaching mode in American law schools and the lecture and tutorial mode in British law schools, the author believes that the latter mode is more suitable for the reference of undergraduates in Chinese law schools. The Socratic method, while effective in the U.S. legal education context, is predicated on the absence of undergraduate law degrees and a heavy reliance on pre-course readings, which contrasts with the Chinese education system where students are more accustomed to instructor-led classroom learning. The tutorial model, on the other hand, is advocated by UK law schools as a way for students to work collectively on issues arising from lectures in a relatively small number of students and faculty. Given the student-to-faculty ratio in Chinese universities, there is a need to adapt this model to facilitate effective learning. In undergraduate international courses, tutorials can be set up in small groups with a teacher-student ratio of 1:10 to ensure that the students complete the first to second levels of global competence, taking into account the first comparison group.

On the other hand, in terms of the evaluation mode, the examination will shift from an approach that requires the students to deliver an input-driven academic paper at the end of the course to an output-oriented moot court seminar and accompanying research paper. Previously, in the co-taught course with Professor Burke-White of Penn Law School, the author had organized an international aviation law moot court with team members (undergraduates) and postgraduate students, spending 2 hours in tutorials role-playing on the ICJ case of the *Middle East Four States v. Qatar*, and organiz-

9 Lilan Gu, Gang Li, *Adolescents' Global Competence and Its Cultivation: Insights from the PISA Global Competence Assessment*, Journal of Educational Science Research, 2020.

ing point-control time-control discussions. This guided seminar is structured with the teacher as the facilitator and the students as participants. The in-class research paper is set to be a time-limited search and write-up of assigned case materials. Reference is made here to the teaching model of the fourth comparison group. Such an evaluation mode will help move from Level 2 to Level 3 of global competence. Before, essay writing was more rigid and did not maximize the development of students' thinking and presentation skills in global competence.

In terms of developing students' reading skills, the reform directs students to do their reading according to the syllabus before class and to engage in guided discussion during tutorials. Drawing on the pedagogical practices of common-law law schools, the course is designed to commence with assigned pre-readings, which serve as the foundation for subsequent seminars and writing assignments. The author plans to select model readings and lead the class in learning how to intensively read and skim English papers in class. Reference is made here to the teaching experience of the third comparison group. This will help students to make up for the shortcomings in global competence from Level 1 to Level 2. In terms of cultivating the ability to analyze practical issues, the course will incorporate discussions around pivotal concerns that are relevant to both national and international entities, thereby enabling students to gain a deeper understanding of real-world legal issues. The author has always insisted that teaching and research should interact with each other from time to time. The ultimate goal of research should be to feed back into teaching. Issues that are at the forefront of teaching should go deeper into research. This section draws on the teaching experience of the second comparison group. This will help students to make a qualitative leap from the second to the third level.

If the reform goes well, it will contribute to the Chinese scientific and academic community for several reasons, and its impact on promoting air law can be profound. First, by focusing on comparing different teaching empirical experiences in foreign countries, it aims to explore a suitable training model for Chinese law school undergraduates, taking "Introduction to International Air Law" as a sample course. It may serve as a model course that will benefit future international air law courses. Second, combined with the background of China's foreign-related law training for the talents, building an international course in line with the characteristics of China's legal education from the perspective of specific practical needs is also a vital target, with the cultivation of global competence as the guide. The author, whose teaching and research directions are the same and who serves as a legal consultant for many state organs and UN organizations, understands the gap between the legal talents under the traditional training mode and the need for better requirements and therefore proposes the idea of global competency-oriented international course construction. Third, from one class to one university, then from one university to all colleges, another aim of this course is to extrapolate from the micro reform to the macro level based on empirical experience and research on the theory of global competence to form a demonstration effect. Education is also a process of perceiving the subtle. This project aims to start from a single course to summarize experience, and by analogy, to contribute to the cultivation of foreign-related legal talents. China needs to transform itself from a receiver and adapter of international rules to a defender and builder, which requires the training of a group of foreign-related legal talents with an international outlook, a good understanding of international rules, and good skills in dealing with foreign-related legal affairs. To summarize, the cultivation of these talents and the development of international law can support and improve each other.

5. Conclusion

Air law education is no easy task. However, the weight of this educational task is growingly important given the development of international air law. Historically, top air law institutions have designed programs and courses for graduate students around the world such as specialized LLM offered by Leiden Law School and McGill Law School. For Chinese legal education, teaching international air law is still a novel topic in mainstream law schools. The experience from CUPL as discussed above serves as a starting point. Particularly, taking the teaching feedback from the course "Introduction to International Air Law", international air law education has also to fit the picture of cultivating global competence in a globalized world.[10]

Based on the experience accumulated in three semesters of teaching, the reform of the course "Introduction to International Air Law" will be implemented both in terms of the teaching mode and the evaluation mode to meet the requirement of global competence. A deeper meaning of any future reform is that it will help to emphasize the function that international law education plays in foreign-related law research and talent cultivation. China's international jurisprudence has kept pace with the reform and opening up, and has prospered in the process of reform and opening up and made important contributions to the construction and development of the country. Of all options, it is necessary to strengthen the teaching of international law, to lay the foundation for cultivating foreign-related legal talents.[11] The international law community pays close attention to the top-level design and implementation pathways for the cultivation of foreign-related law talents. They offer suggestions and insights into the training objectives, programs, and resource allocation for various levels of these talents, including foreign-related legal service talents, foreign-related judicial talents, and future international organization reserve talents. Taking the same international air law course as an example, if the author of the level of teaching and foreign universities of the same level of teachers teaching level is relatively equal, that is, for our students to provide a more equal understanding of international law learning platform. This in itself lays an important foundation for the cultivation of foreign-related law talents and also the improvement of international air law.

10 Anthea Roberts, *Is International Law International*, Oxford University Press, 2019.
11 Huawen Liu, *On Further Promotion of the Chinese Research and Utilization of International Law*, Chinese Review of International Law, 2020..

Towards a new legal framework of the Italian Space Economy

*by Giulia Zucca**

In recent years, the global landscape of space activities has undergone a significant transformation, driven by the rapid growth of industrial interests supported by unprecedented flows of private capital. In Italy, the use of Public-Private Partnerships (PPPs) has been on the rise, with private entities increasingly participating in public investments within the space sector.

This evolution has brought new challenges and opportunities in areas such as satellite services, the development of commercial low-Earth orbit stations, the design and deployment of in-space logistics systems.

In such dynamic context, draft law titled "Provisions on Space Economy" ("**Space Bill**") was introduced to the Italian Parliament on September 10, 2024. This groundbreaking legislation aims to establish, for the first time, a clear legal framework governing private access to and operations in space within Italy.

1. Purposes of the New Legislation

Compared to other countries, Italy currently lacks a comprehensive legal framework that not only addresses the innovations of the Space Economy but also regulates the governance of the sector.

The recently proposed law on Space Economy defines an ambitious set of objectives aimed at advancing Italy's role in the global space sector by promoting investment, supporting Aerospace Districts, and **extending space economy opportunities to non-space companies**. As stated in the explanatory report, the aim of the Space Bill is to strengthen Italy's position within international cooperation and improve the business system.

The draft law also emphasizes the advancement of **scientific research** and facilitates access to the sector for **SMEs and innovative start-ups**. The New Bill establishes special provisions regarding public procurement and support for businesses in the space activities and aerospace technologies sectors, including specific exceptions to Legislative Decree No. 36 of March 31, 2023 (New Public Procurement Code).

2. Key elements of the Space Bill

With regard to its scope of application, the Space Bill aims to regulate space activities conducted by operators of any nationality **within Italian territory**, as well as by **national operators abroad**, subject to prior authorization issued by the competent authority. The introduction of this authorization mechanism, outlined in Art. 7 of the New Bill, makes space activities accessible and manageable for private operators, ensuring their integration into the Italian space economy.

This new piece of legislation entrusts the **Italian Space Agency** (ASI) with the task of supervising space operations, including the authority to revoke the authorizations in case of non-compliance. It is also anticipated that the needs of the Italian space sector will be assessed and quantified through a **five-year National Plan for the Space Economy**, which will identify strategic investments eligible for funding with public resources. In this regard, the **New Bill** provides for the establishment of a new **multi-year fund** aimed at promoting space activities and supporting the development of innovative products and services based on space technologies.

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3. Defining Liability in Aerospace Activities

The Space Bill introduces a **strict liability regime**, representing a significant yet complex development in the landscape of Italian space law.

Article 18, Par. 1 establishes, as a **general principle**, that operators are liable for damages caused in the exercise of space activities. The New Bill imposes an insurance coverage obligation on authorized operators, setting a liability limit of €100 million per accident. To ensure that this mandatory insurance requirement does not hinder market access for certain segments, the New Bill delegates a Prime Minister decree to define three risk categories, each with progressively lower liability limits. The liability cap cannot, in any case, be lower than €50 million, or €20 million per accident for authorized operators exclusively engaged in **research activities** or qualified as **innovative start-ups**.

In relation to damages for which the State is held liable under International Conventions, the New Bill introduces **the right for the State to exercise a recourse action** against the operator who caused damages to persons or property, within the limits of the insurance coverage. This provision allows the State to recover amounts paid in accordance with International Conventions (particularly the "Convention on International Liability for Damage Caused by Space Objects" signed in London, Moscow, and Washington on March 29, 1972). Prior to the New Bill, in cases where Italy, as the launching State, was called upon to respond for damage caused to a foreign citizen, the amounts were paid by the State without the possibility of recourse.

4. Conclusions

The Italian space industry is a global excellence, thanks to its system made up of over 60 universities, companies, and research centres working in synergy. In the last years, Italy has also acquired expertise and implemented space services in all application areas as a result of increasing public investment.

Considering the evolution of private entities from suppliers of goods and services to **independent operators**, the proposed Bill addresses the need to establish a comprehensive legal framework for Space Activities. The New Law would also facilitate the harmonization of Italy's regulations with those of other space powers, particularly the EU Member States, in order to address the absence of EU competence in harmonizing national space legislations.

Finally, the involvement of the industry and policy activities with regulators is crucial, as they could shape future interpretations and amendments to the Space Bill before its final approval by Parliament.

Events

European Air Law Association (EALA) 36th Annual Conference

Barcelona (Spain), 7-8 November 2024

The aviation law community was treated to an exceptional gathering at the 36th Annual Conference of the European Air Law Association (EALA) on 7-8 November, 2024, in Barcelona. As always, the event served as a dynamic forum for legal professionals, industry experts, regulators, and academics to discuss the pressing issues shaping the future of air law and the aviation sector as a whole. With a strong focus on collaboration, innovation, and regulatory evolution, this year's conference was a resounding success.

A Focus on the Future of Aviation Law

The conference opened with a powerful keynote address that set the stage for two days of insightful discussions. Speakers delved into critical topics such as sustainable aviation, evolving regulatory frameworks, and the challenges of maintaining safety and security in an increasingly globalized and technologically advanced industry. The breadth of topics covered ensured there was something for every delegate, whether they were focused on commercial aviation, drone law, or the intersection of aviation and environmental law.

Cutting-Edge Sessions and Thought Leadership

The 2024 EALA conference programme showcased a variety of high-caliber panel discussions and expert-led sessions. From examining the complexities of aviation finance and insurance to unpacking the latest developments in European and international aviation regulations, the conference provided a rich tapestry of perspectives on current and future challenges.

A highlight was the special session on "*AI and its Impact on Aviation Law*", where experts explored the integration of artificial intelligence in air traffic control, autonomous aircraft, and the broader regulatory implications. The discourse around sustainability also dominated several sessions, with discussions centered on the legal implications of net-zero aviation goals and the role of European legislation in driving the future of eco-friendly air travel.

Networking, Collaboration, and Innovation

One of the standout features of the 36th Annual Conference was the opportunity for networking and collaboration. With delegates from all over Europe attending, the event served as a unique platform for fostering international cooperation within the aviation law community. The conference also featured informal networking sessions, where participants could exchange ideas and discuss challenges in a more relaxed environment.

A Look Ahead

The 36th EALA Conference reminded us of the importance of staying ahead of the curve in the ever-evolving world of aviation law. As always, EALA has demonstrated its vital role as a forum for dialogue and a catalyst for positive change in the aviation industry. The event in Barcelona underscored the importance of collaboration between legal experts, industry stakeholders, and regulators to ensure that the aviation sector remains safe, sustainable, and innovative in the years to come.

For more information on EALA's ongoing activities, you can visit **ealа.aero**.

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