

Air services

Revision of Regulation (EC) No 1008/2008

This briefing is one in a series of implementation appraisals produced by the European Parliamentary Research Service (EPRS) on the operation of existing EU legislation in practice. Each briefing focuses on a specific EU law that is likely to be amended or reviewed, as envisaged in the European Commission's annual work programme. Implementation appraisals aim at providing a succinct overview of publicly available material on the implementation, application and effectiveness to date of specific EU law, drawing on input from EU institutions and bodies, as well as external organisations. They are provided by the Ex-Post Evaluation Unit of the EPRS to assist parliamentary committees in their consideration of new European Commission proposals, once tabled.

SUMMARY

The Air Services Regulation (Regulation (EC) No 1008/2008) is a fundamental piece of legislation organising the internal EU aviation market, by, inter alia, clarifying the concept of EU air carrier, establishing who delivers the operating licences and under which conditions, and indicating the exceptions to the freedom to operate. Regulation (EC) No 1008/2008 applies since 1 November 2008.

In 2016, the European Commission initiated an evaluation process whose expected outcome is the release of a new legislative proposal, by the end of 2020. In the meantime, Regulation (EC) No 1008/2008 was temporary amended in 2020, to address the financial challenges faced by the sector in the Covid-19 pandemic context.

1. Background

While air transport is traditionally regulated by national authorities, the creation of an internal market in aviation was accompanied by a gradual transition to common and harmonised rules and standards at European level, leading to a competitive single market for air transport within the EU.

From a legal perspective, this process has been marked by the adoption of three 'packages': in 1987 and 1990, the first and second packages relaxed the rules on fares and capacities, while the third package, adopted in 1992, eliminated the remaining rules concerning the commercial restrictions faced by the European airlines operating within the European Community. This third package, including Council Regulations (EEC) No [2407/92](#), [2408/92](#) and [2409/92](#), and was replaced in 2008 by [Regulation \(EC\) No 1008/2008](#) on common rules for the operation of air services in the Community (the Air Services Regulation).

Regulation (EC) No 1008/2008 laid down common rules relating to the operation of air services, aiming at contributing to an efficient internal aviation market, improved safety levels and better consumer protection. The scope of the regulation covers the licensing of Community air carriers, the right of Community air carriers to operate intra-Community air services and the pricing of intra-Community air services (Article 1(1)).

The Air Services Regulation establishes criteria and conditions governing a number of issues:

- operating licences and aircraft leasing (harmonisation of the award and validity of operating licences, conditions for the withdrawal or suspension of the licence in case of non-compliance; conditions for the leasing of non-EU aircraft, etc.);
- insurance and registration (insurance and registration obligations for air carriers);
- public service obligations (conditions for imposing public service obligations);
- traffic distribution between airports and traffic rights (regulating the distribution of air traffic must be based on the principles of proportionality and transparency, as well as objective criteria);
- pricing (freedom to set the price; transparency regarding the final price, including taxes and all charges; transparency of optional prices; compliance with the pricing rules, etc.).

In 2016, the Commission made a technical proposal to amend Article 13(3)(b) of Regulation 1008/2008, following the signature of an international agreement with the United States of America. Article 13 of the Air Services Regulation establishes the conditions for lease arrangements regarding aircraft registered in third countries. [Regulation \(EU\) 2019/2](#), amending Regulation (EC) No 1008/2008 and adopted by the two co-legislators in 2019, provides for the possibility to derogate from the restrictive conditions applicable to wet-lease agreements for aircraft registered in a third country, where an international wet-lease agreement is signed by the EU.

Also in 2016, the European Commission launched an evaluation process of the Air Services Regulation, to 'provide an up-to-date overview of the application of the provisions of the regulation in the Member States and of the benefits they delivered' and 'to identify evidence based areas of concern in their application, taking into account the current market reality'.

One year later, the [interpretative guidelines](#) relating to Regulation (EC) 1008/2008 were published. The document provides clarifications on the regulation's provisions and their application, by giving the Commission's interpretation of the measures set up by the regulation, describes the procedures to be followed and integrates answers to most frequently asked questions.

In its 2020 work programme, the European Commission announced its intention to release a new legislative proposal by the end of the year.

2. EU-level reports and evaluations

European Commission impact assessment (2006)

In 2006, the Commission carried out an [impact assessment](#) accompanying the proposal for the Air Services Regulation to present a range of measures that would ensure an efficient and homogeneous application of the legislation governing the internal aviation market. Incorporating the feedback obtained through a consultation process with relevant stakeholders, the assessment set general objectives in relation to market efficiency, improvement of safety levels and passenger protection. It also identified specific objectives, such as ensuring the financial health of air carriers, tackling competition distortions and social dumping, enhancing transparency and competition regarding prices and avoiding discrimination against EU carriers based on nationality. The document finally assessed the potential economic, social and environmental consequences that the measures to achieve the objectives could have, and confirmed the responsibility of the Commission to monitor the developments of the aviation sector and the impacts of the revised legislation.

European Commission fitness check (2013)

The Commission's 2013 [Fitness Check on the Internal Aviation Market](#) looked at the relevance of the framework in place compared to the aims for which it was designed. The assessment concluded that the main issues to improve were enforcement, coordination and exchange of best practices among Member States. No need for legislative change or deregulation was identified at that moment, even

if some areas of concern were identified in relation to, for instance, the leasing of aircraft and the restriction of traffic rights.

Communication on an Aviation Strategy for Europe (2015)

In 2015, the European Commission elaborated the [Aviation Strategy for Europe](#), aiming to promote competitiveness and sustainability in the EU aviation sector. The Commission identified three main priorities for this strategy: 'tapping into growth markets, tackling limits to growth in the air and on the ground and maintaining high EU safety and security standards'. In this respect, the Aviation Strategy's indicative action plan envisages the evaluation of different pieces of aviation legislation to obtain an overall perspective of the aviation sector, taking the new market, policy and technological developments into consideration. The Commission also proposed carrying out further studies and evaluations on Regulation 1008/2008/EC.

Inception impact assessment: revision of the common rules for the operation of air services in the EU (2018)

The Commission launched an [inception impact assessment](#) (IIA) in 2018, in parallel to the evaluation of the existing rules on the operation of air services. The IIA was conducted with the purpose of addressing different areas of concern that could undermine competition and innovation in the EU aviation sector by looking at:

- Inconsistency in the application of existing rules on operating licences, public service obligations (PSOs), traffic distribution rules and price transparency.
- New challenges brought by technological, market and policy developments:
 - Uncertainty about the scope of the provisions on operating licences and supervision.
 - The case of EU carrier bankruptcies that shows a reluctance on the part of licensing authorities to award temporary operating licences.
 - The need for better balancing of different interests regarding changes in air carrier practices and consumers' concerns on price transparency.
 - Limited EU carrier access to foreign capital, which leads to higher costs, hindering competition and causing inefficiencies.
 - Potential social impacts of market innovation.

The IIA's objectives were to modernise and adapt the legal framework for the EU internal aviation market by increasing immediate and longer-term market efficiency, promoting competitiveness, contributing to quality jobs and increasing consumer protection. The policy measures considered in this context can be summarised in two different strands:

- 'Measures likely to clarify certain provisions/procedures to achieve a more homogeneous regulatory framework regarding rules on operating licences, ownership and control, leasing, traffic distribution and PSOs.'
- 'Measures likely to reflect the recent market, technological and policy developments in the aviation sector.'

Evaluation of the Air Services Regulation (2019)

In July 2019, the European Commission published its [evaluation](#) of the Air Services Regulation, aimed at assessing its fitness for purpose, the economic and social effects (intended and unintended), and the consistency of the regulatory framework regarding internal market objectives and international obligations. The evaluation also looked for potential problems in the application of the regulation, especially taking the new market and policy developments that have taken place in the aviation sector into consideration. The evaluation covered the period from 2008 to 2017.

The evaluation was based on the evidence gathered in an external support study (2018),¹ as well as on data collection at EU and Member State level, information obtained from relevant stakeholders, an open public [consultation](#) and targeted case studies. Although the provisions of the regulation do not cover social aspects, the evaluation placed special emphasis on social issues regarding provisions on principal place of business and on leasing.

The main findings of the evaluation confirm the effectiveness of the regulation in achieving the objectives for which it was designed, its efficiency with regard to the balance between costs and benefits and also its relevance to addressing the needs of a rapidly evolving aviation market. Although the findings indicate that the regulation is internally coherent, they show a need for better clarification of some aspects in terms of coherence with other instruments and policies, at both EU and international level. The evaluation identifies three priority areas of concern:

- **Operating licences:** the cases of carrier market exits, which have demonstrated the need for a better approach to bankruptcies, including temporary licences and interaction with the [Slot Regulation \(EEC\) No 95/93](#); carriers' principal place of business, regarding the development of business models that carry out operations across several Member States; carriers' principal place of business and home base of aircrews, which may require further action regarding the rules on the applicable labour law and their enforcement; and whether new business opportunities (drones, online platform advertisement of cost-shared flights, etc.) should be regulated, and to what extent, by the Air Services Regulation.
- **Ownership and control (O&C):** According to the feedback from airlines, and despite the Commission's publication of the 2017 interpretative guidelines, O&C rules remain too complex and difficult to apply in some cases. The evaluation conclusions also highlight the limitations posed by O&C rules on access to financing for EU air carriers.
- **Traffic distribution rules:** The findings of the evaluation indicate that traffic distribution rules can 'lead to discrimination to the benefit of legacy carriers and their partners' and that 'the Commission may need to consider an amendment to the existing rules, so as to preserve opportunities of the air carriers to access the internal market freely, while also addressing strains on airport capacity'.

Report from the European Commission on the amendment of the Air Services Regulation in view of the Covid-19 pandemic (2020)

The public health context generated by the Covid-19 pandemic led to the adoption of temporary measures amending the provisions of Regulation (EC) No 1008/2008. In this respect, [Regulation \(EU\) 2020/696](#) introduced temporary derogations aimed at dealing with the 'sharp drop in air traffic as a result of a significant reduction in the demand for transport'. These measures imply the temporary suspension of the obligations of suspending or revoking the operating licence of air carriers in the event of financial difficulties; a temporary derogation from the procedures applicable in cases of refusal or conditions imposed on exercising traffic rights; and temporary new rules on ground-handling services. As the amended regulation envisages, the Commission shall constantly monitor the situation and present a summary [report](#) based on the available data to the European Parliament and the Council. This was published on 13 November 2020. The Commission is also responsible for adopting delegated acts to extend the periods of the temporary provisions if needed, until 27 May 2021.

Based on data gathered from sources and stakeholders, this Commission report had the objective of describing the relief measures and analysing the situation in the aviation sector in order to assess whether the conditions to extend these measures are met. The relief measures proposed include: '1) Measures concerning temporary operating licences; 2) Emergency measures (flight restrictions) linked to the Covid-19 pandemic; 3) Temporary rules on ground-handling services (contracts and selection procedure)'. The report concluded that the conditions to extend the measures concerning

temporary operating licences, as well as ground-handling conditions by delegated act were met; the derogations will therefore be extended until 31 December 2021. The extended validity of ground-handling contracts will also be prolonged until 31 December 2022; however, conditions for an extension beyond 2022 are not met. However, the Commission will continue to closely monitor the situation. Regarding the emergency measures that grant Member States the possibility to restrict traffic rights to tackle the pandemic, the Commission considers that they will not be necessary, since more appropriate measures will be put in place to prevent the progression of the pandemic. Therefore, the conditions to extend this measure by delegated act are not met.

3. Members' written questions

Written question by several Members (Renew), 10 September 2020

The question was addressed in the context of the Covid-19 pandemic. The Members were interested in when the revision of the Air Services Directive would take place, and also in whether the Commission intends to consider the issue of ownership and control restrictions on foreign capital in the context of the pandemic, as well as to give the airlines access to the capital resources they need in order to regain financial stability, through the upcoming revision.

Answer given by Adina Vălean on behalf of the European Commission

While recalling the exceptionally challenging period faced by the aviation sector, the Commission explained that it would continue assessing the impact of the crisis and 'strike the right balance between the financial viability and competitive position of the EU aviation sector and the need for investments and measures to drive sustainability forward'. Access to capital is one of the elements analysed by the Commission. As for the possible timeframe, the Commission 'should set out its agenda in a strategy on sustainable and smart mobility soon to be adopted'.

Written question by Mohammed Chahim (S&D, the Netherlands), 18 September 2019

The questions refers to the lack of data and the necessity for a harmonised survey and database system. In this respect, Mohammed Chahim asked the Commission whether the transparency of data would be prioritised in the revision of Regulation (EC) No 1008/2008, including 'the possibility for passenger origin-destination (including stopovers) surveys', and 'the possibility to monitor commercial air services based on real occurrence (e.g. schedule relevant information extracted from Eurocontrol data or provided by airports)?' At the same time, Mohammed Chahim questioned the Commission on its intention to undertake measures to 'urge national statistics authorities to promptly supply the full set of key data on civil and freight aviation'.

Answer given by Violeta Bulc on behalf of the European Commission

The Commission explained that Regulation (EC) No 1008/2008 was not intended to collect data and its evaluation 'has not detected gaps regarding available statistical data that would hinder furthering the current provisions on air services'. The Commission recalled that data on aviation were collected through other tools (such as Eurostat, national statistics authorities) and there was no intention to modify the scope of the current legal act relating to air transport statistics, Regulation 1358/2003 (therefore no data on ticket sampling will be collected).

Written question by Dino Giarrusso (NI, Italy), 20 November 2019

In his question, Dino Giarrusso referred to the public service obligations envisaged in Regulation (EC) No 1008/2008 and the extent to which Member States can introduce measures guaranteeing the right to mobility without adding to financial burdens. At the same time, Dino Giarrusso asked the Commission whether such measures can be considered abusive.

Answer given by Adina Vălean on behalf of the European Commission

The European Commission recalled that Article 16 of the regulation provides the possibility to impose public service obligations, with no compensation to be paid, while Article 17 refers to public

services operated by one carrier selected by public tender, with possible compensation to be paid. Moreover, support for transport to remote regions, including islands, can also be provided in the form of aid with a social character. However, any compensation paid from public resources needs to comply with State aid rules.

4. European Court of Justice

Ruling in Case C-28/19

In 2011, the Italian Council of State requested a preliminary ruling from the European Court of Justice (ECJ) concerning the interpretation of Article 23(1) of the Air Services Regulation (Case [C-28/19](#)). The request was made in proceedings between the airline Ryanair Ltd and the Competition and Market Authority (Italy), since this authority fined Ryanair Ltd for alleged unfair commercial practices. The object of the fine was that the airline had omitted certain elements of the prices, such as 'passengers' online check-in fees, the value added tax (VAT) applied to the fares and to the optional supplements relating to domestic flights and the administrative fees for purchases made by means of a credit card other than that approved by Ryanair'.

On 23 April 2020, the ECJ answered the referred questions, considering that consumers have the right to effectively compare the prices for air services charged by different airlines. In this respect, the ECJ concluded that airlines should indicate, from the first moment that the price is shown, the air fare and also other taxes and fees, provided that they are considered as unavoidable and foreseeable. In contrast, the optional price supplements must be 'communicated in a clear, transparent and unambiguous way at the start of any booking process and their acceptance by the customer shall be on an 'opt-in' basis'.

Ruling in Case C-487/12

In 2012, the Administrative Court of Ourense (Spain) submitted a request to the ECJ for a preliminary ruling on the interpretation of Article 22(1) of the Air Services Regulation regarding the freedom to set air fares and other prices (Case [C-487/12](#)). The request concerned a dispute between the carrier Vueling Airlines SA and the Consumer Institute of Xunta de Galicia (Spain), over a penalty imposed on the airline by the Consumer Institute following a complaint by an individual consumer regarding additional charges for checking in a suitcase on a Vueling flight. The legal ground for this penalty was the breach of Article 97 (and different provisions of other articles) of Spanish Law on Air Navigation, which according to the referring Court, 'entitles the consumer always to check in a suitcase of a specific description at no extra cost over and above the base price of the plane ticket'.

In September 2014, the ECJ ruled that, although it does not preclude Member States from regulating aspects of the contract of carriage by air to protect the consumer, Article 22 of the Air Services Regulation precludes 'a national rule that requires passenger airlines to grant passengers the right always to check in a suitcase without paying a supplement or surcharge on top of the base price of the ticket purchased'.

5. Stakeholder opinions/Academic papers

Stakeholder opinions

In February 2020, the European Commission and the Florence School of Regulation's Transport Area organised the [13th Florence Air Forum](#), aiming at gathering stakeholders' views on the various political options to be considered in the context of the revision of Regulation (EC) No 1008/2008. A [policy brief](#) of June 2020 summarised the main positions expressed during the event.

Stakeholders agreed on the fact that a number of provisions should be reconsidered, but their views often diverged on the approach to be followed. One of the issues on which most stakeholders agreed was 'the removal of ownership restrictions for *all* investors while maintaining effective control rules'. As regards EU carriers' principal place of business (PPoB), positions diverged: a

majority of airline representatives insisted on the need for clarification as regards the definition of the PPOB and measures to enhance cooperation between Member States, while other stakeholders argued that the current legislation allowed for quality oversight. For travel agent and tour operator representatives, measures to improve financial monitoring need to be accompanied by the introduction of airline insolvency protection schemes, an essential element in ensuring consumer protection, while some airline representatives supported a greater concentration of functions in the Member State of the PPOB, which implies modifying the definition of the PPOB to establish a list of more functions that airlines would be expected to carry out in the Member State of the PPOB. Other problematic issues, which revealed different positions among the stakeholders present in Florence, related to temporary licences, pricing, applicable labour law and competent jurisdiction, traffic distribution rules, public service obligations (PSOs), leasing, as well as the Air Services Regulation in the context of the [European Green Deal](#).

Academic papers

An [article](#) published in 2015 focuses, from a legal perspective, on the relationships between Regulation (EC) No 1008/2008 and other EU legislative acts with regards to additional payments and final prices for passengers, the light of the ECJ jurisprudence (case law [C-573/13](#), *Air Berlin*). The author considers that the clarifications made by the Court as regards Article 23 of the regulation, on price transparency, can be integrated in a broader legal framework, which takes the Air Services Regulation (ASR), Directive [2005/29/EC](#) on unfair commercial practices (UCP Directive) and Directive [2011/83/EU](#) on consumer rights (CRD) and their implementing provisions into account.

For the author of the article, it is important to consider the interplay between the various dispositions of the three legal acts, which complete and reinforce each other. One example could be that the ECJ judgment in *Air Berlin*, which confirms that Article 23 of the ASR on information and non-discrimination, means 'the final price to be paid must be indicated "at all times", without any distinction being made between the moment when that price is indicated for the first time, the moment when the customer selects a particular flight, or the moment when the contract is finally concluded' can also be integrated in Article 22 CRD on additional payments. And this 'because not only does it provide that each optional price supplement shall be communicated in a clear, transparent and unambiguous way at the start of any booking process and even that their acceptance by the consumer shall be on an "opt-in" basis, but it also foresees the consequent sanction'. At the same time, the Court's judgment has an impact on the interpretation of the provision concerning misleading actions and misleading omissions in the UCP Directive (Articles 6 and 7), given that 'one of the elements which has to be taken into account for this control is "the price or the manner in which the price is calculated"'.

The article concludes that, in the light of the ECJ judgment, the provisions of the three legal acts, considered together, 'represent a micro-system against the "booking cost traps" and therefore contribute to integrate the aforementioned provision of the air service regulation, by setting specific form requirements and providing an effective sanction for their inobservance, consequently giving more coherence in pursuing the goal of ensuring information flow and transparency with regard to air service prices, thereby increasing confidence in the EU-Internal Market'.

A more recent [article](#) published in 2020 (re-)considers the Air Services Regulation in the context of the Covid-19 pandemic. The author pleads for a 're-evaluation of the market models developed over the past decades to deregulate the airline industry'. To this end, the article brings several issues into debate, such as: the unfeasibility of a long-term generally subsidised air transport sector under EU law, the inconsistencies between the negative externalities of current air transport policy and the climate goals fostered by the EU, a reflection on how the coronavirus crisis can be seen as an opportunity for a (modern) re-regulation of the sector. With regard to State aid issued to rescue airline companies in a post-emergency scenario, for instance, Munari suggests, instead of an evaluation of the situations affecting airlines on a case-by-case basis or under a sectoral approach, an assessment of the evolution over time and of the overall medium- to long-term market effects of

State aid in aviation. In this respect, Munari believes that State aid leads to the creation of a heavily subsidised industry working in a competitive marketplace. Even if this solution might be compatible with EU law in an emergency situation, it might not be the appropriate tool, according to Munari, because 'subsidized industries in competitive markets not only waste money for the taxpayer, but also tend to create distortions in overall competition patterns which will eventually allow only a few to win, while at the same time producing certain and irreversible waste of (precious) public resources for the "losers"'.

In conclusion, if the Covid-19 pandemic 'has shown that models that were apparently thought to last forever were and are much weaker than imaginable', the air sector being one of them, it could also 'become a "didactic momentum", in which people, lawyers, and policymakers are requested to reset their beliefs' and to re-think the air transport as it has developed over the past 30 years.

7. Consultations, citizens' enquiries, petitions

Public consultations

Between March and June 2018, the European Commission ran a public consultation relating to common rules for the operation of EU air carriers in the internal aviation market, to support the evaluation process started in 2016, and to identify problems, objectives and possible options for the future. The Commission will consider the [results](#) of the consultation in the preparation of its new legislative proposal.

MAIN REFERENCES

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International Transport Forum, [EU Air Transport Liberalisation Process, Impacts and Future Considerations](#), OECD, Discussion Paper No 2015-04.

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[Regulation on common rules for the operation of air services](#), European Parliament Legislative Train Schedule.

ENDNOTE

¹ Support study for the ex-post evaluation of Regulation 1008/2008 on common rules for the operation of air services in the Community, R. Aea, 2018.

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eprs@ep.europa.eu (contact)

www.eprs.ep.parl.union.eu (intranet)

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