AIR TRANSPORT: MARKET RULES

The setting up of the Single Aviation Market in the late 1990s has profoundly transformed the air transport industry and has greatly contributed to the strong growth in air transport in Europe over the past twenty years.

LEGAL BASIS

Article 100(2) of the Treaty on the Functioning of the European Union.

OBJECTIVES

To set up a single air transport market in Europe, ensure its proper functioning, and extend it to certain third countries as far as possible.

ACHIEVEMENTS

Historically, air transport has developed under the auspices and control of national authorities. In Europe, this largely meant monopolistic national carriers and publicly owned/managed airports. International air transport, which is based on inter-state bilateral agreements, has expanded accordingly — with strict control of, in particular, market access and carrier ownership regimes. This fragmentation into national markets and the absence of real competition were less and less at one with increasing standards of living and the resulting growing demand for air transport. From the mid-1970s, civil aviation had to switch from an administered economy to a market economy. Thus, the 1978 Airline Deregulation Act completely liberalised the US market.

The same occurred in Europe in a decade-long process, in the wake of the Single European Act of 1986 and the completion of the internal market: several sets of EU regulatory measures have gradually turned protected national aviation markets into a competitive single market for air transport (de facto, aviation has become the first mode of transport — and to a large extent still the only one — to benefit from a fully integrated single market). Notably, the first (1987) and the second (1990) ‘packages’ started to relax the rules governing fares and capacities. In 1992, the ‘third package’ (namely Council Regulations (EEC) Nos 2407/92, 2408/92 and 2409/92, now replaced by Regulation (EC) No 1008/2008 of the European Parliament and of the Council) removed all remaining commercial restrictions for European airlines operating within the EU, thus setting up the ‘European Single Aviation Market’. The latter was subsequently extended to Norway, Iceland and Switzerland. It could be further extended to some neighbouring countries through the ‘European Common Aviation
Area Agreement’, provided those countries progressively implement all relevant EU rules — which is not yet the case [1].

The ‘third package’ substituted ‘Community air carriers’ for the national air carriers, and set as the basic principle that any Community air carrier can freely set fares for passengers and cargo and can access any intra-EU route without any permit or authorisation (with the exception of some very particular routes on which Member States can impose public service obligations, subject to conditions and for a limited period of time).

The ‘third package’ also laid down the requirements that Community air carriers must comply with in order to start or continue operations, principally:

1. They shall be owned and effectively controlled by Member States and/or nationals of Member States, and their principal place of business shall be located in a Member State;

2. Their financial situation shall be good. They shall be appropriately insured to cover liability in case of accidents;

3. They shall have the professional ability and organisation to ensure the safety of operations in accordance with the regulations in force. This ability is evidenced by the issue of an ‘air operator certificate’.

In parallel with the setting-up of the Single Aviation Market, common rules have been adopted to ensure its proper functioning, which requires, notably, (1) a level playing field and (2) a high and uniform level of protection for passengers.

In order to ensure a level playing field, the legislation on State aid and competition (mergers, alliances, price-fixing, etc.) applies to the air transport sector. This was not obvious since major public recapitalisations of airlines were rather common until the mid-1990s. However, over the years the Commission guidelines serving to assess public funding of the sector were failing to match the current market environment since they dated back to 1994 (airlines) and 2005 (airports and start-up aid for airlines departing from regional airports). They were therefore replaced in spring 2014.

EU rules ensure that all carriers, European and non-European, are granted the same rights and same opportunities to access air transport-related services. This may not, however, be the case in some third countries where discriminatory practices and subsidies may give unfair competitive advantages to air carriers from those third countries. In its Communication on an Aviation Strategy for Europe of 7 December 2015 (COM(2015)0598), the Commission stated its intention to assess the effectiveness of Regulation (EC) No 868/2004 with a view to revising or replacing it with a more effective instrument that would ensure fair competition conditions between all carriers and thereby safeguard connectivity to and from the Union. This was followed by the publication in June 2017 of the proposal for a regulation on safeguarding competition in air transport, repealing Regulation (EC) No 868/2004. Interinstitutional (trilogue) negotiations resulted in a provisional agreement on the proposal on 20 November 2018. According to this agreement, the Commission will be empowered to launch

[1] A study entitled ‘Overview of the air services agreements concluded by the EU’ (European Parliament, 2013) provides an analysis of the contents and outcome of these agreements.
investigations and take a decision on redressive measures if a practice that distorts competition has caused injury or poses a clear threat of injury to an EU air carrier. Whether of a financial or operational nature, any redressive measure must be adopted through a Commission implementing act, although operational measures are subject to a stricter procedure. Following its adoption by the two legislators, Regulation (EU) 2019/712 of 17 April 2019 on safeguarding competition in air transport and repealing Regulation (EC) No 868/2004 was published in the Official Journal on 10 May and entered into force on 30 May 2019.

Fair access to airports and airport services is ensured through Regulation (EEC) No 95/93, which provides that at congested airports ‘slots’ (i.e. permission to land or take off on a specific date and at a specific time) shall be allocated to airlines in an equitable, non-discriminatory and transparent way by an independent ‘slot coordinator’. However, this slot allocation system prevents the optimal use of airport capacity. For that reason, the Commission proposed a number of amendments to Regulation 95/93 in 2011 to improve the efficiency of the system, but so far, there has been no agreement on those between the two legislators. Directive 96/67/EC has gradually opened up to competition the market for ground handling services (i.e. the services provided to airlines at airports, such as passenger and baggage handling, fuelling and cleaning of aircraft, etc.). A Commission proposal from 2011 to further open up this market at the biggest European airports was not approved by the legislator and was withdrawn by the Commission in 2014. In addition, Directive 2009/12/EC lays down the basic principles for the levying of airport charges paid by air carriers for the use of airport facilities and services. This, however, has not prevented disputes between airports and airlines from multiplying.

To ensure fair access to the distribution networks and prevent them from influencing consumer choice, common rules have been in force since 1989. They provide that the Computerised Reservation Systems or CRSs (which serve as the ‘technical intermediaries’ between airlines and travel agents) shall display the air services of all airlines in a non-discriminatory way on the travel agencies’ computer screens (Regulation (EC) 80/2009). However, the role of CRSs is decreasing since online distribution is in more and more general use, including via the carriers’ websites.

To protect passengers and aircraft and to ensure a high and uniform level of safety throughout the EU, national safety rules have been replaced by common safety rules, which have been progressively extended to the entire air transport chain. In addition, a European Aviation Safety Agency has been established which, inter alia, prepares the rules. Security requirements at all EU airports have also been harmonised to better prevent malicious acts against aircraft and their passengers and crew (it is worth noting, however, that Member States retain the right to apply more stringent security measures). Furthermore, common rules (Regulation (EC) No 261/2004) to protect air

[2]Airlines can ‘underuse’ their slots to avoid returning them to the ‘slot pool’ for reallocation to competitors. It is worth noting that while the EU had about 90 ‘coordinated’ airports (i.e. ‘with slots’) in 2016, there were only two such airports in the US. See notably ‘Airport slots and aircraft size at EU airports’ (European Parliament, 2016).
[3]Fact Sheet 3.4.9 deals with civil aviation safety.
[4]Fact Sheet 3.4.7 deals with civil aviation security. ‘The EU regulatory framework applicable to civil aviation security’ (European Parliament, 2013) is a comprehensive digest of the EU legislation on aviation security.
passengers’ rights aim at ensuring that passengers receive at least a minimum level of assistance in the event of serious delays or cancellation. These rules also provide for compensation schemes. However, they are proving difficult to apply, leading to frequent court cases[5]. In March 2013, the Commission presented a new proposal amending Regulation (EC) No 261/2004 (COM(2013)0130) with a view to further enhancing the enforcement of EU rules by clarifying the key principles and implicit passenger rights that have given rise to many disputes between airlines and passengers in the past. The co-decision process is still ongoing and final solutions are yet to be agreed between Parliament and the Council.

More than twenty years after the entry into force of the ‘third package’, the functioning of the Single Aviation Market is, of course, still perfectible, as illustrated by such factors as: the flaws in the slot allocation system; the fact that the vast majority (80%) of routes departing from EU airports are still served by only one (60%) or two (20%) carriers; the financial difficulties facing several airlines and secondary airports; or the complicated oversight of air carriers now operating in several Member States.

Nevertheless, the primary objective has been fully reached: from 1995 to 2014, while the number of passenger-kilometres within the EU increased by around 23%, for air transport it jumped by about 74%. Over the same period, aviation’s share of total passenger transport increased from 6.5% to 9.2%, which is by far the strongest growth of all modes of transport in the EU.

Response to the COVID-19 crisis

Following the COVID-19 outbreak, several measures were adopted to cater for the difficulties in the aviation sector:

— **Regulation (EU) 2020/459** of 30 March 2020 amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports. On 14 October 2020, the Commission adopted via a delegated act a decision to extend the derogation to slot allocation to cover the entire winter season, i.e. until 27 March 2021. Following its publication in the Official Journal, Parliament and Council have a scrutiny period of two months to object to it.

— **Regulation (EU) 2020/698** of 25 May 2020 laying down specific and temporary measures in view of the COVID-19 outbreak concerning the renewal or extension of certain certificates, licences and authorisations and the postponement of certain periodic checks and periodic training in certain areas of transport legislation. In the area of air transport, the text temporarily amends Regulation (EC) No 1008/2008 on common rules for the operation of air services in the EU in light of the COVID-19 pandemic so that the Commission and national authorities can more easily address, for the duration of the crisis, some of the consequences of the coronavirus crisis and mitigate the impacts on aviation.

To tackle the risk of serious economic downturn, the Commission published a temporary framework for State aid measures (updated several times), which will allow EU Member States to provide assistance to companies, in addition to the possibilities available

[5]Fact Sheet 2.2.3 deals with passengers’ rights. In June 2016, in order to clarify the rules in force, the Commission adopted a set of guidelines based on case law.
under the current State aid rules. Member States have since then proposed a number of economy-wide measures and some sector-specific measures.

**ROLE OF THE EUROPEAN PARLIAMENT**

In numerous reports, and particularly in its resolution of 14 February 1995 entitled ‘The way forward for civil aviation in Europe’, Parliament has emphasised the need for a common policy on air transport providing for greater and fairer competition among airlines. Parliament’s support for the establishment and proper functioning of the Single Aviation Market has therefore been constant.

In so doing, however, Parliament has continuously stressed that the liberalisation of air transport must be implemented cautiously and gradually and must balance the interests of both consumers and the industry.

Thus, over the last quarter of a century Parliament has always argued for fair competition, aviation safety, quality of service and passengers’ rights, while also defending the working conditions of airline personnel, as well as environmental protection. For instance, it is Parliament that, right from the start of the liberalisation process, has requested criteria governing State aid to airports and airlines and the adoption of common rules on ground handling, airport charges and passengers’ rights.

This ‘balanced attitude’ towards the liberalisation of air transport was recently illustrated again when Parliament, at first reading, profoundly amended the Commission’s 2011 proposals on slots and on ground handling services at EU airports.

In its report of 20 March 2018 on safeguarding competition in air transport, Parliament voiced its support for the Commission’s proposal aimed at defending Union air carriers against the unfair practices of third country airlines. Its main goal is to establish a practical, effective and easy-to-use Union instrument which would serve as a deterrent or be able to offset injury resulting from State aid or other discriminatory behaviour by non-EU actors in aviation.

Related legislative and non-legislative resolutions of the European Parliament:

- Resolution of 14 February 1995 on the Commission communication on the way forward for civil aviation in Europe *(OJ C 56, 6.3.1995, p. 28)*;
event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air (OJ C 93, 24.3.2017, p. 336);

— Resolution of 11 November 2015 on aviation (OJ C 366, 27.10.2017, p. 2);

— Resolution of 16 February 2017 on an Aviation Strategy for Europe (OJ C 252, 18.7.2018);


— Legislative resolution of 15 May 2020 on the proposal for a Regulation of the European Parliament and of the Council laying down specific and temporary measures in view of COVID-19 outbreak and concerning the validity of certain certificates, licences and authorisations and the postponement of certain periodic checks and training in certain areas of transport legislation.

Following the COVID-19 outbreak and the subsequent impacts on transport, on 19 June 2020 Parliament adopted the resolution on transport and tourism in 2020 and beyond, calling for swift, short-term and long-term support for the transport and tourism sectors to ensure their survival and competitiveness.

Since March 2020, Parliament has adopted several legislative resolutions via an urgent procedure with the aim of combating the immediate negative effects of the pandemic on the transport sector.

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