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1

CONTENTS

Aviation

Automating the Process of Passenger Claims under the EU Passenger	
Rights Regime	
By P. Paul Fitzgerald	<u>p.2</u>
Aircraft Lessors' Rights	
By Nicolai Vella Falzon	<u>p.15</u>
The Protection of Third Party Owners of Installed Engines	
By Nicolai Vella Falzon	<u>p.18</u>
The International Blockchain Registry of Mobile Assets	
By Erich P. Dylus	<u>p.20</u>
A Review and Assessment of the Competition Law Regime in Turkey	
By Neda Şentürk	<u>p.25</u>

Miscellaneous material of interest

Book Review – International Regulation of Non-Military Drones –	
Anna Masutti and Filippo Tomasello Edward Elgar Publishing	
Cheltenham, UK – Northamton, MA , USA	
By Salvatore Sciacchitano	<u>p.37</u>
Book Review – Air Transport Security Issues, Challenges and	
National Policies – Joseph S. Szyliowics and Luca Zamparini Edward	
Elgar Publishing Cheltenham, UK – Northamton, MA , USA	
By Alfredo Roma	<u>p.39</u>

Forthcoming Events

11th European Space Policy Conference – organised by BusinessBridge Europe – January 22-23, 2019, Palais D' Egmont, Brussels<u>p.42</u>

Space Sustainability Forum 2019 Understanding the risks and
promoting business in Space February 11-12, 2019 Habtoor Palace
Al Habtoor City, Dubai, UAE<u>p.43</u>

Drones and Aerodromes: Threats and Opportunities March 4, 2019,London<u>p.44</u>IAT'A Legal Symposium 2019 – March 6-8, 2019 Rome Cavalieri,A Waldorf Astoria Resort, Rome, Italy<u>p.46</u>



AVIATION



Automating the Process of Passenger Claims under the EU Passenger Rights Regime

P. Paul Fitzgerald *

Introduction

The issues of Passenger rights is getting increasing public attention. Crowded cabins, seemingly shrinking seats, congested skies, busy airports, tarmac delays, cancelled flights, emotional support animals and denied boarding situations are provoking memories of "the golden age of flying" and calls for new regulation. Many jurisdictions have responded with consumer protection legislation, typically styled as Charters of Passenger Rights and specifying levels of compensation for defined incidents. Predictably airlines have defended themselves by seeking loopholes in the charters and trying to minimize the extent and the application of the rights.

In many jurisdictions, passengers who were not satisfied with the airline's response to their claims often had to bring the claim before a small claims court. For many passengers, small claims court was an unknown and thus few actually pursued that option. For them, the airline's final offer was precisely that, the last step in the claims process.

Using a lawyer to bring such a claim was often unthinkable because his or her fees would easily eclipse the value of the claim. Some passengers used lawyers, when the issue was one of principle, rather than money, but otherwise lawyers were largely on the sidelines.

Slightly more than a decade ago, two brand new computer based services emerged. Flight tracking services were launched to allow people to know whether their plane was late, or where in the sky their loved one's flight was. Semi-automated claims processing companies were launched based on using precedents and consumer-filled templates to try to reduce the cost of processing claims. Shortly afterwards, the two technologies began to interact, and the fusion of the two has created for the first time, a low cost passenger rights advocate with roughly the same information as the airline's legal counsel. It represents a potential sea change in the handling of airline passenger rights issues.

This article will examine passenger rights issues, explore the technology, identify the potential of the new technologies, provide an overview of the role of lawyers and foresee the potential expansion of this technology to other jurisdictions.

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2

AVIATION



The Challenge of Making a Claim

The EU passenger rights Regulation (EC 261/2004) prescribes set amounts of compensation for defined incidents such as denied boarding, and cancelled flights. The maximum amount of compensation with respect to a single flight is EUR 600. In cases where the airline does not pay the amount of the compensation to the passenger, Article 13(2) of the Regulation allows that passenger to make a complaint to an Enforcement Body.

In practical terms, where the airline declines to pay the amount of compensation the passenger's redress is to make a formal complaint to the relevant authorities of the State where the incident happened. Thus if Ryanair declined to compensate a German passenger for the cancellation of a Ryanair flight between Marseille and Rome, the passenger would complain to French authorities.

IS PURSUING A CLAIM WORTHWHILE?

Marseille is 592 km away from Rome and thus, the value of any claim with respect to flight between these cities would be limited to EUR 250. So an uncompensated passenger would have to determine the level of difficulty and/or costs required to bring a successful complaint before the authorities and may indeed determine that pursuing a complaint is not a worthwhile endeavour. Unless, the process is relatively straightforward, inexpensive and easy, the passenger might decide not to pursue a claim of EUR 250 against an airline with an aggressive reputation.

In countries without a passenger rights regime similar to the one in Europe, passengers who are unable to reach a satisfactory settlement with the airline must bring a claim against the airline in Small Claims Court. Given the reality that the defendant airline will be represented by a lawyer, passengers may seek assistance. In *Lachance* v. *Air Canada*, 2014 NSSM 14, the plaintiff used the free services of volunteer passenger rights advocate, Gabor Lukács, to bring a successful \$800 claim against Air Canada for wrongly re-selling a seat on which he had a confirmed reservation. Had Gabor Lukács been a lawyer, it is highly probable that his fees would have exceeded the value of the claim.

THE VALUE OF ABANDONED CLAIMS

In situations where the cost of pursuing the claim exceeds any potential recovery, it is likely the complaint will not be brought. Thus, if an airline refuses to pay a passenger compensation, and where the value of the compensation is not significant, the matter often ends there. Thus it is in the airline's interest to resist passenger claims.

Here the potential value of all of the small unpursued claims could be substantial, but unless the cost of recovery can be dramatically reduced, it is "money left on the table" from a passenger point of view. This reality has recently sparked a number of companies to consider ways to dramatically reduce the cost of processing passenger claims by leveraging technology.





TECHNOLOGY AS A GAME CHANGER

At the moment there are four Claims Processing Companies (CPC) who are using webbased technology to simplify and partially automate the processing of passenger claims against airlines. Berlin-based FlightRight <https://www.flightright.com/>, Dutch-based Flight Claim <https://flightclaim.com/>, Hong Kong-based Airhelp <https://www.airhelp.com/>, and Lithuanian-based Skycop <https:// www.skycop.com/>. The central philosophy of all four CPCs is simple; if a passenger files a claim, the chance of success is low, if a lawyer files a claim, the chance of success is high but so are the costs. However if one of these companies brings a claim, automation keeps costs down, expertise increases the probability of success, and the firm takes percentage of the compensation only if it is successful.

The Challenge of Automating the Processing of Passenger Claims

If one considers the process of a single passenger claim one realizes that the probability of success is not certain and that there are a number of steps in bringing the claim. In order to automate the process, all of the steps must become a routine, the chance of success must be calculated and the communication between the company and the airline must be as efficient as possible. If one considers a single EUR 600 claim, if the CPC is to take a 25% commission only if successful, the company must be able to perform all of the required steps for less than EUR 150, in order to leave a margin for less expensive claims, and for situations where the CPC is not successful.

Required Elements

In order to be successful, the CPC needs to be seen as legitimate; it must operate within a defined area of high certainty; the facts must be easily and cheaply verified, and the process must be automated to the greatest degree possible.

ACCEPTANCE OF AUTOMATION IN THE LEGAL COMMUNITY

In many jurisdictions, the transactions involved in buying and selling houses, incorporating corporations and drafting of simple wills is done by paralegals and other nonlawyers. There are often seen as routine, relatively simple, low-risk transactions. It is only a matter of time before some or all of these transactions are processed primarily by computer. Automation is even being used in online and kiosk-based driver's license renewal services and at airport border clearance kiosks. This reality minimizes the probability that the CPCs operations will be seen an unorthodox.

A HIGH DEGREE OF CERTAINTY

Vending machines have always depended on a high degree of certainty; the machine will dispense the desired item, and the consumer will pay legal tender in the amount of the price. The machine does not need to think. The consumer's desired drink is at slot "A" and slot "A" is full. The consumer paid EUR 1. Machine verified the EUR 1 coin as being legal tender.

Machine has received EUR 1. Machines sends contents of slot "A" to dispensing tray. Slot "A" is now empty. Consumer has received the drink. The transaction has been completed. The fact that the machine does not need to think can be confirmed by

AVIATION



the fact that vending machines of various types have existed in modern times for over a century and thus predate the era of modern computing.

In dealing with passenger rights, the CPC needs a similar high degree of certainty, but the issues are more complex. For this reason, the CPCs computer will want to confirm that the claim relates to an issue that happened at an EU airport as this guarantees that EC 261/2004 applies. If the claim does not relate to an issue that happened at an EU airport, the computer will only continue if the airline involved was a "Community carrier" within the terms of EC 261/2004. Quite simply, if EC 261/2004 does not apply, the computer will not process further as the costs of handling the claim will probably exceed the value of any negotiated compensation.

MACHINE VERIFIABLE FACTS

To the greatest extent possible, computers rely on fact. An aircraft's flight number, point of departure, departure time, gate used, destination, arrival time at destination, gate used, aircraft registration number, seat configuration and passenger capacity are all facts that are easy to confirm. Over the past decade, new Flight Tracking (FT) services like Flight Radar 24 <https://www.flightradar24.com>, Flight Aware <https://flightaware.com/>, and Flightview <https://www.flightview.com/> have emerged. These were originally aimed to allow travellers and their families to track their flight's departure time, arrival time and punctuality. Today they also offer comprehensive databases for subscribers. The CPCs can write programs to directly import the data from these databases into their own computer systems.

COMPUTER SYSTEM

The power of the FT databases is without precedent, and their use by CPCs not only allows for much greater efficiency in processing passenger claims, it also allows the CPC to identify previously unavailable opportunities.

For example, according to the 3 FT databases, on January 19, 2018, Alitalia cancelled flight 680 from Rome Fiumicino (FCO) to Buenos Aires (EZE) on the same day as it was to operate. The plane was to have departed from Rome at 21:55 CET and to have arrived at Buenos Aires at 7:45 local time after having flown 11,200 km. The flight was to have been operated by an Alitalia Boeing 777-243, bearing Irish registry EI-ISB. Another web-site Seatguru <https://www.seatguru.com/>, identified the aircraft with a capacity of 293 passengers; 30 in business class, 24 in premium economy and 239 in economy class. The FT databases also revealed that EI-ISB operated inbound to Rome as AZ 611 from New York JFK and landed nearly an hour early at 11:17 instead of its scheduled arrival of 12:05. Finally the FT databases revealed that there were no non-stop flights from Rome to Buenos Aires offered within 6 hours of the scheduled departure time of AZ 680.

Thus the computer can confirm that there were up to 293 passengers on a cancelled flight from the EU airport and operated by a community carrier. The flight was to operate over a distance exceeding 3,500 KM. There was no possibility of any routing that would have allowed the passengers to arrive in Buenos Aires within 4 hours of the originally scheduled arrival time of 7:45. The passengers were not given any advance notice of the cancellation as per EC 261/2004, Art 5 (1) (c).

AVIATION



These facts allow the computer to make some inferences.

- 1. Based on EC 261/2004, Art 5 (1) (c), 7(1) (c), each passenger holding a ticket on cancelled AZ 680 is probably entitled to EUR 600.
- 2. Based on EC 261/2004, Art 9 (1), and the time of day the flight was cancelled, each passenger on cancelled AZ 680 is probably entitled to the Right to Care, which may involve hotel stays for passengers who do not live near FCO.
- 3. EI-ISB arrived at FCO at 11:17 and any departure prior to 1:45 would have arrived at EZE in time to avoid any liability under EC 261/2004 Art 6 (c). Alitalia had a 10.5 hour window in which to get an airworthy 777-200 ready to fly to EZE.

However, the FT databases may not contain the reason for the cancellation and thus the computer will try to check the FT databases for confirmation that the airline would not be easily able to show "extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken" as per EC 261/2004, Art 5 (3).

Thus the computer will check to see what time the aircraft scheduled to operate the cancelled AZ 680, EI-ISB, ultimately departed FCO. If it departed on a scheduled flight within 4 hours of the cancellation of AZ 680, the computer may deduce that whatever problem provoked the cancellation of AZ 680 was quickly solved. If other Alitalia 777s arrived at FCO in the hours prior to AZ 680's cancellation and did not depart within 3.5 hours of that cancellation, AZ could be asked why a different 777 was not used. Because the FT databases can track the movement of every plane in Alitalia's fleet, the CPC has significant information on which to estimate the likelihood of a successful EC 261/2004, Art 5 (3) defence by Alitalia. In this example, based on the information provided, the CPC computer would inform the passenger of a high likelihood of receiving compensation.

For the first time, the CPC has almost the same information as the airline. As explained above, the CPC can only guess at the reason for the cancellation, whereas the airline knows, and the CPS does not have access to the flight manifest, crew lists, or other information considered confidential by the airline. However, in other ways the CPC is better informed than the airline. Its databases contain information of all of the flights operated by all airlines that day, including every other flight operated by every other airline at both the point of origin and the point of destination. In addition their database include information on weather, political unrest, applicable laws etc.

Thus if Alitalia's defense is that the flight was cancelled because a national strike in Argentina had affected the international airport, the FT databases will indicate whether other EU and North American airlines landed at EZE within 60 minutes of the scheduled arrival time of the cancelled flight. If Alitalia claims that a storm at FCO forced the cancellation of AZ 680, the FT databases will indicate which other flights departed FCO two hours before and after the scheduled departure time of the cancelled flight.

AVIATION



Neither the CPCs nor the FTs existed a dozen years ago. Today, the CPCs computing power and legal knowledge, combined with the FT databases has metamorphosed the processing of passenger claims. Flightrights explains the way they work:

"We have been offering digital, straightforward and transparent legal assistance based on fast communication channels for more than 6 years now - with no cost risk involved for the consumer. We have programmed our own database that includes more than 80 million data records that are updated daily: strikes, weather information, new court decisions and flight data from across Europe. It recognises within a matter of seconds whether a passenger is entitled to compensation. The only part of the database that the customer sees is the compensation calculator input mask. As soon as we receive the passenger's authorisation, we start working on enforcing the claim against the airline.

This automated service has revolutionised the legal tech industry, as it encourages passengers to check and assert their compensation claims."

Not only has the information imbalance between airline counsel and plaintiff counsel been overcome, but the combination of computing power and the FT databases gives CPCs detailed information on issues of which most consumer protection lawyers are almost completely unaware.

Legal Implications

The days of the general consumer-rights lawyer taking and winning an airline passenger claim against an airline are probably dwindling. Consider the following three scenarios where the airline presents a version of the EC 261/2004, Art 5 (3) defence; weather, mechanical or traffic congestion.

THE WEATHER DEFENSE

If an airline tells a passenger that a flight was cancelled due to weather and weather issues were reported on the date of travel, the passenger's lawyer may well accept that as a reasonable explanation, because s/he may be unable to contradict the allegation.

However, the CPC computers understand that weather is a verifiable fact and their databases list every flight that departed from or arrived at that airport that day. The CPC computer will ask how what percentage of the other flights departing within an hour of the cancelled flight were similarly affected. This profound distinction is due to one simple fact. The CPC's use of the FT databases provide an instant answer to the question; which other airlines also cancelled flights? Without an instant ability to second-guess information provided by the airline, the lawyer is likely to accept the airline's explanation.

AVIATION



THE MECHANICAL DEFENSE

If an airline tells a passenger that the flight was cancelled due to mechanical issues, and its lawyer sends the passenger's lawyer a report signed by an aircraft mechanic, the passenger's lawyer is almost incapable of refuting this without calling expert testimony.

However, the CPC computer knows the last flight operated by the 'grounded' aircraft, what time that plane landed and the interval between that landing and the scheduled departure time of the cancelled flight. It will track the grounded aircraft's return to service and it can even track how many times that aircraft has been scheduled to operate flights that were cancelled. This permits an exploration of whether the mechanical issue really constitutes "extraordinary circumstances which could not have been avoided" as per EC 261/2004, Art 5 (3) in not having an airworthy aircraft to operate the flight.

It is similarly aware of the operations of every other aircraft owned by that airline that could have operated the cancelled flight. It can thus test, to what extent "all reasonable measures ha[ve] been taken" as per EC 261/2004, Art 5 (3) in avoiding the cancellation.

THE CONGESTION DEFENSE

An American airline advised a friend of this author that her short flight from the United States to Canada had been cancelled due to "air traffic congestion and resulting lengthy delays to this flight." Prima facie, if an aircraft is prevented from taking off by Air Traffic Control, this is beyond the airline's power and it is very difficult to refute such a claim.

However, the CPC computers know that even in congested skies many flights are not cancelled. Its databases will list every flight that departed from or arrived at a congested airport during the time period during which the cancelled flight would have operated. It will show whether and how many other flights were cancelled at that airport and other nearby airports, by the airline in question and others. It will permit an exploration of the management decision to cancel that flight instead of others, at a congested airport. It might even be able to facilitate proving that in times of congestion, the airline took advantage of an opportunity to cancel a flight with a low load factor.

In these ways, because the CPCs have access to fast, low-cost information that a lawyer might have had to use a discovery process to uncover, they might well achieve results that would be too expensive or too time consuming for a lawyer to achieve.

AVIATION



The Changing Legal Landscape

By affecting the previous power imbalance between airlines and their complaining passengers, CPCs are enforcing EC 261/2004 in ways that EU regulators hoped over a decade ago. It will no longer be too difficult, too costly or too time consuming to pursue a claim for compensation for denied boarding, and cancelled flights. The regimes of EU passenger rights is getting new teeth, all EU airlines will now be held to the standard that regulators envisioned.

WHAT DEFENSES WILL AIRLINES STILL HAVE

Airlines will still be able to present defenses under EC 261/2004, Art 5 (3) but the comprehensive and deep information and analysis of the CPCs will enable them to rigorously test any defense offered by an airline. Thus airlines will only be able to prevail with a defense which is 100% true, such that it cannot be easily refuted by a fully informed adversary. Thus, if an aircraft is grounded due to an unforeseen mechanical problem, at an airport far from the airline's hub, the possibility of refuting an EC 261/2004, Art 5 (3) defense will be diminished.

LAWYERS NOT INVOLVED

Cases with a low monetary value and any degree of complexity are unattractive for most lawyers. The fees and disbursements are often higher than the value of any potential compensation and thus taking any case on a fee contingency basis is often out of the question. The cases that are of interest to lawyers, and which often involve many lawyers are those that set legal precedent or otherwise change the law. These cases are not about money, they are about principle, and principle often has no fixed price. These cases go forward because the plaintiff wants to make a point and often the financial issues are nearly irrelevant.

In Europe, the case of *Emirates Airlines* v *Dieter Schenkel*, CJEU Case C-173/07, EU:C:2008:400, involved many prestigious lawyers and determined that EC 261/2004 did not apply to the return portion of an EU-third country round trip ticket if that flight was not operated by a community carrier. In Canada, the Supreme Court in *Thibodeau* v. *Air Canada*, 2014 SCC 67, ruled that the *Montreal Convention* precluded an action for damages for violation of obligations pursuant to the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.). As in the European case, many prestigious lawyers represented the parties to the dispute and the various intervenors. As in the European case, *Thibodeau* was not about money, it was about trying to establish a legal precedent.

Airline Pushback

Ryanair has never supported EC 261/2004, and had tried to impose a two-year limit on the bringing of claims, basing its position on Article 35 of the *Montreal Convention*. In *Dawson* v *Thomson Airways Ltd* [2014] EWCA Civ 845 (19 June 2014), the Court of Appeals rejected this position and held that the *Montreal Convention* time limit did not apply to claims brought under EC 261/2004 and further held that the six year period prescribed by section 9 of the *Limitation Act 1980* applies.

AVIATION



On page 64 of its 2016 Annual Report, the carrier argued "[R]ecently courts in several jurisdictions have been broadening the definition of the term "extraordinary circumstances" thus allowing increased consumer claims for compensation. In September 2015, the European Court of Justice, in [*Corina van der Lans v Koninklijke Luchtvaart Maatschappij NV*, C-257/14, EU:C:2015:618], held that airlines are required to provide compensation to passengers even in the event of a flight cancellation on account of unforeseen technical defects."²

Ryanair reacted in late 2015 or early 2016 by changing its terms and conditions. A new Article 15.2.3 reads:

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 ³

The airline justified the change by arguing that the CPCs are charging commissions to process valid claims that Ryanair would have paid, and thus the airline is ensuring that passengers get 100% of the compensation they deserve. The CPCs argue that the changes limit the passenger rights to seek legal representation.⁴

Another polemic Article of Ryanair's terms and conditions, is Article 2.4 which requires that "any dispute arising out of or in connection with this contract shall be subject to the jurisdiction of the Irish Courts."⁵ In an unreported May 31 2017 decision of the Liverpool County Court, *Menditta* v *Ryanair*, Judge Graham Wood QC, ruled that the Article was reasonable as "English passengers could use the small claims procedure in Ireland as a less expensive and more accessible means to claim compensation."⁶ Presumably the Honourable Judge, meant that the small claims procedure would be less expensive than using a CPC, but it nicely avoids the question of how a disgruntled passenger in Manchester, dissatisfied with Ryanair's response to his or her claim, is expected to use the small claims procedure in a foreign country.

Ryanair's designation of Irish Courts as the forum for all disputes and its rejection of CPCs may result in a situation where English-speaking sophisticated clients may be able to reduce the cost and complexity of their claims by dealing directly with Ryanair, and in the case of dissatisfaction, the Irish small claims procedures.

However, for non-English-speaking clients, and those without a good knowledge of the EU Air Passenger Rights regime, these policies may constitute an effective barrier to compensation. Consider Ryanair's public opposition to the evolving definition of "extraordinary circumstances". If the passenger's claim has pertains to a situation dealing with extraordinary circumstance and the claim must be brought directly to Ryanair, is the airline's staff likely to use Ryanair's definition of the term or that definition in *Corina van der Lans* v *Koninklijke Luchtvaart Maatschappij NV* that Ryanair criticized in its 2016 Annual Report? And if the latter definition is used, it is likely that a number of foreign plaintiff's will not pursue the matter before Irish small claims courts.

AVIATION



There is no doubt that the CPCs are a potentially bigger threat to airlines than any previous adversary. In the case of the previously discussed cancellation of AZ 680 on January 19, 2018, if each of the 293 passengers has a right to EUR 600, the total compensation would be EUR 175,800. If a single CPC signed up 100% of the passengers and took 20% commission, the CPC would earn EUR 35,160 for seeking compensation that its computers would have identified as "highly probable." Such potentially lucrative results for relatively little actual legal work has seen CPCs described by Ryanair as "claims chasers"⁷ and "ambulance chasers' of the aviation industry"⁸ because they get up to "50% of the compensation due for simply submitting a claim that can be made free of charge on the Ryanair.com website."⁹

Nonetheless, the biggest threat that the CPCs represent, is that by driving processing costs down, and automating the process, claims that would not have been made are now possible. The CPCs have undoubtedly significantly increased the number of claims, such that Ryanair claims to be dealing with "mass claims issued in bulk by claims management companies."¹⁰

Consider a non-English-speaking, or unsophisticated client who files a EUR 200 claim with a CPC. Even if the CPC takes 50% of the compensation the client is probably EUR 100 better off than s/he would have been otherwise, as s/he might have seen the claims process as not being worth pursuing. Thus s/he will file with the CPC and happily let the CPC keep half the compensation. In a world, where the passenger was not otherwise considering bringing the claim, even the 50% that s/he gets after the CPC takes its cut is "found money".

Thus, for non-English-speaking or unsophisticated passengers the CPC offers a level of simplicity and a probability of victory heretofore unimaginable. If a CPC refuses the case, the passenger can be sure it is without merit, however if the CPC takes the case, compensation if highly probable.

Because the CPC is not a law firm, in the traditional sense, it is not interested in taking complex vexatious cases to wear down airline counsel. Quite simply there are enough legitimate complaints and EC 261/2004 offers sufficient compensation that a highly efficient CPC can make good money simply by focusing on those claims that are easy to prove.

Analysis

The CPCs are here to stay and they have fundamentally and irrevocably altered the balance of power between airline lawyers and those pursuing passenger claims. To a certain extent, one could argue that a regime of strict liability will follow; where the airline defenses will be meaningless and airlines will simply pay the mandated amount for each incident for which compensation is due. This is not a desired outcome; in 2009 this author harshly criticized a Canadian initiative seeking such results.¹¹

On a planet where climate change is a reality, where inclement weather closes airports, volcano ash closes skies and industrial action brings airline operations to a halt, if no situation can result where an airline can benefit from a reasonable interpretation of EC 261/2004 Art 5 (3) the clause should be struck. EU airlines would then adjust fares, routes and customer service accordingly.

AVIATION



In any event, the room left for the lawyers who want to dabble in passenger rights will be minimal; they will never be as inexpensive as the CPCs, and unless a file is precedent setting, the monetary value alone does not often justify the investment of first-rate legal talent. There may well be precedents to set; it is arguably necessary to overturn the principles in *Menditta* v *Ryanair* and Article 15.2.3 of Rynair's terms and conditions. However, there are not many precedents to be set, and thus most lawyers should turn the attention to more lucrative areas of aviation law.

Due to an amazingly increased safety record of the international airline industry, the number of personal injury and wrongful death claims resulting from airline activities in the industrial world are declining¹² and more and more of those are headed for settlement conferences rather than the courtroom. To an extent, this amazing safety record may be making us compliant; if planes are safer than ever, should they not compensate me because my flight was delayed by a thunder storm? Absent thought-ful discussions of such issues, legal decisions may hinder efforts towards increasingly safer skies.

It is important that the EU show leadership. CPCs are undoubtedly an important and permanent part of the European passenger compensation regime. Just as they depend on a high degree of certainty within the EU, they will expand to other jurisdictions if similar passenger compensation schemes are developed there.

Canada is in the final stages of passing a passenger rights regime loosely based on what currently exists in the European Union.¹³One of the former Members of the Agency, Jean Dennis Pelletier, is working with https://flightclaim.ca/ the Canadian subsidiary of Dutch-based Flight Claim .14">https://flightclaim.ca/ the Canadian subsidiary of Dutch-based Flight Claim .14">https://flightclaim.com/>.14 Given his experience and insight, given that Canada's new passenger rights regime specifies compensations amounts for defined incidents, it would be no surprise if Flight Claim soon offers compensation for flights operated by Canadian carriers as it currently does for flights operated by Community carriers.

It is unlikely that Canada will be the last jurisdiction to consider European-style compensation amounts, other States will surely adopt similar regimes soon. However, such developments will bring an important additional challenge; forum shopping.

Currently, Flight Claim's Canadian subsidiary is processing claims by Canadians against Community Carriers or against Canadian carriers with respect to incidents that happened at an airport located in the territory of a EU Member State to ensure that EC 261/2004. However if the Canadian regulations are more or less generous than EC 261/2004, and a claim is made against a Community carrier with respect to an incident that occurred at a Canadian airport, the CPC will decide under which regime that claim would yield the highest compensation amount.

Given the power of modern computing, equipping a CPC with currency conversion databases would not be complicated and this would facilitate a one-stop apples-to-apples comparison between the different applicable passenger rights regimes. Such analysis might be complex and time consuming for a single lawyer or even a sophisticated self-represented passenger claimant, but for a CPC it would be just another minor detail to consider.

AVIATION



Conclusion

It is clear that CPCs will become permanent participant in the dialogue between passengers and airlines with respect to passenger rights. It is equally clear that airlines will pursue a variety of options to thwart the efficient operation of CPCs, as any other strategy would lead, increasingly, to a strict liability regime in passenger rights that might even extend to cover issues over which airlines have no control whatsoever.

There will be efforts by lawyers to restrict or enable the activities of CPCs, to restrict or enable the bringing of actions in the passenger's home jurisdiction, and to restrict or enable the expansion of the CPCs to other jurisdictions. For most airlines, the existence of CPCs means an increase in liabilities. Not only will more passenger claims be brought, but based on the calculations and information of CPCs, an increasing percentage of these claims will be well founded. For this reason, any initiative that decreases a CPC's efficiency reduces the airline's liabilities.

The alternative to CPCs would be a passenger-friendly low-cost passenger rights tribunal similar to Canada's Canadian Transportation Agency, but such tribunals do not give the passenger the same insight into airline operations as that provided by the CPCs. While it is true that CPCs charge a percentage of passenger compensation received, this percentage is probably lower than that which a lawyer might charge. For an unsophisticated passenger, or a passenger filing a claim in a language other than his/her mother tongue, the CPCs percentage is often seen as an investment; by paying the percentage the passenger receives the compensation but without involving the CPC, the passenger's likelihood of receiving compensation declines markedly.

CPCs have managed to find the sweet spot between probability of victory and cost of filing the claim and thus have succeeded in filling a void between those passengers who successfully brought claims before EU airlines and those who were intimidated by the prospect of engaging an unfamiliar small claims court process. For this reason alone, their long term future seems assured and airlines need to adapt to the increasing likelihood of airline passenger claims being filed by a CPC.

⁵See Ryanair, "General terms & conditions of carriage", *supra* note 3, Article 2.4

¹Flightright Legal Tech - Revolutionising conventional legal practice, https://www.flightright.com/aboutus (accessed 18 Sept. 2018)

²See Ryanair, "Ryanair-Annual-Report-FY16", at 64, online: Ryanair <https://investor.ryanair.com/wp-content/uploads/2016/07/Ryanair-Annual-Report-FY16.pdf>.

³See Ryanair, "General terms & conditions of carriage", Article 15.2.3, online: Ryanair https://www.ryanair.com/gb/en/useful-info/help-centre/terms-and-conditions#!.

⁴See Qin Xie, "Ryanair introduce 'illegal' terms and conditions that exclude companies from claiming compensation on your behalf", *Daily Mail* (28 October 2016) online: dailymail.co.uk <https:// www.dailymail.co.uk/travel/travel_news/article-3882774/Ryanair-introduce-illegal-terms-conditionsexclude-companies-claiming-compensation-behalf.html>.

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⁶See Bradley Gerrard, "Appeal being eyed after Ryanair wins court compensation battle", *The Telegraph* (31 May 2017) online: telegraph.co.uk https://www.telegraph.co.uk/business/2017/05/31/appeal-eyed-ryanair-wins-court-compensation-battle/.

⁷ See Tom Madge-Wyld, "Ince & Co secures Ryanair win in jurisdictional dispute", *GTDT Aviation Law News* (08 June 2017) online: gettingthedealthrough.com https://gettingthedealthrough.com/people/67298/tom-madge-wyld/.

⁸lbid.

⁹lbid.

¹⁰Ibid.

¹¹See P Paul Fitzgerald, "Air Passenger Rights: The First Canadian Efforts ... an Inauspicious Beginning" (2009) 9:1 Issues in Aviation Law & Policy 33 (HeinOnline).

¹²In 2017, there were no fatalities caused by scheduled airline operations. See David Shepardson, "2017 safest year on record for commercial passenger air travel: groups", *Reuters* (1 January 2018) online: Reuters.com https://www.reuters.com/article/us-aviation-safety/2017-safest-year-on-record-for-commercial-passenger-air-travel-groups-idUSKBN1EQ17L>.

¹³See, Canada Gazette, Part I, Volume 152, Number 51: Air Passenger Protection Regulations (22 December 2018), online: Canada Gazette http://gazette.gc.ca/rp-pr/p1/2018/2018-12-22/html/reg2-eng.html.

¹⁴See Flightclaim.ca "The Team" online: <https://flightclaim.ca/the-team-2/>.



AVIATION



Aircraft Lessors' Rights

By Nicolai Vella Falzon *

Malta

Contracts of lease, or, as more formally known in Maltese law, contracts for "the letting of things", are regulated in Malta in terms of the Civil Code. The law, enacted during the third quarter of the nineteenth century, regulates the lease of both movable and immovable things. Old and unchanged as it was (at least until recently), the law struggled somewhat when applied to the lease of more modern or higher -tech chattels, like aircraft.

When Malta ratified the Cape Town Convention and its Aircraft Protocol in 2010¹ (the "Convention") the extensive rights and remedies it introduced for the benefit of lessors of aircraft whose lease is registered as a security interest in accordance with the Convention, were in stark contrast with the more conservative, lessee-friendly rules regulating leases generally as found in the Civil Code. Although the Aircraft Registration Act does grant priority to the provisions of the Convention in case of conflict with any other law (including civil law), it was felt that for sake of clarity and legal certainty, amendments to the provisions of the Civil Code relating to the contract of lease were desirable and necessary.

Accordingly, substantive amendments to the Civil Code were made in 2016² introducing specific provisions regulating contracts of lease of aircraft³. Legal certainty aside, the purpose of the amendments was also to improve contractual flexibility in aircraft leasing contracts by granting full autonomy to the parties in the regulation of the agreement between them and to do away with the cumbersome and often lengthy procedures for the repossession of an aircraft in the event of a default under the lease agreement. The law also gives recognition to the commercial realities underlying most aircraft leasing transactions, including the importance of preserving the value of aircraft caught up in the mire of legal disagreements and of protecting the rights of financiers of such aircraft.

In terms of the recently introduced provisions, the laws regulating the lease of chattels generally are set aside or rather subordinated to the terms and conditions agreed between the parties. The law specifically states that in the case of conflict between the provisions of the Civil Code and the lease agreement, the latter will prevail. The parties, therefore, are given full autonomy and maximum flexibility to regulate the terms and conditions of the lease of the aircraft between them.

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AVIATION



Additionally, the remedies available to the lessor in the event of the termination of the lease have also been greatly improved and the procedures to execute such remedies simplified.

Thus, the formality of giving notice by judicial act⁴ prior to the termination of a lease is disapplied in the context of the lease of an aircraft and the mode of termination of the lease will be regulated only by the agreement between the parties. Where the agreement requires prior notice in writing, such notice will be validly given if communicated in writing in any manner, including by electronic means.

Furthermore, the lease of an aircraft, can be immediately dissolved or terminated by the lessor at any time in the event of a default and upon notice in writing to the lessee, notwithstanding the opposition by the lessee, and this without the need of any authorisation or confirmation by any court that an event of default has taken place. In such circumstances, the lessor is given the express power to take possession of the aircraft and, where the lessee is uncooperative, he has a right to ask the Court for an order authorising or directing any of these acts. Indeed, the law as amended imposes an obligation on the Court to render full support to the lessor as expeditiously as possible in such situations.

Unlike in the case of other chattels, therefore, the lessor of an aircraft will not be obliged to prove a default prior to exercising his right to terminate the lease and to repossess the aircraft. Mere notice of default and termination will suffice to grant the lessor the power to take control of his asset. This is not to say that the lessee is powerless in the circumstances, but the law shifts the onus of proof so that if the lessor terminates the lease agreement for reasons which are not contemplated in the agreement, or generally for reasons that are not justified, it is the lessee that has to seek recourse through an action for damages for breach of agreement.

Interestingly, the rights granted to the lessor are extended by right to the mortgagee of the aircraft, who has an automatic right to exercise the powers of the lessor in the event of a default under the lease agreement unless he has specifically renounced the right to do so. Indeed, the definition of 'default' in the context of the lease of an aircraft includes not only the events of default set out in the lease agreement. Commercially, the definition comprises a change in the financial condition of the lessee that endangers the continued performance of the lessee's obligations under the lease and, even more generally, any event which substantially deprives the mortgagee of what it is entitled to expect under the agreement between the mortgagor and the mortgagee.

In conclusion, the recent amendments to the Civil Code provisions regulating contracts of lease have dramatically bolstered the rights of lessors of aircraft such that their rights are now not materially different to the rights granted to the holders of security interests in terms of the Convention. Aircraft leases are now akin to security interests granting important rights and remedies to lessors and financiers alike. The changes reflect better the commercial realities underlying the aircraft lease relationship and should continue to improve the attractiveness of Malta's legislative framework in this area.

AVIATION



¹ As given effect by virtue of the Aircraft Registration Act as of 1 February 2011.

² By virtue of Act LII of 2016.

³The same provisions apply also to ships.

 $^4 Typically a judicial letter that must be filed through the registry of courts in Malta and subsequently served on the lessee or any other relevant parties.$

AVIATION



The Protection of third Party Owners of Installed Engines

By Nicolai Vella Falzon *

Malta

While effectively a creditor friendly jurisdiction, legislation dealing with the enforcement of security or rights over aircraft in Malta gives specific and direct protection to owners of installed engines owned by third parties.

In terms of Maltese law, an aircraft constitutes a separate and distinct asset within the estate of the owner and it is subject to the liabilities incurred in relation to the transactions related to its operation.¹ While the definition of aircraft includes "airframes with aircraft engines installed thereon",² the provisions regulating security over aircraft afford specific protection to third party owners of installed engines so that "where an engine has been attached to an airframe, which is not also owned by the airframe owner, each of the owners shall retain the ownership of their thing and the engine shall not accede to the airframe"³. Indeed, the law states that any security over the aircraft will not extend to any engine attached to the airframe when this is not also owned by the airframe owner. The Roman doctrine of 'accessio cedet principali' (contained in Article 566 of the Maltese Civil Code) does not apply with respect to an engine attached to an airframe when these have different owners.

Similarly, the provisions regulating the enforcement of rights over aircraft, more specifically the rules regulating the warrant of arrest of an aircraft provide that where the engine is not owned by the owner of the aircraft, the effect of the warrant of arrest will only apply to the engine to the extent that the application for the warrant expressly states that the warrant is also intended to operate in relation to the engine, and in all other cases there is a presumption that if the engine is not owned by the owner of the aircraft, the warrant is not deemed to extend to the engine⁴.

While the rights of third party owners of installed engines were recognised, prior to amendments introduced in 2016 the protection of those rights was subject to serious procedural limitations which came to light in the case of *Joseph J. Vella nomine* vs. *Triton Aviation Ireland Limited et (2013)*⁵ and related cases (collectively known locally as the *Wind Jet S.p.A.* cases). In these cases, following the arrest of a number of aircraft in Malta, the owners of a number of engines installed on the aircraft filed an application in the acts of the precautionary warrants of arrest requesting the Court to declare that the warrants of arrest filed against the aircraft had no effect on their engines and, therefore, to order their immediate release. In its decree on the mat-

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AVIATION



ter, the Court observed that the engine owners were not party to the proceedings and acts of the precautionary warrants of arrest and, therefore, they had no *locus standi* to make any requests in relation to the effects of the arrests. In other words, the law at the time did not envisage a procedure whereby a third party owner of an installed engine could apply for an immediate remedy in the acts of the arrest itself but would have had to institute ad hoc proceedings by filing a separate action by sworn application, a procedure that, of its nature, requires a substantially long time to be determined and which therefore afforded ill relief to a third party engine owner.

Following the decisions in the Wind Jet cases, the relevant provisions of the law were amended so that it is now provided that the Court seized with the acts of a warrant of arrest of an aircraft, will also be competent to hear an application by the owner of an engine which does not belong to the owner of the aircraft⁶. The owner of an engine which is attached to an aircraft owned by a different person is now entitled to intervene in any proceedings relating to the arrest of an aircraft in order to protect his interests. Furthermore, there is now a direct obligation on the Court receiving an application by the owner of the engine to immediately direct that it be served upon the person having possession or control of the aircraft and to rule on it expeditiously, within a period of not more than two working days from the date that the application for release is served. Quite consistently with Malta's creditor-friendly stance in the context of aircraft security, this right to obtain speedy relief competent to third party owners of installed engines are extended to mortgagees or holders of any international interest or other security interest over the engines.

²Article 2(1) ARA.

³Article 26(4) ARA.

⁴Article 865B(iv) COCP.

⁵Av. Joseph J. Vella as special mandatary of the foreign company Societa Aeroporto Catania S.p.A. vs. Triton Aviation Ireland Limited and Wind Jet S.p.A., decided by the First Hall Civil Court on the 24th January 2013.

⁶Article 865A(5) COCP.

¹ Article 25 Aircraft Registration Act ("ARA").



AVIATION



The International Blockchain Registry of Mobile Assets

Erich P. Dylus*

Abstract

Moving the International Registry of Mobile Assets onto a blockchain registry system that digitally "tokenizes" each registered asset would provide a more efficient and secure mechanism of authentication, while effectively eliminating many current risks of syntax errors and noncontiguous asset histories. This may be accomplished in accord with the current legal framework, without complicating the user interface on the front end, and allows for potential future inclusion of the asset tokens into smart contracts.

Introduction

The Convention on International Interests in Mobile Equipment, signed in Cape Town on November 16, 2001 (the "Convention") operates to facilitate the efficient financing and leasing of mobile equipment including certain aircraft, rail, and space assets.¹ One of the primary objectives of the Convention was to establish a registration of international interests in such assets, thus providing notice to third parties and enabling creditors to preserve priority against unregistered and subsequently registered interests and creditors in the event of a debtor's insolvency.² The International Registry (the "IR") is monitored by the Convention's Supervisory Authority, who appoints a registrar every five years.³ The IR is publicly searchable online for current registrations, entities, or contracting states. Entities seeking to register interests on the IR must first apply on the website to become an Approved Administrator, complete the required application and review by IR officials, and supply "any additional information which the Registry Officials need."4 The IR is purely digital and will neither perform nor permit registrations or other actions based on external documents or communications other than the electronic consents of all relevant parties provided through the Approved Administrator. This article posits that a blockchain registry system, specifically a "permissioned" variant of the Ethereum⁵ blockchain utilizing a non-fungible ERC721 standard to digitally "tokenize" each registered asset, would provide a more efficient, error-resistant and secure mechanism of authentication and registry for the IR compared to the current system of manual entry of alterable data. Further, moving the IR onto a blockchain registry system need not affect the Supervisory Authority's approval process or confidentiality protocols, which remain essential for the protection of sensitive entity data and Convention compliance.

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Blockchain Background

A blockchain is an example of a distributed ledger system, in which any transacted or registered information must be validated as legitimate by the blockchain's applicable consensus protocol and is thereafter permanently preserved.⁶Blockchain registries generally benefit from increased security, accuracy, and efficiency by distributing computation and verification amongst numerous nodes (avoiding a single system intermediary choke point for verification) and by securing information via complex cryptography.⁷ Blockchains also maintain systemic transparency by permitting access to block metadata and address transaction history (according to the type of blockchain used, which in this instance could mirror the limited public access of the IR's search function), while upholding security by hashing⁸ (or encrypting) any confidential information or values. In this case, to remain compliant with the Convention and current IR protocol, the categories of confidential data or identifiers within the blockchain registry could be encrypted at the discretion of Registry Officials, in line with current practice. These benefits of security, immutability and efficiency have led governments and private entities alike to use blockchains for such varied applications as supply chain management, food and pharma source and quality control, land title record systems, anti-counterfeiting, creative content licensing, and financial instrument trading and settlement. Specifically for the aviation industry, blockchain has been proposed as a potential solution to aircraft maintenance recordation, along with the facilitation of more cost-efficient commercial and leasing transactions by using cryptocurrency settlement and even a dedicated blockchain for the aviation ecosystem.⁹ Blockchain technology provides an opportunity for a simple, efficient and cost-effective overhaul for the essential yet imperfect IR system.

Validation and Security

The IR would be well-suited for a "permissioned" blockchain¹⁰, in which the basic history and information of all blocks may be publicly observed but permission must be given to perform certain tasks in writing, reading, and reaching consensus (for example, transacting, adding or validating information or accessing certain encrypted sensitive data - as opposed to a "permissionless" chain such as bitcoin in which there are no qualifiers to transact and contribute to consensus). Approved Administrators and the Supervisory Authority would receive permissioned status via a cryptographically secured identifier, but their activity could still be publicly monitored on the blockchain, albeit with encrypted values where appropriate.

An asset's registration history would not only be permanently preserved as a past status modification (for example, the occurrence of a registration of an interest or discharge), but also each entity effectuating a change in the asset's registration would have their unique encrypted identifier permanently preserved along with it, which would help to prevent fraud and tampering by leaving a forensic digital imprint. Importantly, permissioned blockchains still entirely resist alteration of historical data, even by the permissioned entities. All entities seeking to record new data or otherwise transact must be authorized by (i) receiving permissioned status and (ii) receiving consensus validation by the network of nodes to write to the block-chain, mitigating conventional centralized security risks. All transactions or new entries by the permissioned actors would leave permanent and irreversible evidence of a change in state or new entry upon the blockchain—any intrusion or attempt by a non-cryptographically permissioned entity to alter the registry system would be rejected. Any such rejection could leave evidence of the rejection (depending upon the protocol desired), allowing further fraud prevention and forensic security.

AVIATION



Accuracy

After the initial approval of permissioned status for the registration process by Supervisory Authority officials, registrations would be less susceptible to human error. For example, when obtaining priority search certificates¹¹, aviation counsel title memos or IR opinions commonly include disclaimers such as:

If a registration exists against an airframe or engine which describes that object differently than as noted in the certificate (any discrepancy in the description of the manufacturer, model or serial number including any space, added number or character, or missing number or character) the certificate will produce a false negative search result. Therefore, there may exist registrations against the airframe or engine which are not reflected on the certificate and which would have priority over subsequent registrations on the International Registry¹²

This type of potential error (registration against an asset that describes the asset incorrectly potentially creating a duplicated registration overlap, conflicting priority and/or a gap in the chain of interests) is mitigated by a blockchain protocol in which changes to an asset's history or status are either confirmed by the nodes as a valid change in block status via correctly entered syntax, or are rejected and return a failed transaction notification (instead of a false negative as in the disclaimer) to the entity attempting to register, because any improper syntax compared to an existing asset registration or attempted overwrite of the history of the asset address would produce a completely different hash value and fail to write to the intended block-chain address¹³. All subsequent registrations for an asset must perfectly match its blockchain address identification values, and searches must match the syntax requirements, or the operation will fail and prompt a correction.

Ensuring Uniqueness and Authenticity

Utilizing a permissioned fork of the Ethereum blockchain with a non-fungible ERC721¹⁴ standard to "tokenize" each registered asset, or to assign each asset a unique digital ID and function values to be transacted on the IR blockchain as a "token" representing that asset, would prevent the aforementioned imposter or syntax error registration issues. Each token is referenced on the blockchain via a unique identification value with accompanying characteristics (e.g. MSN, manufacturer, model, year), and any transferee of the token via a new registration after approval would examine the token's metadata history and identifiers for validation. Thus, each asset on the IR would be represented by a unique and non-replicable token, that may be transferred to user entities or updated as applicable with subsequent registrations.

In the current registry system, a slight discrepancy in information entry for a registration concerning an existing asset on the IR could allow the user entity to mistakenly or intentionally effectuate a new registration (because the existing registration would be undetected) that could cause a gap in the chain of title or in priority. Alternatively, a blockchain registry with tokenized assets would reject an entry or change in priority unless the asset's specific token is affected or if no token with the appropriate characteristics yet exists. New token instances would be subject to approval on the permissioned chain, and if there are duplicative characteristics to an existing token, such approval would be rejected. Thus, an entity that attempts to register against an existing asset by deliberately avoiding the existing token will be

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AVIATION

unable to tokenize and write to the IR blockchain, because approval will only occur if either the unique token is used or there is no existing token with matching asset identifiers that would otherwise prevent a new instance. If the proper token is used or there is no existing registration and thus a new token is created, the new entry into the blockchain may then receive approval to write. This process provides top to bottom validation and ensures continuity with the asset's history. Put simply: an asset's one true token as confirmed by its characteristics must be utilized in any registration, and initial tokenization may only occur if no such token exists with matching asset identifiers. If there is a malicious attempt at fraudulent registration via a new, rogue token or a registration using an existing token is incorrectly entered, the operation fails completely. In the current system, inconsistencies in priority or chain of ownership are simply too easy to effectuate via minor human error in syntax or intentional conflicting registrations.

Creditors of such large value assets as aircraft should not be subject their interests to typo contingency nor noncontiguous asset history risk, and should be ensured by the decentralized, tamper-proof and transparent nature of a blockchain registry that their assets are not subject to surprise encumbrances nor vulnerable to security risks common to centralized data servers. If and when aircraft transactions are stream-lined and secured by the implementation of smart contracts¹⁵, the transfer of the aircraft's token to the proper party would become a commonplace condition precedent. If the consensus in data security, especially those in public owner registries, transitions towards demanding decentralization and immutability in a trustless structure, a blockchain IR may one day become a necessity for the IR's continued legitimacy: while the Registrar is not liable for such errors in *received* registration information¹⁶ and all claims against the Registrar are subject to the defense of contributory negligence¹⁷, the Registrar may be held liable for losses resulting directly from its errors or omissions in maintaining the IR.¹⁸

Conclusion

The front-end user interface of the IR need not be complicated by a transition onto the blockchain. Users and site visitors could still search for assets by various combinations of MSN, name, model, or abbreviations thereof on the current system to find links to matching assets' token addresses, or they could input the asset's specific blockchain address to locate the relevant token by which it is represented. When the asset token is found, the blockchain would disclose the asset's current IR status along with its entire transactional history—all confidential information concerning the asset would be available only to permissioned entities, encrypted with the level of privacy and carrying any other attributes or data deemed acceptable by the Supervisory Authority.¹⁹ The asset's blockchain address private key could be dispersed in pieces to the user entities and permissioned existing creditors via a password combination or any additional network security measure to avoid a single bad actor to take possession of the key. Further, tokenization opens the door to future integration into smart contracts²⁰, in which the tokens may be transacted along with payment directly via blockchain.

Creditors would be assured by their possession of their asset's token and blockchain security that the asset's registration status and thus their priority in interest would be incontrovertible until the next transaction event is validated. Furthermore, the blockchain's encrypted and decentralized method of information storage would provide added security for the IR, as well as reducing overhead, maintenance, and human error. The aerospace industry has embraced cutting-edge technology since its inception - this tradition should be reflected in its international registry system.

AVIATION



¹Official Commentary to the Convention on International Interests in Mobile Equipment, § 2.1 (3rd Ed. Rome 2013) http://www.unidroit.org/instruments/security-interests/cape-town-convention.

²*Id.* at § 2.6.

³Convention on International Interests in Mobile Equipment, Art. XVII (Cape Town 2001).

⁴Welcome to the International Registry, International Registry of Mobile Assets (accessed Jan. 8, 2018) https://www.internationalregistry.aero/ir-web/index.

⁵See Ethereum.org.

⁶See Blockchain Technology Overview, NIST Internal Rep. 8202, National Institute of Standards and Technology (January 2018) https://csrc.nist.gov/CSRC/media/Publications/nistir/8202/draft/documents/nistir8202-draft.pdf/

⁷ld.

⁸Id. at Ch. 2.1.

 9 See Lory Kehoe & John Hallahan, Blockchain - a game changer in aircraft leasing?, Airfinance Annual, 84-87 (2017/2018).

¹⁰There are numerous options for such a permissioned chain designed for enterprise or organization-level requirements built on Ethereum in order to utilize the ERC721 protocol, such as a native private fork of Ethereum, the Linux Foundation's Hyperledger Burrow (https://www.hyperledger.org/projects/ hyperledger-burrow, using the Ethereum Virtual Machine), and Quorum (https://www.jpmorgan.com/global/Quorum).

¹¹Convention, Regulations at § 7.2.

¹²Example disclaimer drafted by the author.

¹³Blockchain Technology Overview at Ch. 2.1.

¹⁴The ERC721 token standard defines the functions: name, symbol, totalSupply, balanceOf, ownerOf, approve, takeOwnership, transfer, tokenOfOwnerByIndex, and tokenMetadata; and defines two events: Approval and Transfer.

¹⁵A smart contract is a collection of code and third party data deployed to a blockchain that executes upon the conditions precedent established in the code. The code, being on the blockchain, can be used (among other purposes) as a trusted third party for financial or other transactions that are more complex than simply sending funds, or to perform calculations, store information, and automatically send funds, tokens or information to other blockchain addresses. *See* Blockchain Technology Overview at Ch. 6; Vitalik Buterin. *Ethereum: A Next-Generation Smart Contract and Decentralized Application Platform* (2013) http://ethereum.org/ethereum.html; Nick Szabo, *Smart Contracts: Building Blocks for Digital Markets*, First Monday, 2(9) (1997).

¹⁶Convention, Regulations at § 28(2)

¹⁷Id. at § 28(3).

¹⁸Id.at § 28(1)

¹⁹This could also include unregistered interests such as specific default remedies or pre-existing rights covered by declaration, as mentioned in Official Commentary 3rd Ed. § 2.7.

²⁰A smart contract is a collection of code and third party data, in many cases deployed to a blockchain, that executes upon the conditions precedent established in the code. The code, immutably preserved on the blockchain, can be used (among other purposes) as a trusted third party for financial or other transactions that are more complex than simply sending funds, or to perform calculations, store information, and automatically send funds or information to other blockchain addresses. *See* Blockchain Technology Overview at Ch. 6; *See generally* Szabo, Nick, *Smart Contracts: Building Blocks for Digital Markets* (1996), *Smart Contracts: 12 Use Cases for Business & Beyond*, Chamber of Digital Commerce (December 2016).



AVIATION



A Review and Assessment of the Competition Law Regime in Turkey

by Neda Şentürk*

Abstract

The air transport is one of the most regulated and state-controlled industries given its extreme risk-bearing and costly feature. The global development in aviation and the increase of tendency towards commercial air services, nevertheless, bring competition concerns into question and lead to the necessity of legal arrangements protecting competitive environment in this sector. This paper aims to explore the competition regime and its implementation to air transportation in Turkey. In that respect, certain references will also be made to the EU competition laws insofar as applicable to Turkish legislation.

Introduction

Although this paper is intended to scrutinize the competition laws and regulations particularly those applicable to air transport in Turkey, I find it crucially important to have knowledge on the roots of competition policies worldwide. Knowing the whys and wherefores of the desire to regulate competition relations will also help to understand better the Turkish competition policy. I, therefore, will briefly mention in this Section the framework in the USA where the first positive competition laws were born. European competition legislation, in which the Turkish competition arrangements find their foundations, will also take place in the present paper.¹

The intention behind the competition laws can be determined as, using the words of the Federal Trade Commission, "to promote the interest of consumers" and "to support unfettered markets" which would lead to "lower prices and more choices". Likewise, the European Commission encourages the competition between companies as it fosters them "to offer consumers goods and services at the most favourable terms" and it causes the reduction of prices. Similarly, as will be seen under Section 2, Turkish law defines the term "competition" as "the contest between undertakings in markets for goods and services which enables them to take economic decisions freely".

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25

AVIATION



• The Dawn and Development of Competition Policy and Law

Considering above-mentioned definitions supporting liberal economies and free competition, it is not a surprise that the earliest legal arrangements in competition law were seen in developed economies which have set an example for emerging market economies.⁴ The passage of first positive competition law in the USA, namely the Sherman Antitrust Act of 1890, hereinafter referred to as the "Sherman Act", goes back as early as 1890. All arrangements, agreements and trusts which tend to restrict free competition were prohibited and thus the protection of economic liberalism, which eventually is for the benefit of customers, was aimed. Further legislation regulating merger controls and price discrimination were passed in the USA in the course of time as the Sherman Act fell short of addressing all competition related problems.⁵

In Europe, on the other hand, the need to regulate the competition policy gained importance due to the cartels appeared in Germany in heavy, electrical and chemical industries during the interwar period.⁶ The support of these industrial cartels to The National Socialists was seen as one of the biggest factors creating totalitarian regime leading world to war and thus there occured a tendency towards regulating the competition policies in Europe. After the Treaty of Paris of 1951 creating the ECSC has initiated the process uniting Europe, the EEC was established in 1958 by the Treaty of Rome of 1957, hereinafter referred to as the "Rome Treaty",⁷ which also laid the foundations of competition policy within Europe.

• Turkish - EU Relations

Before moving on to next Section examining Turkish competition laws and regulations in detail, I find it useful to shortly address the long and ongoing Turkish - European relations which pushes Turkey towards adopting competition laws in compliance with EU law.

Although the negotiations on Turkey's accession to the EU came to a halt lately, there has been a close relationship between Turkey and the EU, formerly referred to as the EEC, since 1963 when the Agreement establishing an Association between the European Economic Community and Turkey, hereinafter referred to as the "Association Agreement", was signed between two parties in order to establish closer bonds. As stipulated by this Association Agreement, a customs union underlying the competition relations between Turkey and the EU, there EEC, was established with Decision No. 1/95 of the EC - Turkey Association Council, hereinafter referred to as the "Customs Union Decision".

Next Section is dedicated to examining Turkish competition laws and regulations and to address the authorities entitled to enforce such laws. A particular attention will also be given to the analysis of the compliance of Turkish competition laws with the *acquis* considering Turkey's long-standing full membership negotiations.

AVIATION



Competition Law in Turkey

• Background: Elements Pushing Turkey to Adopt Specific Competition Laws and Regulations

Adoption of a law regulating competition rules is, in the first place, a constitutional requirement in Turkey. Chapter 2 of the Constitution of Republic of Turkey dated 18.10.1982 and numbered 2709, hereinafter referred to as the "Turkish Constitution", is dedicated to economic provisions and accordingly Article 167 requires the State to take measures to ensure and promote the sound and orderly functioning of the markets for money, credit, capital, goods and services and to prevent the formation of monopolies and cartels in the markets, emerged in practice or by agreement.

As mentioned under Section 1.3., another factor prompting Turkey to adopt a specific competition law is its obligations under the Association Agreement¹⁰ requiring parties to take measures and enact laws in order to comply with the competition provisions of Rome Treaty.

Finally, the Customs Union Decision stipulates Turkey to comply its legislation governing competition rules with the EU *acquis* and to apply them effectively.¹¹

Laws and Regulations

Overview

In the light of the foregoing, the Act on the Protection of Competition numbered 4054 and as amended from time to time with a view to approaching to the *acquis*, hereinafter referred to as the "Competition Act", came into force in 1994. This Act aims "to ensure the protection of competition by performing the necessary regulations and supervisions to this end" as set forth by its Article 1.

In order to analyze Turkish competition rules including both primary and secondary legislation in a more clearly structured way, I will follow the sequence and subchapters used by EU Commission whilst preparing annual working documents demonstrating the progress made by Turkey. I, furthermore, will give place to certain competition cases concerning aviation related matters and make assessment of the degree of compliance of Turkish legislation with the EU *acquis*, where relevant.

• Antitrust and Mergers:

The legislative framework governing antitrust rules consists of (i) restrictive agreements, decisions and concerted practices between undertakings, (ii) abuse of dominant position and (iii) merger control. As will be seen in detail below, the Competition Act is to a large extent aligned with the *acquis* in this respect.

AVIATION



Restrictive Agreements, Concerted Practices and Decisions Limiting Competition

Article 4 of the Turkish Competition Act prohibits agreements and practices between undertakings and decisions and practices made by associations of undertakings which have as their object or effect or likely effect¹² the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services.

As an illustration in 2013, a case concerning Saudi Airlines and Turkish Airlines was brought before the Competition Authority based on the claims that these two flag carrier airlines concluded a price fixing agreement in hajj operations between Turkey and Saudi Arabia. In this case, it was alleged that the flight tickets constituted the most expensive cost item in hajj organisations and furthermore the two airlines concerned were setting prices similarly. As the starting point in each competition case is to define the relevant market, the Competition Authority initiated its examinations with determining the relevant market as "air transport services rendered within hajj tourism". The Competition Authority found out that albeit there are new players operating since 2011¹³, the relevant market share agreement and price -fixing claims were irrelevant. According to this agreement, the party exceeding 50% limit had to pay a 60 USD royalty fee for each adult passenger and 75 USD royalty fee for each child passenger. This agreement does doubtlessly violate Article 4 of the Competition Act.¹⁴

That being said, it was understood that this "royalty fee agreement" was required by Saudi Hajj Instruction Act and thus constituted a legal necessity for Turkish Airlines to be able to operate in hajj season. Despite the obvious restriction of competition in this market, considering the "act of state" defense, the Competition Authority decided not to start an investigation for the two airlines but rather informed the Turkish Ministry of Foreign Affairs and the CAA to prompt them to take necessary measures.

In harmony with Article 101 (3) of the TFEU, however, Article 5 of the Turkish Competition Act lists four cumulative conditions that exempt agreements, concerted practices and decisions of associations of undertakings from the prohibition set forth previously by Article 4. Applying the prohibitions in a strict way would cause the Competition Act to deviate from its main aim which is to protect and enhance the customers' welfare. This clear determination of exemption conditions, I believe, provides an important amount of legal certainty as undertakings concerned would not get fined provided that the agreement is considered within the scope of the exemption.

AVIATION



Abuse of Dominant Position

Pursuant to Article 6 of the Turkish Competition Act, undertakings are banned from abusing their dominant position in a market for goods or services within the whole or a part of the country.¹⁵

Likewise, Article 102 of the TFEU, Article 6 does not prohibit the dominant position itself but the abuse of such position. Certain instances which are likely to be considered as the abuse of dominant position are provided by Article 6 of the Competition Act. That said, these are not *numerus clausus*.

Another important case¹⁶ that the Competition Authority dealt with is based on allegations of Turkish Airlines' anticompetitive behaviours by abusing its dominant market position and applying predatory pricings. This case was brought before the Competition Authority by Pegasus Airlines which is a low-cost carrier based in Istanbul Sabiha Gokcen Airport, hereinafter referred to as "Pegasus", and the strongest rival of Turkish Airlines. Pegasus accused Turkish Airlines of below cost pricing in the markets in which it can be seen as dominant and claimed that these arrangements bear the characteristics of predatory pricing which would result in its rivals to be excluded from the relevant market. After an extensive on-site investigation, Competition Authority concluded that Turkish Airlines' behaviours arose from competition concerns rather than exclusionary conduct intentions. That said, as will be addressed under Section 3.2., Competition Authority pointed out the slot coordination problem in Turkish aviation market and decided to give advisory opinion to relevant institutions in this regard.

Merger Control

The fact that the merger of two companies has a potential of creating a dominant position in the market does not necessarily mean that it will automatically decrease the competition. The mergers themselves, thus, are not prohibited but rather those "which would result in significant lessening of competition in a market for goods or services within the whole or a part of the country" are forbidden by Article 7 of the Competition Act. A merger of small enterprises, for instance, may seem to limit the competition as it results in the decrease of competitors at firt sight. That said, mergers of small and medium sized undertakings against big business' would indeed increase the competition.¹⁷

The mergers and acquisitions which have to be notified to the Turkish Competition Authority in order to become legally valid are determined under the Communiqué on Mergers and Acquisitions Requiring the Approval of the Competition Board numbered 2010/4, hereinafter referred to as the "Merger Communiqué". In line with the systematic followed by the Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, the Merger Communiqué provides certain thresholds which undertakings having exceeding turnovers in a certain market need to notify the Turkish Competition Authority and further obtain its permission.¹⁸

AVIATION



• State Aid

Since state aids lie beyond the scope of the Turkish Competition Act but are rather regulated by the Law on the Monitoring and Supervision of State Aid numbered 6015, hereinafter referred to as the "Turkish State Aid Law", Turkish Competition Authority is not entitled to regulate or audit state aids. Although the Turkish State Aid Law is broadly in compliance with the *acquis*¹⁹, the secondary legislation which is required to implement the rules and procedures of the law itself has yet to be come into force. EU Commission Staff Working Document of 2016, hereinafter referred to as the "Progress Report", which remarks the progress of Turkey in 2016, requires Turkey to finalize the secondary legislation without any further delay ensuring the effective implementation of Turkish State Aid Law and to "prevent unduly granting State aid which distorts competition".

The implementation of the Turkish State Aid Law is left to the State Aid Monitoring and Supervision Board, hereinafter referred to as the "Board", which consists of seven Board Members.

Although Article 4 (11) of this Law states that the Board would be independent while taking decisions, the Board cannot be considered to be operationally and fully independent as rightly set forth by the Progress Report given the fact that these Board Members are all commissioned as ministers²⁰ in Republic of Turkey.

• Liberalization

Article 2 of the Turkish Competition Act does not exclude public undertakings from the scope of the law and its commentary²¹ rather states that the economy shall be seen as a whole, without making any discrimination between public and private institutions and thus state-owned undertakings are also obliged to comply with competition rules.

• Enforcement Institution

An independent authority named Competition Authority is established as required by Article 20 of the Turkish Competition Act.²² Competition Authority does not receive any commands and orders while performing its duties. It is responsible for the implementation of the Turkish Competition Act and mainly entitled to (i) examine merger notifications and either permit or prohibit them, (ii) issue secondary legislation enabling the implementation of the Turkish Competition Act, (iii) evaluate the exemption applications and either grant or refuse them and (iv) receive complaints and notifications and launch investigations thereupon.

Application of Competition Laws to Air Transport in Turkey

A Brief History of Turkish Aviation

One of the most devastating events in human history, World War II, occurred across the world and the great and global importance of international aviation was then emphasized.²³ As a result, from aviation point of view, The Convention on International Civil Aviation of 1944, hereinafter referred to as the "Chicago Convention", which was built on the complete and exclusive "State sovereignty principle"²⁴ came into force in 1944. The Chicago Convention is not only significant in political but also

AVIATION



in economic terms. Article 6 of the Chicago Convention requires an agreement between governments enabling them to fly over the air space of each others' and which provides a market access. Turkey signed the Chicago Convention on 20 December 1945²⁵ and from that moment forward she concluded several BASAs with other countries which eventually contributes to her having a great importance in international civil aviation.²⁶

On the other hand, in the internal market, although there had been many developments in Turkish aviation history, those which their contributions to the growing cannot be underestimated²⁷, the establisment of the Turkish national flag carrier, Turkish Airlines in 1933 as a state-owned company can be considered as the most remarkable one for the purposes of this paper as it leaded to the beginning of competitive environment in aviation area. The adoption of the Turkish Civil Aviation Act in 1983 paved the way for other private airline companies to enter into aviation market and ultimately the monopolist structure of the market started to change. This liberalization movement in aviation market urged Turkish Airlines to renew itself and it entered into a process of privatization. Currently, 50,88 % of its shares are belong to public.²⁸ Apart from Turkish Airlines, there are twelve private airlines operating under Turkish AOC and Pegasus Airlines, Sun Express Airlines, Atlasjet Airlines and Onur Air Airlines are the most known ones among these.²⁹That said, Turkish Airlines has been subject matter to most competition law related cases brought before the Competition Authority due to its close link with the government.

The Competition Authority published an assessment report in 2012 to determine the competition conditions and to address particularly the reasons hindering the development of competition in certain markets including the air transport sector. As will be discussed under following Sections, slot allocation system and certain BASAs between Turkey and third countries are seen as the main factors restricting competition in Turkish aviation industry.

Domestic Air Transport: Slot Allocation Problem

Due to the dramatic growth of the air transport industry especially since the new players entered into the market, "slot allocation" gains more importance as the airport infrastructure may, from time to time, remain insufficient to meet the demand of the airlines. Fair slot allocation, in this regard, is of significance in ensuring a level play field to the airlines.

When we look at the slot allocation arrangements in Turkey, we see that they are regulated by the Slot Allocation Instruction issued in compliance with the EU regulations³⁰ and IATA standards. Slot implementation in Turkey, however, is seen problematic due to the fact that it is not being executed by an independent body. Slot implementation had been carried out by Turkish Airlines until 2005 and left to the General Directorate of Turkish CAA between the years 2005 and 2010. This is rightly criticized by most practitioners and the Competition Authority as the CAA cannot be considered completely independent from Turkish Airlines particularly in terms of human resources and technical support³¹.

AVIATION



From that time forward the General Directorate of State Airports Operations is held responsible for the slot coordination. Since this is also a state economic enterprise that is linked to the Ministry of Transport and Infrastructure and taking Turkish Airlines' partly state-owned structure into account, I believe "fair slot allocation" system is still not reached.

As fairly stated by the Decision of the Competition Authority dated 10.04.2008 and numbered 08-28/322-106 in which, slot coordination shall be given to an independent authority which preferably consists in representatives of airport operators as in European countries.

Article 7 of the Slot Allocation Instruction states that the Slot Coordination Center shall act independently, impartially and transparently. As revealed by a Decision of the Competition Authority, the Slot Coordination Center mainly consists of personnel of Turkish Airlines.

• International Air Transport

Article 6 of the Chicago Convention obliges Contracting States to make economic regulations enabling the operation of commercial international air services between eachother as international air transport is prohibited except to the extent they are permitted by agreements. In practice, these agreements are generally concluded bilaterally, and their main purpose is to establish a market access for designated air carriers as typified by Bermuda I Agreement.³⁴ The protection of the competition in international air transport cannot be assured if the aviation authorities are inclined to designate a single carrier and exclude other airlines from the industry.

In the past, Turkish CAA had been critized for concluding BASAs which include competition restrictive provisions as they solely enabled Turkish Airlines to operate international routes.³⁵ That being said, this has changed lately and currently Turkey is party to 111 multiple designation.

• Remarks

Given Turkish Airlines' close relationship with governmental authorities in Turkey, I find it remarkably important to transfer slot coordination duties from the General Directorate of State Airports Operations to an autonomous body having adequate administrative and technical capacity and which is to be established completely independent from the government.

Although it is not possible to reach every single BASA that Turkey is party to, they shall be amended so as to include multiple designations rather than single designation in order to increase competition in international air transport.

AVIATION



Concluding Thoughts

In an overall assessment it can be concluded that, Turkish competition laws including both primary and secondary legislation are largely aligned with the *acquis* and effectively implemented by the Competition Authority which also perfoms as an advisory body. I think, the independent and autonomous structure of the Competition Authority deserves admiration as also verified by its decisions and advices pointing out some structural problems such as the suspicious close link between the Slot Coordination Center and Turkish Airlines.

There is no specific legislation regulating competition rules in air transport. That said, as remarked several times, slot allocation mechanism and certain BASAs enabling single designation to decimate the competition in air transportation market. In order to prevent these concerns, I believe, slot coordination duties shall be given to an autonomous body which consist of either entirely independent experts or representatives which are to be assigned from the operating airlines equally. Also, competition restrictive clauses under the BASAs shall be amended so as to include several airlines into international air transportation industry. This competitive environment would encourage every operating airline, including Turkish Airlines, to improve their service quality.

LIST OF ABBREVIATIONS

AOC Air Operator Certificate BASA Bilateral Air Service Agreement CAA Civil Aviation Authority CEO Chief Executive Officer ECSC European Coal and Steel Community EEC European Economic Community EU European Union IATA International Air Transport Association

BIBLIOGRAPHY

Articles

G. Gurkaynak & S. Dalkir & D. Durlu, Emerging Markets and U.S. Horizontal Merger Guidelines: A Turkish Competition Law Perspective (2014) W. Feldenkirchen, Competition Policy in Germany (1992) H. Goktepe, Havayolu Taşımacılığı Sektörü ve Rekabet Hukuku (2015)

Books

P. M. de Leon, Introduction to Air Law, 10th ed (2017) M. Budek, Turkish Commercial Aviation, 23 J. Air L. & Com. (1956)

AVIATION



Case Law

Decision of the Competition Authority dated 30.12.2011 and numbered 11-65/1692-599

Decision of the Competition Authority dated 10.04.2008 and numbered 08-28/322-106

Documents of International Organisations

Decision No. 1/95 of the EC - Turkey Association Council (1995) EU Comission Staff Working Document (2016)

National Laws

Sherman Antitrust Act (1890) Constitution of Republic of Turkey (1982) Act on the Protection of Competition (1994) Communiqué on Mergers and Acquisitions Requiring the Approval of the Competition Board (2010) Law on the Monitoring and Supervision of State Aid (2010)

Treaties

Treaty of Paris (1951) Treaty of Rome (1957) Agreement establishing an Association between the European Economic Community and Turkey (1963) Convention on International Civil Aviation (1944)

Internet

'Federal Trade Commission' https://www.ftc.gov/about-ftc/bureaus-offices/bureau -competition accessed 14.03.2018

'Ec.europa.eu' http://ec.europa.eu/competition/antitrust/overview_en.html accessed 14.03.2018

'Republic of Turkey Prime Ministry Undersecretariat of Treasury - About Economy Coordination Board' https://www.treasury.gov.tr/about-economy-coordinationboard accessed 14.03.2018

'Rekabet Kurumu - Grounds for the Articles' https://www.rekabet.gov.tr/en/Sayfa/ Legislation/act-no-4054/grounds-for-the-articles accessed 14.03.2018

'International Civil Aviation Organization' https://www.icao.int/publications/ Documents/chicago.pdf accessed 14.03.2018

'Shareholding Structure' http://investor.turkishairlines.com/en/turkishairlines/ shareholding-structure accessed 14.03.2018

Directorate General of Civil Aviation Authority' http://web.shgm.gov.tr/ documents/sivilhavacilik/files/havacilik_isletmeleri/Havayolu_isletmeleri.pdf accessed 14.03.2018

AVIATION



¹For the sake of clarity, legal arrangements regarding unfair competition fall into scope of the Turkish Competition Act and thus will not be addressed in this paper.

²https://www.ftc.gov/about-ftc/bureaus-offices/bureau-competition, accessed on 14.03.2018

³http://ec.europa.eu/competition/antitrust/overview_en.html, accessed on 14.03.2018

⁴G. Gurkaynak & S. Dalkir & D. Durlu, Emerging Markets and U.S. Horizontal Merger Guidelines: A Turkish Competition Law Perspective (2014)

⁵These are Clayton Antitrust Act and Federal Trade Comission Act.

⁶W. Feldenkirchen, Competition Policy in Germany (1992)

⁷The Rome Treaty has undergone several amendments and finally has consolidated under the name of the "Treaty on European Union and the Treaty on the Functioning of the European Union". For the purposes of this paper, I will not scrutinize each of the amendments but rather will refer to certain articles in so far as they are related to the competition law.

⁸Negotiations on competition law are being conducted under Chapter 8.

⁹ It is commonly referred to as "Ankara Agreement" in Turkey.

¹⁰See, Art. 16 of the Association Agreement

¹¹See, Art. 39 of the Customs Union Decision

¹²Not only the effect derived from the anti-competitive behaviour is controlled, but the aim of such behaviour is also kept under control. Even if an agreement, for instance, is not put into practice and thus is not yet able to limit the competition, it shall be prohibited should it aims to restrict the competition. The emphasis to both effect and object do also stem from Article 101 of the TFEU.

¹³Atlasjet Havacılık A.Ş. started operating between Saudi and Turkey since 2011.

¹⁴Article 4 (2) (b) of the Competition Act explicitly prohibits the partitioning of the markets for goods and services, and sharing or controlling all kinds of market resources or elements.

¹⁵See also, Article 102 of the TFEU

¹⁶Decision of the Competition Authority dated 30.12.2011 and numbered 11-65/1692-599

¹⁷H. Goktepe, Havayolu Taşımacılığı Sektörü ve Rekabet Hukuku (2015)

¹⁸See, Art. 7 of the Merger Communiqué

¹⁹Article 1 of the Turkish State Aid Law defines its aim as to regulate state aids in compliance with the agreements between Turkey and the EU.

²⁰https://www.treasury.gov.tr/about-economy-coordination-board, accessed on 14.03.2018

²¹https://www.rekabet.gov.tr/en/Sayfa/Legislation/act-no-4054/grounds-for-the-articles, accessed on 14.03.2018

²²Pursuant to Article 21 of the Turkish Competition Act, the Competition Authority consists of (i) the Competition Board, (ii) the Presidency, and (iii) the Service Units.

²³P. M. de Leon, Introduction to Air Law 9, 10th ed (2017)

²⁴See, Art. 1 of the Chicago Convention

²⁵https://www.icao.int/publications/Documents/chicago.pdf, accessed on 14.03.2018

²⁶M. Budek, Turkish Commercial Aviation, 23 J. Air L. & Com. 379 (1956)

²⁷For instance, the establishment of the Turkish Aeroplane Society in 1925 and the establishment of first civil aviation company Hürkuş Havayolları in 1954.

²⁸http://investor.turkishairlines.com/en/turkishairlines/shareholding-structure, accessed on 14.03.2018

²⁹http://web.shgm.gov.tr/documents/sivilhavacilik/files/havacilik_isletmeleri/Havayolu_isletmeleri.pdf, accessed on 14.03.2018

³⁰Regulation (EC) No 793/2004 of the European Parliament and of the Council of 21 April 2004 amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports

³¹Given the fact that the former director general of the CAA has been assigned as CEO of Turkish Airlines in 2016, this statement cannot be underestimated.

AVIATION



³²For instance, in Italy slot allocation is being executed by a non-profit organization named "Assoclearence". In France, likewise, COHOR, which is again an independent association which is composed of airlines and airport operators, is responsible for slot coordination.

³³Decision of the Competition Authority dated 30.12.2011 and numbered 11-65/1692-599

³⁴P. M. de Leon, Introduction to Air Law 52, 10th ed (2017)

³⁵http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2014) 66&docLanguage=En, accessed on 14.03.2018



MISCELLANOUS MATERIAL OF INTEREST



Book Review International Regulation of Non-Military Drones Anna Masutti and Filippo Tomasello Edward Elgar Publishing Cheltenham, UK - Northamton, MA-USA

by Salvatore Sciacchitano*

International Regulation of Non-Military Drones offers the reader an exhaustive legal and technical analysis of the current use of non-military drones and it carefully explores the existing regulatory framework as well as the different legal solutions for the regulation of Unmanned Aircraft Systems (UASs).

The authors meticulously describe the societal concerns resulting from the increased use of UASs and identify the possible causes from which they stem. The variety of topics covered in the book, the attention given to the social acceptance and the UASs' several applications for civilian purposes, allow the reader to fully understand both the revolutionary role played by UASs in the airspace and the technical and legal matters linked to their use.

The authors' consolidated experience in the field of international and European air law and aviation safety regulation is the value added to the book, which addresses topics such as technical aviation regulation and public law, security, liability, privacy and data protection.

Starting from the fact that UASs are considered, in using authors' words, a *"disruptive innovation in aviation"*, the book firstly encompasses an analysis of the issues concerning the social acceptance of these innovations and then it focuses on the scope of international standardisation.

The book presents both a fresh thinking and approach on the possible legal solutions that may be adopted in order to provide the UASs with a common liability regime and/or an effective common framework. It summarises the changes in the regulatory approach in the field of civil aviation, in the domain of safety, security, liability, insurance, privacy and data protection as consequence of the increasing use of UASs' applications for civilian purposes.

In this respect, attention is given to the liability issues, which are analysed in light of both recent interventions of the European institutions aiming at harmonising the regulatory framework for the integration of civil drones into the European common airspace and international organisations guidelines. The authors sift through the potential risks associated to the use of drones and they provide the reader with possi-

*ECAC Executive Secretary.

37

MISCELLANOUS MATERIAL OF INTEREST

-ble insurance solutions for mitigating these risks. Alongside the insurance solutions, the book highlights the limits of the available insurance products to address the full extent of the risks involved. On this topic the book also deals with product liability insurance with particular regard to the liability of aviation autonomous technology's manufacturers and it takes into account the definition of 'defective product' which is considered on the basis of national, European and international case-law.

It is authors' willingness to explain the emerging regulatory framework, which will support huge business opportunities for the European enterprises and operators. From the technical and operational perspective, this framework is based on three "categories of operations": the least risky one ("open" or "A") subject to minimum administrative procedures ("buy and fly"); the medium-risk one regulated through the specific operation risk assessment (SORA) and the high-risk one "certified" on the basis of emerging ICAO standards.

This is definitely a timely book focusing on the new aviation players which, like each emerging phenomenon, create technical and regulatory challenges to be faced. The ICAO Remote Pilot Licence was in fact adopted by the ICAO Council in March 2018, while common EU rules for UAS operations are expected to be promulgated in 2019.

The authors provide an analysis of the private and public dimensions of the safety and security provisions for UASs also in light of the existing and possible future contributions given by the case-law of the European and national Courts. The book draws upon a variety of aspects linked to the use of UASs ranging from the insurance field and the operations domain to the privacy and data protection issues.

The in-depth analysis, characterised by a logical progression of all the critical aspects of the civil use of UASs, makes the book a source of knowledge for a wide range of people such as academics, stakeholders, jurists and policy makers.

MISCELLANOUS MATERIAL OF INTEREST



Book Review

Air Transport Security Issues, Challenges and National Policies Joseph S. Szyliowics and Luca Zamparini Edward Elgar Publishing Cheltenham, UK - Northampton, MA, USA by Alfredo Roma*

The book collects the opinions of distinguished scholars on the global system of aviation security, examining what has been implemented in many countries and what has influenced the organisation of security measures, especially after 9/11. The book also aims at identifying the context within which security issues are defined, the overall policy and the resources allocated.

The introduction - written by Joseph Szlyliowics and Luca Zamparini - stresses how the globalisation has created an enormous movement of people across the whole world where air transport has played a key role, raising huge problems of security at national and international level. Originally air transport was a typical governmental activity. Then, from the eighties of the past century the privatisation and liberalisation processes have allowed private entities to take over many activities relating to the air transport. However, the regulatory and surveillance activity still remains in the hands of the public administration, national and international.

The international dimension of air transport is witnessed by the 1944 Chicago Convention, which established the International Civil Aviation Organisation (ICAO), the United Nations body that issues recommendations for its 191 member countries. Standards established by ICAO did not consider air transport security until terrorists targeted aviation in 1960. Thereafter, in 1963 the Tokyo Convention, and the 1971 Montreal Convention for the Suppression of Unlawful Acts against Safety of Civil Aviation, were adopted. In 1974 an addition was made to Annex 17 of the Chicago Convention which became the primary policy instrument stating the ICAO efforts to enhance global aviation security. At the same time regional organisations like the EU adopted proper measures to integrate the ICAO principles. The book examines in details the measures adopted by the major countries.

*Former President od the Italian Civil Aviation Authority (ENAC) and of the European Civil Aviation Conference (ECAC)

12 NOR

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MISCELLANOUS MATERIAL OF INTEREST

In the second chapter Luca Zamparini makes a deep analysis of costs/benefits of investments in air transport security. The conclusion is that beyond a certain level of security, costs would be huge. Therefore, it is possible to minimize aviation risks but not to eliminate them. Attention should be paid to the security screening in order to avoid delays in the movement of passengers.

Regarding the regulatory framework of aviation security, Francesco Rossi Dal Pozzo, after a description of the major terrorist attacks to aviation, puts his attention on what has been issued after 9/11. The ICAO Declaration and Resolution, the EU Regulation 300/2008 and the ICAO Recommended Practice 3:48 for the collection of personal data (PNR).

The role of the private sector for air transport security is examined by Jeffrey Price who stresses the point of the security screening, especially after 9/11, in accordance with ICAO Annex 17. Another important step was the creation of the American TSA in 2002 and the adoption of other preventing measures like the flight Marshall. In the meantime, other biometric systems were created for the identification of passengers or personnel working in the airside of the airports. Finally, also detecting systems for baggage have become more sophisticated. Most of the screening procedures in the airport are now performed by private entities. Needless to say that such controls dramatically slow down the boarding and landing procedures.

Douglas Brittin analyses the security measures in the air cargo sector where sophisticated metal detectors have been produced although attacks to air cargo have been quite rare.

The second part of the book is dedicated the air security systems of some countries.

There is no doubt that the Unites States is the leading country for the aviation security measures, also because it has been the main target for terrorist attacks. In Chapter 7, Joseph Szyliowicz offers a full description of what has been implemented in the US where in 2015 700 million people travelled by air only domestically. Through the Department of Homeland Security and the TSA, consistent funds were invested to improve the screening procedures on passengers and baggage. The new Risk Based Security considered every passenger as an equally dangerous threat. An Air Marshall Service was set up and an effective method of information collection was put in place, including the General Aviation. The US continue to develop biological, chemical and information system to enhance the security of air transport.

Kamaal Zaidi presents the Canadian aviation security based on a matrix of several federal agencies, airport authorities, air carriers, police intelligence services. The key roles are played by the Canadian Air Transport Security Authority and the Airport Authorities. In addition, Canada has a vast set of rules, the heart of which are the Aeronautical Act and the Canadian Air Transport Security Act.

Dawna Rhoades and Michael J. Williams clearly show the political and economic turmoil that have affected Brazil preventing its aviation development that forecasted its new terminal to become the largest hub in Latin America and bigger than London Heathrow in 2042. Even the opportunities of the Olympic Games and the World Cup have not been able to increase both domestic and international air transport and consequently to improve the security measures.

1280

MISCELLANOUS MATERIAL OF INTEREST

Hillel Avihai focuses on air transport security in Israel, which suffered from many terrorist attacks, and because of that has developed very sophisticated security measures later implemented by other countries, like armed personnel on board. At the basis of the aviation security in Israel there is a philosophy which includes, inter alia, the principle that the aircraft represents the state of Israel and therefore has to be regarded as a national symbol. Moreover, in some cases "life comes before the quality of life".

Evaristus Irandu examines the situation of air transport security in Kenya where the ICAO minimum security measures are applied. However, the state-of-the-art technology is rarely applied for cost implications. Actually, providing adequate security for passengers, planes and infrastructures is a much more daunting task for the African countries than for other regions. "Given the real threat to aviation security worldwide, all ICAO MS should start using armed pilots.....", Kenya says. But this is contrary to the ICAO policy, which defends the civil status of air transport.

Chapter 12 offers a deep analysis of the Malaysian aviation status. After a detailed description of the Malaysian aviation history and industry, including accidents (two of which have recently been on the first page of the major world newspapers), air security provisions and procedures are fully described appearing in compliance with the international security standards. Vitally important has been the Malaysian contribution to the plane tracking systems, especially after the disappearance of flight MH370 and the shot down of flight MH17.

The situation of transport security in Japan is reported in chapter 13 by Toki Udagava Hirakava. Japan suffered from some hijackings: the 1970 "Yodo-go" Hijacking, the 1973 Dubai hijacking and the Dhaka hijacking. However, only after 9/11 Japan reacted against terrorist attacks with some concrete measures taking example from the US. But, while the US focused any emergency authority in one agency, the Department of Homeland Security, Japan maintained the traditional hierarchical structure, which compromises the decision process.

The last chapter of the book, written by Tim Prensler, offers a wide description of the Australian aviation security. Australia, perhaps because of her distance from the Europe and the US, for a long time had not suffered from terrorist attacks. The measures taken for aviation security have been mainly driven by surprise events without following a logic route. Such measures have been influenced by some events like the Schapelle Corby affair or the Allan Kessing affair and only after 9/11 the Australian Government commissioned a security analysis that was conducted by Sir John Wheeler. However, it seems that one of the main reasons why Australia has not been hit by terrorist attacks is the efficiency of its intelligence based counter terrorist system.

The book offers a complete analysis of development since 1960 of security measures for aviation, including the organization of some major countries, stressing that the future of aviation security must consider that air transport continues to grow and is expected to double in the coming decade from 3.1 billion to 6.5 billion passengers. Technology will supply more and more sophisticated equipment. However, considering the different situations of some countries presented by the book, it seems necessary that ICAO issues recommendations to adopt a common regulatory framework and reduce the number of entities involved in the aviation security.

FORTHCOMING EVENT



11TH EUROPEAN SPACE POLICY CONFERENCE organised by Business Bridge Europe

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https://www.copernicus.eu/en/events/events/11th-european-space-policyconference

42



FORTHCOMING EVENT



Space Sustainability Forum 2019 Understanding the risks and promoting business in Space

February 11 - 12, 2019 Habtoor Palace Al Habtoor City Dubai, UAE





FORTHCOMING EVENT



Drones and Aerodromes: Threats and Opportunities

Monday 4th March 2019 - London

Sponsored by



8.30 Registration

- 9.00 <u>Opening Remarks</u> Panagiotis Panagopoulos, CEO & Founder, Aeropodium
- **9.10** <u>Newcomers in aviation</u>: The arrival of drones Speaker to be confirmed
- 9.40 <u>Panel Discussion</u> Drones: A disruptive innovation for aviation? Speakers to be confirmed

10.30 Networking Coffee Break

11.00 Panel Discussion

The aircraft operators' concerns - Speakers to be confirmed

12.00 Panel Discussion

The airports' perspective - Speakers to be confirmed

13.00 Networking Lunch Break

14.20 Social benefits and concerns in the use of drones



FORTHCOMING EVENT



14.50 <u>Insuring drone risk</u> Speaker to be confirmed

15.20 Networking Coffee Break

15.50 <u>Liability issues</u> Prof. Anna Masutti, Senior Partner, LS Lexjus Sinacta

16.20 <u>Panel Discussion</u> Safety and security regulations Speakers to be confirmed

17.00 Concluding Remarks

http://www.aeropodium.com/drones.html



FORTHCOMING EVENT



IATA Legal Symposium 2019 6-8 March Rome, Italy Rome Cavalieri, A Waldorf Astoria Resort

The IATA Legal Symposium is the world's premier annual aviation law event, with a reputation for insight, relevance and value among in-house counsel, private practitioners and government lawyers alike. The event is well known for its engaging subject matter, outstanding speakers, lively debate and, of course, some of the best networking opportunities you'll find anywhere in the industry. In 2019, this flagship IATA conference will draw upon leading experts, from every corner of the world, to examine the key challenges of our legal and regulatory environment with a particular focus looking into the future.

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