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English Court Approves Deferred Prosecution Agreement Between Serious Fraud Office and Airbus

*Catriona Nicol and Joseph Dyke**

Abstract

By a decision handed down on 31 January 2020 in Director of the Serious Fraud Office v Airbus SE, Dame Victoria Sharp (as President of the Queen's Bench Division of the English High Court) ("the Judge") gave judgment approving a Deferred Prosecution Agreement ("DPA") entered into between the Serious Fraud Office and Airbus SE, the seventh such DPA that the Serious Fraud Office has entered into.

Background

In August 2016, the Serious Fraud Office announced an investigation into Airbus SE, a company registered in the Netherlands and domiciled in France and the Netherlands. That investigation was part of an international investigation involving the French and US authorities that concerned potential bribery and corruption offences in a large number of jurisdictions. The particular investigation of the Serious Fraud Office concerned bribery offences in Malaysia, Sri Lanka, Taiwan, Indonesia and Ghana.

According to the judgment (at paragraph 5): "The SFO's investigation demonstrated that in order to increase sales, persons who performed services for and on behalf of Airbus offered, promised or gave financial advantages to others intending to obtain or retain business, or an advantage in the conduct of business, or Airbus SE".

Summarising the counts on the indictment against Airbus, the Judge stated (at paragraph 38) that: "In brief, persons associated with Airbus, not exclusively its employees, offered very substantial sums of money by way of bribes to third parties in order to secure the purchase of aircraft, by civil airline companies, in counts 1 to 4; and by the Government of Ghana, in count 5".

Once a DPA has been reached, the Serious Fraud Office must apply to the court in private for a declaration that the entering into of the DPA (on its particular terms) is in the circumstances likely to be in the interests of justice and that the proposed terms are fair, reasonable and proportionate.

*Associates at McNair Chambers.

Decision

The Judge concluded that the DPA was in the interests of justice, and that its terms were fair, reasonable and proportionate.

Interests of Justice

First, the Judge began by assessing the "seriousness" of the underlying conduct, outlining (at paragraph 63) the relevant factors at play: "the nature of the offending, including the harm caused, the duration of the conduct, the circumstances giving rise to it, the sophistication of the methods used, whether or not a cover-up was attempted, the seniority of the people involved, the payments wrongly made, whether public officials were involved and whether the offending was multi-jurisdictional are all relevant factors in the assessment of seriousness".

The Judge determined (at paragraph 64) that:

"The seriousness of the criminality in this case hardly needs to be spelled out. As is acknowledged on all sides, it was grave. The conduct took place over many years. It is no exaggeration to describe the investigation it gave rise to as worldwide, extending into every continent in which Airbus operates. The number of countries subject to intense criminal investigation by the various agencies, and the scale and scope of the wrongdoing disclosed … demonstrate that bribery was, to the extent indicated, endemic in two core business areas within Airbus".

Nevertheless, the Judge viewed the resolution of the matter by means of a DPA (rather than a criminal prosecution) as in the interest of justice, notwithstanding the seriousness of the underlying conduct.

In doing so, the Judge relied upon the fact that Airbus had (eventually) self-reported and had given "exemplary" cooperation to the prosecuting authorities. The Judge also drew attention to various measures implemented by Airbus starting from late 2014 to improve its compliance weaknesses, including management changes and the commissioning of an independent compliance review panel. In addition, the Judge was mindful of the effects a criminal prosecution would have "on Airbus and the collateral effects on thousands of innocent third parties, corporate and individual".

Overall, therefore, the Judge was satisfied that the resolution of the matter through a DPA, rather than a criminal prosecution, was in the interests of justice, notwithstanding the seriousness of the impugned underlying conduct.

Terms: Fair, Reasonable and Proportionate

The Judge summarised the terms (at paragraph 88) as follows: "The DPA will come to an end three years from the date of the declaration which I have made today. Airbus will pay a total financial sanction of €983,974,311 to the SFO for onward transmission to the Consolidated Fund, within 30 days of this declaration.

Airbus will continue to make improvements to its ethics and compliance policies and procedures. There will be ongoing co-operation and self-reporting by Airbus and Airbus will pay the reasonable costs of the SFO's investigation in relation to the alleged offences and the DPA (€6,989,401)".

The DPA's financial sanction included a provision for the disgorgement of €585,939,740, which represented the gross profit of conduct covered by the five counts on the indictment and one which "fairly reflects the gross profit made by the wrongdoing reflected by those counts" – the figure was arrived at through a process whereby Airbus instructed external specialist financial consultants to analyse gross profit, whose work was then reviewed by further external specialist financial consultants instructed by the Serious Fraud Office.

After having assessed culpability, the Judge applied a multiplier – leading to a harm penalty of €715,750,545 in respect of counts 1-4 and €80,318,596 in respect of count 5.

However, the Judge applied a level of discount "so as to reflect the fine that would likely be imposed upon a conviction after a guilty plea" and also to "take account of Airbus' exemplary cooperation and remediation".

The DPA also brought an end to the Serious Fraud Office's investigation into Airbus and its controlled subsidiaries.

Overall, the Judge concluded that:

"The DPA requires Airbus to pay a significant financial penalty, thereby sending an important deterrent message to corporate wrongdoers. It also recognises and rewards what Airbus has now done to address the problem by discounting that financial penalty by 50 percent. The DPA has, in addition, given Airbus the opportunity to demonstrate its corporate rehabilitation and commitment to effective compliance over the period of the DPA, without facing the potential consequences of a criminal conviction. This ensures a major UK employer continues to operate according to high ethical and compliance standards. By entering into the DPA, the SFO avoids the significant expenditure in time and money inherent in any prosecution of Airbus, and it can use its limited resources in other important work. The DPA is likely to provide an incentive for the exposure and self-reporting of organisations in similar situations to Airbus. As the SFO submits, this is of vital importance in the context of complex corporate crime".

Concluding Remarks

As the Serious Fraud Office reported on its website in relation to this judgment, the instant matter marks the seventh DPA entered into between the Serious Fraud Office and companies since their introduction in 2013. Across those seven DPAs, the total value is approximately £1.53 billion.

AVIATION

A link to our mailing on a previous DPA entered into between the Serious Fraud Office and Rolls-Royce can be found here.

The judgment serves as a stark reminder of the benefits available, in terms of the treatment likely to be received from the Serious Fraud Office and from the Court, through self-reporting (as early as possible) and through full co-operation with the investigative process.

EC 261/2004 in the Context of the Covid-19 Coronavirus Pandemic

Sofia Michaelides Mateou and Andreas Mateou***

Abstract

The Coronavirus Covid-19 has impacted every sector of the economy and is having a tremendous impact on the aviation industry resulting in the demand for travel to fall for the first time since the 2009 global financial crisis.
In addition to the financial difficulties airlines are faced with in the prevailing aviation environment and the increasing costs they battle with in order to survive, they now have to deal with the domino effect of the Coronavirus Covid-19 pandemic. Airlines initially cancelled flights in and out of affected countries and denied boarding to certain nationals or infected persons. The widespread escalation of infectious cases and the rapid transmission of the virus across borders resulted in the outbreak being classified as a pandemic and a ban on international flights. Flight cancellations and grounding of fleets have had a crippling effect on airlines and the aviation industry as a whole and on millions of passengers having to deal with their flights being re-routed or cancelled.

Together with the decline in global traffic and lost revenue on airline profitability, airlines will also need to consider the impact of passengers seeking compensation. This paper considers EC 261 and the EU Commission guidelines on passenger rights in the context of the global Covid-19 pandemic and the cancellation of flights.

Introduction

The aviation industry and its vast network of connectivity with its 45,000 routes is a vital part of and a great contributor to global socio-economic growth. Carrying over 4.1 billion passengers a year, supporting 65.5 million jobs world-wide and USD$2.7 trillion (direct, indirect, induced and catalytic) in global economic activity, it creates employment, supports tourism, channels international trade, foreign investment and economic development[1].

The growth of the aviation industry is also dependent on a number of external factors and crises, which are beyond the control of the aviation industry stakeholders such as the 2008-2009 world financial crises, the 2001 September 11th attack and other terrorist threats, the severe acute respiratory syndrome (SARS) outbreak in 2003, the H1N1 Swine Flu in 2009, the Eyjafjallajokull volcano eruption in Iceland in 2010 and the current outbreak of the Covid-19 coronavirus.

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Coronavirus Covid-19

The outbreak in November 2019 of a respiratory illness caused by the Covid-19 Coronavirus in Wuhan, Hubei Province in China has evolved into a pandemic with an unprecedented impact on the aviation industry. Containment efforts initially limited travel to and from Hubei and then focused on airports with direct services to China. As a result of the speed with which the infection spread, additional restrictions were put in place and Japan, Malaysia and Thailand restricted flights to China and South Korea. Cases of infections were reported in the Middle East, Europe, America and Africa and in an effort to prevent further transmission and contain the spread of the Covid-19 virus, international and domestic flights were banned. On 11 March 2020, the World Health Organisation (WHO) declared Covid-19 a pandemic. Infections have been reported on every continent except Antarctica and in at least 185 countries. On 21 April, there were 2.486,964 people infected with the virus and 170,507 deaths have been reported and the numbers are increasing on a daily basis.

During the media briefing declaring the Covid-19 outbreak as a pandemic, the Director-General of WHO, Dr. Tedos Adhanom, remarked that "this is not just a public health crisis, it is a crisis that will touch every sector"[2] and evidently the impact on the aviation industry is unprecedented. On 5 March 2020, IATA predicted that the financial impact of the Covid-19 pandemic on the aviation industry would be a loss of $113 billion in 2020. However, at the end of March, in light of the increased travel restrictions and based on a scenario where the restrictions are imposed for a maximum of three months, IATA predicted a loss of $252 billion in revenue or a 44% decrease from the revenue in 2019 and suggested that airlines will need $200 billion in liquidity just to survive the 'airline industry's gravest crisis'[3].

In addition to the plight of many airlines who have been struggling to survive in the increasingly competitive aviation market and economic pressures, airlines have had to take drastic measures as a result of borders closing and severe travel restrictions such as grounding their fleets, compelling pilots to take early retirement, laying off employees or placing them on unpaid leave, reducing salaries and downsizing operations in an effort to cut costs. Millions of passengers have also been affected by the restrictive travel bans and the widespread cancellation of flights and therefore airlines will also need to consider their exposure to passenger claims under EU Regulation R261/2004.

EC 261/2004 and EU Interpretive Guidelines

EC Regulation 261/2004[4] provides a legal framework for providing passengers with compensation and assistance in the event of denied boarding, flight cancellations or delays of 3 hours or more. The Regulation provides that under certain conditions, passengers have the right to compensation of a fixed amount of between 250 and 600 Euros, depending on the distance of the flight[5], reimbursement or re-routing. EC 261 applies to flights within the EU which are operated by an EU or a non-EU airline; flights arriving in the EU from outside the EU which are operated by an EU airline; and flights departing from the EU to a non-EU country operated by an EU or a non-EU airline.

The Regulation, which has been in force since February 2005, initially only obliged airlines to compensate passengers for cancelled or delayed flights but in 2009 in the Sturgeon case the European Court of Justice extended the rules to also apply to a flight delay of 3 hours or more.

The Court also stated that the carriers obligations to compensate passengers can be limited or excluded if the carrier can prove that the event causing the delay, cancellation or denied boarding was caused by 'extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken'.

There is no fixed category of what would amount to an extraordinary circumstance which would discharge the carrier's obligations under EC 261 and it is up to the courts to determine, on a case by case basis, whether the reason for a flight delay or cancellation would be added to the circumstances which have already been judged to be extraordinary, such as, inter alia, hidden manufacturing defects, weather conditions, lightning strikes, security risks, political instability and air traffic management.
On 18 March, the European Commission published Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19[6]. The guidelines, which are not binding, aim to clarify the rights of passengers travelling by all means of transport and the obligations for the carriers.

Extraordinary Circumstances

Passengers have the right to compensation in certain cases unless the carrier is exempted because the event resulting in the delay, cancellation or denied boarding was as a result of an extraordinary circumstance which could not have been avoided even if all reasonable measures had been taken. The guidelines state that EC 261 does not recognise a separate category of 'particularly extraordinary' events, beyond the 'extraordinary circumstances' referred to in Article 5(3) of the Regulation.

The EU Commission guidelines clearly state that where public authorities take measures intended to contain the Covid-19 pandemic, such measures are by their nature and origin not inherent in the normal exercise of the activity of carriers and are outside their actual control. It also provides a list, albeit not a complete and exhaustive list, of the airline cancelling a flight in the context of the Civid-19 pandemic which could be considered to be extraordinary circumstances, namely:

- an outright prohibition by public authorities of flights or the traffic of persons
- on the grounds of protecting the health of the crew when there are no passengers
- on the aircraft in order for appropriate organizational measures to be taken with respect to the right to compensation (depending on the circumstances and to be determined on case-by-case basis.

The Eyjafjallajökull volcano

In 2010, subsequent to the eruption of the Eyjafjallajökull volcano in Iceland, many flights were cancelled when part of the European airspace was closed between 15 and 22 April. In the case of Denise McDonagh v Ryanair[7] the plaintiff, a passenger on the Faro to Dublin flight which was cancelled after the volcano erupted, was only able to return to Dublin on 24 April 2010. As the airline did not provide her with any care during her extra stay in Iceland, she sued the airline for compensation for the cost of the meals, refreshments, accommodation and transport she had incurred, which amounted to 1 129.41 Euros. The Dublin Metropolitan District Court in Ireland referred the matter to the Court of Justice of the European Union (CJEU) to consider whether, inter alia, the closure of part of European airspace following the eruption of the volcano in Iceland constituted an extraordinary circumstance exempting the

airline from its obligation to compensate the passenger with the specified fixed sum in accordance with EC 261, and if so, whether the carrier was still obliged to provide assistance to passengers when a flight was cancelled due to extraordinary circumstances (para 26).

Referring to previous court rulings that an extraordinary circumstance is an event which is not inherent in the normal exercise of the carrier's activity, is beyond the actual control of the carrier on account of its nature or origin, and re-iterating that such circumstances go beyond the control of the air carrier, whatever the nature of those circumstances or their gravity (para 29), the court found that the closure of part of European airspace after the volcanic eruption was an 'extraordinary circumstance'.

The Court clarified that, when there are extraordinary circumstances the carrier is released from its obligation to pay compensation, but stressed that the carrier still has the obligation to provide care to the passenger, irrespective of what event gave rise to the cancellation of the flight. The court also stated that if the circumstances such as the ones in the present case went beyond the scope of 'extraordinary circumstances' due to their origin and scale, such an interpretation would go against the objectives of EU 261 and that such an interpretation would mean that air carriers would be required to provide care to passengers who endured limited inconvenience as a result of a flight cancellation and that passengers, such as the plaintiff, who was forced to remain at an airport for several days would be denied that care.

The court also held that where the airline does not meet its obligations to provide the assistance and care, passengers can claim reimbursement of the amounts, which in the circumstances of each case, are proved to be necessary, appropriate and reasonable to make up for the shortcomings of the airline, which will be assessed by the national courts (para 66).

Denied Boarding

In accordance with EU 261 an airline denies boarding when it refuses to carry a passenger unless there are reasonable grounds to do so such as health, safety or security reasons or where the passenger does not have the necessary travel documents (Article 2j). A passenger who has been denied boarding as a result of displaying any of the symptoms of the Covid-19 virus would probably not be able to claim compensation.

Delay

A flight which has been delayed for 3 hours or more, for example to take the temperature of the passengers, or disinfect the aircraft or because another passenger presenting symptoms of the Covid-19 virus had been denied boarding, would probably be considered to be delayed as a result of extraordinary circumstances and the passengers who have been delayed would not have the right to compensation.

Cancellation

EU 261 stipulates that passengers have the right of reimbursement or re-routing, when their flight has been cancelled by the airline, irrespective of the reason of the cancellation[8]. Article 5 obliges the operating air carrier to offer the passengers the choice among: a) reimbursement b) re-routing at the earliest opportunity, or c) re-routing at a later date at the passenger's convenience.

A passenger can therefore choose between reimbursement or re-routing at the earliest opportunity or re-routing at a later date at the passenger's convenience. If only one reservation has been made for the outward and return journey, the passenger will have the option of being reimbursed for both flights or re-routed on the outward flight. Where passengers choose reimbursement, they must be given the choice between accepting a voucher or being reimbursed with the cost of the ticket. The EU Commission guidelines clarify that, with regards to the Covid-19 pandemic, the earliest opportunity could imply considerable delay and be subject to considerable uncertainty. As it may not be possible to re-route passengers to the intended destination within a short period of time or to even know when re-routing will become possible, the guidelines suggest it might be preferable for passengers to opt for reimbursement of the ticket price or to be rerouted at a later stage, at their own convenience. It should be noted that airlines have the obligation to inform passengers about delays and/or uncertainties when choosing re-routing instead of reimbursement.

If a flight has been cancelled and the passenger has not been informed in sufficient time, the passenger can be compensated by means of reimbursement or re-routing at the earliest opportunity or at a later date. If the passenger does not wish to travel, the passenger may get reimbursed, depending on whether the type of ticket bought provides for this, as the carrier will not have an obligation to compensate the passenger under EU 261. It is very likely that Member States will have additional measures in place in light of the Covid-19 virus to address this issue for passengers who do not wish to or cannot travel as a result of the pandemic[9].

Compensation of fixed sum

Airlines are obligated to provide passengers with reimbursement or re-routing, along with care and assistance in accordance with EU 261. If the airline cancels the flight with less than 14 days notice, the airline will be obligated to provide compensation to the passenger of up to a maximum of 600 EUR, depending in the distance of the flight. This obligation to provide compensation in the form of a fixed sum would not apply to cancellations made more than 14 days in advance or where the cancellation is caused by 'extraordinary circumstances' that could not have been avoided even if all reasonable measures had been taken.

Taking the view that cancelling a flight as a result of the Covid-19 pandemic could constitute extraordinary circumstances, the right to get compensation in the event of a flight being cancelled later than 14 days from the departure date, may be lost.

Right to care

Article 9 of EU 261 gives passengers a right to care in the form of meals and refreshments, hotel accommodation in cases, transport between the airport and place of accommodation, two telephone calls, telex or fax messages, or e-mails. The EU Commission highlights that the obligation of care continues even when a flight has been cancelled because of extraordinary circumstances. A passenger whose flight is cancelled as a result of the Covid-19 pandemic would be entitled to this right of care, irrespective of whether the circumstances surrounding the pandemic would be deemed to be extraordinary. It should be noted however, that when an airline cancels a flight, the airline is only obliged to provide this care to passengers who choose to be re-routed at the earliest convenience and not in cases where passengers choose reimbursement or re-routing at a later date at their own convenience.

The courts in the litigation subsequent to the volcanic eruption in Iceland discussed above held that there was no temporal or monetary limit to the carriers obligation to provide care and assistance where cancellation was caused by extraordinary circumstances[10]. In the context of the Covid-19 outbreak, the circumstances may last for a lengthy time and this may prove to be very costly for airlines.

Despite the advice by the EU Commissioner for Transport that cancellation of flights as a result of the Covid-19 pandemic should be assessed on a case by case basis, in light of the global escalation of the outbreak of the Covid-19 to a pandemic and the international grounding of flights, it seems unlikely that flight cancellations will not be deemed to be as a result of extraordinary circumstances.

Whether or not passengers will test this point in a court of law and how the courts will interpret and apply the provisions of EU261 in the context of the Covid-19 pandemic remains to be seen. In the event that this does occur, it is very doubtful that the courts will determine that cancelling a flight due to the pandemic would not be considered to be as a result of extraordinary circumstance. A ruling that such circumstances are not extraordinary would be irrational and unreasonable and would open the floodgates to a tremendous amount of litigation and undoubtedly result in a tremendous cost to the airlines which many will not be able to endure.

In the event that an airline would need to demonstrate that it took all reasonable measures to avoid the cancellation and thus be exempt from compensating the passenger, they would need to demonstrate that there was a clear link between the extraordinary circumstances and the cancellation of the flight and that the cancellation could not have been avoided even if all reasonable measures were taken. This burden of proof can easily be discharged in in the case where the airline has been banned from operating into a specific country as result of the pandemic. In the event that an airline can re-route the passenger it should do so, and in addition, the airline would need to demonstrate that the particular alternative route chosen to get the passengers to their desired destination was the best one.

On the other hand if an airline chooses to cancel a flight due to a poor load factor to a specific destination which, as a result of health concerns related to the pandemic, has lost its appeal, it would be more difficult for the airline to argue that the cancellation was as a result of extraordinary circumstances or that it took all reasonable measures to avoid the cancellation. A court considering a passengers claim for compensation under these circumstances would need to consider the airlines measure on a case by case basis. An airline not able to discharge this burden of proof, would be liable to pay compensation if the passengers were given less than two weeks' notice of the flight cancellation and they were not able to be rebooked with similar arrival and departure times. Irrespective of whether or not the airline will be liable to pay the passenger compensation for the flight cancellation, the airline still has the obligation to provide the passengers with reimbursement or re-routing as well as accommodation, food, transport, and two phone calls etc[11].

Reimbursement

When a flight has been cancelled as a result of Covid-19 passengers have the right in accordance with EU261 to be reimbursed within seven days for the full purchase price of the ticket for the part(s) of the journey not made, and for the part(s) already travelled if the passenger cannot continue to the final destination together with, when relevant, a return flight to the first point of departure at the earliest opportunity (Article 8.1(a)).

The compensation can be by means of cash, electronic bank transfer, bank order, or cheque or, with the signed agreement by the passenger, a travel voucher and/or other service (Article 7.3).

In light of the unpredictability and uncertainty of when normal operations will resume, passengers will no doubt prefer to receive reimbursement in the form of cash. As a result of the magnitude of the pandemic and the travel restrictions, bans and cancellation of flights, immediately reimbursing passengers with cash will undoubtedly put an additional financial strain on the airlines, drain cash reserves and may result in pushing already struggling airlines over the brink into bankruptcy. Airlines will thus prefer to provide vouchers and other services instead of cash with some airlines providing flexible vouchers for travelling up to 6 months or a year in lieu of refunds. Many airlines have waived cancellation fees and fees for changing travel dates. This will expeditiously settle refund requests but will also be instrumental in assisting in the recovery of the aviation industry. Not enforcing an immediate refund will assist the airlines and According to IATA, $35 billion are owed to passengers for flight cancellations[12]. IATA supports delaying the requirement for immediate refunds and the implementation of a flexible voucher system to be used for future travel or refunded at a later time as this will provide airlines with a 'lifeline' to survive and re-start their operation after the crisis has passed.

Passengers need to agree in writing to being reimbursed with a voucher or other services but as airlines will understandably prefer this method and may try to impose this method and compel passengers to accept this form of compensation, it remains to be seen whether a passenger who refuses a voucher and then sues the airline for compensation will be successful if the matter went to the court. Nevertheless, it should be noted that passengers may exercise their contractual rights and try an alternative course of action and sue based on the type of ticket purchased and the principles of contract law applicable to the jurisdiction governing the airline with which the passenger contracted with.

Conclusion

The Covid-19 pandemic has impacted everyone and the world is battling to limit the spread of the virus by banning flights, imposing curfews and lockdowns whilst simultaneously trying to cope with the tremendously high cost to human life and the crippling effects on the economy. The devasting consequences to the aviation industry are dire. Travel demand has decreased by 70% globally and by 90% in Europe. The aviation industry, with 2.7 million people directly employed by airlines and 65.5 million jobs supported by the industry is facing unprecedented difficulties[13].

There is no doubt that, in the words of Alexandre de Juniac, IATA's Director General and CEO, the Covid-19 pandemic is the biggest crisis that the industry has ever faced. However, during this time of uncertainty, we need to trust in the resilience of the aviation industry, work together and remember that, as history has shown, aviation recovers from crisis. The question is not if the aviation world will recover, but when it will recover.

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[1]ICAO Working Paper, A40-WP/1891 EX/76 2/8/19, 2 August 2019. Available at https://www.iata.org/contentassets/e45e5219cc8c4277a0e80562590793da/aviation-contribution-un2030-sustainable-development.pdf

[2] WHO Director-General's opening remarks at the media briefing on COVID-19', 11 March 2020. Available at https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020

[3]IATA, Media Briefing on COVID-19, 31 March 2020. Available at https://www.iata.org/en/pressroom/speeches/2020-03-31-01/ and Press Release No 18 of 24 March 2020. Available at https://www.iata.org/en/pressroom/pr/2020-03-24-01/

[4]Air Passenger Rights Regulation (EC) 261/2004 of the European Parliament and of the Council. Repealed Regulation (EEC) No 295/91, JO L46/1 of 17-2-2004 and became effective from February 2005.

[5]see Article 7 –The amount of 250 euros for flights of 1.500 km or less, 400 euros (for all intra-Community flights of more than 1500 kilometres and for all other flights between 1500 and 3500 kilometres), and 600 euros for non-EU flights of more than 3,500 km.

[6] European Commission, 'Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19,' Brussels, 18.3.2020 C(2020) 1830 -19, 18 March 2020. Available at https://ec.europa.eu/transport/sites/transport/files/legislation/c20201830.pdf

[7]Judgment of the Court (Third Chamber) (request for a preliminary ruling from the Dublin Metropolitan District Court - Ireland) - Denise McDonagh v Ryanair Ltd (Case C-12/11), 31 January 2013. Available at http://www.bailii.org/eu/cases/EUECJ/2013/C1211.html

[8]EU 261 Article 5 (Cancellation) referring to Article 8 (Right to reimbursement or re-routing).

[9]CMS Law, COVID-19: The European Commission clarifies passenger rights', 6 April 2020. Available at https://www.cms-lawnow.com/ealerts/2020/04/covid19-the-european-commission-clarifies-passenger-rights?cc_lang=fr

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[11]Jordan, J et al, 'Coronavirus Covid-19: Managing Eu261 Exposures,' HFW, 5 March 2020. Available at https://www.hfw.com/Coronavirus-COVID-19-managing-EU261-exposures-Mar-20

[11]IATA, 'Passenger Ticket Refunds During COVID-19 Crisis', 3 April 2020. Available at https://www.iata.org/en/pressroom/ceoblog/passenger-tickets-refunds/

[13]ibid.

European Common Rules on Drones Become Applicable

*Filippo Tomasello**

Abstract

Following the extension of the competencies of EASA to civil drones of any mass through Regulation 2018/1139, the European Commission has promulgated in 2019 a Delegated Regulation 945 and an Implementing Regulation 947. However, none of these EC acts was immediately applicable. In fact applicability is planned to happen in the steps, from 202o to 2020. The article illustrates which rules will change at which step

1. EU Classes of civil drones

Based on Article 58 of the new EASA Basic Regulation (NBR)[1], the European Commission (EC) on 12 March 2019 adopted the Delegated Regulation 2019/945[2] for putting small UAS on the European internal market. Key features of this Regulation are:

- Small Unmanned Aircraft (UA) are those whose Maximum Take-Off Mass (MTOM), comprising payload (e.g. camera) and batteries is no more than 25 Kg;
- Technical specifications for these aircraft will not be published by EASA, but will be (Art. 12) "harmonised standards" or parts thereof, the references of which have been published in the Official Journal of the European Union;

ISO Level	MTOM (Kg)	EU UA Class
I	0 < mass ≤ 0.250	**C0**
II	0.250 < mass ≤ 0.900	**C1**
III	0.900 < mass ≤ 4	**C2**
IV	4 < mass ≤ 25	**C3 and C4**
V	25 < mass ≤ 150	Not applicable
VI	150 < mass	Not applicable

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The views expressed are purely those of the author and thus may not in any circumstances be regarded as an official position of either EuroUSC or University Giustino Fortunato.

- DG-ENTR has given a mandate to ASD-STAN to develop such technical specifications for five "Classes" of drones intended for the civil market (see Table 1);
- ASD-STAN is an "Associated Body" of CEN, which is in turn one of the three European Standardisation Organisations (ESO), officially recognized as competent in the area of voluntary technical standardisation by the EU Legislator[3];
- Delegated Regulation is not only based on EASA NBR, but also on the Regulation on the internal market[4].

TABLE 1: UA mass classification in ISO 21895 and EU UA "Classes"

In summary, this Delegated Act allows to regulate not only manufacturers of small drones established in the EU, but also manufactures established anywhere in the world (e.g. China) if wishing to sell their products in the EU internal market. And in fact, the need to address Chinese manufacturers was one the main reasons for departing from the aviation tradition (i.e. Type Certificate – TC, issued by EASA) for small UAS. Other reasons are that a TC would be disproportionate for a small UAS of few kg flying within Visual Line Of Sight (VLOS) from the remote pilot and that it would be unnecessary to overload Authorities for verifying conformity of these small aircraft. Indeed, to verify conformity, the main tool is a declaration signed by the manufacturer and based on one of the processes ("modules") established by the EU Council[5].

Figure 1: CE Mark

This declaration, which gives the privilege of affixing the "CE" mark on the product and on the packaging, may be backed by a certificate issued not by an aviation authority, but by an independent, competent and accredited third party. DG-ENTR has already accredited thousands of such "notified bodies"[6], although none yet for this specific activity, pending the availability of the "harmonised standards".

2. Eu Categories of UA operations

Furthermore, based on Article 57 of EASA NBR, the EC has also adopted, on 24 May 2019 Implementing Act 2019/947[7] on "operations" of UA. In this act, three "categories" of UA operations are mentioned, not to be confused with the "classes" of the drones in Regulation 2019/945. The categories of operation in fact, are based on the safety risk perceived by the society, which is of course not assessed using mathematical formulas, but through political judgment at the level of the EU Institutions. In this perspective there are three risk categories:

- Low risk ("open" category) in which no prior approval by the competent aviation authority is required before flying the UA, since the safety risk perceived by the society is negligible (e.g. a drone of few hundred grams flown in VLOS over urban areas, with shrouds around the propellers, but also a drone of 25 kg flown by a farmer, still in VLOS, over her/his field in rural areas); this category is also labelled by some experts as "buy and fly"; the five "classes" of drones mentioned above are eligible to fly in this category, which is further subdivided in sub-categories;

- Medium risk, alias "specific" category, like a drone of 10 kg over urban areas or flying Beyond VLOS, in which case an assessment of the safety risk and demonstration of implementation of the identified mitigations is always necessary; the five "classes" of drones are not intended to fly in this category, although the risk assessment may demonstrate that in some cases this could be feasible;
- High risk, alias "certified" category, like air-taxis for Urban Air Mobility (UAM), which consist in rotorcraft carrying on-board few paying passengers, in which case all the traditional aviation approvals would be required (namely licence for the remote pilot; certificate of airworthiness for the aircraft and certificate for the organisation of the operator, being the latter usually a commercial company).

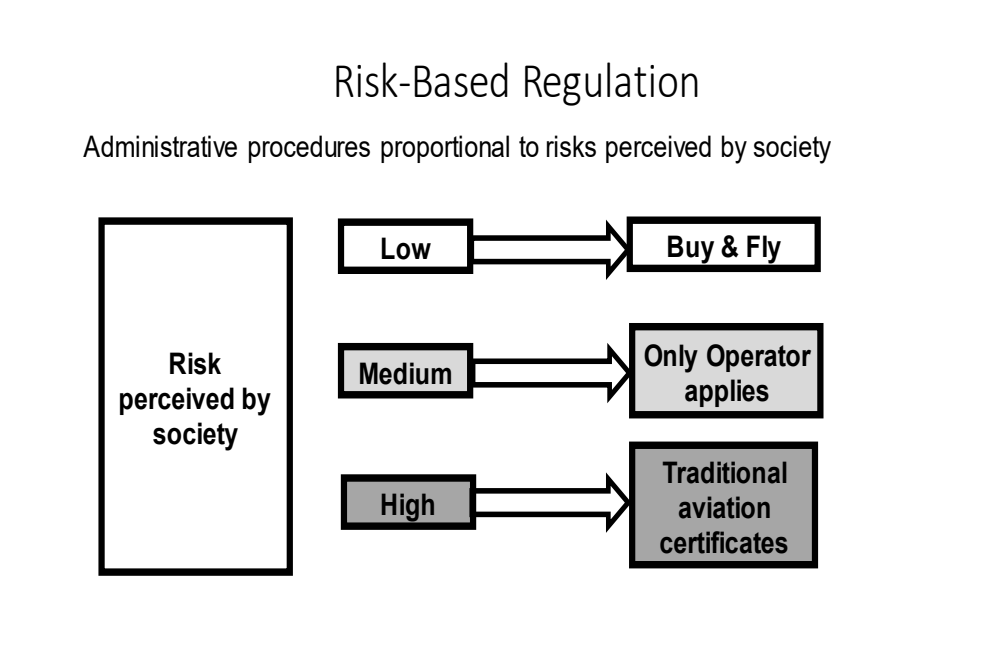

Figure 2: Safety risk and categories of UA operations

The purpose of these notes is not however to present in detail the EC acts 2019/945 and 947, but instead to discuss, in the following paragraphs, the transition from the present situation, largely based on national rules in each of the individual EU Member States, towards the full applicability of these two Regulations.

3. What will happen on 1st of July 2020?

In fact, both Regulations 2019/945 and 947 have been published in the Official Journal of the EU on the 11th June of 2019, so entering into force on the 1st of July of that year.
As soon as the "harmonised standard", in the form of EN adopted by CEN would be published in the Official Journal of the EU, which is expected around end of 2020, Regulation 2019/945 could be voluntarily applied by UAS manufacturers all over the

world allowing them, and their importers and distributors, to affix the CE mark and sell their drones on the EU internal market. No specific transition provisions are in fact contained in this Regulation.
Conversely, Implementing Act 2019/947 contains four Articles (i.e. from 20 to 23) on the transition period which will cover a time span from 1st July 2020 until 1st of July 2022, which means one, two or three years after entry into force.

In summary on 1st July 2020:

- Registration (Art. 14 2019/947) will become mandatory for all UA in the certified category and for all operators carrying out operations in the open and specific category with the exception of drones below 250 kg not equipped with cameras or similar sensors, and with the exception of "toy"[8] aircraft even if equipped with cameras; it should be clarified that registration is not relevant for safety, but the EU institutions have considered it essential for security and privacy concerns;
- Operations in the "open" category will be possible, even with drones not carrying the CE Mark and not accompanied by a Declaration of Conformity with the "harmonised standards" based on Regulation 2019/945, but limited to drones of less than 500 g (instead of 900) in the subcategory A1/C1 and to drones of less than 2 kg (instead than 4) in subcategory A2, or up to 25 kg in subcategory A3;
- Operations in the certified category will still be subject to case-by-case assessment, including air-taxis, until specific common rules would be available (the EASA NPA on the subject is expected early in 2021;
- Conversely operations in the specific category will be subject to the common rules in Regulation 2019/945, which basically mean carrying out a risk assessment based on Article 11 therein.

4. Specific category from 1st July 2020 onwards

In the specific category there will be three possibilities:

- Simple submission of a declaration signed by the Accountable Manager of the operator company, where a "standard scenario" allowing this possibility exists; presently there are no standard scenarios adopted at EU level, although this is in progress[9]; the declaration does not exempt the operator to provide attached evidence, when the required level of safety assurance is medium or high;
- In case of medium assurance level the evidence could be e.g. a Manual used by the operator;
- In case of high assurance, the evidence must be an attestation issued by a competent, independent and accredited third party, which could be a "notified body" listed by DG-ENTR or a "qualified entity" accredited by an aviation authority based on Art. 69 NBR;
- Where no standard scenario exists, the operator shall apply to the national aviation authority (never EASA for operators established in the EU) to obtain a prior authorisation before the flight(s); the application shall be accompanied by a risk assessment (and evidence of implemented mitigations, like in b) and c) above); for this risk assessment EASA in the published Acceptable Means of Compliance (AMC) recommend to use the SORA methodology developed by JARUS; web-based tools exist on the market to facilitate its implementation[10];

- Finally, the operator company may apply for a "Light UAS Operator Certificate" (LUC) on a voluntary basis, which would give the operator the privilege of authorising inside its organisation the specific operations; this of course required an independent safety management function inside the company and in any case it exempts from "showing" the risk assessment to the Authority before the operation, but it does not exempt form carrying out such an assessment and keeping record of it, including evidence of the implemented mitigations as in b) and c) above.

In conclusion on 1st July 2020 registration and operations in the specific category will be no longer regulated at national level in the EU, but based on the common rules in Regulation 2019/947.

5. What will happen on 1st of July 2021?

After 1st of July 2020, common EU standard scenarios will be adopted by the EC and published, based on EASA Opinion 05/2019.

Furthermore, on 1st July 2021:

- Certificates, licences or attestations issued to remote pilots based on national rules, shall be converted into attestations compliant with Regulation 2019/947, which means only theoretical knowledge in the open category and in specific category, also the practical skill required by the risk assessment (and the associated evidence determined by the required level of assurance);
- Equally any declaration or authorisation to UAS operators shall be converted into an authorisation complaint with Regulation 2019/947; and
- States shall not only define specific volumes where drone operations are allowed, prohibited or allowed under certain conditions based on Art. 15 of Regulation 2019/947, but States shall also distribute this information through digital means (e.g. app on the mobile telephone) or designate one or more U-Space Service Providers to disseminate the information to operators.

6. What will happen on 1st of July 2022?

The last step of the transition will occur on 1st July 2022, when:

- Operations in the open category will be entirely based on Regulation 2019/947 and its Annex, which means drones in classes C0 and C1 (i.e. up to 900 g) eligible for operations in subcategory A1 (over people), drones in class C2 (i.e. 4 kg) eligible for operations in subcategory A2 (close to people), while operations in A3 (classes C3 and C4 up to 25 kg an far from people) will continue as already on 1st July 2020;
- All drones sold on the internal EU market and intended for operations in the open category shall be accompanied by the CE Mark and by the Declaration of Conformity with the harmonised standards based on Regulation 2019/945;
- However, drones sold to consumers before 1st of July 2022 may continue to be used in the subcategories A1/C0 (i.e. less than 250 g) or A3 (up to 25 kg but far from people), but not A2;
- Finally, model clubs or associations, whose members would be exempted from the risk assessment, shall obtain a collective authorisation based on Art. 16 of Regulation 2019/947.

A summary of these transition provisions is depicted in Figure 3.

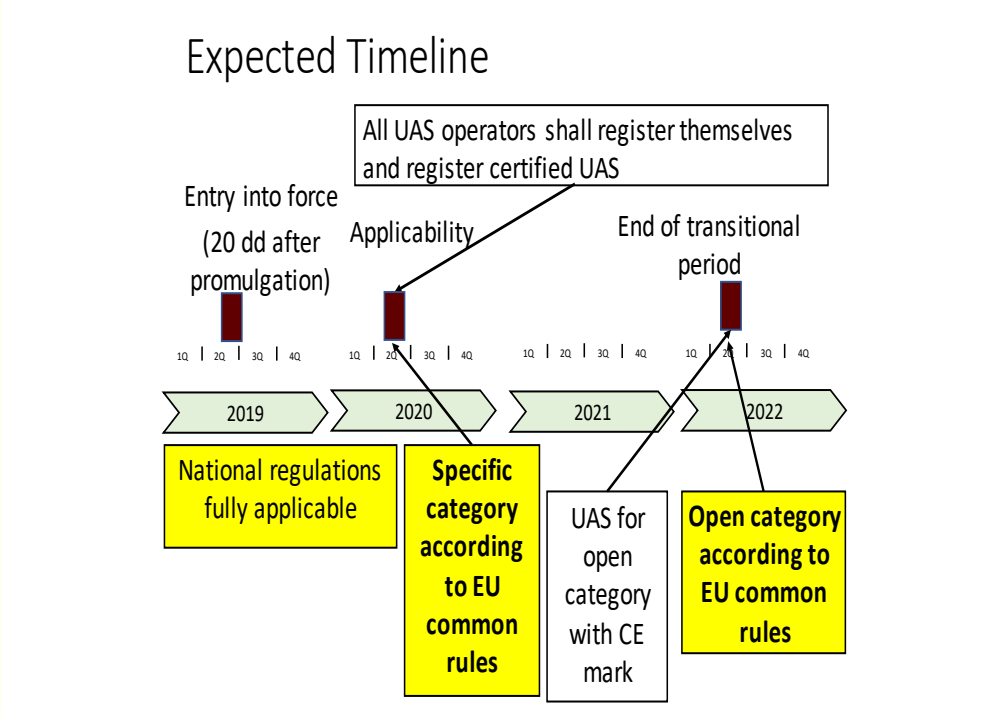

Figure 3: Transition from 1st July 2020 to 1st July 2022

7. What may happen next?

While the transition towards the full application of Regulations 2019/945 and 947 is in progress, of course EC, EASA and Standard Development Organisations (SDO) supported by stakeholders are working of further developments.

In more detail the EC is processing EASA Opinion 05/2019, which, on 6th November 2019 proposed the first two common standard scenarios for inclusion in Appendix 1 to Regulation 2019/947 (currently reserved, alias empty). Readers may not that in case of standard scenario, the operator will not be required to conduct a risk assessment based on SORA. But this does not mean that there is no risk assessment. In fact, in the specific category of UAS operations the risk assessment is always required. But in the case of a standard scenario developed by EASA, the risk assessment is in fact carried out by that Agency (and indeed published in the Explanatory Note of the Opinion). The burden on the operator is so reduced. However, the operator shall still provide evidence that the required mitigations have been implemented, as certified by a notified body or qualified entity when the required level of assurance is high.

Furthermore, although Regulations 2019/945 (Art. 40) and 2019/947 (Art. 6) establish thresholds above which the operations enter into the certified category, common rules for the latter are not yet available. EASA, supported by an Expert Group of stakeholders is working on them and a first NPA may be published early in 2021.

Current thinking in this expert group is that in the certified category there would be different "types" of operation:

- Operations type #1: operations under Instrument Flight Rules (IFR) for the carriage of cargo (no passengers) in airspace classes A-C (typical classes of en -route airspace on long range international connections) and taking-off and landing at aerodromes under EASA's scope (i.e. essentially international aerodromes in scope of Volume I of Annex 14 to the Chicago Convention), for which EU common rules would be complaint with ICAO Standards and Recommended Practices (SARPs), including e.g. amendment 175 to Annex 1 to the Chicago Convention for the Remote Pilot Licence (RPL) applicable on 3rd November 2022;
- Operations type #2: Operations of UAS taking off and/or landing in congested (e.g. urban) environment using pre-defined routes in volume of airspaces where U-space services are provided (part of the flight could be in non-congested (e.g. rural) environment). These include operations of UA carrying passengers (e.g. Vertical Take-Off and Landing (VTOL) air taxis) or cargo (e.g. UAS providing goods delivery services). Take-off and land could be at any aerodrome or any designated landing port, vertiport or landing site. These operations would not be necessarily compliant with ICAO SARPs since essentially domestic, at heights below the minimum height standardised in Annex 2 to the Chicago Convention (i.e. 500 ft above ground level) and carrying passenger which is beyond current ICAO scope; and
- Operations type #3: same as Operation type #2 with manned VTOL aircraft (i.e. pilot on-board), including operations in airspace where U-space services are not available.

In fact, these emerging VTOL operations and related aircraft are very similar, whether the pilot is on-board or not. The envisaged future EU common rules for Urban Air Mobility (UAM) would hence offer a consistent framework within which VTOL operators may initially offer commercial air transport with one single pilot on-board (not excluding a second crew member on the ground), later transitioning to the remote pilot on the ground, then to multiple VTOL under responsibility of a single pilot) one more reason not to apply the ICAO SARPs) and finally to completely autonomous flight, without the need of any pilot. The operator will still need to plan the operation, coordinate with Air Traffic Management/U-Space before take-off and in case of need implement the emergency response plan. Therefore, even in the absence of the pilot a "UAM Dispatcher" may nevertheless be required.

Acronyms	
AMC	Acceptable Means of Compliance
ASD-STAN	Aero-Space and Defence - Standard Association
CEN	Comité Européen de Normalisation
DG-ENTR	Directorate-General Enterprise and Industry
EASA	European Aviation Safety Agency
EC	European Commission
EN	European Norm
ESO	European Standardisation Organisations
EU	European Union
IFR	Instrument Flight Rules
ISO	International Standard Association
JARUS	Joint Authorities for Rulemaking on Unmanned Systems
LUC	Light UAS operator Certificate
MTOM	Maximum Take-Off Mass
NBR	New Basic Regulation (establishing EASA)
NPA	Notice of Proposed Amendment
RPL	Remote Pilot Licence
SARPs	Standards and Recommended Practices
SORA	Specific Operation Risk Assessment
TC	Type Certificate
UA	Unmanned Aircraft (i.e. only the 'machine' which flies in the air)
UAM	Urban Air Mobility
UAS	Unmanned Aircraft Systems (i.e. comprising not only the Unmanned Aircraft, but also other components, among which the unit from which the remote pilot commands the flight)
VLOS	Visual Line Of Sight
VTOL	Vertical Take-Off and Landing

[1]Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91.

[2]Commission Delegated Regulation (EU) 2019/945 of 12 March 2019 on unmanned aircraft systems and on third-country operators of unmanned aircraft systems.

[3]Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council.

[4]Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93.

[5]Decision No 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC.

[6]https://ec.europa.eu/growth/tools-databases/nando/

[7]Commission Implementing Regulation (EU) 2019/947 of 24 May 2019 on the rules and procedures for the operation of unmanned aircraft.

[8]Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys.

[9]EASA Opinion 05/2019 - Standard scenarios for UAS operations in the ‘specific’ category.

[10]https://www.online-sora.com/

The Delicate Balance – Safety versus Justice Interest: The latest developments in Switzerland

*Marc Baumgartner**

Abstract

Following two verdicts by the Swiss Federal Supreme Court on air traffic control incidents this article describes the occurrences, which led to court cases ending in one condemnation of an Air Traffic Controller and an acquittal. A third case, currently ongoing, will be the subject of a potential a possible future article with a more specific assessment of the arguments used by the Judges of the Federal Supreme Court.
This article will outline the two different air traffic control incidents and will relate them to the two valid judgements. The chronology of judgements will be given, using the description of the incidents as well as the graphics and images used by the Swiss Accident Investigation Board.[1]

First Case

Summary from the Final Report No 2211 of the Swiss Accident Investigation Board (SAIB)[2]

Published on 9.10.2014

On 12 April 2013, the two commercial aircraft with the flight numbers TAP 706 and RYR 3595 were cruising in Swiss airspace under the control of the Zurich Area Control Centre (ACC).

At 16:00:53 UTC, while at FL 370, the crew of TAP 706, with the radio callsign "Air Portugal seven zero six", an A319 on a scheduled flight from Lisbon (LPPT) to Prague (LKPR), reported to the Zurich ACC Upper Sector M4 air traffic controller (ATCO).

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The crew of RYR 3595, with the radio callsign "Ryanair three five niner five", (a B737 on a scheduled flight from Pisa (LIRP) to Lübeck (EDHL) also reported to the ATCO just a short time later at 16:01:11 UTC, while at FL 360.

At 16:10:43 UTC the crew of RYR 3595 requested clearance to climb to FL 380 due to expected turbulence; though without mention of their radio callsign. The ATCO replied as follows: "Six Delta Whiskey, climb three eight zero". This was the radio callsign for flight RYR 6DW, an aircraft belonging to the same aviation operator reporting to the sector shortly before. The crew of flight RYR 3595 responded to the clearance for flight RYR 6DW as follows: "Flight level three eight zero, Ryanair three five niner five" and initiated a climb. Neither the ATCO nor the crew of RYR 6DW did respond to this readback of RYR 3595.

At 16:11:37 UTC the ground-based short-term conflict alert for Sector M4 reported an impending conflict between TAP 706 and RYR 3595. After the crew of RYR 3595 answered in the negative to the ATCO's immediate query as to whether they were at FL 360, he instructed them to descend immediately.

The traffic alert and collision avoidance system on both aircraft generated resolution advisories (RAs) shortly afterwards; these were immediately followed by both crews.

At 16:11:49 UTC, the closest point of approach between the two aircraft was reached:0.8 NM horizontally and 650 ft vertically.

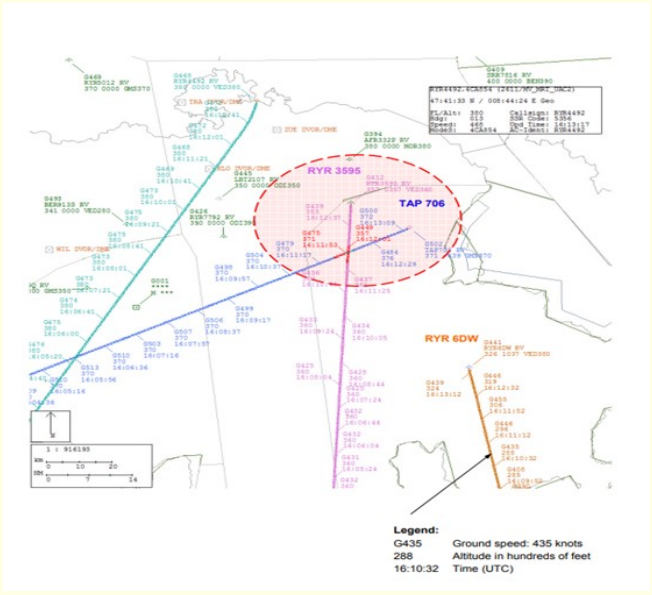


Figure 1 Annex of SAIB Report

Causes

The serious incident is attributable to the fact that the crew of a commercial aircraft initiated a climb without clearance, which lead to a dangerous convergence with another commercial aircraft.

The following factors were identified as the cause of the serious incident:

- *The crew initiated the climb on the basis of a clearance which had been issued to another commercial flight belonging to the same aircraft operator.*
- *The air traffic controller did not realise that the clearance issued was not read back by the crew for which it had been intended.*

The following was identified as a contributing factor to the serious incident:

- *A request by a flight crew for clearance to a higher flight level without specification of their radio callsign;*
- *The issue of altitude clearance by air traffic control without verification of the crew which had made the request;*
- *Absent reaction of another crew to whom the clearance was addressed to; Insufficient attention was given to the prevailing weather conditions when the decision to combine sectors was made.*

The Swiss AIB recalls its role on page 2 of the report:

In accordance with Art 3.1 of the 10th edition, applicable from 18 November 2010, of Annex 13 to the Convention on International Civil Aviation of 7 December 1944 and Article 24 of the Federal Air Navigation Act, the sole purpose of the investigation of an aircraft accident or serious incident is to prevent accidents or serious incidents. This statement in the final report is mandatory per Article 16.1 of EU Regulation 996/2010[3] which is applicable also in Switzerland, since the Confederation has elected to be part of the EU aviation system. The legal assessment of accident/incident causes and circumstances is expressly no concern of the safety investigation. It is therefore not the purpose of this investigation to determine blame or clarify questions of liability.

If this report is used for purposes other than accident/incident prevention, due consideration shall be given to this circumstance.

Criminal Proceedings

The report (Bleienheuft/Wysk 2019)[4] was approved and published by the SAIB on 9.10.2014. On 8.12.2014 the Federal Prosecutor[5] opened an investigation procedure initially against unknown person. This was – after initially focusing on the pilot - extended to the air traffic controller concerned on 22 December 2016.

In 2017, the Office of the Attorney General of Switzerland issued an order of summary punishment under article 237 of the Swiss Penal code against the pilot of RYR3595 and against the air traffic controller. The Federal Criminal Court upheld the air traffic controller's conviction on his appeal in its ruling of 30.5.2018. The air traffic controller, however, appealed to the Federal Supreme Court, which dismissed his appeal in its ruling of 27.6.2019.

The Judgement[6]

The ATCO petitioned the Federal Supreme Court that he should be acquitted of the allegation of negligent disruption of public transport (CH Penal Code art. 237 al. 1 and 2). He claimed that the judgment of the Federal Penal Tribunal should be lifted. He argued as follows:

First point:

- *The complainant submits that the lower court did not establish the actual risk of collision. They erroneously relied on the analysis of the SAIB, instead of following his request for evidence and clarifying the actual risk of collision by means of an expert opinion. Further in the complainant's view, the following should also have been clarified in an expert opinion when an evasive action is triggered by the Traffic Collision Avoidance System (TCAS/ACAS).*
- *The complainant further submits that lower court used the EU Regulation 996/2010 Art 2 (definition) al. 16*[7] *which lists an evasive action as a serious i ncident, this thus however not automatically mean a concrete endangering according to the swiss law.*

Note: the lower court has without the knowledge of the complainant requested the SAIB to answer a catalogue of questions (annex 1). The SAIB answered these questions without the complainant being aware of it until after the verdict was provided by the lower court.

The Federal Supreme Court rejected this complaint (Please note that only excerpts selected by the authors are reproduced here – translated with DeepL and adapted by the author. Editorial choices were made. The numbering of the paragraph is taken from judgement):

1.5.1 In connection with the request for evidence submitted by the complainant, the complainant relied on the European Organisation for the Safety of Air Navigation (EUROCONTROL) analysis carried out at his request. While the SAIB classified the incident as an ICAO Category A ("Risk of collision. The risk classification of an aircraft proximity in which serious risk of collision has existed."), EUROCONTROL had concluded that the incident was an ICAO category B ("Safety not assured.

The risk classification of an aircraft proximity in which the safety of the aircraft may have been compromised."). In order to clarify this question, the previous instance (sic. Federal Criminal Court named hereafter and only for the article FCC) had been required to obtain an expert opinion. Furthermore, the complainant submits that the FCC erred in its application for supplementary evidence on the question of the circumstances under which the traffic warning and collision avoidance system had been triggered.

1.5.2 The mere fact that EUROCONTROL categorised the incident differently is not sufficient to challenge the SAIB decision. Rather, the analysis by EUROCONTROL needs also to show that the assessment of the SAIB was inadequate or inconclusive. The complainant does obviously not propose this added amendment. In this respect, the FCC relied solely on the findings of the SAIB and was not obliged to provide an expert opinion, as requested by the complainant. In addition, based on the SAIB report the FCC set forth under the circumstances by which the traffic and collision avoidance system was triggered. (Judgment under appeal E. 2.3.2).

Second Point

The complainant alleges a violation of Article 237(2) of the Criminal Code, i.e. concrete endangerment of life and limb, were not proven.

The Federal Supreme Court rejected this complaint (Please note that only excerpts selected by the authors are reproduced here – translated with DeepL and adapted by the author. Editorial choices were made. The numbering of the paragraph is taken from judgement).

2.4. The complainant submits that, despite the fact that the safety distance was not observed, there was no specific risk to the passengers and crews of the two commercial aircraft, and therefore a concrete endangerment in the sense of Article 237 of the Criminal Code must be denied. This is based first of all on the fact that the two aircraft did not change course as a result of the avoidance order and thus (even without altitude correction) the horizontal distance would not have been closer than 1.5 km. In his observations, the complainant submits that without height correction it would not have automatically come to a collision. However, nonetheless an examination of whether a sufficiently concrete risk (i.e. obvious and serious risk, see E. 1.2 above) existed needs to be carried out. One cannot solely rely on the heading to determine the risk of collision as it does not allow for unforeseeable influencing factors to be taken into account in the airspace. For this vertical and horizontal minimum distances have to be provided and observed.

2.5. Finally, the complainant criticizes the considerations of the first instance's opinion that the triggering of the evasive order by TCAS indicates the danger. The risk of collision was not avoided due to the technical warning system because no risk of collision existed, regardless of the triggering of the evasive command.

On the contrary, when assessing the actual risk, one should consider that all planes today are equipped with this system, one of the purposes of which is indeed to mitigate the effect of honest mistakes by pilots or ATCOs. The complainant submits that the assessment of concrete endangering, should be based solely on the assessment of the facts and not only on the basis of the text in a regulation. Moreover, the evasive action does not change anything, as the planes had not come closer than 1.5 km to each other and, due to the direction of their headings, would not have come closer.

The FCC consideration of the evasive manoeuvre is not objectionable. As stated above it is the massive underrun of the safety distance which triggers the avoidance command, regardless of the course direction. Furthermore, the definition of "serious incident" in Art. 2 No. 16 of the EU Regulation 996/2010 essentially is standardization, based on experience. If the FCC uses the intended categorization of incidents which triggers an evasive manoeuvre (as in the present case) while taking into account the specific circumstances as an indication of the risk, this cannot be criticized. The previous instance rightly assumed that a concrete danger existed in the sense of Article 237 of the Criminal Code.

Third Point

The complainant denies having infringed his duty of care within the meaning of Article 12(3) of the Criminal Code.

The Federal Supreme Court rejected this complaint (Please note that only excerpts selected by the authors are reproduced here – translated with DeepL and adapted by the author. Editorial choices were made. The numbering of the paragraph is taken from judgement).

3.3 The FCC considers that the complainant violated the rules of the air traffic control procedure and thus his duty of care by requesting the crew of the yyy to state their call sign and to ensure that the notified crew of zzz had correctly understood his clearance. The complainant had that specific responsibility for control, which is why he had to reckon with the mistakes made by others.
Finally, the FCC states that the occurrence could have been avoided if the complainant had requested the call sign from the requesting crew of yyy. Thus he could also have prevented a further breach of duty by requesting the readback of zzz. The risk of a collision and the associated endangering of human life was avoidable.

3.4. As reference points for the criminal-law assessment of the conduct in question, the standards and recommendations of ICAO must be consulted. Article 3(1) of the Ordinance on Air Navigation Services of 18 December 1995 (VFSD; SR 748.132.1) declares the implementation of air navigation services, including the standards and recommendations of ICAO in the relevant Annexes to the Convention on International Civil Aviation of 6 February 1944 (SR 0.748.0) to be directly applicable. Annex10 to the Convention, Volume II, lays out the communication procedures, including those with characteristics of air traffic control procedures (i.e. not mandatory standards).

In accordance with point 5.2.1.9.2 (Exchange of Communications) of Annex 10 to the Convention, the following shall apply:
"Acknowledgement of receipt. The receiving operator shall make certain that the message has been received correctly before acknowledging receipt." Paragraph 4.5.7.5.2 of ICAO Doc 4444, Procedures for Air Navigation Services, provides the following: "The controller shall listen to the readback to ascertain that the clearance or instruction has been correctly acknowledged by the flight crew and shall take immediate action to correct any discrepancies revealed by the readback."

3.5 With regard to point 5.2.1.9.2 of Annex 10 to the Convention, the FCC considers correctly that knowledge of the identity of the sender is part of the correct understanding of a message. The complainant contests, however, that point 5.2.1.9.2 is not exahustive. He refers to ICAO Doc 4444 specifically regulated situations, in which a readback is mandatory and argues that the request of the yyy was a mere request for which no readback was necessary. The duty of an air traffic controller is to ensure that he or she is aware of a correctly understood message by the flight crew, but applies action independently of the regulation of mandatory readbacks in specific situations. In connection with the breach of duty of care, the lower court rightly refers to paragraph 5.2.1.9.2 of Annex 10 to the Chicago Convention.
Furthermore, the objection that the only decisive factor is that the crew of the yyy in ignoring the clearance provided to zzz climbed, is unhelpful. The error of the crew of the yyy cannot relieve the complainant of his duties.

3.6 The complainant alleges that, because of the poor quality of the radio communications, he did not recognize that the readback came from a crew that was not addressed. He said that he did not not understand the readback, but misunderstood it. If he was insecure, he would have inquired. The complainant made the wrong assumption based on the lack of identification of the yyy that the request came from zzz. However it is precisely one of his duties not to work on basis of assumptions, but to verify them. Furthermore, the lower court correctly stated that precisely because of the poor quality of radio communications, he was obliged to verify his assumption.

3.7 Finally, he submits that, under the principle of legitimate expectations, he could rely on the fact that the other participants behaved correctly. There had been no concrete evidence that someone did not follow the rules and he had no evidence that his clearance for the zzz flight crew could be used by another crew to leave the flight level. In doing so, the complainant disregards the fact at the time of the request, yyy was in violation of the rules. The complainant could not rely on the fact that the request, as accepted by him, came from the zzz and was supposed to exclude possible ambiguities.

The appeal must be dismissed. The costs of the federal court proceedings are to be imposed on the appellant (Art. 66 (1) sentence 1 FSCA).

Guilty of the disruption of public transport by negligence article 237 of Penal Code al. 2 in conjunction with al.1 second paragraph

60 x 300 CHF on probation for 2 years (18'000CHF)

Cost of proceedings lower court
Prosecutor 900
Court case 2000

Cost of proceeding supreme federal court
3000 CHF

Second Case – Simultaneous take-off (valid verdict – ATCO acquitted)

Summary of The Incident

Published on 2.5.2012[8]

On 15 March 2011 at 11:41:15 UTC, the Swiss International Airlines Airbus A320-214 aircraft, with the ATC callsign SWR 1326, received clearance to taxi to the take-off position on runway 16 at Zurich airport. While taxiing to the take-off position, the air traffic control officer (ATCO) of aerodrome control (ADC) cleared SWR 1326 for take-off at 11:42:19 UTC. The crew of SWR 1326 acknowledged this clearance and initiated their take-off roll at 11:43:12 UTC.

At 11:43:05 UTC the Swiss International Airlines Airbus A320-214 aircraft, with the ATC callsign SWR 202W, which was waiting in the take-off position on runway 28 at the same airport, received clearance for take-off. Due to their directions (i.e. one towards more or less South and the other more or less towards West) , these two runways converge and actually cross. The crew acknowledged this clearance and immediately initiated their take-off roll.

During the take-off roll, at 11:43:47 UTC, the crew of SWR 202W noticed SWR 1326, which was converging from the right on runway 16, and immediately initiated an aborted take-off. At approximately the same time, the ADC air traffic control officer gave the crew of SWR 202W the order to immediately abort their take-off.

The speed of SWR 202W at this time was 135 kt. The aircraft came to a standstill on runway 16 and then taxied to the assigned stand.

The crew of SWR 1326 had not noticed the serious incident and continued their flight to their destination.

Figure 2 situational display of the incident - source STSB

Following the aborted take-off SWR 202W had to cool down the breaks at the parking stand. The crew offered the passengers who did not wish to continue the flight at that moment, to disembark. One of the passengers leaving the aircraft was an online journalist, who published what he has learned from the passenger information received by the crew. Thus, the online media reported about the incident prior to the official internal notification of the incident.

Causes

The serious incident is attributable to the fact that the air traffic control officer concerned gave take-off clearance to an aircraft on runway 28 although another aircraft on runway 16, to which he had given take-off clearance shortly before, was still on its take-off roll. The result was that an inadvertent convergence of these aircraft occurred, involving a high risk of collision. The following factors significantly contributed to the genesis of the serious incident:

- *At a time with a very high volume of traffic at Zurich airport, survey flights were being carried out, which increased the complexity of operation for air traffic control.*
- *The air traffic control officer concerned was engaged on tasks which did not have a high priority at this time.*
- *The aerodrome control centre work concept allowed only inadequate mutual support in the case of a high volume of traffic and in general did not feature any monitoring for early detection and correction of errors.*
- *The air traffic control's collision warning system was inappropriate for resolving the impending conflict. The genesis of the serious incident was favoured by the complex operation on two intersecting runways which is subject to a small error tolerance in the event of a high volume of traffic.*

Criminal Proceedings

The report 2136 of the SAIB was approved and published by the SAIB on the 2nd of May 2012. On the 22.5.2012 the cantonal prosecutor Winterthur/Unterland, Airport Branch, opened an investigation procedure pertaining to an allegation of hindering public transport by negligence, (based on article 237 of the Swiss Penal Code). On the 7th of December 2016 the district court of Bülach[9] acquitted the ATCO as follows:
The accused is not guilty nor implicated in the negligent disruption of public transport in accordance with Art. 237 al. 2 and Art 237 al 1 of the swiss penal code.
The prosecutor appealed (7.12.2016) this judgement and on the 4th of December 2018 the cantonal court of Zurich[10] condemned the ATCO (under Article 237 al 2 and Art 237 al 1 of the Swiss Penal Code) to 90 days of 210 CHF fine on probation for two years.
The ATCO appealed and on the 29th of October 2019 the Federal Supreme Court[11] acquitted the ATCO.

The Judgment[12]

The ATCO petitioned the Federal Supreme Court to be acquitted of the allegation of negligent disruption of public transport (CH Penal Code art. 237 al. 1 and 2). He claimed that the judgment of the Cantonal court of Zurich should be lifted. He argued as follows: (Please note that only excerpts selected by the authors are reproduced here – translated with DeepL and adapted by the author. Editorial choices were made. The numbering of the paragraph is taken from judgement).

Point One

The applicant alleged infringement of the principle of the right to a fair trial, in particular his rights of defence. He submitted that the lower court based its conviction on a further hypothetical fact. This fact was even implicitly described in the indictment, which claimed that a concrete danger to life and limb would have existed if the launch of SWR 202W had only been aborted on the complainant's order two seconds after the effective abort. However, only the effective and two hypothetical variants i.e. the take-off roll of aircraft SWR 202W initiated five seconds earlier or the failure of the aborted take-off - should form the basis of the assessment. According to the expert, there was no concrete danger in any of cases.

The Federal Supreme Court argued: (Please note that only excerpts selected by the authors are reproduced here – translated with DeepL and adapted by the author. Editorial choices were made. The numbering of the paragraph is taken from judgement).

1.2 The complainant's objection is unfounded. The accusation against him is that, as the responsible air traffic controller he gave the aircraft on Runway 28 (SWR 202W) the take-off clearance, while another aircraft (SWR 1326), which he had also given a take-off clearance for shortly before was still in the take-off run on Runway 16. As a consequence, there had been a high risk of collision, in which event people would most likely have been killed or injured. The conduct of the complainant and the associated danger to air traffic are thus clearly described in the indictment. However, whether the danger that occurred is sufficient to fulfil the elements of the offence pursuant to Article 237 of the Criminal Code and, if applicable, whether the occurrence of the danger was due to negligence, is the sole responsibility of the court (see below E. 2.1.2). From the point of view of the prosecution, it suffices to assert a concrete danger under Art. 237 StGB on the basis of incriminating behaviour. It is not necessary to explain what the danger consisted of or could hypothetically have consisted of. For example, in turbulence due to exhaust jets, braking, evasive action, or, as the lower court apparently assumes, the crew of the aircraft SWR 202W would only have braked on the complainant's instructions. Apart from this, the lower court and the public prosecutor's office must agree that it is impossible to describe all conceivable consequences of behaviour of an accused person that has been judged to be erroneous. There is no violation of the principle of prosecution. Furthermore, the public prosecutor's office explicitly saw a danger in the fact that the SWR 202W aircraft would have started the take-off run five seconds earlier. This would present the scenario, that aircraft SWR 202W would not have braked until two seconds later, on the complainant's order.

In both cases, the aircraft would have been closer to the possible collision point, and the speed in the variant described by the prosecution would have been even higher than in the latter variant. Contrary to the complainant's view (complaint, pp. 8 and 13 et seq.), the question of whether a safe braking manoeuvre would still have been possible for SWR202W at a higher speed was therefore raised from the outset. He was also able to defend himself against the charges that had been brought. It also cannot be seen as a violation of the principle of indictment or of the principle of inquiry. The lower court is not supposed to have taken into account the systematic nature of the bill of indictment and the connection that, in the complainant's view, was evident between the indictment and the expert opinion on the concrete danger. This is a question of the assessment of evidence (see below).

Point Two

The complainant does not contest the actual course of events. However, he claims that the lower court, in violation of the presumption of innocence, did not take into account various pieces of evidence. This worked to his disadvantage and affirmed a violation of due diligence solely on the basis of the report of the Swiss Safety Investigation Authority (hereinafter SUST) who had arbitrarily assessed this report. Furthermore, there had been no concrete danger to life and limb.
The Federal Supreme Court argued (Please note that only excerpts selected by the authors are reproduced here - translated with DeepL and adapted by the author. Editorial choices were made. The numbering of the paragraph is taken from judgement).

2.2.1 On the basis of the SUST report, the lower court assumes the following undisputed facts:

On 15 March 2011 at 11:42:19 UTC (coordinated universal time) in 8058 Zurich Airport, the complainant, as the air traffic controller in charge, gave clearance for take-off to aircraft SWR 1326, which was in the process of taxiing into the take-off position on Runway 16. The crew of SWR 1326 acknowledged this clearance and initiated the take-off run at 11:43:12 UTC. At 11:43:05 UTC, the complainant had also given clearance for take-off to the aircraft SWR 202W which was waiting in the take-off position on runway 28. The crew of this aircraft also acknowledged the clearance and initiated the take-off run. At 11:43:47 UTC, the crew of aircraft SWR 202W noticed SWR 1326 approaching from the right on runway 16 and immediately initiated the aborted take-off on its own initiative. At that time the aircraft was about 550 meters from the intersection of runways 16 and 28; its speed was 135 knots or 250.02 km/h. The SWR 202W aircraft came to a standstill on Runway 16, before the intersection of the two runways. The crew of aircraft SWR 1326 did not notice the incident and continued the flight to its destination. No persons were injured.

2.2.2 The complainant is in no doubt that the permission to take off granted by him to aircraft SWR 1326 and SWR 202W in quick succession led to an increase in the risks inherent in traffic at Zurich public airport. He therefore rightly affirms an act of tort under Article 237 of the Criminal Code. Based on the statements of the expert B._____, there is a conclusion that there was no concrete danger for the occupants of the aircraft SWR 202W when the pilots of this aircraft aborted take-off.

The expert did not consider it likely that people could have been injured by the aborted take-off of aircraft SWR 202W that had actually taken place. According to expert's statement, the aborted take-off per se was not a manoeuvre in which people were directly endangered. Even with the over-heating of the aircraft brakes and the calling of the fire brigade, there was no danger to the crew and passengers of the aircraft SWR 202W. This is a normal and routine procedure whereby danger to life and limb of the passengers is negligible.
According to the lower court, the edge vortices and/or exhaust gas jets caused by the aircraft SWR 1326 did not represent a concrete danger to life and limb of the passengers of the aircraft SWR 202W which aborted the take-off. According to the files, there were wake turbulences (air movements) in the area of the intersection of runways 16 and 28. However, there was no concrete evidence that these wake turbulences had been able to exert any relevant physical forces on the SWR 202W aircraft which had come to a standstill immediately before the runway intersection. According to the expert, the aircraft had "not come too close" to each other.

2.2.3 In the light of the above and based on the facts as they actually occurred, the conduct of the complainant caused no specific threat or disruption to public air transport within under Article 237 of the Penal Code. The lower court also assumes this. Contrary to their opinion, however, a hypothetical different course of events cannot be used to substantiate a concrete danger (see 2.1.2 above). The lower court correctly considers that the occurrence of a damaging event, i.e. the injury or death of persons, is not a prerequisite for the fulfilment of the facts. However, the complainant's misconduct of positioning two aircraft simultaneously in the take -off area and moving towards each other is not more than an abstract danger to public transport. But despite his conduct, thanks to the presence of mind of the crew of the aircraft SWR 202W, no concrete danger to life and limb of persons occurred. It is irrelevant what might have happened if the crew of the aircraft SWR 202W had only initiated the braking manoeuvre on the complainant's order. Nothing else emerges from the doctrine set out in recital 2.1.2[13] above and from the case-law partly quoted by the previous instance. In particular, BGE 106 IV 121 E. 3c also called for a concrete or serious danger, albeit broadly defined, namely the increased risk of a crash as a result of an unplanned delay. (Sic. the judgement then refers to the other judgement). In the recent judgement 6B_1220/2018 of 27 June 2019, an automatic avoidance command was then triggered by the traffic warning and collision avoidance system due to a massive loss of the prescribed safety distance, and the incident was classified by the SUST in Category A ("Risk of collision. The risk classification of an aircraft proximity in which serious risk of collision has existed") in accordance with the classification scale of the International Civil Aviation Organisation (ICAO), which in the opinion of the Federal Supreme Court implied the near danger of a collision (E. 1.5.1 and E. 2.3 of the above-mentioned ruling). The lower court did not mention anything comparable, namely a similar approach of the two aircraft, and this is not apparent from the expert opinions (see E. 2.2.2 in fine above). In contrast to the present case, the verdict of guilty in judgment 6B_1220/2018 was also based on facts which had actually been held. By contrast, the complainant's conviction based on hypothetically different facts violates federal law.

Thus the Federal Supreme Tribunal states

3. The complaint is well-founded. Nullify the contested decision and refer the case back to the lower court for a new order of costs.
As a matter of principle, no costs are to be charged in the Federal Supreme Court proceedings and the Canton of Zurich must pay the complainant compensation for the parties (Art. 66, para. 1 and 4, 68, para. 1 and 2 FSCA).

Conclusion

Three air traffic control incidents have been brought in front of Swiss Courts. Two valid judgments by the Federal Supreme Court exist. One acquitted the air traffic controller and the other one condemned the air traffic controller. In the third case the ATCO has been condemned by the district court in Bülach and has appealed to the cantonal court.

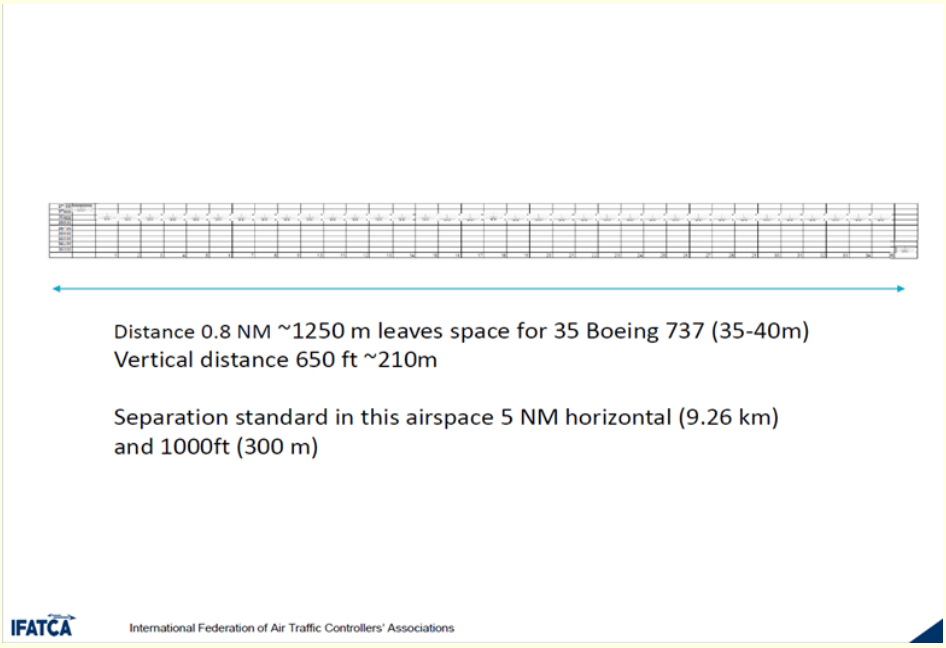
Discussion in the Swiss Aviation sector and beyond have taken place in order to adjust the Swiss legislation to the new principle of aviation safety and reporting. Bleienheuft and Wysk (2019) explain the need to address some of the transposition of EU Regulation 376/2014 and 996/2010 in Switzerland with regard to the use of safety information and safety data made available to the safety investigation and used by the Swiss justice system. The European Commission should perhaps consider revising Regulation 376/2014 introducing in it a clearer severity classification taxonomy, to mitigate the risk of divergent assessments in the future. Furthermore, Switzerland has filed a difference to ICAO 5.12.[14] And last but not least, a political revision process of several Swiss legal instrument has been launched and is currently in the political revision process.

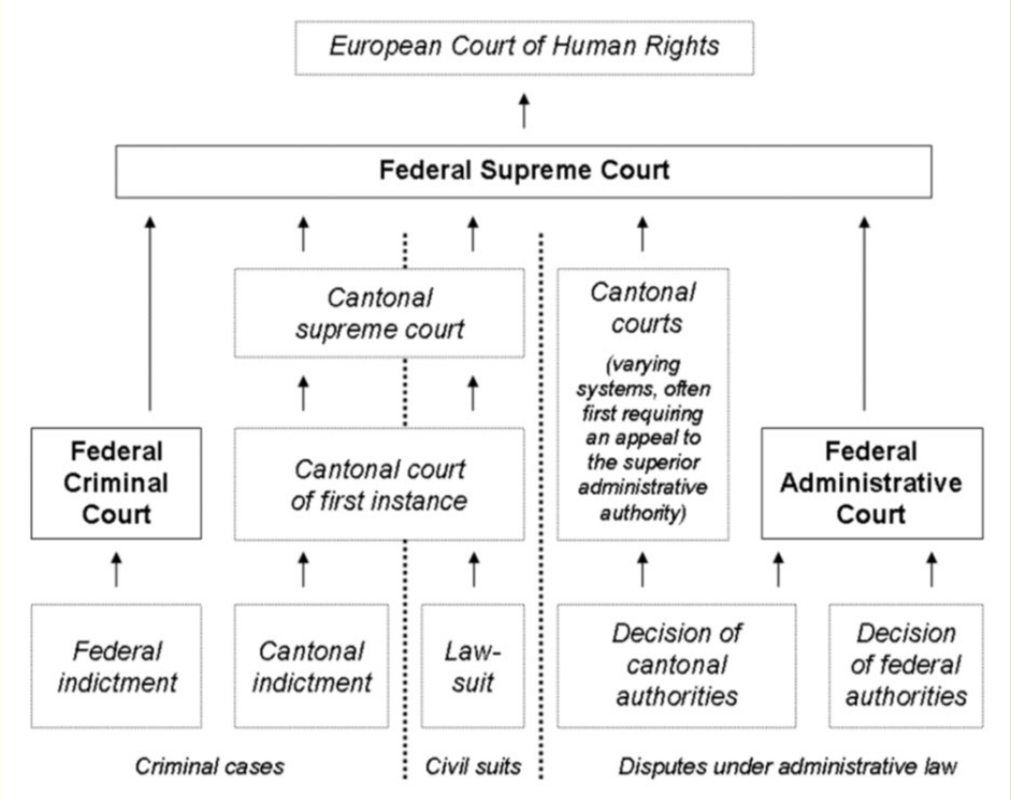
Annex 1

The lower court has requested asked the following questions to the Head of the SAIB.

1. What is the SAIB's opinion on the Evaluation by Eurocontrol of 9.3.2018 (qualification of the incident as ICAO Category B), in particular the Risk Analysis Tool?
2. Does the evaluation of Eurocontrol resulted in change, additions or corrections to the SAIB report No 2211? If so, to what extent?
3. What is SAIB's opinion on the document "Risk Assessment of Incidents and ATM Specific Occurrences"?
4. Did the "Risk Assessment" result in changes, additions or corrections to the SAIB Report No. 2211? If so, to what extent?
5. What is SAIB's response to the Memo of skyguide (Air Navigation service provider of Switzerland) from 27.3.2018?
6. Did this Memo result in changes, additions or corrections to the SAIB Report No. 2211? If so, to what extent?

AVIATION


Distance 0.8 NM ~1250 m leaves space for 35 Boeing 737 (35-40m)
Vertical distance 650 ft ~210m
Separation standard in this airspace 5 NM horizontal (9.26 km)
and 1000ft (300 m)
IFATCA
International Federation of Air Traffic Controllers' Associations


European Court of Human Rights
Federal Supreme Court
Cantonal supreme court
Cantonal courts
(varying systems, often first requiring an appeal to the superior administrative authority)
Federal Criminal Court
Cantonal court of first instance
Federal Administrative Court
Federal indictment
Cantonal indictment
Law-suit
Decision of cantonal authorities
Decision of federal authorities
Criminal cases
Civil suits
Disputes under administrative law

[1]Swiss Accident Investigation Board has been renamed and is now called the Swiss Transportation Safety Investigation Board (STSB). At the time of the incident it was called SAIB. this acronym is used throughout this article.

[2]https://www.sust.admin.ch/inhalte/AV-berichte/2211_d.pdf accessed 1.3.2020

[3]Regulation (EU) No 996/2010 of the European Parliament and of the Council of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation and repealing Directive 94/56/EC.

[4]Bleienheuft/Wysk, Strafverfolgung von Lotsen und Verwertung von Erkenntnissen der Unfalluntersuchungstellen, ZLWG68 Jg 4_2019 p.543-562.

[5]The defendant argued that he should be judged under cantonal jurisdiction on the ground that the act has been committed at the skyguide's headquarters in Wangen near Dübendorf/ZH. This would in itself have meant that the cantonal jurisdiction (Art. 22 CCP) would be competent. In the present context, however, Federal Prosecutor investigated the pilot of the RYR 3595 (negligent traffic disruption) and sentenced him with a penal order dated April 4, 2017, which has since become legally binding. For process-economic reasons (attraction of competence) and in particular in the light of federal court rulings, according to which the criminal division of the Federal Criminal Court Jurisdiction is valid, the federal jurisdiction is given Federal Penal Tribunal SK2018.1. 30.05.2018 translated with DeepL on 23.2.2020 and arranged. The author made editorial choices.

[6]Federal Supreme Court Bgr 6B_1220/2018 (in German) downloaded on 1.9.2019 translated with deepL on 23.2.2020 and adapted by the author. The author made editorial choices. Only the orginial document in German should be used as legally valid document.
See https://www.bbc.com/news/business-48362283 - accessed 24 July 2019.

[7](16) 'serious incident' means an incident involving circumstances indicating that there was a high probability of an accident and is associated with the operation of an aircraft, which in the case of a manned aircraft, takes place between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked, or in the case of an unmanned aircraft, takes place between the time the aircraft is ready to move with the purpose of flight until such time it comes to rest at the end of the flight and the primary propulsion system is shut down. A list of examples of serious incidents is set out in the Annex.

[8]https://www.sust.admin.ch/inhalte/AV-berichte/2136_e.pdf accessed 23.2.2020

[9]Bezirksgericht Bülach GG140060-C/U translated, adapted and edited by the author.

[10]Obergericht des Kantons Zürich SB170072-O/U/hb.

[11]Bundesgericht 6B_332/2019 https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2Faza://29-10-2019-6B_332-2019&lang=de&zoom=&type=show_document accessed 23.2.2020

[12]Federal Supreme Court Bgr 6B_332/2019 downloaded on 23.2.2019 translated with deepL on 23.2.2020 and adapted by the author.

[13]Paragraph 2.1.2 of the judgement qualifies in detail what condemnable action qualify as negligence in the sense of Penal Code art 237 al 1 and 2.

[14]Supplement to Annex 13 – aircraft accident and incident investigation. Swiss legislation requires that all documents be made available to judicial authorities and aviation authorities.

The New Plan on Indonesian Air Defense Identification Zone

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Abstract

The most recent regulation pertaining to the Indonesian Air Defense Identification Zone is stipulated through the newly-formulated Government Regulation No. 4/2018. However, a status quo is still in place due to its pending implementation. This article aims to describe the new Air Defense Identification Zone plan in regards to the current situation within the region, then analysing the potential obstacles in its implementation. At the end, this article provides legal and policy recommendation for the Government and Indonesian Air Force plan in implementing the Government Regulation No. 4/2018.

1. Overview

The Air Defense Identification Zone (ADIZ) has been implemented by numerous states worldwide, starting in 1955 when the United States declared ADIZ, then followed by Canada and the Philippines. The United States declaration stipulated that the United States was entitled to control the navigation of aircraft on 200 nautical miles from its beaches in the Pacific and Atlantic Ocean[1]. Every violation committed on those areas was punishable by imprisonment or by fine. This policy was based on a principle developed by a United States scholar, John Cobb Cooper, which believed that the interests of the country shall be addressed through physical and scientific abilities.

Indonesia enacted its ADIZ back in the 1960s following Cold War tensions and conflict with Malaysia. The implementation of ADIZ in Indonesia is a manifestation of the concept of self-defense as mandated by Article 51 of the United Nations Charter[2]. The ADIZ was established even before Indonesia was acknowledged as an archipelagic state according to the United Nations Convention on the Law of the Sea (UNCLOS) 1982[3]. The coordinates only included the Java Island up to Lombok and Palembang areas. Specifically, the large rectangle was located at 180 nautical miles from north to south and 390 nautical miles from west to east[4].

The Indonesian Air Force[5], as one of the strongest fleets in the region during that time, had the power to enforce ADIZ. This situation depicted the government's intention to only focus on security above the Java Island and its surroundings, where the most developed areas during that period were located – consisting of Jakarta as the capital (central government), vital objects, and industry.

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The views expressed are those of the authors.

Image 1 - The Indonesian ADIZ on the 1960s-now

Along with the development of the geopolitical situation, an ADIZ, which has been left unchanged since half a century ago no longer, suits Indonesia's character as an archipelagic state. UNCLOS 1982 describes archipelagic water as sovereign territory, in accordance with the Indonesian national interest. Such is the reason there is a need for a new ADIZ that will better suit the national interest and security.
The Government Regulation No. 4/2018 on National Airspace Security[6] is enacted to answer the ADIZ polemic. However, the regulation could not be simply enforced at the time being, especially towards the article mentioning ADIZ. There are some issues that the government must resolve first to ensure Indonesia is deemed as one which conforms to international law.

2. The New Air Defense Identification Zone

Besides regulating prohibited and restricted area, the Government Regulation No. 4/2018 has laid a foundation to set up ADIZ[7]. Not only enacting ADIZ above national territory as an archipelagic state according to UNCLOS, the regulation also goes further by enabling Indonesia to set up ADIZ above its Exclusive Economic Zone (EEZ) and continental shelf[8]. It must be highlighted that so far there is no convention that explicitly explains ADIZ in detail nor has it become a customary international law. The Chicago Convention of 1944[9], as the magna carta of aviation law, is also silent regarding this matter.

> Article 6(2) of the Government Regulation No. 4/2018,
> "*…the Government is entitled to establish Air Defense Identification Zone*."

Its notion implies that the government "could" establish ADIZ, and such action is not a must or mandatory act[10]. This provision opens the possibility of delaying ADIZ implementation, at least until everything is ready. The government must resolve some issues to ensure Indonesian ADIZ conforms to the international law as described in the next part of this article. At the same time, Article 6(2) opens the possibility of a gradual ADIZ establishment.

It may start at one point, and steadily increased until it is set up around all of Indonesian territory as a belt. In paralel, the Indonesian Air Force is aiming to achieve the minimum essential force through the increase of fleets, radars, and other infrastructures. Thus, it pushes the immediate implementation of ADIZ in all Indonesian territory instead of a gradual implementation.

Image 2 - The New Indonesian ADIZ according to the Government Regulation No. 4/2018[11]

The flight plan for any foreign state aircraft and foreign civil aircraft performing non-scheduled flight flying on Indonesian ADIZ above EEZ or continental shelf must be informed to the Air Traffic Controller (ATC)[12]. There is no distinction whether such aircraft has the intention to enter the Indonesian sovereign territory or not. Article 11 of the Chicago Convention serves as a possible justification if Indonesia as an archipelagic state decides to expand its ADIZ beyond the 12-miles territorial waters above EEZ[13]. However, it does not mean establishing sovereign rights within the airspace.

When flying across ADIZ above the sovereign territory of Indonesia, any foreign state aircraft needs to obtain diplomatic and security clearance; while foreign civil aircraft performing non-scheduled flight needs to obtain flight approval besides the two clearance obliged for state aircraft[14]. A sum up to five billion Indonesian Rupiah (approximately USD 330,000) awaits any foreign civil aircraft performing non-scheduled flight who fails to obtain such required documents[15]. Unfortunately, the minimum fine is not determined yet nor further formula calculation for determining such fine has been enacted – the latter shall be stipulated in the form of a ministry of transportation regulation in the future. Despite the situation, there is a huge increase pertaining to the fine, noticing how the previous penalty was only amounted at sixty million Indonesian Rupiah (approximately USD 4,000).

The aforementioned fine is crucial following the increasing number of flights in the Association of South East Asian Nations (ASEAN) region. Indeed, the ASEAN Open Skies is happening, and the ASEAN Economic Community Blueprint 2025 does exist[16], but these two instruments only focus on scheduled flights by civil aircraft. The Government Regulation No. 4/2018 scope does not stress scheduled flights – only (foreign) civil aircraft performing non-scheduled flight. This leaves cargo and charter flights as the main subject.

3. Current Challenges for Implementing the New Air Defense Identification Zone

The main issue of the immediate implementation of ADIZ in all Indonesian territory as a belt instead of a gradual implementation lies in the airspace of Riau and Natuna Islands (famously known as Natuna Flight Information Region - FIR). There is an ongoing dispute over the control of this airspace with Singapore, and it has not been settled for decades. The International Civil Aviation Organization (ICAO) decision back in 1946 to delegate the air navigation service above this airspace becomes today's status quo. The prospect for reassignment to Indonesia has faced strong resistance even until today[17].

Annex 11 of the Chicago Convention mentions that an aircraft must be under the control of only one ATC at any one time. Thus, if an aircraft is required to be in radio contact with different national security units at the same time without mutual coordination, then it is deemed to have violated the single control unit principle[18].

The case of Ethiopian Airlines Flight ETH 3728 route Addis Ababa-Hongkong, a non-scheduled flight performed by civil aircraft acting as a cargo plane, which was intercepted and forced to land in Hang Nadim Airport in Batam by two Indonesian Air Force F-16 on January 2019 should be seen as a lesson. Furthermore, the total amount of fine imposed to the aircraft was not announced to public.

The fact that Natuna FIR is under Singapore's control plays a role in the aforementioned case. Singapore ATC claims to perform its duties for the sake of flight safety and efficiency, but in reality the concept of FIR mandated by ICAO – which is tightly intertwined with Indonesian airspace as an archipelago – is not fully accommodated[19]. No guarantee that such airspace violation will not happen again, and it might even get worse after the new Indonesian ADIZ is enacted around the area. It must be highlighted that foreign state aircraft and foreign civil aircraft performing non-scheduled flight are at most risk.

The successful numerous scrambles at intercepting increasing unauthorized flights without endangering the targeted aircraft has shown the Indonesian Air Force's commitment to respect Article 3bis of the Chicago Convention as customary international law. Annex 2 of the Chicago Convention stipulates the procedure of interception; and the Indonesian Government Regulation No. 4/2018 referred to the convention in formulating its procedures.

The Indonesian Air Force Chief of Staff will further synergize the provisions on interception with the Ministry of Transportation. Some issues regarding ADIZ that need further explanation and periodically be reviewed include but are not limited to the altitude within ADIZ, true airspeed, and estimated point of penetration within ADIZ. The legal instrument must immediately be ready when the new Indonesian ADIZ is enacted.

Article 3bis has been widely ratified by most states, even considered as ius cogens by some experts - much different with ADIZ which is not a customary international law. Furthermore, to what extent does the aircraft security, especially when in distress, is depending on the understanding each personnel - especially pilots and legal bureau - of the Indonesian Air Force.

Hopefully the new ADIZ realization will still upholds the right of self-defense as recognized within Article 51 of the United Nations Charter, and not as a tool to solidify airspace control in Natuna FIR nor territorial claims within the rising tension in the South China Sea. Lessons could be learned from the Chinese ADIZ which tries to claim sovereign rights over the disputed Senkaku/Diaoyu Islands from Japan[20]. Peace and stability must be maintained in ASEAN airspace, and now Indonesia is being tested.

4. Conclusion and the Way Forward

Indonesia needs to ensure that ADIZ will not be used as a tool to back up a state's position within an ongoing airspace control or FIR dispute. To ensure flight safety at the highest level, ADIZ in Natuna FIR could not yet be established since the air navigation service is still being provided by another state.

The new ADIZ plan to secure such airspace within the area must wait until the reassignment from Singapore to Indonesia has been completed. Otherwise, it could become a boomerang for the ongoing progress on Natuna FIR reassignment between the two states. A gradual implementation of the new ADIZ seems the best option to start, and at the same time the relevant authorities should start preparing the necessary legal instruments.

Indonesia should ratify Article 3bis of the Chicago Convention even though it has been considered as customary international law or even ius cogens. This is important noticing that the world also considers Indonesia's position in the legal instrument.

Lastly, it should also be considered to enact ADIZ around the capital - Jakarta - like in Washington. The 9/11 tragedy showed how aircraft could be turned into a deadly weapon. The fact that the involved aircraft were the ones serving domestic routes reminds that the threat does not always come from outside.

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[1]IATA, 'Passenger Ticket Refunds During COVID-19 Crisis', 3 April 2020. Available at United States Regulations of the Administrator: Security Control of Air Traffic, Part 620.

[2]Charter of the United Nations and Statute of the International Court of Justice, signed on 26 June 1945 in San Francisco.

[3]United Nations Convention on the Law of the Sea, signed at Montego Bay, Jamaica, on 10 December 1982 and is effective since 16 November 1994.

[4]Aeronautical Information Publication (AIP) Vol. 1 dated 17 September 2006.
See also https://amti.csis.org/indonesian-adiz-forthcoming/ accessed on 3 April 2020.

[5]The Indonesian Air Force formerly named Angkatan Udara Republik Indonesia (AURI), now Tentara Nasional Indonesia Angkatan Udara (TNI AU).

[6]The Indonesian Government Regulation No. 4 Year 2018 on National Airspace Security, signed on 13 February 2018.

[7]The Indonesian Government Regulation No. 4/2018, art. 6(2).

[8]The Indonesian Government Regulation No. 4/2018, art. 9(2).

[9]The Chicago Convention of 1944, done at Chicago on 7 December 1944.

[10]The original provision in the Indonesian language stated, "…*Pemerintah dapat menetapkan zona identifikasi pertahanan udara (Air Defense Identification Zone/ADIZ)*".

[11]https://amti.csis.org/indonesian-adiz-forthcoming/ accessed on 3 April 2020.

[12]The Indonesian Government Regulation No. 4/2018, art. 14.

[13]Stefan A. Kaiser, *The Legal Status of Air Defense Identification Zones: Tensions over the East China Sea*, "*Zeitschrift für Luft- und Weltraumrecht* (*German Journal of Air and Space Law*)", Vol. 63, 2014, pp. 529-530.

[14]The Indonesian Government Regulation No. 4/2018, art. 15.

[15]The Indonesian Government Regulation No. 4/2018, art. 11.

[16]The ASEAN Economic Community Blueprint 2025 was adopted by ASEAN Leaders at the 27th ASEAN Summit in Kuala Lumpur, Malaysia, on 22 November 2015.

[17]See Ridha Aditya Nugraha, *Flight Information Region above Riau and Natuna Islands: The Indonesian Efforts to Regain Control from Singapore*, "*Zeitschrift für Luft- und Weltraumrecht (German Journal of Air and Space Law)*", Vol. 67, 2018, pp. 236-253.

[18]International Civil Aviation Organization, Annex 11 - 3.5.1 and 3.5.2.

[19]https://www.hukumonline.com/berita/baca/lt5d96ccae4b35c/menyempurnakan-hukum-positif-pengamanan-wilayah-udara-nasional-oleh--ridha-aditya-nugraha/ accessed on 3 April 2020.

[20]Stefan A. Kaiser, *The Legal Status of Air Defense Identification Zones: Tensions over the East China Sea*, "*Zeitschrift für Luft- und Weltraumrecht (German Journal of Air and Space Law)*", Vol. 63, 2014, pp. 534-541.

The Air Passenger Transportation During Italian Covid-19 Lockdown

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Abstract

The Covid-19 lockdown is having a huge negative impact on the commercial aviation sector: its most negative effect is on the load-factors and, lastly, on the possibility to land over quarantined territories. During last weeks, the Italian national Government too decided to limit the possibility to move around some areas, before, and on the entire national territory, later; at the end of an escalation of restriction measures, it has been even disposed the closing of certain airports. The article provides a guideline for the interpretation of the most relevant legislative provisions recently issued with respect to such issue.

Health Measures applied to individuals entering Italy

With the aim of containing the dissemination of the epidemic COVID 19 spread, the Minister of Infrastructures and Transport and the Minister of Health issued the Decree No. 120 on March 17, 2020[1] which brings with it new health measures which apply to those individuals entering Italy. Such measures have been furtherly ruled by the Minister of Infrastructures and Transport and the Minister of Health with the Decree No. 145 on April 3rd, 2020 (by which the same Authorities made reference to the order issued jointly by the latter Ministries on March 28, 2020).
The above mentioned Decree 145 provides that such individuals, which arrive in Italy by air transport (as well as by maritime, rail, road and internal waterway transport), even if asymptomatic, shall:

- immediately communicate its entry into Italy to the territorial competent Health Authority (as soon as they arrive at the airport);
- undergo health surveillance and fiduciary isolation for a period of 14 days from the entry into Italy;
- in the event of the infection of COVID 19, report this situation promptly to the health authority.

The above provisions can be derogated only for proven work needs and for a time of 72 hours which could be prolonged of additional 48 hours for specific demonstrated needs. In this case, natural persons entering Italy are required to submit a declaration in which they certify that they enter only for the aforementioned work requirement. With the same declaration, they assume the obligation, in the event of the infection of the coronavirus, to immediately report this situation to the health authority territorially competent and to submit themselves to fiduciary isolation, pending the determinations of the aforementioned health authority.

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The views expressed are those of the authors.

The derogation to the obligation to the fiduciary isolation for the natural persons which enter into the Italian territory, even if asymptomatic, applies even to the personnel of the crews of those air carriers having their head office in Italy.

Restriction to the Italian airport system operation

On March 12, 2020, as per Decree no. 112 (), Ministry of Infrastructure and Transport, in agreement with Ministry of Health, limited the operation of Italian airport system and, in order to comply with it, ENAC states that airport operators which shall operate without any restrictions are those indicated into Art. 2, par. 1, of the above mentioned Decree: Ancona, Bari, Bologna, Cagliari, Catania, Genova, Lamezia Terme, Lampedusa, Milano Malpensa, Napoli Capodichino, Palermo, Pantelleria, Pescara, Pisa, Roma Fiumicino, Torino, Venezia Tessera and Roma Ciampino exclusively for State flights, transport of organs, canadair and emergency services.

For the airport operators that are not included into the above said Art 2, par. 1, (i.e. the airport operators of: Milano Linate, Bergamo Orio al Serio, Verona, Firenze, Roma Ciampino – without prejudice to the exceptions already referred to above -, Reggio Calabria, Brindisi, Trieste and Treviso) it is applied the restriction of the operation since March 14, 2020, with the exception of Milano Linate which temporary stop began since Monday March 16, 2020.

With the aim of granting only the essential minimum service in the air transportation sector, the above mentioned measures have been furtherly confirmed by Article 1 of the Decree No. 153() issued on April 12, 2020 by the Ministry of Infrastructure and Transport, in agreement with Ministry of Health.
Nevertheless, according to such decree, is demanded to ENAC's evaluation the allowance of the operations in such last airports for the following purposes:

- the maintenance of the airport certification requirements under the applicable law;
- the allowance of the access to the premises of the airport to ENAC's, ENAV's and any other State Authority's employee should such authority have its office in the airport;
- should it be deemed necessary, the recovery of the full functionality of the airport;
- cargo or mail flights, State flights, health emergency or other emergency services.

Anyway, all airports ensure operational requirements, included the ones related to cargo flights.

Since March 14, 2020, the restriction to the airport activities applies to private flying airport solely, by analogy with it is stated with reference to the airport which are not included into Art. 2 par 1.

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[1]https://www.gazzettaufficiale.it/eli/id/2020/17/20G00034/sg

[2]http://www.mit.gov.it/sites/default/files/media/notizia/2020-04/DECRETO%20NR.%20145%20DEL%203%20APRILE%202020_0.pdf

[3]https://www.gazzettaufficiale.it/eli/id/2020/03/29/20A01921/sg

[4]http://www.mit.gov.it/sites/default/files/media/notizia/2020-03/d.m.%20n.%20112%202020.pdf

[5]https://www.enac.gov.it/sites/default/files/allegati/2020-Apr/M_INFR_GABINETTO_REG_DECRETI_R_0000153_12_04_2020.pdf

Outbreak of COVID-19: the EU Publishes Slot Waiver for Airlines

*Carlotta Matteuzzi**

The outbreak of COVID-19 led the Parliament and the Council of the EU to issue Regulation (EU) No. 2020/459 in order to help air carriers to cope with the severe drop in air traffic due to the Coronavirus pandemic. This Regulation aims at mitigating the severe economic impact on airlines, ensuring them access to slots for the 2020 summer season and reducing the risk of 'ghost flights' that would have been operated only to maintain slots.

The Regulation provides for a suspension of the airport slot requirements until 24 October 2020. Until then, airlines are not, therefore, required to use at least 80% of their take-off and landing slots in order to keep them the following year.
In other words, the Regulation establishes a 'freezing' of the 'use it or lose it' rule laid down in Articles 8(2) and 10(2) of Regulation No. 95/1993.

More specifically, the waiver applies from 1 March 2020 to 24 October 2020 and it has also retroactive effects - from 23 January 2020 to 29 February 2020 - for flights between the European Union and China or Hong Kong.

With regards to the above-mentioned period, the Council of the EU specified that the measure can be extended if the Covid-19 situation persists, by means of European Commission delegated act. It is precisely the European Commission that shall monitor the situation and report back by 15 September 2020.

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[1]REGULATION (EU) 2020/459 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 30 March 2020 amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports.

[2]Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports.

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The Air Carriers' Obligation to Pay Compensation (including for Covid-19?) in the Light of the Recent CJEU Case Law

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On 19 December 2019, the European Court of Justice published its judgment in Case C-532/18 on the interpretation of the Article 17 (1) of the Montreal Convention which rules on air carrier liability in case of the death or bodily injury of a passenger due to an accident occurred during the flight, which begins from the operations of embarking and ends with those of disembarking.

In essence, CJEU was asked to rule on a case involving a young passenger – represented by her father – seeking compensation against an air carrier for the physical damage suffered during a flight from Palma de Mallorca (Spain) to Wien (Austria), when a cup of hot coffee, that had been served to her father and placed on his folding table, spilled causing the young passenger second-degree scalding.

The request for preliminary interpretation had been made by the Austrian Supreme Court which asked the CJEU whether Article 17 (1) of the Montreal Convention must be interpreted as meaning that the concept of "accident" - used but not defined therein - covers a situation in which an object used when serving passengers has caused bodily injury to a passenger.

In providing the interpretation of the concept, the CJEU departs from the traditional approach according to which the air carrier is only liable for the damages occurred during the flight and arising from the nature, status or operation of the aircraft. This would lead to the result that the air carrier cannot be held liable for the accidents which are not linked to air transport and may also occur in other circumstances (like the one at stake).

In its judgement the CJEU sets out that under Article 17 (1) of the Montreal Convention the air carrier liability does not require a materialized hazard typically associated with flight operations or air transport (in this case, the air carrier highlighted that no unforeseen and involuntary accident would have occurred causing the hot coffee spill).

According to the Court, making the air carrier's liability subject to the condition that the damage is due to an 'accident' linked with the air transport or flight operations is not consistent with the goals pursued by the Montreal Convention.
Therefore, the EU Court of Justice replies to the domestic Supreme Court that the concept of 'accident' covers all situations occurring on board an aircraft "without it being necessary to examine whether those situations stem from a hazard typically associated with aviation".

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The ruling rendered by the CJEU may have a great impact on the air carriers' liability, thus leading to a substantial increase in passengers' compensation claims. Furthermore, it cannot be excluded that, in the future, airlines might be obliged to pay compensation to passengers as a result of Codiv-19 contamination.

To this end - regardless to the interpretation given by the Court - under the current regulatory framework passengers need to prove that the contamination occurred 'during the flight' and such burden of proof appears difficult to be discharged, being currently impossible to establish when the passenger has been infected.

IBA Annual Conference 2020 and the Aviation Law Committee

The IBA 2020 Annual Conference will be held in Miami and the Aviation Law Committee's sessions will feature a programme focusing on State and international airline regulatory issues, recent developments in international aviation casualty litigation as well as discussion on current issues regarding aircraft, aircraft engine leasing and financing transactions and methods for enforcing the rights of the parties to those transactions.

For a comprehensive description of the Aviation Law's Committee's programme please go to https://www.int-bar.org/Conferences/conf927/ProgrammeSearch/Results/Index.cfm?Search=ListSessionsByCommittee&CommitteeGuid=9E78EFB8-BC10-497E-9231-92AA82C63E54

For more Information on the 2020 Annual Conference:
https://www.ibanet.org/Conferences/Miami-2020.aspx