

THE AVIATION LAW
REVIEW

NINTH EDITION

Editor
Sean Gates

THE LAWREVIEWS

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NINTH EDITION

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PREFACE

The Aviation Law Review continues to be among the most successful publications offered by The Law Review, with the online version massively increasing its reach within the industry not only to lawyers but to all those involved in the various aspects of management touched by laws and regulations that, from certain jurisdictions, flow like a river in full spate. Now that subscribers to Bloomberg Law and Lexus Nexus have access online, that of course has also significantly increased the readership.

This year I welcome a new contribution from Turkey, and extend my thanks and gratitude to all of our contributors for their continued support. I would emphasise to readers that the contributors donate very considerable time and effort to make this publication what it has succeeded in being; the premier annual review of aviation law. All contributors are carefully selected based on their knowledge and experience in aviation law. We are fortunate indeed that they recognise the value of the contribution they make and the value of the *Review* that it enables.

Notwithstanding the risks posed by new variants, at the time of going to press at least the threats posed by covid-19 to the world and the aviation business sector seem to be beginning to recede in some parts of the world, while others continue to languish where vaccinations have yet to become available, and where vaccine hesitancy is encouraged from dark alleys in social media up to the level of irresponsible political figures around the world. The damage wrought on aviation has been particularly severe consequent upon the grounding of airlines, the closure of airspace and the uncertainty as to when, and to where, flights may safely be taken. So far as lessors are concerned, attempts by lessees to moderate their financial exposure by reliance upon the pandemic by arguing that contracts have thereby been frustrated have been denied in several courts. As yet, no decisions have crossed my desk regarding operating leases, and decisions in respect of them will, of course, depend upon the terms of those leases. While there have been some bankruptcies, the majority of carriers have managed to cling on to financial life by virtue of reliance on governmental support, although this has not been routinely and equally available throughout the world.

In last year's preface I referenced the difficulties encountered by Boeing with regard to the damage to its reputation as well as the reputation of the Federal Aviation Administration (FAA) following the 737 MAX grounding. It was eventually, after extensive modification, declared safe to fly, but then came under renewed scrutiny six months later as a result of a potential electrical problem that led to the renewed grounding of more than 100 aeroplanes belonging to 24 airlines around the world in April 2021. The practice of the major aviation authorities around the world of accepting the type certificates of other regulators appears likely to be the most enduring victim of this debacle, with airworthiness authorities under very considerable pressure to make sure for themselves they are satisfied with the certification

of aircraft manufactured in other countries. The European Air Safety Authority has been under a particular spotlight in this respect and, according to European Aviation Safety Agency (EASA) Executive Director Patrick Ky:

we have a bilateral safety agreement (between EASA and the FAA) that was signed some time ago, under which the direction had been taken to reduce more and more the level of involvement of EASA on FAA-approved projects. Of course, given those tragedies for which we have seen, we have stopped this trend and we will increase our level of involvement and our independent review of US projects in order to build our own safety assessment of those projects.

The impact of Brexit on aviation continues to be worked out, although the EU–UK agreement on the subject came into force alongside the trade agreement in 26 pages of the 1,449-page text. The agreement provides in broad measure that traffic rights between the UK and EU are preserved, cabotage rights are removed, cargo fifth freedoms are permitted allowing cargo to be on carried from one European destination to a third country, and vice versa, subject to bilateral agreements between the UK and the individual Member States of the EU. Ownership and control restrictions require that airlines must be owned and effectively controlled by nationals in their headquarters and that airlines must have their principal place of business in their own territory and hold an air operator's certificate from the competent authority in their own jurisdiction. There is an exception to this in that UK airlines are permitted to be effectively controlled by nationals of the EU, the European Economic Area or Switzerland. This ownership provision is echoed in the UK–US bilateral agreement permitting UK airlines to be owned by EU nationals while operating from the UK to the US. Clearly, the principal beneficiary of these provisions is British Airways, owned by IAG headquartered in Spain, which also owns other EU airlines.

The UK is no longer part of EASA, but there is close coordination between the Civil Aviation Authority of the UK and EASA as well as mutual recognition of licences.

The EU–UK agreement also touches upon the thorny and troublesome issue of EU 261 in that it aims for a high level of consumer protection and cooperation between the EU and the UK in this area. The European Union (Withdrawal) Act 2018 provides that regulations such as EU 261 are automatically incorporated into UK law, being known as retained EU law, unless and until they are revoked by an Act of Parliament. The regulation itself, therefore, continues to apply unless and until it is changed by the UK Parliament. That power does seem currently unlikely to be exercised among the myriad issues falling to be addressed by the newly empowered Parliament, although the opportunity may arise if the long-promised review of EU 261 in Europe is finally brought forward by the Commission for decision, when the issue could at least be debated. One can but hope that the regulation will be made more compliant with the terms of its preamble and original content before it is subjected to the legislative whims and activist fancies of the European Court of Justice (ECJ). However, decisions made up until 31 December 2020 will be retained in the UK and will be binding at least at first instance level, with limited powers given to the Court of Appeal and the Supreme Court to depart from past case law. Decisions after December 2020 will not be binding but will continue to be persuasive. The extent to which the UK will depart from ECJ case law has already been reviewed in two Court of Appeal cases, *Tuneln v. Warner* and *Lipton v. BA Cityflyer*. The Court of Appeal held that the power to depart from ECJ decisions should be used as an exception only, and that in the first case actually applied to a post-Brexit ECJ ruling in reaching its decision. In *Lipton*, the Court set out a list of matters to be considered

in determining its approach. These early decisions seem at least to indicate that the Court of Appeal and Supreme Court will require significant reasons to exercise their inherent power to depart from the law promulgated by the ECJ.

In the meantime it is clear that the Court of Justice of the European Union continues on its rampage against the safety, security and financial viability of aviation by its latest decision on the subject in the case of *Air Help v. SAS* of 23 March 2021. In this case, the Court has held, against the recommendation of its Attorney General, that a strike organised by a trade union of the staff of an air carrier that is intended in particular to secure pay increases does not fall within the concept of an extraordinary circumstance capable of releasing the airline from its obligation to pay compensation for cancellation or non-delay in respect of the flights concerned. The Court relied on its earlier decisions to the effect that in order to qualify as extraordinary, the event must not be inherent in the normal exercise of an air carrier's activity, and must be beyond its actual control, because the regulation has to be strictly interpreted to afford a high level of protection for air passengers and because the exemption from the obligation to pay compensation is a derogation from the principal that air passengers have the right to compensation.

As so frequently in the past, the Court has made these comments by ignoring some elements of the preamble to the regulation in favour of others, and misinterpreting other elements of the preamble so as to make the payment of pocket money to passengers take priority over the obligation imposed on Member States to procure general compliance by air carriers with the regulation and appoint an appropriate body to carry out enforcement tasks. In other words, states should make sure operators do not wrongly delay or cancel flights, with compensation being paid in the limited circumstances set out in the regulation, and not as a device to punish errant carriers or to jeopardise their financial viability. It cannot be said too often that the payment of compensation does not protect passengers and can be carried to extremes and, as in this case, actually jeopardise connectivity and safety.

In an act of particular judicial gymnastics in its *SAS* decision, the ECJ held that Preamble 14, which specifically states that extraordinary circumstances 'may, in particular, occur in cases of . . . strikes that affect the operation of an operating air carrier', did not assist *SAS* in the current case because a strike, as one of the ways in which collective bargaining may manifest itself, must be regarded as an event inherent in the normal exercise of the employer's activity and that, therefore, a strike whose objective is limited to obtaining an increase in pilots' salaries is an event that is inherent in the normal exercise of that undertaking's activity. The Court also, extraordinarily, held that 'since a strike is foreseeable for the employer, it retains control over events in as much as it has, in principle, the means to prepare for the strike and, as the case may be, mitigate its consequences'. In a continuing feat of legerdemain, the Court held that just because a carrier may have to pay compensation to passengers for cancellations or delays does not mean that the carrier has to accept without discussion strikers' demands. The air carrier 'remains able to assert the undertaking's interests, so as to reach a compromise that is satisfactory for all the social partners'. The effect of the decision, of course, is to hand to unions a weapon in their armoury of almost nuclear capacity to destroy the undertaking altogether unless its demands are met, since failure to comply leads to what are increasingly becoming ruinous levels of obligations to pay 'compensation' to passengers in respect of cancelled flights. It is becoming increasingly difficult to escape the conclusion that the ECJ has a covert purpose of the destruction of the airline industry in Europe, but it is hopefully difficult to imagine that this decision is one that the UK Court of Appeal would follow without demur.

Airlines in Europe need to stand together to resist the continued assault of the regulation on their very existence, for without such unity, to paraphrase Aesop, division can only produce disaster.

Once again, many thanks to all our contributors to this volume including, in particular, those who have joined the group to make *The Aviation Law Review* the go-to resource.

Sean Gates

Gates Aviation Ltd

London

July 2021

ITALY

Anna Masutti¹

I INTRODUCTION

The primary domestic legislation governing the aviation sector in Italy is the Italian Navigation Code (INC), introduced by Royal Decree No. 327/1942, which deals with the main civil, administrative, criminal and procedural aspects of this field. The INC also regulates drones, which are classified as remotely piloted aircraft systems (RPAS).²

The administration of Italy's air navigation sector is ensured by the Ministry of Infrastructure and Sustainable Mobility (MIMS), which, after the issue of Decree No. 190/2020 of 23 December 2020, has replaced the previous Ministry of Infrastructure and Transport (MIT), the Italian Civil Aviation Authority (ENAC), the National Agency for the Safety of Flight (ANSV) and the Aero Club of Italy, while the management of air navigation in its operational profiles has been conferred to ENAC.

In particular, ENAC is the agency in charge of regulating aviation in Italy, as provided by Article 687 of the INC and by Legislative Decree No. 250/1997. It is ENAC's responsibility to supervise and regulate air carriers and to lay down implementing rules for air traffic services.³ Furthermore, ENAC has the duty of imposing fines on airlines that are in breach of Regulation (EC) No. 261/2004. Additionally, ENAC drafted the Passenger's Charter and the Charter of Airport Standard Services, a *vade mecum* of national, European and international regulations on air passenger protection, detailing the claims and compensation procedures available to passengers in cases of non-compliance with the rules set out in the above-mentioned Regulation. The Charter of Airport Standard Services sets out the minimum quality standards that airport operators are bound to observe in providing their services.

In addition, Law No. 214/2011, as subsequently amended by Law No. 27/2012, has established the Regulatory Transport Authority (ART). ART carries out important functions in regulating, promoting and ensuring fair competition in the transport sector. ART also performs supervisory functions regarding airport charges and is in charge of verifying that tender notices do not contain discriminatory conditions or obstruct other markets' competitors. With Resolution No. 136/2020 of 16 July 2020, ART has approved the update of the models for the regulation of airport charges previously approved with Resolution No. 92/2017. In particular, considering the debate between the main Italian airports (i.e., Milan,

1 Anna Masutti is a partner at RP Legal & Tax.

2 In addition to the INC, the discipline on drones is encompassed in Regulation (EU) No. 1139/2018, Commission Delegated Regulation (EU) No. 945/2019 and Commission Implementing Regulation (EU) No. 947/2019. More detailed information about the drones' legislation is addressed in the following paragraphs.

3 See ENAC Regulation of 8 June 2015 on air traffic services, 2nd Edition.

Rome and Venice) in favour of the dual-till system, and air carriers asking for a single-till or hybrid approach, ART has decided to apply the single-till airport charges system. However, Measure 19.1 of Annex A of Resolution No. 136/2020 has established that, should the transparency criteria set forth in Measure 19.2 be applied, the implementation of the dual-till system is allowed and the airport operator can establish how and to what extent the margin deriving from accessory activities can be taken into account in the definition of the charges. Moreover, on 4 January 2021, the Italian Supreme Administrative Court issued judgment No. 5/2021, which has affirmed that the transport activities carried out by air carriers shall be necessarily included in the regulatory powers attributed to ART, since it is explicitly established – by Article 37, Paragraph 2, Letter h) of Law Decree No. 201/2011 – that ART carries out all the functions of supervisory authority in the airport sector, where this role consists in the regulation of relations between airport operators and users as regards the setting of airport charges.

Another entity that comes into play in regulating the aviation sector is the Italian Antitrust Authority. Established under Law No. 287/1990, it is an independent authority in charge of reporting unfair commercial practices and misleading advertisements, with the power to levy fines. The Antitrust Authority has already fined several air carriers for unfair commercial practices relating to underpricing or mispricing of tariffs and other reimbursable elements of cost, which tend to prejudice passengers' interests in cases of flight cancellation. The Antitrust Authority also considers unfair the practice of acceptance of insurance policies by passengers given that this service is normally preselected during the carrier's online booking process. As a consequence, consumers who are not interested in purchasing the service would be forced to opt out.

It is worth highlighting that in the Italian legal system there are the regional administrative courts and the Supreme Administrative Court. The regional administrative courts have jurisdiction over ENAC and Antitrust Authority decisions, and their judgments can be challenged before the Supreme Administrative Court.

II LEGAL FRAMEWORK FOR LIABILITY

Air carriers' liability for death or injury to passengers, for loss of or damage to goods or baggage, and delay in international transport is governed by the Montreal Convention of 28 May 1999 on International Air Transport, which entered into force in Italy on 28 June 2004 following its simultaneous ratification by 13 Member States of the European Community (now the European Union), the Community itself and Norway. It replaced both the Warsaw Convention of 1929 and subsequent protocols and the Guadalajara Convention of 1961.

With the entry into force of the Montreal Convention, the European Parliament and the Council adopted Regulation (EC) No. 889/2002 of 13 May 2002, which amended Regulation (EC) No. 2027/1997 of 9 October 1997, to align European rules with those of the Convention. This Regulation broadens the extent and scope of Montreal Convention provisions on carriage of passengers, baggage and cargo. After the adoption of Regulation (EC) No. 889/2002, the most important piece of legislation relating to the INC was modified. Section II of the INC sets out rules that are entirely dedicated to aviation matters, while Section I concerns matters related to maritime law. With Law Decrees No. 96/2005 and No. 151/2006, several amendments were introduced to the INC's provisions governing

the aviation sector with the aim of creating national rules in line with international and Community standards and, in particular, with regard to the transport of passengers and the consequent carrier's liability and protection of passengers' rights.

By means of the above-mentioned amendments, Italy has extended the enforceability of the Montreal Convention to every area of commercial aviation, which includes the ferrying of air passengers and baggage, as well as areas left out by the extension brought about by Regulation (EC) No. 2027/1997, as amended by Regulation (EC) No. 889/2002. The excluded areas concern transport services carried out by non-Community air carriers (in Italy, these services are governed by the above-mentioned ENAC Regulation of 21 December 2015) as well as services performed by unlicensed carriers (to date, non-Community air carriers are not permitted as per the cabotage rights enshrined in the Chicago Convention). Unlicensed operators include, for example, carriers operating with light aircraft, as well as those involved in transport services with points of departure and arrival at the same airport.

Article 941 of the INC, concerning air carriage of passengers and baggage, and Article 951 on the transport of goods, extend the applicability of the Convention to the entire air transport sector, to which the domestic laws – Law Decrees No. 96/2005 and No. 151/2006 – become applicable.

Article 941, Paragraph 1 of the INC has extended the applicability of the Convention to personal injury caused to passengers. Although, according to the prevailing interpretation, the Convention applies only to bodily injury and not psychological injury, under national law the notion of personal injury includes psychological damage.

However, it is important to keep in mind that this extension is not applicable to areas of transport to which the Convention applies in its own right, or as a result of European rules.

Article 949 ter of the INC states that the two-year limitation period laid down by the Montreal Convention shall apply to any passengers' claims brought before Italian courts. With regard to carrier liability, the INC provides for a compulsory insurance system (Article 942). Since Regulation (EC) No. 785/2004 on insurance requirements for air carriers and aircraft operators does not establish a complete regulatory framework on insurance, the civil liability insurance rules laid down in the Italian Civil Code apply, as well as the provision contained in Article 942, Paragraph 2 of the INC, which provides that the passenger has the right to bring a direct action against the carrier's insurer for any damage suffered or incurred. As for the transport of passengers and goods by air, the Italian legislator found in 2006 that the regulation on liability for damage caused to third parties on the surface was adequate and comparable to the international regulations in force. Indeed, Article 965 of the INC extends the rules of the Rome Convention 1952 to damage caused on Italian territory by aircraft registered in Italy, as well as damage caused by state aircraft.

There have been some changes in Italian law with regard to the rules on liability for collisions between aircraft. These are in line with the regulation of liability of the operator for damage caused to third parties on the surface's amendments. Article 972 of the INC states that all rules governing the limitation of compensation and its implementation in the event of liability for damage caused to third parties on the surface (Rome Convention) shall also apply to liability for damage caused by collisions between two aircraft in flight, or between an aircraft in flight and a moving ship (where responsibility for damage falls on the aircraft). Article 971 of the INC modifies the extent of the limits laid down in the Rome Convention (which vary according to the weight of the aircraft – Article 11 of the Convention) and fixes it

in accordance with the minimum amount of insurance required as per Article 7 of Regulation (EC) No. 785/2004. The minimum coverage is determined by the maximum takeoff mass of the aircraft and ranges from 750,000 to 700 million special drawing rights (SDR).

i International carriage

As mentioned above, an air carrier's liability for cargo loss, damage or delay in international transport is governed by the Montreal Convention. Article 951, Paragraph 1 of the INC establishes that the air transport of goods is regulated by the rules contained in the Convention. The Montreal Convention does not apply to damage in the event of an outright carrier's non-performance of passenger carriage. In fact, the INC (Article 952) recalls the limitation of liability foreseen in the Montreal Convention for the carriage of goods but not for the carriage of passengers or baggage (Article 949 bis of the INC).

ii National carriage

Article 951 of the INC makes the liability rules set out in the Montreal Convention applicable to all air transportation of goods. In particular, the gaps in the Montreal Convention rules in relation to the carriage of goods have been filled by the INC both by referring to and extending the INC rules governing maritime transport and by introducing the provision regarding the non-performance of transport services set out in Article 952 of the INC. The latter Article corresponds, in fact, to the liability regime established by the Convention in respect of delay.

iii General aviation regulation

The law governing the liability of the operator in general aviation activities is established by the INC and other domestic laws (see President of the Republic's Decree No. 133 of 9 July 2010).

Article 743, Paragraph 1 of the INC sets out a broad definition of aircraft, describing them as machines used for the transport of passengers and goods by air. Consequently, the activities performed by aircraft are subject to the rules of the INC.

With regard to aircraft used for leisure and microlight aircraft, a special regulation for insurance obligations has been introduced through Decree No. 133/2010. However, this special regulation refers to both the Community guidelines on insurance obligations, as well as to the principles established by the INC for such obligations. Decree No. 133/2010 introduces specific insurance requirements for single and double microlights without motor (two-seaters weighing up to 100 kilogrammes) for powered aircraft (weight not exceeding 330 kilogrammes for fixed-wing aircraft used for leisure flights, and not more than 450 kilogrammes for helicopters) and for two-seater powered aircraft (weighing not more than 450 kilogrammes, and not more than 495 kilogrammes on devices with fixed wings used for recreational flying and helicopters). This Decree has amended Law No. 106 of 25 March 1985 in light of developments in technology and the safety needs of leisure aviation.

Article 20 of Decree No. 133/2010 establishes a compulsory insurance for civil liability of the operator for damage caused to third parties on the surface as a result of impact or collision in flight.

Article 21 introduces the requirement for insurance coverage and requires that the insurance contract must be concluded in compliance with Regulation (EC) No. 785/2004, and it foresees the extension of insurance coverage to damage caused by gross negligence. It

also provides for the obligation of the insurer to directly indemnify the injured third party, within the limit of the maximum coverage. However, this does not preclude the possibility of recourse by the insurer against the insured, to the extent and circumstances provided for in the contract.

iv Passenger rights

ENAC has issued the Passenger's Charter, which contains the rights conferred on passengers pursuant to Regulation (EC) No. 261/2004.

The Passenger's Charter is a practical guide in which ENAC has summarised useful information for those travelling by air. It was drawn up for the first time in 2001 and distributed in all Italian airports. A new version (the fifth) was introduced in 2005, together with new rules governing delay and cancellation of flights, with the aim of reporting, in particular, the increase in the amount of compensation payable by carriers in the event of denied boarding owing to overbooking, introduction of forms of compensation and assistance in the event of flight cancellations or long delays, as well as the extension of such protection to passengers on charter flights.

In November 2009, ENAC issued the sixth edition of the Passenger's Charter, including information on the provisions issued by the European Union on the rights of persons with disabilities or reduced mobility, the rules on airport security checks and the surveillance of foreign operators. In this edition of the Charter, ENAC has also incorporated the principles established in the judgment of the European Court of Justice dated November 2009 regarding passengers' compensation in the event of a long delay. The judgment upheld the rights of passengers to be compensated in the event of reaching their destinations over three hours later than the scheduled time of arrival.

In addition, the Italian legislator introduced into the INC certain provisions aimed at ensuring special protection for passenger rights. Special mention shall be made to Article 943, which imposes a specific obligation to provide information. If transport is carried out by an air carrier other than the carrier indicated on the ticket, the passenger must be adequately informed prior to the issuance of the ticket. While, for ticket reservations, the information must be given at the time of booking. In the case of a lack of information, a passenger may request the termination of the contract, reimbursement of the ticket fare and payment of damages. Article 943 also establishes that carriers cannot operate from the Italian territory if they do not fulfil their obligations to provide information referred to in Article 6 of Regulation (EC) No. 2027/1997 (as amended by Regulation (EC) No. 889/2002). In addition, Article 948 introduces rules for passengers' waiting lists. The carrier has the obligation to communicate to the passenger its respective waiting list number while putting up a waiting list for a certain flight. Moreover, the list must be posted in a location accessible and visible to the public. Passengers whose names have been entered on the waiting list have the right to access transport according to the assigned waiting list number.

Article 783 of the INC requires air carriers to carry out an annual check of the quality of services offered to passengers, according to indications given by ENAC, which checks compliance with promised quality, and, in the event of non-compliance, enforces measures laid down in its rules that can even lead to the withdrawal of the operator's licence (Article 783 of the INC).

It should be noted that the Italian legislator, by issuance of Legislative Decree No. 53/2018, has implemented the EU Passenger Name Record Directive (Directive No. 2016/681/EU) on the use of passenger name record data for the prevention, detection, investigation and

prosecution of terrorist offences and serious crime. According to such Directive, airlines must transfer the data collected to the competent authority (i.e., passenger information unit) in the relevant Member State.

Moreover, it is worth recalling judgment No. 1584 of 23 January 2018, in which the Italian Supreme Court clearly stated that in the case of flight cancellation or delayed arrival, the burden of proof lies with the air carrier. Therefore, in a claim for compensation under Regulation (EC) No. 261/2004, passengers have only to prove their title (i.e., the flight title) while the air carriers must provide evidence of the proper fulfilment of the flight obligation.

Finally, it should be noted that, because of the covid-19 outbreak, ENAC, with press release No. 12/2020 of 29 of February 2020, has informed passengers whose flights were cancelled, and passengers who were subject to the restrictions imposed by third countries, that they had the right to reimbursement of their ticket price, but that did not have the right to compensation provided for in Article 5 (3) of Regulation No. 261/2004 because, in such circumstances, the cancellation of a flight – or the impossibility of flying – was considered dependent on the carrier. Subsequently, Law No. 27 of 24 April 2020 in Article 88 bis, Paragraphs 11 and 12, establishes that air carriers could offer a voucher instead of the reimbursement of the ticket's price. The voucher had a validity of one year from the date of issuance. Hence, the issuance of the voucher fulfilled the reimbursement obligation and did not require any form of acceptance by the passenger. In this regard, it should be noted that ENAC, in a press release issued on 18 June 2020, has established that, since the covid-19 restrictions had been lifted, cancellations made after 3 June 2020 were not attributable, except in specific cases, to the pandemic. Hence, air carriers must reimburse the ticket price to passengers whose flight have been cancelled.

The European Commission has addressed the matter, too, and on 18 of March 2020 it issued interpretative guidelines⁴ aimed at clarifying how certain provisions of the EU passenger rights legislation apply in the context of the covid-19 outbreak. The Commission Guidelines have established that, in the case of cancellation due to covid-19 restrictions, passengers have the right to choose, at their discretion, between reimbursement or rerouting, and they must also be offered care by the operating air carrier, free of charge. In addition, and in line with the ENAC press release's content, the Commission has affirmed that measures adopted to contain the covid-19 pandemic cannot be considered inherent in the normal exercise of the activity of carriers, and that they have to be seen as outside their actual control. Hence, the measures taken to contain covid-19 should be regarded as extraordinary circumstances precluding the right of passengers to claim compensation as established by Article 5(3) of Regulation 261/2004. Moreover, on 13 May 2020, the Commission adopted a recommendation regarding the issue of vouchers to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the covid-19 pandemic. The rules contained therein are aimed at making vouchers more attractive to passengers. Indeed, the Commission has recommended that vouchers should be valid for at least one year, should be transferable and should be refundable if unused. The Commission has also reminded Member States that they could use state aid to satisfy passengers' claims for reimbursement arising from covid-19 travel disruption.

⁴ Commission Notice – Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with covid-19, 18.3.2020 C(2020) 1830 final.

Finally, in March 2021, the European Court of Auditors published a document referring to the EU measures adopted in relation to air passenger rights⁵ to give air passengers a more comprehensive review of the rules governing their rights and to help them facing claims that have occurred since the beginning of the covid-19 crisis.

III LICENSING OF OPERATIONS

i Licensed activities

Within the EU, international and domestic air services are governed by Regulation (EC) No. 1008/2008 (and subsequent amendments), which provides market access to all carriers who have obtained an operating licence, as well as an air operator's certificate. This principle was also adopted by the Italian legislator in 2005 and 2006 as it modified the rules of the INC, stipulating services that are allowed to be performed by air carriers. These include air transport services to passengers and carrying of mail and cargo on scheduled and non-scheduled flights on intra-Community routes by carriers who have obtained an operating licence, and previously a certificate (an AOC), according to the provisions laid down in the INC and in EU legislation.

ENAC is the body responsible for the issuance of the AOC. The certificate proves that the operator has the professional ability and the organisation necessary to ensure the exercise of its aircraft in a safe condition for the aviation activities specified therein (Article 777 of the INC). ENAC establishes, through its own internal rules, the content, limitations and procedures for the issuance, renewal and changes, if any, to the AOC. The Regulation governing ENAC's issuance of a national AOC for air transport undertakings is also applicable to air carriers performing helicopter operations.

ENAC grants air carrier licences to undertakings established in Italy according to Regulation (EC) No. 1008/2008. The conditions for the issuance, formalities and validity of the licence are subject to the possession of a valid AOC specifying the activities covered by this licence.

For the issuance of the licence, ENAC requires the operator to submit evidence of the administrative, financial and insurance requirements referred to in Regulation (EC) No. 1008/2008 and Regulation (EC) No. 785/2004, and proof of availability of one or more aircraft on the basis of a property deed or under a contract for the use of the aircraft previously approved by ENAC.

In accordance with Article 779 INC, within one year from the issuance of the licence, and every two years thereafter, ENAC must recheck all the requirements in terms of ownership, control, financial support, guarantees, etc.

ENAC may, at any time, suspend the licence if the carrier is unable to ensure compliance with the licensing requirements, and it has the authority to revoke it if it appears that the carrier is no longer able to meet its commitments. The procedures carried out by ENAC i to verify the licensing requirements established by Chapter II of Regulation (EC) No. 1008/2008 are laid down in ENAC Circular of 23 December 2015.⁶

Furthermore, on 17 November 2017 ENAC issued a regulation regarding fire-fighting air operations in Italy. This Regulation sets out the rules applicable to the release, maintenance,

5 European Court of Auditors, Air passenger rights during the covid-19 crisis, March 2021.

6 ENAC Circular, Licenza di Esercizio di Trasporto Aereo, EAL, 23 December 2015.

limitations and revocation of the firefighting air operator certificate (COAN). The COAN is mandatory to perform this type of flight operations, which ENAC defines as ‘air operations devoted to fire-fighting, including flights for observation and finding of fires, spread of extinguishing and retardant products, transport of specialised personnel and flight training’.

To obtain the COAN, the applicant must comply with several requirements regarding the place of business, citizenship and professional ethics of the legal representative and the board members, nationality of the operator, operator’s financial means, registration of the aircraft, aircraft’s property, airworthiness certificate and insurance coverage.

Finally, with particular regard to the drones sector, it is worth recalling Regulation (EC) No. 1139/2018 laying down new requirements to ensure drones’ free circulation in the European Common Aviation Area, and the third edition of the ENAC regulation on remotely piloted aerial vehicle operations falling within its competence.⁷ However, it should be noted that after Regulation (EU) 2019/947 entered into force on 1 January 2021, introducing several innovations regarding the certification, airworthiness and insurance of unmanned aircraft systems (UAS), ENAC has updated the national legislation to comply with the new EU regulation, and has issued the new ENAC UAS-IT Regulation, which entered into force on 4 January 2021.

ii Ownership rules

ENAC issues the air carrier’s licence according to Regulation (EC) No. 1008/2008 (Article 778 of the INC) and the EC interpretative guidelines (2017/C 191/01) dated 16 June 2017. The licence is granted to undertakings established in Italy whose effective control, through a shareholding majority, is owned directly or through majority ownership by a Member State or nationals of EU Member States and whose main activity is air transport in isolation or in combination with any other commercial operations of aircraft or the repair or maintenance of aircraft. Moreover, air carriers must own a valid certificate of airworthiness issued by ENAC for one or more aircraft being its property or leased as provided by Paragraph 4 (c) of ENAC Circular No. EAL-16 of 23 December 2015. In addition, air carriers must provide satisfactory evidence of administrative, financial and insurance requirements, as provided by Regulation No. 1008/2008.

Finally, it is worth highlighting that, in its Work Programme 2020, the European Commission has highlighted – among the new initiatives to be taken within the aviation services package’s policy objective – the necessity to revise ownership and control rules in order to help air carriers to mitigate the economic impact of the crisis on the air transport sector.

iii Foreign carriers

Access to European routes is ensured to all air carriers (Italian and European) in possession of the AOC and the operating licence granted by ENAC (Article 776 of the INC).

The services of scheduled air transport of passengers, mail or cargo that are conducted, in whole or in part, outside the European Union are governed by bilateral agreements.

Regarding non-EU scheduled air transport services, Article 784 of the INC provides that it is an essential condition that the civil aviation authorities of the states that are parties to the agreement have a regulatory system for certification and surveillance for air transport

7 ENAC Regulation, Remotely Piloted Aerial Vehicles, Third edition of 11 November 2019.

services; this is required to ensure a level of safety as provided by the Chicago Convention standards. The air transport services are performed for the Italian part by designated air carriers, established on national territory, with a valid operating licence granted by ENAC or by a Member State of the European Union, that are provided with financial and technical capacity and insurance sufficient to ensure the smooth running of air services in conditions of safety and to safeguard their right to mobility of citizens (Article 784 of the INC).

With regard to the operation of extra-EU scheduled services, in December 2014 ENAC issued Circular EAL-14B encompassing guidelines on the authorisation and designation procedure for both Italian and Italian-based EU carriers in accordance with international air transport agreements. The Circular aims to improve the regulatory framework and to assist the industry by broadening business opportunities. Once an EU airline has been recognised by ENAC as an established carrier, and it must comply with all national laws and regulations applicable to its specific business in Italy (including any relevant fiscal and employment laws).⁸ ENAC has also outlined the criteria in selecting carriers applying for traffic rights to and from extra-EU airports.

In 2016, ENAC issued Circular EAL-23, which determines the implementation procedures of the second edition of the ENAC Regulation on Non-scheduled Air Services between EU and Third Countries, approved in December 2015 (implementing Article 787 of the INC). The Circular aims to simplify the procedures concerning traffic rights permissions in favour of non-EU carriers operating non-scheduled services in Italy. In particular, it provides the revision of the accreditation process of non-EU operators performing services in Italy, according to the third-country operator authorisation provided for in Regulation (EU) No. 452/2014, and subsequent amendments. The Circular establishes two different authorisation procedures respectively for aircraft having a maximum operational passenger seating configuration of not less than 20 seats, and for taxi flights (performed with aircraft having a configuration of a maximum number of passenger seats of less than 20). The choice of carriers shall be made by ENAC on the basis of criteria established in advance and made public and through transparent and non-discriminatory procedures. Designated carriers cannot give the service hired to other air carriers without the prior written consent of ENAC, under penalty of exclusion from the hired service (Article 785 of the INC).

On 20 May 2019, China and the European Union signed an agreement on civil aviation safety and a horizontal aviation agreement to strengthen their aviation cooperation. Prior to this agreement, only airlines owned and controlled by a specific Member State or its nationals could fly between that Member State and China, while the new horizontal aviation agreement will allow all EU airlines to fly to China from any EU Member State through a bilateral air services agreement with China under which unused traffic rights are now made available. In addition, on 7 March 2019, the US and the EU agreed to amend Annex 1 to the Agreement on cooperation in the regulation of civil aviation safety, and in June 2020, the European Commission signed two bilateral aviation agreements with Japan and South Korea, respectively.

⁸ A minimum wage for air transport personnel has been established by Article 203 of Law Decree No. 34/2020.

iv The national airport plan

In accordance with Article 698 of the INC, in 2015 the Ministry of Transport published the latest version of the national airport plan, which was formally approved by the issuance of Decree of the President of the Republic No. 201/2015.⁹ It aims to ensure a balanced development of Italian airports, offering a new governance system, identifying structural priorities and optimising the global transport offer. The plan aims to prevent competition conflicts between airports located in the same region, favouring the creation of a common airport system with a single governing body. The Italian airport plan has been drafted according to EU principles included in the 2014 EU Commission Guidelines on state aid to airports and airlines. The plan identifies 10 traffic zones; each zone has one strategic airport with the sole exception of the centre–north zone, where Bologna and Pisa–Florence operate, provided that the Pisa and Florence airports become totally integrated. The 10 strategic airports are: Milan Malpensa (north-west), Venice (north east), Bologna and Pisa–Florence (centre–north), Rome Fiumicino (centre), Naples (Campania), Bari (Mediterranean–Adriatic), Lamezia (Calabria), Catania (east Sicily), Palermo (west Sicily) and Cagliari (Sardinia). Other airports of national interest can be identified provided that they can actually play an effective role in one zone and can achieve at least a break-even point in their annual accounts. The plan also envisages the strengthening of airport infrastructure, the development of intermodality, the creation of a cargo network and the facilitation of general aviation.

Since the publication of Decree No. 201/2015, the volumes and components of Italian airport traffic have grown significantly, the travel habits of EU and global passengers have changed and the covid-19 pandemic has challenged the resilience of the Italian airport network. These factors prompted the MIT to request ENAC to update the national airport plan and, to this end, on 10 February 2021 ENAC issued a call for tenders for the update and revision of the national airport plan and for the evaluation of the strategic environmental assessment procedure. The procedure is currently ongoing.

IV SAFETY

Safety in the aviation field is guaranteed by the maintenance of the airworthiness of aircraft, parts and spares. Safety requires the certification of management organisations and products, as well as the qualification of technical and operating staff working in the field. Safety technical regulation is established and implemented by ENAC, which issues airworthiness certificates and air operator certificates, and approves maintenance programmes in accordance with the international and European rules issued by the International Civil Aviation Organization (ICAO) and by the European Aviation Safety Agency (EASA).¹⁰

The basic Regulation (i.e., Regulation (EU) No. 1139/2018) – which repealed Regulation (EC) No. 216/2008 – whose purpose is to establish and maintain a high uniform level of civil aviation safety in the Union) restates the role covered by the European Aviation Safety Agency and expands it to include drones and urban air mobility. The Regulation gives the Agency a coordinating role in cybersecurity in aviation and widespread scope for research and development, international cooperation and environmental protection.

9 Decree No. 201 of the President of the Republic of 17 September 2015.

10 See Regulation (EU) No. 1139/2018 of 4 July 2018 on common rules in the field of civil aviation.

The Italian implementation process is supervised by ENAC, which issued Guideline No. 2017/003-APT¹¹ incorporating interpretative and procedural information on aspects relating both to airport certification and to the conversion of certificates issued by ENAC on the basis of national legislation. The Guideline is intended to provide operators with a comprehensive framework of the criteria for the application of the requirements of Basic Regulation No. 1139/2018 and the related implementing rules.

Civil aviation safety is also ensured through the issuance of the state safety programme (SSP),¹² a project provided for by ICAO Annex 19 (which entered into force in November 2019), which in Italy is governed by a special committee that includes ENAC, ANSV, the Ministry of Infrastructure and Transport, the Air Force, ENAV (the Italian air navigation service provider) and Aero Club d'Italia. The SSP aims to determine an acceptable safety standard for the entire civil aviation system and then identify the activities that the state will have to undertake to achieve or maintain this level of safety. To this end, the SSP provides that each state is equipped with specific indicators (safety performance indicators) to assess the degree of safety achieved in the aviation sector in its national territory.

It is worth highlighting that ENAC was the first aviation authority to adopt such indicators and to subsequently issue, in 2019, the basic edition of the safety performance indicators document.

The basic edition of the SSP encompasses the requirements provided for in new basic Regulation (EU) No. 1139/2018, and it has introduced the principles of 'just culture', as required by Regulation (EU) No. 376/2014. With the fourth edition, the SSP fully complies with the standards defined by the second edition of ICAO Annex 19, thus completing the implementation of the safety principles in the management of Italian civil aviation.

In Italy, the accident reporting system is guaranteed by the pilot in command of the aircraft, who has the duty to record the accident or incident in the flight book immediately after landing and sending a report to ENAC. Articles 826 to 832 of the INC regulate air accidents, establishing several duties for airport management, the Italian air navigation services provider and for the ANSV. Pursuant to Article 826 of the INC, the technical investigation of air accidents and incidents is conducted by the ANSV.

Regarding safety, Regulation (EC) No. 1139/2018 confers the power on the European Commission, with the support of EASA, to establish the requirements and technical characteristics that drones need to have in order to fly safely.

In May 2021, ENAC issued the state plan for aviation safety 2021–2025 (SPAS) in compliance with the requirement of Article 8 of Regulation (EU) 2018/1139 to describe the safety activities that, in accordance with the objectives set out in the state safety programme – Italy, are put in place to ensure the highest levels of safety in the Italian aviation sector. The SPAS has the same validity period (five years) as the corresponding edition of the European plan for aviation safety (EPAS). With the publication of the SPAS, ENAC has set out the objectives to implement the strategic decisions adopted in the state safety programme – Italy to satisfy the requirement of Article 8 of Regulation (EU) 2018/1139; the safety actions attributed to the EU Member States by EASA through the EPAS; the safety actions identified at the national level on the basis of the safety data collected by ENAC; and the mitigation actions of the safety risks identified at the European and national level.

11 ENAC Guideline No. 2017/003 – APT ed. No. 2 of 10 October 2019 – Proceeding for the conversion of the airport certificate pursuant to Regulation (EU) No. 139/2014.

12 State Safety Programme, 4th ed. of 3 February 2020.

V INSURANCE

The amendments to the INC made in 2005 and 2006 (by Decree No. 96 of 9 May 2005 and Decree No. 151 of 15 March 2006), which adapted its provisions to the international and Community standards in force in Italy, have also had a significant impact on aviation insurance regulation.

The previous regulations on compulsory insurance for air carriers and aircraft operators have been replaced by the current obligations to insure civil liability for damage caused to passengers, baggage, cargo and third parties established at European level. The current rules oblige air carriers and aircraft operators to ensure their liability for damage caused to passengers, baggage and cargo in accordance with EU legislation (Regulation No. 785/2004). In this way, Italy applies the same EU regulations, with one specific provision established in favour of passengers. Indeed, Article 942 of the INC allows passengers to exercise direct action against the insurer for compensation for damage caused by the air carrier; this action is not envisaged by Regulation No. 785/2004.

As a result of this provision, an injured person may claim compensation directly against the air carrier's insurer. With regard to the legal action against the insurer, Article 1020 of the INC provides for a limited period of one year. Since the passenger has at his or her disposal a period of two years to bring an action against the air carrier (Article 35 of the Montreal Convention), it is generally believed that if the same passenger intends to act directly against the insurer, he or she should have the same two-year term for the action against the insurer.

VI COMPETITION

The Italian system does not provide specific regulation for the aviation sector. Therefore, Law No. 287 of 10 October 1990, which introduced to the Italian legal system general rules on competition, is also applicable to the aviation sector.

An interesting point regarding the Italian aviation sector concerns the opportunity to implement public investments in small and regional airports with the aim of giving them a central role in their economic growth and regional development without distorting competition.

In this regard, on 14 June 2017, the EU Commission adopted Regulation (EU) No. 2017/1084, which amended the General Block Exemption Regulation (GBER)¹³ and extended its scope to ports and airports. The amended Regulation's rules exempt support measures for ports and airports from prior Commission scrutiny, thus simplifying the procedure for public investments in ports and airports. The aim of the GBER is to facilitate public investments that can create jobs and growth.

The aforementioned Regulation is specifically designed for regional airports, which are defined as 'airports with average annual passenger traffic of up to 3 million passengers', and to reduce the regulatory burden and costs for public authorities and other stakeholders in the EU.

Prior to the issuance of the GBER amending regulation, the Italian authorities presented their position concerning its first draft. Following a public consultation on the draft, the authorities considered that a real and effective simplification of the administrative

13 Commission Regulation (EU) No. 651/2014 of 17 June 2014 and subsequent amendments.

burden may be realised under the condition that operating aid to airports would be exempted from the notification procedure. In addition, they underlined the need to clearly define the instances of small airports, which are exempt from the application of state rules.

On this matter, the Italian authorities consider that airports for general aviation and those with scant economic traffic should not be considered as being in competition with other airports because of their small size. Therefore, any public financing given to them should not be considered a way to affect competition or trade relations between Member States.

In addition, the Italian Ministry of Infrastructure and Transport guidelines and the ART intervention on the subject may be revised, in accordance with the approved GBER amending Regulation (EC) No. 651/2014 for regional airports, as it represents an important support instrument for regional airports, which are a substantial part of airport structure in Italy.

With the 2020 Budget Law, measures have been introduced to ensure territorial continuity with Sicilian airports and social tariffs for certain categories of travellers to and from Sicily. In this regard, the Italian state has allocated €25 million. The 2020 Budget Law also left the regulation of the financing system for the performance of the coordination function for slots allocation at national airports designated as coordinated or schedules facilitated to a ministerial decree. This new regulation, in order to ensure that coordination activities are carried out in an impartial, non-discriminatory and transparent manner, will also establish the distribution of the related costs, with 50 per cent to be borne by the operators of the airports concerned and the remaining 50 per cent to be borne by the operators of aircraft requesting to use those airports, without charge to the state. Finally, a fund for the preliminary study necessary for the introduction of 'tourist flights' has been set up with a budget of €100,000 for each of the years 2020–2022. While the 2019 Budget Law allocated €3 million for each of the years of the three-year period 2019–2021 at Crotone Airport and, in addition, authorised an expenditure of €15 million for the year 2019 and €10 million for 2020 to allow the necessary work of the restructuring of and security upgrades to Reggio Calabria Airport, in December 2020, the 2020 Budget Law allocated €500 million to Italian airport operators and handling services providers for losses that occurred due to the covid-19 outbreak.

With regard to the European rules on competition, the European Council adopted Regulation (No. 712/2019) to safeguard the competitiveness of EU air carriers against unfair competition and other practices implemented by non-EU airlines. The new legislation entered into force in May 2019 and goes beyond the existing Regulation (EC) No. 868/2004, which has proved to be ineffective. Under the new Regulation, if the European Commission finds that a practice distorting competition, adopted by a third country or a third-country entity, has caused an actual injury to EU air carriers, the European Commission may impose redressive measures aimed at offsetting that injury.

Those redressive measures shall take the form of 'financial duties or any operational measure of equivalent or lesser value, such as the suspension of concessions, of services owed or of other rights of the third-country air carrier' (Article 14.4) but shall, however, respect the principle of proportionality. To this aim, the measures must be proportional, limited to a specific geographic area and not exceed what is necessary to remedy the injury to the EU air carriers concerned, and must never result in the suspension or limitation of traffic rights granted by a Member State to a third country.

For the sake of completeness, the recent introduction into Italian law of the new Code of the Crisis of Business and Insolvency (Legislative Decree No. 14/2019), which modifies

the regulation of bankruptcy procedures to which airlines in precarious financial situations could have access in order to facilitate their financial recovery, should also be highlighted. Due to the covid-19 pandemic, the entry into force of the new Code has been postponed from 15 of August 2020 to 1 September 2021.

In any case, it should be noted that the applicability of the extraordinary administration of large companies contained in Decree No. 347/2003, and further amended by Decree No. 134/2008, remains unchanged provided that the air carrier meets the requirements for access.

In addition, on 28 January 2020, ENAC adopted a three-year plan for the prevention of corruption and transparency precisely aimed at defining a strategy to prevent the commission of acts of corruption in public administrations that could potentially be detrimental to free competition among air carriers.¹⁴

VII WRONGFUL DEATH

Italian law allows for the recovery of actual damages as pecuniary damages (economic loss, out-of-pocket expenses and loss of profit) and non-pecuniary damages – those resulting from wrongful death, personal injury, the loss of physical or mental integrity (or both), or pain and suffering. The Italian legal system recognises non-pecuniary damages for wrongful death suffered by the ‘secondary victim’. Despite there being no statutory definition of secondary victim, the notion generally encompasses family members. A distinction is, however, made by Italian courts between secondary claimants who live in the same house with the primary victim (such as a spouse or dependent children) and secondary claimants who are closely related to the primary victim but live separate and independent lives, when assessing the gravity of life disruption arising from the accident and the quantum of non-pecuniary damages. Secondary claimants have to demonstrate the blood relationship and the existing close and loving bond with the primary victim. This close bond may also be presumed for the spouse or young children living with the victim (although such a presumption does not exonerate the secondary claimant from the burden to prove the strength of the relationship).

For the assessment and liquidation of non-pecuniary damages for secondary victims, Italian courts rely on parameters set out in the tables elaborated and regularly updated by the Court of Milan (the latest edition of the Milan tables was adopted in 2018). These tables contain a section for the calculation of damages secondary victims are entitled to claim for pain and suffering in the event of death or severe injury of the primary victim.

The system is based on a chart containing the various hypotheses of family relationship. These tables essentially sum up compensation for either biological or psychological damage, considering the specific circumstances and features of the case. The Milan tables have become the reference throughout Italy, following the indications given by the Italian Supreme Court. As a general rule, the compensation must be tailor-made. While applying the Milan tables, the judge must consider all the relevant factors (such as the severity of the injury and the age of the victim) and find a figure within limits set by the chart fitting best with the circumstances of the case. These tables, in essence, contain two sections: one for the calculation of the non-pecuniary damage suffered by the primary victim, as well as the secondary victim (known as the *danno riflesso*) if he or she is physically or mentally affected by the event, in order to compensate temporary and permanent invalidity arising from the accident, and another for the calculation of non-pecuniary damages for secondary victims, in the event of loss or

14 ENAC’s Board of Directors’ resolution No. 6/2020.

disruption of the family relationship arising from the death or a severe permanent inability of the primary victim. A secondary victim's non-pecuniary damages must be duly proven; courts require the claimants to confirm that the event has caused such a substantial disruption in the standard and ordinary habits to impose a choice of life that is radically different. The Italian Supreme Court has furthermore repeatedly held that the secondary victims must prove the intensity and strength of the family bond, sharing of life and habits.

Moreover, it is worth highlighting that under Italian law, a sudden death (that is to say a death immediately following an event) does not give rise to a right to a claim transferred to heirs, on the assumption that as soon as a person dies, he or she is no longer a legal person and loses the capacity to suffer damage caused by death.

The principle was confirmed in 2015 by the Joint Chambers of the Supreme Court,¹⁵ which resolved a conflict that had emerged in case law over the years.

The successors of the primary victim are entitled to claim non-pecuniary damages suffered by the primary victim before dying, as far as a reasonable lapse of time incurs between the event and the death,¹⁶ and may also claim the *danno catastrofale*, consisting of the affliction by the primary victim deriving from the awareness of imminent death.¹⁷

VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure

Liability is allocated among the defendants according to the respective negligence in causing the accident.

ii Carriers' liability towards passengers and third parties

See Section II.

iii Product liability

There are no specific rules governing manufacturers' liability; the Italian regulations on product liability and the Italian Consumer Code¹⁸ shall apply.

iv Compensation

There are no sector-specific rules. The Italian regulations on product liability shall apply.

IX DRONES

Drones are remotely piloted aircraft systems considered for all intents and purposes to be aircraft by Article 743 of the INC. The use of drones is regulated by national laws, EU regulations, ENAC regulations and, for military drones, by decrees of the Ministry of Defence. The rapid evolution of the remotely piloted aircraft systems sector has led to the need to innovate the relevant legislation contained in Regulation (EC) No. 216/2008. For this reason, the European Union recently adopted Regulation No. 1139/2018, which is in

¹⁵ Cassazione, Sezioni Unite, 15350/2015.

¹⁶ Among many others see Cassazione 32372/2018.

¹⁷ Among many others see Cassazione 29492/2019.

¹⁸ Legislative Decree No. 206 of 6 September 2005.

the process of being implemented by the European Commission with the support of EASA aimed at establishing common rules on the use of drones to allow their free circulation in the European common aviation area. As previously said, on 12 March 2019 the European Commission adopted Delegated Regulation (EU) 2019/945¹⁹ establishing common rules setting technical requirements for drones, and on 24 May 2019 it adopted Implementing Regulation (EU) 2019/947 on the rules and procedures for the operation of unmanned aircraft. The legislation introduces common rules for operators, whether professional or recreational, enabling them to operate across borders. Once drone operators have received the authorisation in the state of registration, they are allowed to freely circulate in the European Union. The new rules include technical and operational requirements for drones defining the capabilities to be flown safely. For instance, new drones will have to be individually identifiable, allowing the authorities to trace a particular drone, if necessary. The Regulation provides rules covering each operation type, from those not requiring prior authorisation to those involving certified aircraft and operators, as well as minimum remote pilot training requirements. It is worth highlighting that on 12 December 2019, EASA published the Easy Access Rules for the Basic Regulation (Regulation (EU) 2018/1139) to provide stakeholders with an updated and easy-to-read publication.

Regarding safety matters, the approach taken by the European Commission and EASA is to apply the highest safety standards achieved in manned aviation to drones to prevent the occurrence of any type of accident.

Beyond the European Union institutions, in 2019 ENAC adopted the third edition of the Regulation²⁰ on Remotely Piloted Aerial Vehicles laying down the necessary requirements that shall be met to ensure the safety levels for the different types of RPAS operations, the provisions for operating RPAS and those regarding air navigation in national airspace and common provisions applying to RPAS. The ENAC Regulation also lays down provisions and limitations that must be complied with for the operation of model aircraft in national airspace. ENAC has also contributed to the development of the international UAS regulation for categories A (open), B (specific) and C (certified) under the joint authorities for rulemaking on unmanned systems context. In particular, ENAC, in coordination with the ICAO Remotely Piloted Aircraft Systems Panel, made a considerable contribution in order to define the emission criteria of the Type Certificate and the Airworthiness Certificate for C Category UAS. On this occasion, preliminary discussions about the concepts and the problems of the UAS autonomous flights have also started.

By virtue of the recent entry into force of the new EU legislation on drones, ENAC has adopted the ENAC UAS-IT Regulation, issued on 4 January 2021. The new national Regulation establishes that it is not allowable to conduct operations with a drone in the absence of valid third-party liability insurance coverage (Article 27). The provision specifies that, in addition to being adequate for the purpose, the insurance of the drone must provide for insurance limits that are not lower than the minimum parameters indicated in the table of Article 7 of EC Regulation 2004/785 regarding the insurance requirements applicable to air carriers and aircraft operators operating from, to, or in, the territory of a Member State. In particular, the table establishes that for an aircraft with a maximum takeoff weight of less than 500kg, the minimum insurance limit is equal to 750,000 SDR, corresponding to

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

20 ENAC Regulation on Remotely Piloted Aerial Vehicles, ed. 3 of 11 November 2019.

around €900,000. Finally, Article 27 of the new ENAC UAS-IT Regulations prescribes that, in compliance with Article 743 of the INC, the provisions of Article 1015 of the Civil Code shall also apply to unmanned aircraft, extending the regime of direct action by injured third parties against the insurer also to cases of damage caused by the use of drones.

X VOLUNTARY REPORTING

Regulation (EU) No. 376/2014 establishes rules related to the reporting, analysis and follow-up of occurrences in civil aviation. Article 3(2) of this Regulation has been recently amended by Regulation (EU) No. 1139/2018. For the purpose of this Regulation, occurrence means any safety-related event that endangers or that, if not corrected or addressed, could endanger, an aircraft, its occupants or any other person and includes in particular accidents or serious incidents. This Regulation aims to improve aviation safety by ensuring that relevant safety information relating to civil aviation is reported, collected, stored, protected, exchanged, disseminated and analysed. It provides a reporting system that is both mandatory (mandatory occurrence reporting (MOR) and voluntary (voluntary occurrence reporting).

Regarding the Italian system, companies in the aviation sector are required to set up a voluntary reporting system to facilitate the collection of details of occurrences that may not be captured by the mandatory reporting system and of other safety-related information that is perceived by the reporter as an actual or potential hazard to aviation safety. Any significant information shall be analysed and notified to ENAC by means of the 'eEMOR' system.

However, it is also possible to address the voluntary reports directly to the competent authority; in this case, the reporting process works without using the internal company reporting system. The competent authority is the National Agency for Flight Safety (ANSV). Once voluntary reports have been sent directly to the ANSV, and the agency has properly analysed them, they enter into the national events database administered by ENAC, which ensures the appropriate confidentiality and protection of the collected details of occurrences. The ANSV is also concerned with the investigation of aircraft accidents in cooperation with ENAC.

The sole objective of occurrences reporting is the prevention of accidents and incidents, and not to attribute blame or liability. The absence of punitive purposes (in the name of a no penalty policy or a just culture), as well as the fact that the authors of the information remain anonymous, are intended to remove resistance and fears to communicate, and also to realise more complete occurrence reporting. Voluntary reporting – also of confidential information – could bring an important contribution to operational safety in aviation. In particular, these reports may include premonitory or near-miss occurrences that could lead to real incidents if not communicated in due time.

XI THE YEAR IN REVIEW

i Key facts

The covid-19 emergency required the adoption of Law Decree No. 18 of 17 March 2020 – then converted into Law and amended by Law No. 27 of 24 April 2020 – which lays down new provisions for the companies Alitalia SpA and Alitalia Cityliner SpA. Article 79, Paragraphs 3 to 8 of the said Law Decree authorises the renationalisation of Alitalia by the establishment of a new public company entirely controlled by the Ministry of Economy and Finance, or by a company with a prevalent direct or indirect public participation. On

9 October 2020, the Ministry of Economy and Finance, the Ministry of Infrastructure and Transport, the Ministry of Economic Development and the Ministry of Labour and Social Policies signed the decree for the incorporation of the newco Italia Trasporto Aereo SpA (ITA): the company will replace Alitalia as the flagship company and will be based in Rome. Recently, on 25 May 2021, the government and the European Commission have entered into a preliminary agreement aiming to establish the divestment of Alitalia and to make ITA fully operative in the upcoming months. In particular, the Commission and the government have reached a common understanding on the key parameters deemed necessary to ensure a complete economic discontinuity between ITA and Alitalia. This implies that, on the one hand, ITA will have to regain – by means of related public tenders – the management of all Alitalia’s services, such as maintenance, branding and handling services, but it also means, on the other hand, that ITA will not inherit the huge debts and financial problems of Alitalia, thus forming a separate and independent entity.

With regard to public service obligations (PSOs), it should be noted that on 21 February 2020 the Minister for Infrastructure and Transport signed a decree providing for the extension, until 31 December 2020, of the PSOs imposed on the routes connecting Sardinia to the main national airports (i.e., Rome and Milan). The routes between the main national airports and Cagliari and Alghero airports are operated by Alitalia, which was also assigned the routes to Olbia, previously operated by Air Italy. Moreover, PSOs have also been imposed for the routes connecting national airports and the Sicilian airports of Trapani and Comiso. In light of the covid-19 pandemic, these PSOs have been suspended for the moment.

On 11 May 2020, ENAC issued a decision establishing the suspension of Italian airport concession fees until 31 January 2021. This suspension is granted under the condition that the airport authorities (concessionaires) do not ask for rental payments from sub-concessionaires (involved in aviation activities and not in commercial ones).

Finally, on 28 January 2021, ENAC issued Circular ATM-03C defining and updating the criteria and procedures for the establishment, modification, extension of validity and cancellation of no-fly zones, both dangerous and regulated.

ii The covid-19 pandemic

Almost all the measures taken for the years 2020 and 2021 are due to the fact that no industry has been so affected by the covid-19 pandemic as the air transport and tourism industries. Indeed, according to Eurocontrol’s latest data, in May 2021 air traffic decreased by 65 per cent compared to the same 2019 period,²¹ and it is likely to decrease even more since new travel restrictions have recently been imposed by Member States on non-essential travel due to the latest waves of infection (for example from and to India). Moreover, the International Air Transport Association (IATA) added a covid-19 variant scenario in its most recent outlook for 2021,²² estimating that the revenue passenger kilometres (RPK) for 2021 might only reach 38 per cent of the RPK achieved in 2019. This situation is part of the general decline foreseen by IATA in its previous financial outlook, which confirmed that the deep losses in the air transport sector recorded in 2020 will continue in 2021. In particular, a global net loss of US\$38.7 billion is expected in 2021 (more than the \$15.8 billion loss previously forecast).²³

21 See Eurocontrol, *Comprehensive Air Traffic Assessment - covid-19 impact on European air traffic*, 5 May 2021.

22 See IATA, *covid-19: weak year-end for air travel and outlook is deteriorating*, 3 February 2021.

23 See IATA, *press release No. 95/2020, Deep Losses Continue Into 2021*, 24 November 2020.

With particular regard to Italy, on 20 April 2021, ENAC published the traffic data related to year 2020. During the full year, the Italian air traffic was strongly affected by the covid-19 crisis, which caused a severe contraction in line with the restriction registered in the rest of the world. 2020 recorded a decrease of 72.5 per cent of passengers transited at Italian airports compared to 2019, between domestic and international traffic. Domestic traffic recorded a more moderate decrease of 61.1 per cent, compared to international traffic, which instead recorded a decrease of 78.3 per cent.

In light of the impact that covid-19 has had on passenger traffic, the EU has decided, over past months, to implement broad measures regarding air cargo operations, slot allocation and state aid.

Air cargo operations

In light of the strategic importance of air cargo – which plays a vital role in the quick delivery of medicines, medical equipment and supplies needed to combat the current pandemic – the European Commission, through the issuance of Guidelines,²⁴ has requested that Member States implement appropriate operational measures to facilitate air cargo transport and to reduce additional costs.

The measures listed in the Commission Guidelines include the following:

- a* for transport coming from outside the EU, the granting, without delay, of all necessary authorisations and permits including, where legally possible, temporary traffic rights for additional air cargo operations, even when conducted by passenger aircraft;
- b* temporarily removing, or applying flexible, night curfews or slot restrictions at airports for essential air cargo operations;
- c* facilitating the use of passenger aircraft for cargo-only operations; and
- d* ensuring that air cargo crew as well as handling and maintenance personnel are qualified as critical staff in cases of lockdown or curfew, and exempting from travel restrictions asymptomatic transport personnel, including aircrew, engaged in the transport of goods.

The Commission stresses that the containment measures adopted for the covid-19 emergency should be limited to the movement of passengers, and they are not deemed to limit the movement of aircraft. Thus, restricting the movement of travellers rather than flights will prevent the disruption of air cargo.

Slot allocation

The Parliament and the Council of the EU issued Regulation (EU) No. 2020/459 aiming at ensuring airlines 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 provided for a suspension of the airport slot requirements until 24 October 2020. Until then, airlines were not, therefore, required to use at least 80 per cent of their takeoff and landing slots in order to keep them the following year. More specifically, the waiver applied from 1 March 2020 to 24 October 2020, and it had also retroactive effects – from 23 January 2020 to 29 February 2020 – for flights

²⁴ Communication from the Commission, European Commission Guidelines: Facilitating Air Cargo Operations during covid-19 outbreak, 2020/C 100 I/01, of 27 March 2020.

between the European Union and China or Hong Kong. Regarding the above-mentioned period, the Council of the EU specified that such measure could be extended if the covid-19 situation persists by means of a European Commission delegated act.

On 27 January 2021 the EU announced its intention to issue new temporary rules to help air carriers cope with the drastic decline in air traffic caused by the covid-19 crisis and avoid the operation of empty flights by an agreement with Member States' ambassadors on a negotiating mandate for granting airlines relief from airport slot use requirements for the summer of 2021, while taking initial measures to start relaunching the industry and encouraging competition. The new rules will also give flexibility to adapt to different scenarios and allow for measures to be taken up to the summer 2022 scheduling period.²⁵

State aid

Based on Article 107(3)(b) of the TFEU,²⁶ the Commission adopted a temporary framework for state aid measures²⁷ to support companies during the covid-19 outbreak.

The temporary framework allows Member States to set up schemes to direct grants, selective tax advantages and advance payments of up to €800,000. Furthermore, it allows Member States to provide state guarantees on bank loans, subsidised public loans to companies and safeguards for banks that channel state aid to the real economy, and to grant short-term credit insurance. Based on the exception provided for in Article 107(2)(b) TFEU, the Commission enables Member States to compensate companies for the damage directly caused by exceptional occurrences even if they have received rescue aid in the past 10 years.

In 2020, several European airlines (for example, Lufthansa group, EasyJet, Virgin Atlantic and Air France–KLM) requested state aid from their respective governments. It is worth mentioning that from December 2020 to May 2021, the European Commission has approved state aid measures in favour of several airlines and airport operators in Portugal, Italy and Ireland. Finally, on 12 May 2021, in addition to the previous aid granted, the Commission approved more than €12 million for the Italian aid measure to compensate Alitalia for further damage suffered due to the covid-19 outbreak.²⁸

Moreover, on 13 May 2020 the European Commission issued guidelines laying down general principles applicable to all transport services and specific recommendations designed to address the characteristics of each mode of transport. These guidelines aim to provide a common framework to support authorities, stakeholders, social partners and businesses operating in the transport sector during the gradual reestablishment of connectivity and free movement while protecting the health of transport workers and passengers.²⁹

25 Draft Regulation amending Regulation 95/93 as regards temporary relief from the slot utilisation rules at Community airports due to the covid-19 pandemic - Council mandate, 22 January 2021.

26 Article 107(3)(b) TFEU provides for an exception of aid to remedy a serious disturbance in the economy of a Member State.

27 Communication from the Commission 'Temporary Framework for State aid measures to support the economy in the current covid-19 outbreak (C(2020) 1863 final, of 19 March 2020.

28 European Commission, Coronavirus Outbreak - List of Member State Measures approved under Articles 107(2)b, 107(3)b and 107(3)c TFEU and under the State Aid Temporary Framework, updated to 12 May 2021, https://ec.europa.eu/competition/state_aid/what_is_new/State_aid_decisions_TF_and_107_2b_107_3b_107_3c.pdf.

29 Communication from the Commission, covid-19: Guidelines on the progressive restoration of transport services and connectivity, 13 May 2020, C(2020) 3139.

Moreover, on 28 January 2021, the Commission extended the effectiveness of the temporary framework for state aid measures until 31 December 2021, and has also made some amendments to it. In particular, the maximum amount of the support measures that can be granted under the temporary framework³⁰ has been doubled. In addition, Member States can also ask to convert repayable instruments into other forms of aid, such as direct grants. With specific regard to the transport sector, the Commission has stated that Member States can provide support measures on the basis of Article 107(2)(b) TFEU to compensate for the damage directly caused by the covid-19 outbreak, such as damage directly caused by restrictive measures that preclude the beneficiary, *de jure* or *de facto*, from conducting its economic activity – or a specific and significant part of its economic activity – in certain areas (e.g., damage caused by restrictions of flights or other transport to or from certain points of origin or destination).³¹

XII OUTLOOK

The covid-19 pandemic has shed light on the vulnerabilities of the EU economy and, in particular, of the transport sector, which has been severely affected by the restrictive mobility measures that it has been necessary to adopt over the past year to contain the outbreak. In this context, at the end of 2020 the European Commission issued its Sustainable and Smart Mobility Strategy,³² a policy document that sets out the actions required to ensure that each mode of transport can contribute to the achievement of the objectives set by the European Green Deal: reducing greenhouse gas emissions by 55 per cent by 2030 and making Europe the first climate-neutral region in the world by 2050. With regard to civil aviation, the Strategy sets the ambitious goal of making zero-emission aircraft available to the European market by 2035. In particular, according to the Commission, a more efficient management of air traffic, for example through the Single European Sky, can contribute to reducing the climate impacts associated with emissions of gases other than CO₂ in the air transport sector. The main measures proposed in this regard are carbon pricing and the simultaneous reduction of emission allowances allocated free of charge to airlines under the European Emissions Trading System (ETS) through the revision of the ETS Directive by the end of 2021. In addition, the ReFuelEU Aviation initiative will promote the production and diffusion of sustainable fuels for the aviation sector.

30 The aid may be provided in an amount of €225,000 to companies active in the agricultural sectors, in an amount of €270,000 to companies that operate in the fishery and aquaculture sector and in an amount of €1.8 million to companies active in all other sectors, including the transport sector.

31 See point 15 bis of Communication from the Commission C(2021) 564, Fifth Amendment to the Temporary Framework for State aid measures to support the economy in the current covid-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance, 28 January 2021.

32 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Sustainable and Smart Mobility Strategy – putting European transport on track for the future, COM(2020) 789, 9 December 2020.

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