

2007

Regulatory Convergence - Extending the Reach of EU Aviation Law

Richard Smithies

Recommended Citation

Richard Smithies, *Regulatory Convergence - Extending the Reach of EU Aviation Law*, 72 J. AIR L. & COM. 3 (2007)

<https://scholar.smu.edu/jalc/vol72/iss4/1>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

REGULATORY CONVERGENCE — EXTENDING THE REACH OF EU AVIATION LAW

RICHARD SMITHIES*

SINCE 1988, the European Union (“EU”) has gradually developed a comprehensive regulatory framework that applies to all aspects of air transport. The aim has been to liberalise European aviation to take advantage of the EU’s single economic area and, at the same time, to harmonise the regulatory framework so that the same rules will apply to all.¹ Full liberalisation was achieved in 1997 with the final implementation of the Third Liberalisation Package covering licensing, market access and fares, and rates.²

The development of the EU’s regulatory framework has continued since 1997 with the focus on new areas, including passenger and environmental protection, insurance, safety, and security. Over a period of several years, the Commission of the European Communities (“CEC”) also took steps to establish its competence to manage the external aviation relations of the EU, which was confirmed by the European Court of Justice (“ECJ”) in 2002.³ Since then, the EU has been defining its external aviation policy to ensure that the more than 2,000 air service agreements signed by Member States are amended to meet the legal requirements of the EU.⁴

* Richard Smithies is an independent aviation consultant specializing in international and regulatory issues. He recently retired from IATA in Geneva, as Director of Policy Analysis, after a 42-year career in aviation. Prior to joining IATA in 1990, he spent seventeen years with ICAO in Montreal. Between 1963 and 1972 he worked with consultants and airlines in Paris, London, and New York. He now lives in Geneva and Vancouver.

¹ *Communication from the Commission on the Consequences of the Court Judgements of 5 November 2002 for European Air Transport Policy*, ¶ 4, COM (2002) 649 final (Nov. 19, 2002).

² *Id.* ¶ 5.

³ *Id.* ¶¶ 27-38.

⁴ *Id.* ¶¶ 46-47; *Communication from the Commission—Developing the Agenda for the Community’s External Aviation Policy*, at I(2), COM (2005) 79 final (Mar. 11, 2005).

An important new concept that has emerged is that of achieving convergence of regulatory regimes between EU and non-EU States to safeguard fair competition between economic operators.⁵ Given the comprehensive scope and the detail of the EU regulatory framework, with almost 60 regulations or directives enacted since 1988, it is clear that non-EU airlines will increasingly be affected by these rules.

On November 5, 2002, the ECJ issued its decision on the *Open Skies* case and confirmed the competent authority of the CEC to deal with external aviation matters for the EU.⁶ The decision marked an important step in developing Community air transport policy and limiting the powers of Member States in this area. The Court reached three main conclusions:

- First, nationality clauses in Bilateral Air Service Agreements (“BASAs”) are illegal because they limit the freedom to establish Community air carriers anywhere on the territory of the EU;⁷
- Second, the CEC has competence over computer reservations systems (“CRS”), fares, and rates within the territory of the EU and on airport slots;⁸ and
- Third, it also has competence over other matters covered by BASAs that have been the subject of EU law, namely safety, commercial issues (including ground handling), taxes and duties, aircraft noise, denied boarding compensation (“DBC”), liability, package travel, data protection, and security.⁹

In the wake of this ruling, the Council of Ministers conferred on CEC the responsibility for transitioning from relations based on existing BASAs to a policy managed at the Community level.¹⁰ This daunting task involves bringing an estimated 2,000 BASAs in line with EU law.¹¹ The CEC outlined how it would undertake this task in March 2005 in a communication entitled *Developing the Agenda for the Community’s External Aviation Policy*¹² and identified three goals:

⁵ See COM (2002) 649, *supra* note 1, ¶¶ 40-41.

⁶ *Id.* ¶¶ 27-29.

⁷ *Id.* ¶¶ 34-36.

⁸ *Id.* ¶ 29.

⁹ *Id.* ¶¶ 31-32.

¹⁰ *Communication from the Commission—Developing the Agenda for the Community’s External Aviation Policy*, at II, COM (2005) 79 final (Mar. 11, 2005).

¹¹ *Id.* at I(2).

¹² *Id.*

- Bring existing BASAs into conformity with Community law through horizontal agreements or limited bilateral negotiations to achieve the same result;¹³
- Create a Common Aviation Area with neighbouring countries by 2010 through agreements involving adoption of Community aviation regulations currently in force;¹⁴ and
- Conclude global aviation agreements with targeted third countries.¹⁵

Achieving these objectives will extend the application of EU law both geographically and in subject matter in different ways. The effect in the long run will be to establish an expanding plurilateral framework for air transport liberalisation and to start a dialogue with non-EU states on the development of a consistent regulatory framework covering almost one fifth of the Member States of the International Civil Aviation Organisation (“ICAO”). On account of the legal and financial implications of these developments, many non-EU airlines have a direct interest in how this framework evolves. Governments will also need to assess the balance of benefits to their economies.

In examining the “how” and the “what” of “regulatory convergence,” this paper first looks at the geographical expansion of the group of states applying Community aviation law and the changes to existing agreements required to bring them into line with Community law. Finally, it reviews remaining EU regulations that could be applied to the operations of non-EU air carriers. It must be noted that certain legal provisions, in such areas as consumer protection, CRS, safety, environment, and insurance, already apply to non-EU carriers serving the EU.

I. EXPANDING THE GEOGRAPHICAL FRAMEWORK

An important EU aviation policy objective is to create a Common Aviation Area (“CAA”) or single market with outside partners.¹⁶ The intention is to build on the successful formula used to establish the European Common Aviation Area (“ECAA”) by which three non-EU states, Iceland, Norway, and Switzerland, agreed to adopt EU rules on air transport.¹⁷

¹³ *Id.* at II(1), II(1.1), II(1.2).

¹⁴ *Id.* at II(2.1).

¹⁵ *Id.* at II(2.2.1).

¹⁶ COM (2002) 649, *supra* note 1, ¶¶ 16-20.

¹⁷ *Id.*

By 2010, it is expected that the CAA could comprise over forty countries.¹⁸ These states will have either adopted the Community's rules already in place (*acquis communautaire*) or have agreed to pursue a policy of flexible coherence by aligning their own laws with the Community's regulation of markets, air traffic, security, and safety. It may be expected that the expansion of this group of like-minded states will have a knock-on effect on the regulatory policy of other states with whom they interact. The EU has identified three groups of countries with which it will try to conclude similar, albeit different, agreements.¹⁹

The first group consists of states in the Western Balkans with whom the EU will seek to integrate into the ECAA. These include Albania, Bosnia-Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia ("FYROM"), Serbia and Montenegro, and the United Nations Interim Administration Mission in Kosovo ("UNMIK").²⁰

A second group of neighbouring countries includes Ukraine, Moldavia, Belarus, Georgia, Azerbaijan, and Armenia, to which Russia may eventually be added.²¹ Finally, the EU is moving to conclude what it terms, Euro-Mediterranean Aviation Agreements with whom some neighboring Mediterranean states, such as Morocco.²² These agreements are a new type of agreement modelled upon Open Aviation Agreements.²³ They would cover a range of issues aimed at reciprocal opening of markets and the removal of economic barriers to trade and investment. They would also include a "most favoured nation" clause.²⁴

II. BRINGING EXISTING BASAs INTO LINE WITH COMMUNITY LAW

Another way in which European Commission regulations will be systematically applied to the operations of non-EU carriers is through agreements to bring existing bilateral agreements into conformity with Community law.

The principal concern of the EU is ensuring application of Article 43 of the European Community Treaty on freedom of

¹⁸ See COM (2005) 79, *supra* note 10, at II(2.1).

¹⁹ *Communication from the Commission—A Community Aviation Policy Towards Its Neighbours*, ¶¶ 13-18, COM (2004) 74 final (Feb. 9, 2004).

²⁰ *Id.* ¶ 14.

²¹ *Id.* ¶ 17-18.

²² *Id.* ¶ 45.

²³ *Id.* ¶ 40.

²⁴ *Id.* ¶¶ 40, 44.

establishment that allows any EU enterprise to do business anywhere in the Community without discrimination.²⁵ The nationality clause of the great majority of BASAs currently in force discriminates between EU carriers on the grounds of nationality by reserving international traffic rights to airlines owned by nationals of the parties to the agreements.²⁶ There are two ways to bring agreements into compliance with Community law through the inclusion of standard clauses.

The first is by a traditional negotiation conducted by a Member State leading to the inclusion of model clauses that establish Community competence, notably on ownership and control and on the right of establishment. Regulation (EC) No. 847/2004 set out a framework within which Member States can conclude BASAs while ensuring a harmonised approach and verifying that new agreements comply with Community law.²⁷ Some of the conditions set down in the Regulation are:

- That all agreements “that contain provisions contrary to Community law should be amended or replaced by new agreements that are wholly compatible with Community law”;²⁸
- That any State can proceed to negotiate with a third country provided that any relevant standard clauses (for example, Community carrier clause) have been included in the negotiations and that it notifies the CEC;²⁹ and
- The Member State is authorized to conclude the agreement if it contains the relevant standard clauses (again, the Community carrier clause) and communicates the final outcome of the negotiations to the CEC.³⁰

The second way is for the CEC to conduct a single negotiation with a third state,³¹ on behalf of all Member States, amending that state’s BASAs with EU States to bring them into conformity with EU law. Such an agreement is called a Horizontal Agreement³² and includes the following standard clauses:

²⁵ Consolidated Version of the Treaty Establishing the European Community art. 43, Dec. 24, 2002, 2002 O.J. (C 325) 1.

²⁶ COM (2002) 649, *supra* note 1, ¶¶ 34-36.

²⁷ Commission Regulation 847/2004, 2004 O.J. (L 157) 7, 8.

²⁸ *Id.* at Preamble (6).

²⁹ *Id.* art. 1(1).

³⁰ *Id.* art. 4.

³¹ Third State or Third Country means a non-EU Member State.

³² At the end of July 2006, the Council of Ministers approved the signature and provisional application of horizontal agreements with Albania, Bosnia-Herzegovina, Bulgaria, Chile, Croatia, Georgia, Maldives, Moldova, New Zealand, Romania, Serbia-Montenegro, Singapore, Ukraine, and Uruguay. In addition,

- Designation, Authorization and Revocation – This replaces the traditional designation clauses with a Community designation clause, permitting all Community carriers to benefit from the right of establishment in the territory of an EU Member State but without creating any additional traffic rights for Community carriers;³³
- Rights with regard to regulatory control of safety – This has two effects:
 - a) Each Party has the right to inspect aircraft operated by carriers designated by the other Party; and
 - b) Both Parties undertake to recognize the certificates issued by their respective competent authorities. In the case of the EU, this may be the European Aviation Safety Agency (“EASA”);³⁴ and
- Taxation of Aviation Fuel – Taxation of aviation fuel is harmonized by Directive 2003/96/EC.³⁵ If any two EU Member States choose to tax aviation fuel on flights between their territories, these measures will apply to all carriers operating on these routes, including the carriers of any third country operating on a fifth or seventh freedom basis.³⁶
- Pricing – The European Union seeks to resolve conflicts between existing BASAs and Regulation (EC) No 2409/92 on fares and rates for air services, which prohibits third country carriers from being price leaders on air services for carriage wholly within the Community.³⁷

In July 2005, the European Council of Ministers confirmed that Member States could continue negotiating with third countries in parallel with Community-level negotiations towards open aviation area agreements, provided they respect Regulation (EC) No. 847/2004.³⁸ Crucially, it also stressed that acceptance of these community clauses, through bilateral or Community-level negotiations, is a prerequisite for broader negotiations with the Community.³⁹

agreements have been initiated with Australia, Azerbaijan, Former Yugoslav Republic of Macedonia (FYROM), Kyrgyzstan, Lebanon, Malaysia, and Morocco, Paraguay, Vietnam.

³³ *Id.*

³⁴ See Regulation (EC) 1592/2002 of the European Parliament and of the Council of 15 July 2002, http://eur-lex.europa.eu/LexUriServ/site/en/oj/2002/l_240/l_24020020907en00010021.pdf.

³⁵ Council Directive 2003/96/EC, art. 1, 2003 O.J. (L 283) 51.

³⁶ Model Agreement, art. 4, http://ec.europa.eu/transport/air_portal/international/pillars/doc/draft_horizontal_agreement_en.pdf.

³⁷ Commission Regulation 2409/92, 1992 O.J. (L240) 15.

³⁸ Council Conclusions 2005/C 173/01, ¶ 9, 2005 O.J. (C 173) 1.

³⁹ See *id.* ¶ 19.

III. GLOBAL AVIATION AGREEMENTS WITH THIRD COUNTRIES

The last way in which EU aviation law may come to apply to third countries is through the conclusion of global (meaning overall) agreements with “targeted” countries⁴⁰ to “create more open international markets *operating under fair and equitable conditions*.”⁴¹ The choice of non-EU negotiating partners will be based on:

- The economic importance and prospects for growth and improved access for the European Community with reference to specific markets;
- The need to reach agreement on what constitutes a fair competitive framework; and
- The *advantages of regulatory convergence* based on the Community’s experience of regional economic integration and by technical, technological and industrial cooperation, benefiting the air transport system as a whole.⁴²

The EU considers that a fair competitive framework is best achieved by the progressive harmonization or convergence of rules governing air transport to create a level playing field, not least by ensuring that airlines bear the same regulatory cost burden.⁴³ These rules cover safety, security, competition, state aid, passenger protection, taxes and charges, and environmental protection.⁴⁴

The protracted negotiations with the United States have delayed obtaining a clearer picture of the position the EU would be willing to accept to achieve regulatory convergence with its most important aviation partner and make it difficult for other potential partners and airlines to fully assess how the future will play out.⁴⁵

The following sections review some of the features of existing EU legislation that already apply to non-EU air carriers. They

⁴⁰ In addition to the United States with which negotiations began in June 2003 and China with which talks were scheduled to begin in 2006, the Community has identified the following regions and countries: Asia/Pacific region (India, Japan, South Korea, Australia, New Zealand, and Singapore); and the Americas (Canada, Mexico, and Chile). COM (2005) 79, *supra* note 10, at II(2)-II(2.2.4).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *See id.* at I(2).

⁴⁴ *Id.*

⁴⁵ *See id.* at III.

are grouped under the headings safety and security, consumer protection, commercial issues, and environmental protection.

IV. SAFETY AND SECURITY

The most important development in this area was the establishment in 2003 of the European Aviation Safety Agency ("EASA").⁴⁶ Its mandate includes the certification of aircraft and equipment, the preparation of common rules and procedures in the area of aviation safety, and the provision of technical expertise to the European Union and its partners.⁴⁷ The EASA will soon become responsible for the issuance of certificates of airworthiness, Air Operator Certificates ("AOC") and pilot licenses, but, until this transfer takes place, certificates issued by EU member States will remain valid.⁴⁸

Since January 2003, security at all EU airports is governed by Regulation (EC) No. 2320/2002, which is based on the standards contained in ICAO Annex 17, recommendations of the European Civil Aviation Conference ("ECAC"), and on provisions of the European Commission.⁴⁹ The Regulation and the implementing legislation apply to all EU airports, service providers, catering, cleaning and cargo parties, as well as Community and foreign airlines departing or transiting any EU airport.⁵⁰ The areas covered are specified in the Annex to the Regulation and six Implementing Regulations that set down standards, specifications, definitions and inspection procedures.⁵¹

V. PASSENGER PROTECTION

The European Union has developed a considerable body of law to protect airline passengers. The scope and application of these regulations vary depending on such factors as reciprocity, whether a ticket is bought in the EU, whether the airport of departure is located in the territory of a State situated in the EU, and whether a non-EU State has corresponding regulation. A general principle underlying these rules is that airlines have a duty of care to their passengers.

⁴⁶ Commission Regulation 1592/2002, art. 2(3)(c), 2002 O.J. (L 240) 1.

⁴⁷ *Id.* arts. 12-15.

⁴⁸ *Id.* arts. 8, 15.

⁴⁹ Commission Regulation 2320/2002, Preamble (7), art. 4, 2002 O.J. (L 355)

1.

⁵⁰ *Id.* art. 3.

⁵¹ *Id.* Annex.

The European Union is still developing its policy on passenger rights. The new measures, however, also add to the cost of doing business in the Community for all carriers. These measures include passenger compensation, data privacy protection, assistance for passengers with reduced mobility and information about the identity of the operating carrier.

VI. DENIED BOARDING, CANCELLATION, OR LONG DELAY OF A FLIGHT

Regulation (EC) No. 261/2004 came into force in February 2005 replacing a Regulation dating from 1991 that dealt only with situations involving denied boarding.⁵² The new Regulation establishes common rules on compensation and assistance to passengers in the event of denied boarding, cancellation, or long delay of a flight.⁵³ It increased existing compensation amounts, which now vary according to the flight distance or the length of a delay upon arrival.⁵⁴

In addition to giving financial compensation, airlines must also assist passengers to revise their travel plans by giving them the choice between rescheduling the ticket or receiving a refund and payment for hotel accommodation and food.⁵⁵ The new rules extend these rights to passengers whose flights are cancelled.⁵⁶ They apply to all passengers facing denied boarding, cancellation, or delay on a scheduled flight for which they have a confirmed reservation that departs from an airport located in the territory of any EU Member State, irrespective of the State where the air carrier is established, the nationality of the passenger, or the point of destination.⁵⁷

The regulation also applies to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, and the operating air carrier of the flight concerned is a Community carrier.⁵⁸

⁵² Commission Regulation 261/2004, 2004 O.J. (L 46) 1.

⁵³ *Id.* art. 1.

⁵⁴ *Id.* art. 7.

⁵⁵ *Id.* art. 9.

⁵⁶ *Id.* art. 5(1).

⁵⁷ *Id.* art. 3(1).

⁵⁸ *Id.* at Preamble (6).

Member States have now set up national bodies to enforce and handle complaints by passengers.⁵⁹ The actual application of the new Regulation that IATA and EU low-cost airlines have described as impractical and confusing is still unclear. Cases are only just coming before the Courts that will define how the law will be applied.

VII. DATA PRIVACY PROTECTION

Stringent measures on Data Protection have been in effect in the EU since 1995 when Directive 95/46/EC was introduced.⁶⁰ Among other provisions, this Directive safeguards the right to privacy in the processing of personal data and the right for an individual to have access to his data file.⁶¹ The events of September 11th led certain states to seek access to personal data to combat terrorism, in particular where air travel is involved. A particularly contentious issue is provision of Passenger Name Record ("PNR") data in advance of a flight and its retention for a period of time.⁶² Since 2004, an EU-US Policy Dialogue meeting is held twice yearly to improve coordination of policies.⁶³

VIII. PASSENGERS WITH REDUCED MOBILITY

In July 2006, the EU adopted Regulation (EC) No. 1107/2006 regarding the rights of persons with reduced mobility ("PRMs") when travelling by air.⁶⁴ The new rules apply to all PRMs travelling by air and departing from, or transiting through an airport located in the territory of a Member State.⁶⁵ It applies to passengers departing from an airport located in a third country to an airport on the territory of, a Member State if the flight is part of a journey that started in the EU and the operating carrier is a Community carrier.⁶⁶

⁵⁹ *Id.* art. 16.

⁶⁰ Council Directive 95/46/EC, 1995 O.J. (L 281) 31.

⁶¹ *Id.* arts. 12, 16.

⁶² Justice, Freedom and Security High on US-EU Transatlantic Agenda, http://ec.europa.eu/justice_home/fsj/external/usa/wai/fsj_external_usa_en.htm.

⁶³ *Id.*

⁶⁴ Commission Regulation 1107/2006, Regulation Concerning the Rights of Persons with Reduced Mobility when Traveling by Air, 2006 O.J. (L 204) 1.

⁶⁵ *Id.* ¶ 9.

⁶⁶ *Id.*

The proposed Regulation establishes requirements to ensure seamless care of PRMs at airports and when they are in transit.⁶⁷ No carrier is able to refuse to accept a reservation from a PRM at an airport where the Regulation applies, nor refuse to check-in or board a person with a reservation.⁶⁸ The managing body of airports are responsible for providing assistance to PRMs without a direct charge; the costs are covered by a levy on all air carriers.⁶⁹ The Regulation lays down the circumstances under which a PRM can apply for assistance and the services to be provided by air carriers and airports.⁷⁰

IX. IDENTITY OF THE CARRIER

In 2005, the EU enacted Regulation (EC) No. 2111/2005 with the aim of establishing a Community-wide list of airlines banned from operating in the Community (referred to as the EU blacklist) and ensuring that passengers are fully informed of the identity of the operating carrier.⁷¹

The Regulation sets down common criteria for imposing an operating ban on a carrier and requires that states notify the CEC of any ban they impose.⁷² The Commission will then inform other States of the ban.⁷³ The first such Community ban was published in March 2006, and each state must ensure that the ban applies on its territory.⁷⁴

The Regulation also requires that an air carriage contractor (air carrier or tour operator) must ensure that the customer is informed of the identity of the operating carrier at the time of reservation.⁷⁵ In the event of a change in the carrier, the contractor must inform the customer as soon as possible but no later than at check-in or boarding when no check-in is required.⁷⁶ This requirement must be specified in the contract of carriage.⁷⁷ If the passenger chooses not to fly with a replacement carrier—because it is on the blacklist—the air carriage

⁶⁷ *Id.* at Preamble (1), (2).

⁶⁸ *Id.* at Preamble (2).

⁶⁹ *Id.* at Preamble (6), (7).

⁷⁰ *Id.* art. 5.

⁷¹ Commission Regulation 2111/2005, Preamble (2), (3), 2005 O.J. (L 344) 15.

⁷² *Id.* art. 1, 3.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* art. 11(1).

⁷⁶ *Id.* art. 11(2), (3).

⁷⁷ *Id.* art. 11(6).

contractor must offer the passenger the right to reimbursement or re-routing.⁷⁸

The EU Code of Conduct for computer reservation systems ("CRS") already entitles consumers booking a flight via CRS to be informed of the identity of the operating air carrier.⁷⁹ There was, however, no legal requirement for a carrier that had sold a flight directly to inform the passenger of the identity of the operating carrier in the case of a wet-lease, a code-shared, or an interlining flight.⁸⁰

The new rules apply to all flights (including flights between two non-EU countries) that are part of a contract of carriage that starts in the EU.⁸¹

X. COMMERCIAL ISSUES

Non-EU air carriers are also affected by Community rules regarding commercial issues such as computer reservation systems ("CRS") and slot allocation.

A. COMPUTER RESERVATION SYSTEMS

The EU introduced a Code of Conduct for Computer Reservations Systems in 1989 that was later amended in 1993 and 1999.⁸² The Code sets down transparent and non-discriminatory measures to combat potential abuses in the loading and display of information, access to sensitive marketing data, and unreasonable conditions that might be imposed on participants or subscribers.⁸³

The EU rules define the rights and obligations of system vendors (that is the party operating a CRS), parent carriers (that is, part owners of the CRS), partner airlines, subscribers (that is, a party using a CRS to distribute air transport products – travel agents), and consumers. An Annex to the Regulation specifies the criteria to be used for ranking flights on the principal display and gives the consumer the right to see the display at the

⁷⁸ *Id.* art. 12.

⁷⁹ Commission Regulation 323/1999, art. 8, 1999 O.J. (L 40) 1.

⁸⁰ *Id.*

⁸¹ *Id.* art. 1.

⁸² Commission Regulation 2299/89, 1989 O.J. (L 220) 1, *as amended by* Commission Regulation 3089/93, 1993 O.J. (L 17) 18 *and* Commission Regulation 323/1999, 1999 O.J. (L 40) 1.

⁸³ Commission Regulation 2299/89, *supra* note 82, art. 9.

time of booking.⁸⁴ It also requires the system to identify the actual carrier that will operate each leg.⁸⁵

The obligations incumbent on a system vendor do not apply with respect to a parent carrier of a third country to the extent that its CRS does not conform with this Regulation or does not offer Community air carriers equivalent treatment to that provided under this Regulation.⁸⁶ Similarly, the obligations of parent and participating carriers do not apply with respect to a CRS controlled by air carriers of a third country to the extent that a parent or participating carrier is not accorded equivalent treatment in that country to that provided under this Regulation.⁸⁷

B. SLOT ALLOCATION

In 1995, the EU adopted common rules (Regulation (EC) No. 95/93) for the allocation of slots at Community airports, later revised by Regulation 793/2004.⁸⁸ The EU defines a slot as “the permission given by a coordinator in accordance with this Regulation to use the full range of airport infrastructure necessary to operate an air service at a coordinated airport on a specific date and time for the purpose of landing or take-off.”⁸⁹

The Regulation also redefines two categories of airports with capacity limitations:

- Coordinated airports – airports with a serious shortfall in capacity where, in order to land or take off, it is necessary to have been allocated a slot by a coordinator;⁹⁰ and
- Schedules facilitated airports – airports where there is a potential for congestion at certain times of the day, week or year, which is amenable to resolution by voluntary cooperation between air carriers and where a schedules facilitator has been appointed to facilitate the operations of air carriers at that airport.⁹¹

At present, 21 of the 32 Category 1 airports in the European Union have some capacity limitations.⁹² The Regulation clari-

⁸⁴ *Id.* Annex.

⁸⁵ *Id.*

⁸⁶ *Id.* art. 7(1).

⁸⁷ *Id.* art. 7(2).

⁸⁸ Commission Regulation 95/93, 1993 O.J. (L 14) 1; Commission Regulation 793/2004, 2004 O.J. (L 138) 50.

⁸⁹ Commission Regulation 793/2004, *supra* note 88, art. 1(a).

⁹⁰ *Id.* art. 1(g).

⁹¹ *Id.* art. 1(i).

⁹² STUDY TO ASSESS THE EFFECTS OF DIFFERENT SLOT ALLOCATION SCHEMES: A FINAL REPORT FOR THE EUROPEAN COMMISSION 22, 204 (2004), <http://www.aci->

fies the process of slot allocation (Article 8), how slots can be transferred, and the operation of a slot pool (Article 10).⁹³ Coordination is also required to take account of any agreed industry or Community guidelines, notably the IATA Worldwide Scheduling Guidelines.⁹⁴ Limitations on the use of slots, entitlement of historic slots, and the means whereby new entrant carriers can obtain slots are also defined.⁹⁵

Since 2004, the CEC has been considering how to develop market-oriented mechanisms to facilitate the transfer of slots and make more efficient use of scarce airport capacity.⁹⁶ Other objectives are to maintain effective competition at Community airports and to ensure that any alternative slot allocation scheme serves the overall EU transport policy and does not conflict with other slot allocation procedures world-wide.⁹⁷

Article 12 of the revised Regulation deals with "Relations with Third Countries" and sets out procedures for retaliatory measures against a non-EU state that engages in discriminatory behaviour against EU carriers in regard to slot access or does not grant national treatment.⁹⁸

XI. INSURANCE

Two new regulations have come into effect since 2002 that have implications for non-EU carriers. Anticipating the ratification of the Montreal Convention of 1999, which finally came into force in June 2004, the European Union enacted Regulation (EC) No. 889/2002 amending a regulation from 1997 on air carrier liability in the event of accidents.⁹⁹ Article 6 imposes certain general provisions on all carriers, including non-EU carriers, with respect to information to be made available when selling carriage by air in the Community.¹⁰⁰ In addition to the main provisions governing liability, each passenger is to receive writ-

europe.org/upload/NERA%20study%20on%20the%20effects%20of%20different%20slot%20allocation%20schemes%20-%20January%202004.pdf.

⁹³ *Id.* arts. 8, 10.

⁹⁴ *Id.* arts. 5-9.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *See id.* Preamble (17).

⁹⁸ *Id.* ¶ 8; Commission Regulation 95/93, *supra* note 88, art. 12.

⁹⁹ Commission Regulation 2027/97, 1997 O.J. (L 285) 1; Commission Regulation 889/2002, 2002 O.J. (L 140) 2.

¹⁰⁰ Commission Regulation 2027/97, *supra* note 99, art. 6; Commission Regulation 889/2002, *supra* note 99, ¶ 8.

ten indication of the liability limit for a particular flight (if a limit exists) regarding death or injury, baggage, and for delay.¹⁰¹

Concern over third party liability in the wake of September 11th led to the adoption in April 2004 of Regulation (EC) No. 785/2004.¹⁰² This Regulation set minimum insurance requirements for air carriers to cover their aviation-specific liability with respect to passengers, baggage, cargo, and third parties.¹⁰³ Insured risks must cover accidents (as defined under the Montreal and Warsaw Conventions), plus risks of war and terrorism.¹⁰⁴

It applies to all air carriers and aircraft operators flying within, into, out of, or over the territory of a Member State, including carriers from third countries, to ensure comparable treatment to Community air carriers.¹⁰⁵ It does not, however, cover flights over the territory of EU Member States by non-Community air carriers using aircraft that do not land or take-off from an airport on their territory.¹⁰⁶

XII. ENVIRONMENTAL PROTECTION

The EU believes that the sustainable development of future transport systems depends on an integrated approach to environmental protection.¹⁰⁷ No sector is more strongly influenced by this approach than air transport where the EU sees sustainable development as being dependent on improving technical standards on noise and gaseous emissions and on introducing economic incentives to influence market behavior.¹⁰⁸ At the international level, Member States have pushed hard for increasingly stringent environmental protection measures regarding gaseous emissions and noise levels.¹⁰⁹

¹⁰¹ Commission Regulation 2027/97, *supra* note 99, art. 6; Commission Regulation 889/2002, *supra* note 99, ¶ 8.

¹⁰² Commission Regulation 785/2004, 2004 O.J. (L 138) 1.

¹⁰³ *Id.* art. 1.

¹⁰⁴ *Id.* at Preamble (5), (6).

¹⁰⁵ *Id.* art. 2(1).

¹⁰⁶ *Id.* art. 2(2).

¹⁰⁷ *Communication from the Commission to the Council, Air Transport and the Environment Towards Meeting the Challenges of Sustainable Development*, COM (1999) 640 final (Dec. 1, 1999).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* ¶¶ 14-15, 59-62.

A. ENGINE EMISSIONS

Under its 6th Environmental Action Program, the EU made clear that it would take measures to reduce greenhouse gas emissions (carbon dioxide) from aviation if the International Civil Aviation Organization (“ICAO”) failed to do so.¹¹⁰ Given the lack of consensus at the ICAO 35th Triennial Assembly in 2004, the EU moved towards developing its own measures, in spite of an Assembly Resolution calling on States not to take unilateral measures before the next Assembly reviewed the question in 2007.¹¹¹

In September 2005, the European Commission presented a plan to include aviation in the EU’s emissions trading scheme (“ETS”).¹¹² The ETS is designed to reduce emissions of heat-trapping gases that contribute to global warming. In preparing its strategy, the Commission examined several other forms of market-based solutions, including airline ticket or departure taxes and emissions charges, but concluded that these would be less effective in environmental terms and less cost-efficient.¹¹³

The current thinking in the Commission is that the scheme would apply to all flights departing from airports in the EU, including international flights, so that Community airlines would not be put at a disadvantage compared to foreign competitors. A legislative proposal is expected in the second half of 2006 to clarify the EU’s intentions.

B. NOISE ABATEMENT

In March 2002, an EU Directive took effect on the “establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports.”¹¹⁴ It replaced an earlier proposed regulation to restrict the operations of aircraft that had been hush-kitted to comply with ICAO Chapter 3 noise standards but were only marginally compliant with those standards.¹¹⁵ The proposed regulation was replaced by the Directive after the ICAO and the United States chal-

¹¹⁰ *Communication from the Commission to the Council, Reducing the Climate Change Impact of Aviation*, ¶ 4.3, COM (2005) 459 final (Sept. 27, 2005).

¹¹¹ *Id.* ¶ 4.2.

¹¹² *Id.* ¶¶ 1-2.

¹¹³ *Id.*

¹¹⁴ Council Directive 2002/30/EC, 2002 O.J. (L 85) 40.

¹¹⁵ *See id.* at Preamble (25).

lenged it.¹¹⁶ Carriers may be required to reduce movements of marginally compliant aircraft at certain airports by twenty percent a year.¹¹⁷ Exemptions for ten years exist for such aircraft registered in developing countries, but are subject to certain conditions.¹¹⁸ The Directive also provides a harmonized definition of marginally compliant aircraft.¹¹⁹

XIII. CONCLUSION

Over the past 15 years, the EU has successfully liberalised air transport in Europe and harmonised the legal framework in this field. The expansion of the EU and the adoption of the community *acquis* by other States have considerably extended the scope of application of these laws, which are viewed as the underpinnings for fair competition. In terms of trade liberalisation, one can speak of this development as an expanding plurilateral agreement between “like-minded countries” to which others may adhere.

Since the ECJ ruling in 2002, the European Union has been negotiating with key partners, notably the United States, to agree on fully liberalised aviation markets. Just as harmonisation of rules was considered essential in creating the internal market, so the EU now views some degree of *convergence* of rules as being necessary for fair competition in international open markets. The usefulness of this approach to open markets, however, is not shared by some of the EU’s negotiating partners.¹²⁰

¹¹⁶ A Step Further in the Battle Against Aircraft Noise, http://www.epp-ed.org/Activities/pday02/day031_en.asp.

¹¹⁷ *Id.* art. 6(1)(b).

¹¹⁸ *Id.* art. 8.

¹¹⁹ *Id.* art. 2(d).

¹²⁰ In a speech to the Institute of European Affairs in Dublin in February 2005, Mr. James Byerly, Deputy Assistant Secretary for Transportation Affairs of the US Department of State said:

An Open Aviation Area would be akin to the internal aviation market in the EU, with common, harmonized rules on safety, security, the environment, consumer protection, state aids, denied boarding compensation, computer reservation systems—virtually the whole gamut of regulatory elements relevant to air service. It’s a clever argument, but it diverts attention from the primary goal of promoting vigorous airline competition and tends to focus instead on applying a sharp regulatory scythe to level every blade of grass on the proverbial playing field.

John R. Byerly, Deputy Assistant Sec’y for Transp. Affairs, U.S. Dep’t of State, Remarks at the Institute of European Affairs (Feb. 8, 2005).

However, as a growing number of States accept some degree of convergence with EU air transport law, the importance of this expanding plurilateral group may have an exemplary effect in many countries, especially in such areas as passenger rights, safety, and environmental protection. The EU sees some forty states (twenty percent of the ICAO member states) sharing similar views by 2010.¹²¹ Such a grouping cannot fail to have a significant influence on the liberalization of international air transport markets.

Describing the impact of European standards-setting on manufacturing in Asia, Thomas Fuller, writing in the *International Herald Tribune*, observed, “‘Europe has one standard that applies to so many countries.’ . . . Many of the European standards now being adopted in Asia—for cars, toys or textiles—are legislated unnoticed even by most European consumers. But they can have a profound influence on manufacturing in Asia and beyond.”¹²²

It seems likely that similar remarks will apply increasingly to international air transport and that convergence will be seen to have played an important part in shaping the future of global aviation markets. In the meantime, there will be a lot of hard negotiating.

¹²¹ See COM (2005) 79 final, *supra* note 10, at II(2.1).

¹²² Thomas Fuller, *Viceroy's Long Gone, EU Grows in Asia*, *INT'L HERALD TRIBUNE*, Mar. 16, 2006.