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FLAGS OF CONVENIENCE: MARITIME AND AVIATION

Allan I. Mendelsohn*

Introduction

I want to say at the very outset that I am very pleased to have been invited to speak at this Conference and especially on this Panel that is focusing its attention on the hugely controversial and extremely important question of whether the Norwegian-owned airline, known as Norwegian Air International - or, as I shall call it for short, NAI - is in fact what is today known in international law as a “flag of convenience”. What do we mean by “flag of convenience” and why are we focusing on this issue at all.

Let me start out with the basics of definition. “Flag of convenience” is an expression that first appeared in maritime law in the mid-1950s to describe ocean-going cargo ships that were owned totally and exclusively by U.S. owners and had operated over the oceans flying the U. S. flag but that, for reasons I shall describe next, engaged in the pernicious practice of what came to be known as “flagging out” or, in more kindly terms, trading in their U.S. flag and U.S. registration for the flag and registration of some foreign country. At that time, more than a half century ago, the foreign countries that engaged in this recipient practice were a smallish group primarily made up of only three foreign governments - Panama, Liberia and Honduras or, as we knew them then, the “PanLibHon” governments and their fleets.

Reasons For Flags of Convenience

Now, why did the U.S. owners of these vessels decide to trade-in their U.S. flags. The three main reasons at the time were:

(1) the ability to avoid payment of U.S. taxes and to pay only the far more modest taxes - if any were imposed or required at all - of their adopted foreign flags and governments;

(2) the ability to avoid hiring U.S. citizen seamen crews, invariably represented by either the National Maritime Union (NMU) or the Seafarers International Union (SIU). In their place, they were able to hire far cheaper, and usually non-unionized, foreign seamen crews from countries like the Philippines or, at that time, Hong Kong or other less developed countries in Latin America and Asia;

(3) and, lastly, the ability to avoid what were usually the much higher and more regularly enforced safety standards that U.S. law imposed on U.S. flag vessels but that

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most other countries at the time did not impose on their own flagged vessels.

The U.S. Merchant Marine: Post World War II To Today

I have given you this background not just because it is interesting from the point of view of international law, but mainly because I do not want to see happen in the field of international aviation exactly what happened in the field of international maritime from the late 1950s to today. What most of you do not know or may not recall is that, for at least one decade after World War II, the United States maintained by far and away the world's largest privately owned merchant marine fleet - with all of the vessels owned by American citizens and flying the U.S. flag. That U.S. flagged fleet very successfully governed at least the U.S. - if not also the international maritime trades - while paying U.S. taxes, employing American seamen and crews, and setting a welcome example of ocean going fleets that enforced the highest safety standards of their day.

That was the early and mid-1950s. Coming back to today, it is fair to say that, as a direct consequence of what later became the highly popular and deregulated "flag-out" movement, the world and especially our own country witnessed what can only be called a determined and successful race to the bottom. In fact, the United States has reached the almost totally deplorable situation today where there are almost no ocean going cargo vessels at all that are owned by Americans and that fly the U.S. flag. A few U.S. owned and flagged vessels ply the U.S. coastal or so-called cabotage routes but largely and only because of the requirements of the 1920 Jones Act (that, incidentally, the U.S. industry would very much like to see repealed). And there are still a few other U.S., flagged vessels involved in the ocean trades, but they are mostly owned by the Danish company, Maersk Lines, and they are flagged U.S. only in order both to retain at least a few, even if subsidized, trained U.S. seamen/crews and to carry U.S. Agency for International Development (AID) and other government related preference cargo shipments. That should prove to all of you just how successfully depressing a race to the bottom can be - at least in the world of maritime transportation¹.

NAI

With this introduction, it should now come to none of you as a surprise that I am very opposed to the U.S. Department of Transportation (DOT) granting permission or operating authority to NAI. Nor, for that matter, do I approve of granting such authority to any other foreign flagged airline that chooses, like NAI is doing, to obtain its operating authority from a country and under a flag that is not the same as that of its principal owners and that, like Ireland, maintains laws and regulations that are favorable for avoiding the payment of significant income taxes and equally favorable for purposes of applying and enforcing less-than-adequate terms and conditions of employment. What I believe few of us have focused on so far in this controversy is Ireland's tax and employment policies. Whether what I have been repeatedly told by so many seemingly unbiased observers about Irish aviation policies is true or not, I must leave to further research by all of us and especially by those who are pushing the DOT for approval of NAI's application.

But what I have been told by several individuals who are not involved in this controversy and who would seem to be in a position to know the facts is that Ireland's corporate taxes (12.5%) are very favorable, much more favorable than Norway's (about

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27%) and, indeed, just about the most favorable of any country in the European Union (for example, Germany - about 30%; France - about 33%) to businesses such as NAI. Perhaps they are not quite as favorable as those given by the “PanLibHon” nations to flagged-out vessels in the 1950s and ‘60s. But they are favorable enough such that it may well be quite understandable why NAI would prefer to incorporate and obtain its license in Ireland rather than Norway. On this basis, it is thus fair to say that at least one of the three reasons for the maritime race to the bottom seems clearly to be present in the context of the current aviation controversy².

Second, I have also been told, and again by individuals with no relation to or interest in this controversy, that, so far as concerns Ireland’s labor policies, pilots and crews flying with Ryanair seem to be all too quick to complain regularly and consistently about the airline’s labor policies. Nor have they been able to take effective steps to correct those policies so as to better their wages and conditions of employment. This is due primarily, so it is said, to the fact that Ryanair wants to maintain its reputation for being among the lowest fare airlines, and it can only continue to do so with the substandard labor conditions that it enforces - all in accordance with, or not outlawed under, Irish labor law³. So we now appear to have two of the three reasons for the maritime race to the bottom that are present also in this aviation context.

I am not going to make any comparisons with respect to the safety aspects, first, because most of the maritime advantages that were originally available on this aspect have since been corrected by way of enforceable and enforced new international treaties; and, second, because ICAO and the EU, much to their credit, do such an excellent job at maintaining the highest safety standards throughout international aviation that there would appear to be no advantages available in this area among different possible flagging or registration states.

Middle East Aviation

It may be useful at this point to say a few words about the carriers from the Middle East who, thanks to all of our Open Skies Agreements, are enthusiastically expanding their fleets and operating hugely expanded routes throughout the world - certainly far more and far more expansive than anyone involved in international aviation would have ever thought possible less than a decade ago⁴.

There’s no doubt that, like flags of convenience in maritime, the Middle East carriers are hiring most of their employees (pilots and flight attendants) from third countries - if for no other reason than that there are simply not enough trained personnel in the individual Middle East countries to meet the ever escalating needs of their ever growing airlines. While there do not appear to be any serious published reports about the pay and working conditions of the pilots and crews operating these airlines, occasional newspaper article do suggest that the Middle East airlines are paying pilot wages that are not at all dissimilar to those that are paid by U.S. and other western airlines - if for no other reason, we are also told, than that there is a general shortage of experienced pilots in today’s international aviation and, if an airline wishes to operate long distance aircraft, it must pay western equivalent wages to its pilots.

On the other hand, when it comes to flight attendants, the facts here may not be the same. As many of you know, I teach international aviation and maritime law at the Georgetown Law School. This is how and why, after a discussion this past semester of open skies and the Middle East carriers, I received from one of my students an article

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tells an extraordinary story about the treatment of flight attendants on one of these carriers. I am not sure if the same story is true on other Middle East carriers, but there are two observations that I believe must be made: first, employment conditions on carriers from countries that do not have an established history of maintaining first rate conditions of employment should be a subject deserving of serious and continuing public examination; and, second, at least in the case of a carrier like NAI flagging in Ireland, there would seem to be no reason why it could not engage in much the same treatment of its foreign-hired flight attendants as is described in this article (<http://www.expressen.se/nyheter/the-truth-about-the-luxury-of-qatar-airways/>). Whether we wish to see such a recurring development is another question incident to that of flags of convenience.

My Reasons For Taking On This Controversy

And now, I would like to give an answer to all of you who are understandably wondering why someone like me, who has no client and hence no vested interest in this controversy or its outcome should be so concerned and, if you will, so definitive in his views in opposition to the NAI application. So I would like to give you my answer, which I hope will be as interesting and as persuasive to all of you as were, I also hope, my reasons for opposing the NAI application.

Well over 50 years ago, I was discharged from the U.S. Army, and because I then wanted to be a labor lawyer, I went to work for the National Labor Relations Board here in Washington, DC. For reasons I will never know, I ended up working in the Appellate Enforcement Office where I enjoyed the unique and unparalleled opportunity of briefing and arguing cases before the U.S. Courts of Appeals throughout the country. For reasons I will also never know, my superiors really liked me (I always liked them too), and they assigned me to work as the briefing attorney on several of their most interesting cases pending at the time. And so it was that in late 1960 or so, I was assigned to work on what was then the very important, but not yet fully appreciated, maritime flag of convenience case.

That case, which was ultimately destined for the U.S. Supreme Court, involved an effort by U.S. maritime unions to organize the foreign employees of a cargo vessel that once flew the U.S. flag but whose U.S. owners (United Fruit Company), although continuing their regular U.S.-Latin American trading routes, had registered and flagged out several of their vessels into Panama and terminated the employment of their U.S. crews. By so flagging out, they became entitled to hire exclusively (and much lower paid) foreign seamen and to largely avoid the payment of U.S. taxes, thus very substantially enhancing their own profits. The Labor Board won the case in the District Court in New York (*Empressa Hondurena de Vapores v. NLRB*, 200 F. Supp. 484, 1961, U.S. Dist. LEXIS 3715), but after an emergency appeal, that decision was reversed by the Court of Appeals (*Empressa* at 300 F.2d 222, 1962, U.S. App. LEXIS 620). In early 1963, the Supreme Court affirmed the Court of Appeals referring to the “well-established rule of international law that the law of the flag ordinarily governs the internal affairs of a ship” and holding that U.S. unions could not try to organize foreign seamen working on foreign flagged vessels despite the vessels’ U.S. ownership and the fact that they plied U.S. trade routes almost exclusively. See, *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 1963 U.S. LEXIS 239.

As I mentioned earlier, the three flag of convenience countries then were Panama, Liberia and Honduras. In the ensuing 50 or so years, more than 30 other countries (in-

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cluding such major countries as, for example, the Marshall Islands, Vanuatu, Tuvalu, etc.) have offered their registry and flags to any willing ship owner. In that same period of time, those of us involved in the litigation were to witness consequences that even we, as opposed as we were at the time to the development, had never thought to be at all possible. Although the ship owners and their *amici* in the cases had assured us and the courts that the vessels involved in the litigation were among the few to be offered up for registry transfer, today the top ten flag of convenience countries register 55% of the world's deadweight tonnage. More importantly, and as I also mentioned earlier, the once all-powerful and dominant post World War II U.S. owned and U.S. flagged merchant fleet has disappeared to the point where today, with the exception only of the U.S. coastal and Puerto Rican trades, there are hardly any U.S. owned and flagged vessels plying the "blue water" deep sea international maritime trades. And all of this, back in the 1960s as well as today, was publicly and widely justified on the basis that flag transfer was only to make ocean transport of cargos more competitively priced so that Americans would be able to pay less for their ocean-borne produce and other goods.

Confidentiality

An even more pernicious aspect of the maritime movement to flags of convenience is the steadily emerging new trend that allows the beneficial owners of these vessels to hide or keep confidential their real identities. A most fascinating example of this occurred just very recently when, I think most of you will recall, the Israeli Navy intercepted and seized a freighter that had apparently secretly loaded rockets and other sophisticated weaponry in Iran for shipment reportedly to Sudan and from there overland to Hamas in the Gaza Strip. The newspaper reports of the seizure identified the vessel with the name "Klos C" and as flying the Panamanian flag. The Iranian authorities quickly disclaimed any relationship or connection to the vessel and declared that it was all a lie manufactured by Israel in time for the annual AIPAC meeting.

Of course, the first thing one does at this point is to research the Panamanian ship registry to learn who owned or chartered the vessel. Doing so, however, results only in the disclosure that the vessel is owned by a company called Whitesea Shipping and Trading Co., Ltd., incorporated in the Marshall Islands. Going then to the Marshall Islands Registry (conveniently located in Reston, Virginia), one can learn only that Whitesea Shipping and Trading Co. is nothing more than a one vessel corporation with absolutely no ownership of any nature identified or available. Moreover, while I myself am only a single individual making an inquiry, there is no doubt that agencies and departments of the U.S. and other governments made similar inquiries - if only because of the extreme importance in these circumstances of identifying the owner or charterer of the vessel. Unfortunately, and because that identity has never yet been disclosed in any public media, it seems clear that the Marshall Islands Registry either itself does not know or, alternatively, is abiding by its pledge or guarantee of confidentiality.

Conclusion

I hope that from what I have said about this incident and about the almost total disappearance of the U.S. owned and flagged fleet that you will agree with me that the consequences of the maritime movement towards flags of convenience were and continue to be truly deplorable. Why the U. S. government has allowed all of this to oc-

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curr and largely unknown to most of the American public is a question to which I have no answer.

But apart from the sad state of the U.S. merchant marine and international maritime law, I also hope you will agree with me that if allowing Norwegian Air International to obtain U.S. operating authority represents even the most modest first step towards flags of convenience in international aviation, you will all join me in urging the US DOT to promptly and decisively reject NAI's application. NAI may well follow the example set by United Fruit back in the 1960s and appeal the DOT's decision to the courts. But this time, unlike 50 years ago, we have the knowledge and experience of just how dreadful the consequences can be of taking even a most modest step in the direction of moving towards flags of convenience in international aviation.

¹ Similarly, almost every cruise vessel operating to and from US ports is foreign flagged (though there is some US ownership).

² See Forbes Magazine, Nov. 6, 2013, "If Ireland Is Not A Tax Haven, What Is It?"

³ For a representative sampling of articles relating to Ryanair and its troublesome labor relations, see:

<http://www.independent.co.uk/news/uk/home-news/you-thought-ryanairs-attendants-had-it-bad-wait-til-you-hear-about-their-pilots-8621681.html>

<http://www.telegraph.co.uk/travel/travelnews/10063697/Ryanair-accused-of-exploiting-staff.html>

<http://www.ihateryanair.org>

On March 30, 2014, Gulf Business reported that Dubai's Emirates Airlines just added its 46th and 47th A-380 to its fleet. Other reports indicate that the airline very recently placed an order for 50 additional A-380s. The Aviation Daily of March 4, 2014 reported that Abu Dhabi's Etihad Airline's fleet currently includes 10 A-380s, and it has an additional 71 787-9s on "firm" order. The Av Daily of March 19, 2014 reported that the three largest Middle East carriers, Emirates, Qatar and Etihad, accounted for 1.4% of the total Boeing/Airbus orders in 2000 and 5.3% in 2013, but will account for 8.9% in 2023.

EU'S EXTERNAL AVIATION RELATIONS:
THE QUESTION OF COMPETENCE

Sonja Radošević*

1. Introduction

The European Union's ("hereinafter the EU") gradual development of a comprehensive *internal* regulatory framework that applies to all aspects of air transport has had profound impact on the development of aviation business for the benefit of all the stakeholders and the consumers. Being highly successful in liberalising the aviation sector in Member States, the EU has taken the opportunity to pursue its action further than that is, so to say, far beyond the Union borders.

Behind every EU's regulatory achievement, however, be it of *internal* or *external* nature, lies the question of legal competence. Unlike its Member States who possess a general competence as subjects of international law, international organizations, such as the EU, are governed by the principle of speciality, so that as the International Court of Justice ("hereinafter the ICJ") has noted, "*they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them*"¹.

Whereas it is beyond doubt that the EU has become an important force in advancing the transformation of international aviation system on a global scale, within it, however, institutional questions relating to the division of external competences among the Member States and the EU remain disputed. According to the Court of Justice of the European Union ("hereinafter the CJEU"), the EU has to a large extent acquired *exclusive* competence to engage in and to determine Member States' aviation relations with third countries.

It is the intent of this paper to analyse, from the perspective of international (air) law and EU (air) law, afore-mentioned and myriad of other problems, relating in particular to the question of EU's competence in the field of external aviation relations. In order to properly disentangle on the one hand legal foundations of EU's alleged *exclusive* competence and on the other inquire into its limits and assess possible future problems arising therefrom, the paper initially addresses the pivotal precondition - the attainment by the EU of *internal* competence in air transport.

2. EU's competence in air transport

The question of competence of international organisations, such as the EU, is a question of legal powers that the organization with recognised international legal personality² is invested with³. In this sense it is necessary to distinguish between the organization's *internal* and *external* competence.

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Internal competence consists of the competence of the international organization to lay down *internal* rules which are binding on the Member States and on individual persons and undertakings. Conversely, *external* competence relates to the organization's capacity to enter into international agreements and foreign relations with other subjects of international law.

3. EU's *internal* competence in air transport

Though creation of a European common internal market has been a goal since the conclusion of the Treaty of Rome in 1957, movement toward a single market in commercial air transport has proven to be a difficult challenge⁴. Unsurprisingly however since aviation has been traditionally conducted on the basis that each country has sovereignty over the airspace above its territory, as confirmed by Article 1 of the 1944 Chicago Convention⁵. Moreover States' past and present practice as well as their perception shows again the rationales for the "sovereignty sensitive" character of international air transport. As either cause or effect, or a mixture of both, airspace has been seen as a valuable national asset, access to which can be traded for similar reciprocal benefits or even benefits in areas outside aviation. Among others air transport has also important social and economic functions, in providing links both within a State and between a State and the rest of the world⁶. Against this background, it is not surprising that traditionally there had been a close identification between most States and their flag airlines and that nationality clause in air services agreements have been vigorously kept, as elsewhere also in Europe. States were and even today continue being keen in keeping the conduct of air transport affairs and their economic regulation as a "crown jewel" in their national realm.

For the above-mentioned reasons, from the outset of the European Communities, today the EU, Member States wished to defer the development of *internal*, let alone *external* common EU air transport policy⁷. Furthermore, in the context of the establishment of the EU, national competence in the economic field can be distinguished from national competence in the political field. The latter is reasonably even more "sovereignty sensitive" than the former, as it is related to the power to make decisions in such matters as the national public interest, the establishment of political and administrative structures, recognition of States, defence and the conduct of diplomatic relations and foreign policy, i.e. external aviation relations with non-EU Member States.

Title VI of the Treaty on the functioning of the European Union ("hereinafter TFEU or the Treaty") sets out provisions on EU Common Transport Policy and Article 100 makes it clear that these provisions apply only to transport by rail, road and inland waterway, but that with regard to sea and air transport, "the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may decide whether, to what extent and by what procedure appropriate provisions may be laid down"⁸. During negotiations on the exact same provision in the former EEC Treaty, now the abovementioned TFEU, a compromise was reached; it was decided to mention these two modes of transport in the Treaty but to avoid the automatic application of the transport title to sea and air transport⁹. This compromise essentially aimed at permitting further action on behalf of the EU, then EEC, in these two modes of transport but had left a large number of questions unresolved. In particular, as long as the Council had not adopted any secondary legislation in the field of sea and air transport it was doubtful whether general rules of the Treaty applied to these modes of

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transport, as they were pursuant to the wording of the provision effectively excluded from the Treaties' scope¹⁰.

Considering the great importance of air transport for the unification of Member States' national economies¹¹ and for the efficiency and maximization of the common market at large, it is not surprising that during the 1970s and 1980s, the then European Court of Justice ("hereinafter ECJ"), today CJEU, delivered a series of decisions that mapped out the fundamental underpinnings of what was to become the EU regulation of air transport and constructed a framework in which the Commission could proceed with the desired *internal* liberalization of the aviation market.

In this respect the first landmark decision rendered by the CJEU, then ECJ, was the *French Seamen's* case in 1974, in which the Court pronounced that the general rules of the EC Treaty - such as *non-discrimination on national grounds, right of establishment, competition, mobility of labour, and equal pay* - apply to air transport, even though no regulation had been adopted to enforce those laws¹². This holding, indeed, could be argued went against the very wording of the then Article 84(2) of the Treaty of Rome¹³, today TFEU Article 100(2), as amended by the Single European Act¹⁴, which provided that the Treaties' provisions be applicable to air transport only after the Council has adopted rules making them so. On the other hand the Court creatively, yet authoritatively argued that for the achievement of the Community's objectives the abovementioned general rules must apply to the whole complex of economic activities, including air transport. Furthermore, the CJEU made clear that the general rules of the Treaty automatically apply in the field of air transport as long as the Council, acting under Article 84(2)¹⁵, has not decided otherwise. This also meant, according to the Court, that the Commission is under legal and political duty to ensure that general rules of the Treaty are applied in sea and air transport as well¹⁶. All of the afore-mentioned coupled with the change in Member States attitudes¹⁷, gave the necessary support to the Commission's attempts to introduce liberalization, leading eventually to what has come to be known as the "first package" of air transport liberalization legislation at the end of 1987.

Although the 1974 judgment of the Court of Justice mentioned above had important implications for air transport, they were only implications, and it was in 1986 in the case of *Nouvelles Frontières*¹⁸ that the Court confirmed that the competition rules did indeed apply to air transport as to other sectors. The substantive issue addressed by *Nouvelles Frontières* involved the French law requiring approval of tariffs from public authorities. The Court held that the tariff filing procedure was not contrary to the EEC Treaty unless the tariffs themselves run afoul of the competition rules. "*In essence, the Court ruled that it is contrary to the Treaty to approve air tariffs where these tariffs are the result of an agreement, a decision of an association of undertakings [trade association] or a concerted practice itself contrary to Article 85*"¹⁹. Whereas, the Court did confirm that, absent specific language in the EEC Treaty, air transport was '*subject to the general rules of the Treaty, including the competition rules*',²⁰ it then concluded that absent specific regulations governing air transport adopted by the Council, it was in effect up to 'competent authorities in Member States' to apply the competition rules of the Treaty to agreements concerning the air transport industry, or, alternatively, the Commission could issue a 'reasoned decision'²¹. In other words, Member States retained the power to rule on lawfulness of agreements, decisions or concerted practices and on abuses of dominant positions according to their national law, until the Council (acting on proposal from the Commission) promulgates regulations implementing the competition rules.

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Next decision rendered by the CJEU and importantly contributing to further liberalization of the *internal* EU aviation market, namely the adoption of the so called “second liberalization package” in 1990, was the *Ahmed Saeed* case of 1989²². The Court found that Article 85, now TFEU Article 101, was ‘directly applicable’ to inter-Community air tariff agreements, even in the absence of implementing legislation promulgated by the Member States or the Commission, a conclusion that went beyond the above-mentioned holding in *Nouvelles Frontières*²³. In addition, the Court declared Article 86, now TFEU Article 102, as being ‘directly applicable’ to air transport even in the absence of implementing regulations, and that infringement thereof could be invoked by any person directly. Moreover, the Court confirmed its previous judgement in the *Wood Pulp* case²⁴ that held the EU competition laws were extraterritorially applicable to acts done by foreigners abroad (agreements entered into outside the EU, then EEC) if those acts had direct, substantial and foreseeable effects within the Member State concerned.

Whereas deregulation of aviation market on a bilateral level had already initiated between two important European States, UK and the Netherlands in between the above-mentioned *Nouvelles Frontières* and *Ahmed Saeed* rulings, already in 1984²⁵, in most other European States protectionist policies were still deeply rooted. Nonetheless, the change in Member States behaviour which ultimately, by 1993, led to acceptance of further liberalization measures, the adoption of “third package”, and into completion of *internal* aviation market may be attributed to the following factors. First, the Commission’s continued pursuit towards an EU-wide liberalization approach and the concentration of its efforts on the United States, in particular by using the threat of American competition to construct a pan-European compromise on aviation matters²⁶. Moreover, Commission’s reliance on the abovementioned CJEU’s judgments to put pressure on governments, which successfully augmented political weight of pro-liberalization forces, even in States that were traditionally against it, i.e. France, Germany²⁷.

The initial objective of the EU air transport policy was the creation of the *internal* aviation market. However, beyond market opening, the EU was able to gradually push for action in manifold areas regulating air transport, e.g., competition, airspace management, safety and security standards, passenger rights, environmental matters, and last but certainly not least into far reaching extension of regulating EU Member States’ external aviation relations with third countries.

4. EU’s external competence in air transport

The legal basis of the EU’s *external* competence in air transport may be derived from one of the following sources of international law: (4.1.) directly from the provisions of the EU founding treaties, that is provisions of the EU primary sources – *explicit* external competence; (4.2.) from the public international law doctrine of ‘implied powers’, as interpreted by judgments and opinions of the CJEU – *implicit* external competence; (4.4.) from the EU’s secondary legislation adopted by the Council – *ad hoc explicit* external competence.

4.1 Lisbon Treaty - EU’s explicit external competence?

The Lisbon Treaty for the first time introduced a provision on EU’s competence for the conclusion of international agreements, as confirmed in TFEU Article 216. This provision concerns the *external* representation of the EU with respect to the conclusion of international instruments, i.e. international agreements, administrative agreements

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and political commitments such as memoranda of understanding²⁸. Nevertheless, these general provisions dealing with EU's external representation are far from being straightforward³⁰, and more importantly they do not deal explicitly with the issue of external transport, let alone external aviation relations, which as will be explained further below continue to enjoy a separate status, even under the Lisbon Treaty. In addition, Article 216 recognizes that the EU "may conclude an agreement with one or more third countries or international organisations", however, it is confined in acting within the limits conferred upon it by the Treaty³¹, and it does not have free choice of the means for the fulfilment of the purposes of the Treaty³². Therefore no *explicit general* competence of the EU for conclusion of international agreements in the field of air transport may be derived from these provisions.

To the contrary, in the field of Common Transport Policy, TFEU Title VI, no provisions in the Lisbon Treaty are directed at international relations with non-Member States or international organizations. Likewise, it is for the Council acting jointly with the EU Parliament to decide whether appropriate provisions may be laid down for *sea and air* transport³³. For this reason, same as it was under the old doctrine based on the theory of '*compétence d'attribution*'³⁴, it is possible to conclude today, that according to the primary sources of the EU, the Union's external relations in the field of air transport would only be possible on the basis of a priory decision made by the Council under Article 100(2)³⁵.

Unlike States as subjects of international law who possess a general competence to conclude treaties without restrictions as to subject, form or procedure, the powers of international organizations to enter into foreign relations is not unlimited, but restricted to what is necessary for the exercise of their functions and the fulfilment of their purposes³⁶. Such powers in the case of EU's external aviation relations, however, are not as was described above, provided in the Union's constituent instruments. Precisely for this reason have the EU and the Commission as its external negotiator, similarly as it was with the creation of *internal* aviation market, found other innovative ways towards gradually obtaining an external air transport negotiation mandate to which, as seen from the constituent instruments and State practice, Member States were originally opposed.

From the very beginning of the 1980s³⁷ up to the CJEU's decision in the '*Open Skies case*' in 2002, Member States have witnessed important political and eventually legal changes taking place in the EU that have all crucially contributed to what has come to be known nowadays as the 'EU's external aviation policy'.

First of all, the CJEU evolved a body of jurisprudence concluding that there is not only *explicit* external competence but also *implicit* external competence and that the EU has implicit external competence in the field of transport, including sea and air transport (4.1.1.). Second, there has been rapid progress on an *ad hoc* basis in the field of EU's external competence in aviation relations found in the adoption of secondary legislation by the Council (4.1.2.). Furthermore and as will be addressed more in detail below, one must not neglect two additional pivotal factors in the creation of 'EU's external aviation policy'. Firstly, the Commission's continuous legislative and political initiatives and strategies towards attaining external negotiating mandate in the field of air transport and secondly, Commission's protracted and highly ambitious claims of having *exclusive* competence in respect of EU's external aviation relations.

4.2 EU's implicit external competence

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The Commission's quest for an *external* negotiation mandate in air transport dates to the very beginning of *internal* aviation integration³⁸ and had repeatedly been denied by the Member States. As early as 1984, the Commission identified external aviation relations as a major aspect of a potential wider EU air transport policy³⁹. Thus in 1990 Commission published a Memorandum and a proposal for legislation on the subject⁴⁰. This Memorandum claimed that the Community, today the EU, was *exclusively* entitled to conduct negotiations on air transport relations with third countries on behalf of the Member States, and put forward a proposal for a Council decision authorizing the Commission to undertake such negotiations⁴¹. Two years later, in 1992, Commission issued a further communication to the Council on the subject⁴², which although adopting a more pragmatic approach, still claimed *exclusive* competence in the field of external aviation relations. Both proposals were refused on behalf of the Member States.

The Commission's quest for an *external* negotiation mandate in air transport dates to the very beginning of *internal* aviation integration³⁸ and had repeatedly been denied by the Member States. As early as 1984, the Commission identified external aviation relations as a major aspect of a potential wider EU air transport policy³⁹. Thus in 1990 Commission published a Memorandum and a proposal for legislation on the subject⁴⁰. This Memorandum claimed that the Community, today the EU, was *exclusively* entitled to conduct negotiations on air transport relations with third countries on behalf of the Member States, and put forward a proposal for a Council decision authorizing the Commission to undertake such negotiations⁴¹. Two years later, in 1992, Commission issued a further communication to the Council on the subject⁴², which although adopting a more pragmatic approach, still claimed *exclusive* competence in the field of external aviation relations. Both proposals were refused on behalf of the Member States.

With respect to the aforementioned Commission's initial claims of *exclusive* competence in terms of substance two points may be distinguished. First, the Commission asserted that the legal basis of its *exclusive* external competence in air transport is derived from the provision dealing with Common Commercial Policy ("hereinafter CCP") of the, at that time in force EEC Treaty, as replaced today by the TFEU. Therefore Commission here argued that it bares *explicit* external competence that is *exclusive* competence⁴³ steaming directly from the EU's primary sources. Second, the Commission in addition argued it had *exclusive* competence even in respect of non-commercial aviation matters where they were covered by the EU legislation or the conclusion of agreements with third countries were likely to affect common rules adopted. Here, the Commission contrary to its first argument, relied on a subsidiary source of public international law, namely on the so called 'implied powers' doctrine, as developed initially in the jurisprudence of the ICJ and later in the framework of EU law also by the CJEU.

The first argument has, with the adoption of TFEU lost its legal value, as the Treaty in Title III, section on CCP, explicitly excludes "*negotiation and conclusion of international agreements in the field of transport*", which, "*shall be subject to Title VI of Part Three [section on Common Transport Policy] and to Article 218 [Conclusion of International Agreements]*". Moreover, it had already been argued prior to this provision, that the CJEU itself in *Opinion 1/94* excluded the possibility of attaching the matter of (air) transport to the CCP and indeed Member States had never intended for transport to fall within its scope⁴⁵. As already discussed above, the Union's constituent instruments do not provide for explicit EU's external competence in air trans-

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port to the issue of CCP, the only remaining legal basis for EU's external powers in air transport that the Commission could rely on, at least *ab initio*, is the so called doctrine of *implicit* external competence.

According to international law, international organizations, such as the EU, possess those powers that the States which create them entrust to them⁴⁶. Such powers may be expressly laid down in the constituent instruments or may arise subsidiarily as implied powers, being those deemed necessary for fulfilment of the functions of the particular organization⁴⁷. The ICJ already in 1949 noted in the *Reparation* case that: "under international law the organization must be deemed to have those powers which, though not expressly provided in the Charter [constituent instrument], are conferred upon it by necessary implication as being essential to the performance of its duties"⁴⁸. In the framework of EU law, the first time the CJEU introduced the *implied* powers doctrine was in its *ERTA* judgment⁴⁹. The Court through a purposive interpretation of the EEC Treaty declared that the competence of the EU to enter into international agreements arises not only from *express* conferment by the Treaty, but may equally derive from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the institutions of the EU. According to the Court therefore, when the EU adopts *internal* rules on a particular subject, it automatically acquires the competence to enter into *external* relations in respect of the same subject⁵⁰. In other words, if the adoption of an international agreement falls into the scope of EU's internal rules, i.e. these rules may be affected by the agreement⁵¹, the EU holds the external competence for its conclusion. Under EU law this is called the doctrine of parallelism of competence or *ERTA* doctrine⁵². In the post *ERTA* decisions the CJEU developed even more liberal approach towards determining EU's *implicit* external competence. In these cases the CJEU did not find the foundation of EU's powers to act externally in the need to preserve the integrity of EU's internal competence, but was derived from an assumed fact that an external action on the part of EU is '*necessary*' for the attainment of one of the objectives of the EU⁵³.

In 2002 CJEU rendered its decision in the '*Open Skies*' cases⁵⁴, which is a landmark decision *inter alia* for the reason of laying down the rules of EU's *implicit* external competence allocation in the field of air transport and because it marked the beginning of 'EU's external aviation policy'. The Commission's complaint was that by concluding the '*Open Skies*' air services agreements ("hereinafter ASA's"), the defendant States infringed the *exclusive* external competence of the EU. In support of that complaint it put forward two separate lines of argument: one based on the assertion that it was '*necessary*', in the sense contemplated in *Opinion 1/76*, for such agreements to be concluded at EU level; the other based on the assertion that the ASA's in question '*affect*', in the sense contemplated in the *ERTA* judgment, the common rules adopted by the EU in that field.

The Court rejected Commission's first argument of '*necessity*' for EU *exclusive* external action, essentially stating that in order for the EU to affirm its own external competence on this basis, it will always have to obtain first in accordance with the Treaties' procedures specific institutional recognition of such '*necessity*', i.e. prior Council authorization⁵⁵. To the contrary, however, in respect of the second argument the Court found that the *ERTA* findings are indeed in principle applicable to air transport and stated: "*even in the field of transport, the Community's exclusive external competence does not 'automatically' flow from its power to lay down rules at internal level*". To the contrary, "*the Member States, whether acting individually or collec-*

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tively, only lose their right to assume obligations with non-member countries as and when common rules which could be 'affected' by those obligations come into being"⁵⁶. Hence, the Court undertook to resolve the central disagreement among the Commission and Member States, namely to determine *which*⁵⁷ are these rules of EU air law and in *what way* can they be affected by ASA's, in order to find the areas of law where EU's *exclusive* external competence in air transport does exist. Firstly, in circumstances where common rules are *exhaustive* and *apply to non-EU nationals*, the EU alone is entitled to assume obligations *vis-à-vis* third countries⁵⁸, even if the assumed international obligations are not in direct conflict with EU law, but "*may merely 'affect' the common rules*"⁵⁹. Secondly, the Court stated that in order to ascertain if the provisions of ASA's could "*impinge on the correct application of the common rules*" or "*alter their scope*" or even "*conflict with them*" a careful analysis on a case by case basis must be undertaken⁶⁰. "*In order to establish that the common rules are 'affected' it is not enough to cite general effects of an economic nature which the agreements could have on the functioning of the internal market; what is required instead is to specify in detail the aspects of the Community legislation which could be prejudiced by the agreements*"⁶¹.

Following essentially the steps described in the table below the Court held that in the following areas, which are capable of being affected by the ASA's, EU's *exclusive* competence applies: (a.) the establishment of fares and rates on intra-Community routes, (b.) slot allocation and (c.) computerized reservation systems. Member States, as a result, do not have any sovereign power whatsoever to engage in international aviation negotiations in these areas.

ASSESSMENT OF THE QUESTION WHETHER DISPUTED INTERNATIONAL AIR SERVICES AGREEMENTS 'AFFECT' THE EU LEGISLATION, IN THE SENSE CONTEMPLATED BY THE ERTA DOCTRINE, AS UPHELD BY THE CJEU IN ITS LATER DECISIONS,

STEPS	ASSESSMENT	SIDE NOTES
(1.)	<p>Are the provisions covered by the ASA already the subject matter of internal EU legislation? → <i>Common rules could be 'affected' by ASA.</i></p> <p>a) Assumed international obligations fall '<i>within the scope of the EU rules</i>', and/or are '<i>concerned with an area which is already covered to a large extent by EU rules</i>', and/or they are '<i>in the spheres covered by those acts</i>'.</p> <p>b) Internal legislation capable of being '<i>affected</i>' applies (also) to the conduct of non-EU nationals.</p> <p>c) Claimant must provide detailed & precise specification of the alleged '<i>affect</i>' on internal EU legislation. General assumptions of distortion of internal market/competition – not sufficient.</p>	<ul style="list-style-type: none"> ➤ According to the CJEU such provisions would be <u>unlawful per se</u> on the basis of ERTA principle. ➤ EU enjoys <i>exclusive</i> external competence. ➤ Result: Member States are obliged to dully cooperate with the EU Institutions, in order to '<i>preserve the unity of the common market and the uniform application of EU law</i>'.
(2.)	<p>Are the provisions in the ASA in conflict with internal EU legislation? → <i>Common rules are 'breached'*</i> by assuming obligations under ASA.</p> <p>* Note: EU internal rules have been breached from the perspective of EU (air) law (violation directed towards EU, Member States & the common market), <i>not</i>, however, from the perspective of international (air) law.</p>	<ul style="list-style-type: none"> ➤ According to the CJEU such ASA's are (under EU law*) <u>unlawful in any case</u> → no need for ERTA test. ➤ EU enjoys <i>exclusive</i> external competence.
(3.)	<p>ASA's which do not fall in either of the (1.) or (2.) category, but are liable to '<i>affect</i>' the common rules.</p> <p>a) Examples: "<i>Agreements which concern aspects which are contiguous to those governed by the common rules</i>", or "<i>agreements which, while they concern a matter which is to a large extent covered by common rules, relate however to aspects not (or not yet) regulated by those rules.</i>"</p> <p>b) Specific assessment in light of the particular circumstances of each case.</p>	<ul style="list-style-type: none"> ➤ According to the CJEU, Member States under such ASA's <u>might 'affect' the common rules</u>, by <i>impinging on their correct application</i> or <i>altering their scope</i>. ➤ EU enjoys <i>exclusive</i> external competence. ➤ Result: Obligation of loyalty and sincere cooperation incumbent upon the Member States.

4.3 The nature of EU's external competence in air transport

Once the question of the legal basis of the EU's external competence has been determined it is necessary to examine the nature of such competence and its effect on the rights of Member States. The first question that arises in this respect is whether Member States still have external competence in relation to a particular subject.

First, with regard to Common Transport Policy as envisaged by the TFEU, Title VI, the norm is that the internal competence of the EU must be shared with Member States. This means that the EU is not immediately and definitively competent, that is to say unless the EU has exercised its competence in a particular area by means of secondary legislation, the Member States remain free to act.

Second, as elaborated above, in the absence of a Treaty provision establishing EU's explicit *external* competence in air transport, legal basis was found in the doctrine of *implicit* external competence. In principle therefore, EU's *implicit* external competence in air transport is likewise shared, which also complies with the conferment under the TFEU, Article 100(2) of the wide discretion in this field given to the Council⁶². Nevertheless, as has been discussed above, the consistent evolution of CJEU's case law has now rather firmly established that even in air transport issues EU's *implicit* external competence may in certain particular matters work so as to exclude, in entirety, the competence of Member States. When common rules, including rules governing air transport, could be '*affected*' within the meaning of the *ERTA* judgment, according to the Court's judicial practice, Member States lose their freedom to negotiate with non-member countries, and that is to say, irrespective of the content of the agreements to be negotiated and of any conflicts that might ensue as between them and the common rules. This means, according to the CJEU, that the EU is in such external matters exclusively, that is immediately and definitively competent. The Court in the '*Open Skies*' cases found that three out of five areas of EU air law submitted on behalf of the Commission were capable of being '*affected*' by the disputed ASA's.

Since the '*Open Skies*' cases, however, the EU has been in the process of adopting an increasing set of common rules applicable to *non-EU carriers* as well, which for example regulate, not only: mechanisms for preventing impairment of fair competition and matters relating to aviation commercial opportunities (including ground-handling), but also other issues such as passenger rights, data protection, environmental concerns, safety and security standards, allocation of slots, customs duties, taxes, user charges and other. According to the CJEU, as soon as Member States would attempt to enter into ASA's with non-EU countries, which would include for example the above mentioned issues, the EU would regarding these subject matters by *implication*, and to the detriment of Member States' sovereignty, acquire *exclusive* competence for their negotiation.

Notwithstanding internal procedural and practical questions that may arise from this scenario⁶³, what is more, from an *international* air law point of view, it is the Member States' who, regardless of this internal *implicit* delegation of national competences, retain the status of being the subjects of all relevant international air law conventions and air services agreements, and thereby the only addressees of sovereign rights deriving therefrom. Although, according to the CJEU, Member States have *implicitly* transferred several aspects of their regulatory powers in the field of external aviation relations to the EU pursuant to the conditions explained above, it is none-

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theless them - Member States - who are the only ones having the core sovereign title to granting or disallowing international air traffic rights to other non-EU countries. Moreover, the EU would, according to the Court, acquire exclusive competence over subject matters, which are proven to 'affect' the common rules, only on a case-by-case basis, rather than on an industry-sector basis⁶⁴.

In conclusion it is important to note the complexity of the problem and to emphasise that the notion of EU's *exclusive* external competence in air transport, as developed in the jurisprudence of the CJEU, does not mean exclusive *general* competence, but competence that, under certain conditions, arises only with respect to specified matters. As a practical result - at least for the time being - Member States may "freely" enter into external aviation relations, however, they are in their rights no longer independent actors, as they have clear and unambiguous obligations under EU law, that must be followed when undertaking aviation relations *vis-à-vis* 3rd countries.

4.4 EU's secondary legislation - EU's *ad hoc explicit* external competence

The rapid progress in the EU's external competence is represented by measures of secondary legislation adopted by the Council in air transport matters or in matters having air transport within their scope. Doctrine speaks of two possible ways for the EU to acquire external competence under secondary legislation⁶⁵. Firstly, the EU could by relying on the international law theory of 'implied powers', assume *implicit* external competence in air transport matters covered by internal rules adopted by the Council. Secondly, and this is precisely what was the immediate effect of the 'Open Skies' cases in 2002, the Council could acting under TFEU, Article 100(2) on an *ad hoc* basis adopt legislative measures confirming *explicitly* the EU's external competence.

In the 'Open Skies' cases Commission did not win on its claims of *general* exclusive competence in external aviation relations; it did, however, importantly succeed in attaining full judicial recognition of the existence of its *implicit* exclusive external competence over matters covered by *internal* EU air transport legislation⁶⁶. This in light of ever increasing comprehensive set of internal EU air transport legislation applicable also to non-EU nationals, nevertheless effectively amounts to a very close approximation of general exclusive competence. Thereto and legally armed with its success on other claim as well⁶⁷, Commission shortly after the judgment issued a communication among other things calling on all Member States to exercise their rights to terminate their ASA's with the US, and recommending that the Council give the Commission a mandate to negotiate with the US as soon as possible⁶⁸. In 2003 Commission and the Council reached an agreement on the matter which resulted in the adoption of a Regulation⁶⁹ setting out the conditions on how Member States could continue to negotiate bilateral ASA's without infringing their obligations under EU law and in the birth of the so called 'EU's External Aviation Policy', based on three pillars.

Under the first pillar, based on Council's authorisation to the Commission, the latter was to negotiate EU level agreements (so called horizontal agreements⁷⁰) with third countries, in order to bring Member States' existing bilateral ASA's with those countries in line with EU law⁷¹. Under the second pillar, pursuant to Council's authorization, the Commission was to negotiate a comprehensive agreement with the US, aimed at creating an 'open aviation area' to replace the so-called 'open skies' agreements, and other more restrictive agreements, agreed bilaterally by the Member States. Under the third pillar, the principle was agreed to create a Common Aviation Area, comprising the EU and potentially all of the countries located along its southern

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and eastern borders, with the aim to achieve an as high as possible degree of economic and regulatory integration of the aviation markets concerned.

In the latest Council conclusions on the issue of EU's external aviation relations reached on December 20, 2012, three pursued objectives may be distinguished. First, Council is in favour for the Commission to reach further comprehensive agreements with all neighbouring States and welcomes Commission's intent to request a mandate to negotiate other far reaching comprehensive agreements with important aviation partners⁷². Second, Council supports the Commission's measures for strengthening 'fair competition' and third, Council encourages Commission's efforts in tackling the ownership and control restrictions.

The EU and the Commission as its external negotiator have, as may be discerned from the above-mentioned trends, attained some far reaching external negotiation mandates pursuant to prior Council's authorizations in each specific case. Therefore, EU's external air transport competence - at least for the time being - is *explicit*, being expressly based on EU's secondary legislation. It is important to note, however, the tremendous significance of all the legal, political and strategic steps undertaken by the Commission beforehand and the judicial backup provided by the CJEU, which jointly augmented the favourable political will among the Member States and eventually led to *express* delegation of national competences in the otherwise highly 'sovereignty sensitive' field of external aviation relations. Moreover, until Member States fully denounce from undertaking further aviation relations with non-EU countries, individual ASA's will very likely, in this highly multi-level jurisdictional environment, continue causing discrepancies as to the questions of *who* has *what* kind of competence and in respect of *which* exact air law matters.

5. Conclusion

Albeit external affairs of individual States' have traditionally been perceived as falling within the reserved domain of their domestic jurisdiction, and even more so in respect of external *aviation* relations, where sovereignty has traditionally played central role, it has now become firmly acknowledged that the powers to enter into foreign relations are the inherent and necessary attributes of international legal personality and are therefore enjoyed in addition to States also by international organizations.

The CJEU judgments have, in accordance with the international law doctrine of 'implied powers', now clearly established that the EU has *exclusive* competence for external relations in a number of areas dealing with aviation. Since, however, negotiation of traffic rights remains exclusively in the realm of Member States' sovereignty; the CJEU's jurisprudence effectively establishes a situation of "shared exclusive competence" in order to deal with all matters typically contained in a bilateral air services agreement. This as a result entails the obligation of close co-operation between the Member States and the EU.

The CJEU's standing with regard to the question of EU's *implicit exclusive* external competence is unambiguous, nevertheless the fact that the Commission -at least for the time being- rather exercises its external powers in air transport through *explicit* delegation of external competences based on EU's secondary legislation, i.e. Council authorizations, demonstrates that in terms of international law and international relations, competence based on "mere" jurisprudential sources would most likely be

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perceived as highly disputable, whereas express conferment via internal legislative means is clearly not. Moreover, it creates the perception of greater negotiation power endowed in the EU acting as one entity. In this sense, comparison may be drawn with the creation of *internal* aviation market, whereby Commission's reliance on CJEU's judgments proved to be pivotal for its completion, likewise as it was with the attainment of *explicit* external competence following the 'Open Skies' cases.

In conclusion, it may be said, on the one hand, that the EU Member States are still *independent subjects* of international law, but that, on the other hand, they are no longer *independent actors*. With their involvement in the EU and more specifically in the creation of *internal* air transport market, they have, *explicitly* or *implicitly*, conferred to the EU the exclusive powers to enter on their behalf into external (aviation) relations with third countries.

¹ ICJ, Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, ICJ Rep., 1996, pp.66, 78-9, citing the PCIJ, Advisory Opinion in the Jurisdiction of the European Commission of the Danube, PCIJ, Series B, No. 14, p. 64 which noted; "As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise those functions to their full extent, in so far as the Statute does not impose restrictions upon it".

² ICJ, *Reparation case*, I.C.J. Reports (1949), 174; The criteria of legal personality in international organizations derived from the *Reparation case* may be summarized as follows:

- 1) A permanent association of States, with lawful objects, equipped with organs;
- 2) A distinction, in terms of legal powers and purposes, between the organization and its member States;
- 3) The existence of legal powers exercisable on the international plane and not solely within the national system of one or more States.

³ Shaw, INTERNATIONAL LAW, 6th Ed., Cambridge University Press, p. 1306.

⁴ P S Dempsey, EUROPEAN AVIATION LAW, Kluwer Law, 2004, p. 1.

⁵ J Balfour, *EC External Aviation Relations: The Community's increasing role, and the new EC/US Agreement*, Common Market Law Rev. 45, 2008, p. 443-463.

⁶ P.P.C. Haanappel, *Bilateral Air Transport Agreements - 1913-1980*, 5 Int'l Trade L.J. 241 1979-1980, p. 241.

⁷ See C Woll, *The road to external representation: the European Commission's activism in international air transport*, Journal of European Public Policy, 13:1, p. 52-69.

⁸ TFEU, Article 100(2) (ex TEC, Article 80(2)).

⁹ A A Menick von Zebinsky, EUROPEAN UNION, EXTERNAL COMPETENCE AND EXTERNAL RELATIONS IN AIR TRANSPORT, (Kluwer Law International), 1996, p. 9.

¹⁰ TFEU, Article 100(1) ; (ex TEC, Article 80(1)).

¹¹ The Treaty of Rome was enacted with the presumption that "national economies can be unified only if there is an efficient system for moving people and goods".

¹² CJEU, *Commission v. France*, Case 167/73 [1974], 1974 E.C.R. 359; Menick von Zebinsky, *supra*, Note 9, p. 9.

¹³ "The Council may, acting unanimously, decide whether, to what extent and by what procedure appropriate provisions may be laid down."

¹⁴ "The Council may, acting by qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down."

¹⁵ Today, TFEU Article 100(2).

¹⁶ Menick von Zebinsky, *supra*, Note 9, p.11.

¹⁷ The deregulation of domestic air transport in the USA, with effect from 1978 had significant indirect effects on the mindsets of the EEC member States, both by reason of the changes in the structure of the US air transport industry and its direct effects there and by influencing the general climate of opinion in the EEC and elsewhere. See C Woll, *supra*, Note 7, p. 52-69.

¹⁸ CJEU, *Ministere Public v. Asjes* (Nouvelles Frontieres), 1986 EUR. COMM. CT. J. REP. 65, 72 [1985-1986 Transfer Binder] COMMON MKT. REP., (CCH).

¹⁹ P.P.C. Haanappel in Dempsey, *supra* Note 4, p. 33; TFEU, Article 101

²⁰ CJEU, *Nouvelles Frontieres*, at §14, 287, at 16,772, 16,778 (1986).

²¹ *Id*, at 16,778-780.

²² CJEU, *Ahmed Saeed Fluereisen and Silver Line Reiseburo v. Zentrale zur Bekämpfung unlauteren Wettbewerbs EV*, Case 66/86, (1989).

²³ Dempsey, *supra* Note 4, p. 35.

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- ²⁴ CJEU, Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, *A. Ahlstrom Osakeyhito and Others v. Commission of the EC*, (1988).
- ²⁵ See P. Mendes de Leon, *Before and After the Tenth Anniversary of the Open Skies Agreement Netherlands-US of 1992*, *Air & Space Law*, vol. xxviii/4/5 (September 2002).
- ²⁶ C Woll, *supra*, Note 7, p. 52-69.
- ²⁷ *Id.*
- ²⁸ M Gatti, P Manzini, External representation of the European Union in the conclusion of international agreements, *Common Market Law Review* 49: 1703–1734, Kluwer Law International, 2012, p. 1703.
- ²⁹ TFEU, Arts. 216-219.
- ³⁰ See M Gatti, P Manzini, *supra*, Note 28; “[...] combination of political sensitivity and legal uncertainty renders the EU’s representation very contentious: in the recent past, this area has seen not-so-hidden “turf wars” that damaged the image and effectiveness of the EU’s external action”.
- ³¹ See TFEU, Article 216; “[...]where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties
- ³² See TFEU, Article 216; “[...] or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope”.
- ³³ TFEU, Article 100(2).
- ³⁴ Menick von Zebinsky, *supra*, Note 9, p. 20-21.
- ³⁵ In conjunction with TFEU, Article 352; See also: H. Wassenbergh, Annotation to J. Balfour, *European Community External Aviation Relations - The Question of Competence*, *Air & Space Law*, Vol. XXI, Number 1, 1996, p. 8.
- ³⁶ ICJ, *Legality of the Use by a State of Nuclear Weapons* case, ICJ Rep., 1996, pp. 66, 78-9; Menick von Zebinsky, *supra*, Note 9, p. 1.
- ³⁷ Council Decision 80/50 on consultations between EU States and the Commission on external aviation relations, Council Decision (EEC) 80/50, O.J. 1980, L 18/24; Being the very first legislative initiative in the field of air transport, preceding even the creation of *internal* aviation market, see Balfour *supra* Note 5.
- ³⁸ Council Decision (EEC) 80/50, O.J. 1980, L 18/24; COM Memorandum (90)17; COM Memorandum (92)434; Council Decision (EEC) 92/384, O.J. 1992, L 200/20.
- ³⁹ C Woll, *supra*, Note 7, p. 52-69.
- ⁴⁰ COM Memorandum (90)17.
- ⁴¹ Balfour, *supra* Note 5, p. 445.
- ⁴² COM Memorandum (92)434.
- ⁴³ TFEU, Article 3(1)(e); (Part of EU’s exclusive competences).
- ⁴⁴ For further explanation see: J. Balfour, *European Community External Aviation Relations - The Question of Competence*, *Air & Space Law*, Vol. XXI, Number 1, 1996.
- ⁴⁵ During negotiations for the TEU, the Commission proposed the replacement of the term *CCP* with the term *External Economic Policy* and the inclusion within the *EEP* of all economic measures relating to trade in goods and services, including trade in air transport services. However the proposal was sharply rejected by the majority of the delegations mainly because they feared that (air) transport would fall within the scope of *CCP*; Working Paper of the Commission dated 27th February 1991 [unpublished] in Menick von Zebinsky, *supra*, Note 9, p. 23.
- ⁴⁶ See *supra* Note 1.
- ⁴⁷ Shaw, *supra*, Note 3, pp. 1307.
- ⁴⁸ ICJ, *Reparation case*, I.C.J. Reports (1949), 174, at p. 182; Confirmed later in various other ICJ judgments.
- ⁴⁹ CJEU, *ERTA, Commission v. Council*, Judgement of 31st March 1971, [1971], ECR 263, Case 22/70.
- ⁵⁰ ‘ERTA’ Decision, CJEU, §27, “[...]each time the Community ... adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules” .
- ⁵¹ J. Balfour, *supra*, Note 44, p. 4.
- ⁵² *Id.*; See also C. Hillion, *ERTA, ECHR and Open Skies: Laying the Grounds of the EU System of External Relations*, p. 225; “[...] the ERTA decision catalyses the on-going emergence of the EU as a law making actor on the global stage, particularly in the GATT context”.
- ⁵³ CJEU, Joined cases 3, 4, 6/76, *Officier van Justitie v. Kramer*, Preliminary Ruling of 14th July 1976, [1976] 2 CMLR 440 and Case 1/76, *Draft Agreement establishing a European laying up fund for inland waterway vessels*, Opinion of 26 April 1977, [1977], ECR 741, 2 CMLR 279.
- ⁵⁴ ‘Open Skies’ Cases C-466-469, 471, 472, 475, 476/98, *Commission v. United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany*, [2002] ECR I-9427.
- ⁵⁵ §§49-53, Opinion of the Advocate-General; Procedures laid down in TFEU, Article 352.
- ⁵⁶ *Ibid.*, at §65.
- ⁵⁷ According to the Court there are 3 Options:
- 1) EU rules that are in clear conflict with the international agreement.
 - 2) EU rules that cover the same subject matter as the international agreement.
 - 3) EU rules that are liable of being ‘affected’ by the international agreement, although they do not fall in

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either of the above stated categories.

⁵⁸ F Sørensen, W van Weert & A Cheng-Jui Lu, *ECJ Ruling on Open Skies Agreements v. Future International Air Transport*, Air & Space Law, Vol. XXVIII/1 (February 2003), p. 4.

⁵⁹ At §67, Tizzano, Opinion on Open Skies Agreement cases, *ibid*, citing also prior decisions.

⁶⁰ *Ibid*, at §§76, 77.

⁶¹ *Ibid*, at § 77.

⁶² Council with Parliament shall decide 'whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport'.

⁶³ For example do the Member States' need prior authorisation from the Commission when initiating such negotiations or is notification sufficient? Pursuant to Regulation 847/2004 Member States are obliged to allow Commission to participate as an observer in the negotiations.

⁶⁴ Dempsey, *supra*, Note 4, p. 88.

⁶⁵ Menick von Zebinsky, *supra*, Note 9, p. 41.

⁶⁶ See COM (2002) 649, 31-32 and *supra* Point 4.2.

⁶⁷ Traditional nationality clauses in disputed Air Services Agreements' were held to be illegal because they were inconsistent with EU rules on the Right of establishment.

⁶⁸ Balfour, *supra* Note 5.

⁶⁹ Regulation (EC) No 847/2004 of the European Parliament and the Council of 29 April. 2004 on the negotiation and implementation of air service agreements between Member States and third countries. OJ 30 April 2004, L157, p. 7.

⁷⁰ See for further explanation: P. Van Fenema, EU Horizontal Agreements: Community Designation and the 'Free Rider' Clause, Air & Space Law, vol. xxxi/3 (June 2006).

⁷¹ The main purpose of horizontal agreements was to replace traditional nationality clauses with EU-clause. However, the agreements include in manifold cases also other provisions (e.g. *fuel clause*, *tariffs clause*, *fair competition clause*), for which it has been argued, go beyond EU's external competence, see: Balfour, *supra* Note 5 and Van Fenema, *supra* Note 70. It is the opinion of this author, however, that relying on CJEU's doctrine of *implicit* external competence, as contemplated by the *ERTA* doctrine and upheld in the 'Open Skies' cases, the Commission could firmly argue it does have the competence to agree on the aforementioned matters, which are all covered by internal EU legislation.

⁷² E.g., China, Russia, the Gulf States, Japan, Turkey, India and ASEAN States.

REMOTELY PILOTED AIRCRAFT SYSTEMS: PRIVACY AND DATA PROTECTION IMPLICATIONS

Alfredo Roma*

1. Introduction

While Remotely Piloted Aircraft Systems (hereinafter RPAS) have been widely employed for military purposes, in recent years the full potential of a civilian RPAS market has become apparent. RPAS represent an extremely versatile and flexible tool, able to fulfil effectively a wide array of tasks in the fields of law enforcement, environmental and scientific research, natural disaster monitoring and to be used as a viable alternative to manned aircraft in many contractor-supplied flight services. However, the versatility of this tool may also pose a serious threat to citizens' privacy rights in Europe and elsewhere and may jeopardise the enforcement of data protection rules.

In the last two decades, our society has come to accept the curtailment of the individual's privacy rights as the price to pay in order to reap the benefits of technological progress. In order to enjoy greater security, better customer services and the boundless opportunities offered by the Internet, we have been asked to give up some of our hard-won privacy rights and to open our private sphere to the public eye. In 1999 Scott McNealy, then CEO of Sun Microsystems, dismissed public concerns about the impact of emerging information technologies on privacy rights quipping: "*You have zero privacy now. Get over it*". However, this kind of matter-of-fact attitude has done little to assuage mounting concerns for the loss of control over our personal data, our image, our tastes, our very names and over the bundle of rights collectively described by the word "*privacy*".

The encroachment on our personal sphere has today reached alarming proportions, since thanks to tremendous strides in Information Technology it is possible for Governments to collect and store extraordinary amounts of personal information relating to their citizens. Sensitive information, concerning buying habits¹, health and financial records, political and religious beliefs or sexual orientation is regularly collected and stored (and sometimes even traded as a commodity) by corporations and commercial undertakings, often with little oversight from public authorities.

In the information society, individuals live under constant surveillance, not unlike the inmates in Jeremy Bentham's panopticon², and it is difficult to determine the effects that this new "society of control" will have on personal behaviour or social relationships³.

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ships⁵.

Félix Guattari and Gilles Deleuze offered a dystopian representation of a future where *“one would be able to leave one’s apartment, one’s street, one’s neighbourhood, thanks to one’s [...] electronic card that raises a given barrier; but the card could just as easily be rejected on a given day or between certain hours; what counts is not the barrier but the computer that tracks each person’s position - licit or illicit - and effects a universal modulation”*⁶.

The need to protect society from crime, terrorism or deviant behaviour has often been invoked to justify (and even advocate) further encroachment into our personal lives by Governments and law enforcement agencies. Daniel Solove compared the power relationship created by these inroads into our private lives with Kafka’s “The Trial”, emphasizing the utter powerlessness, vulnerability and disenfranchisement of the individual by the collection of sensitive and personal information, *“without any meaningful form of participation”*⁷ in the processing of said information⁸.

RPAS is the new tool deployed to collect information for civilian as well as military purposes. These aircraft are capable of flying silently for more than 24 hours⁹ at considerable range, loiter over targets and collect a considerable amount of information. RPAS can be extremely simple and even rudimentary, short-range vehicles or very expensive and sophisticated long-range aircraft. Large airframe RPAS - sometimes fitted with jet engines - can be used for more delicate missions, requiring aircraft to fly at medium or high altitude and in difficult meteorological conditions, without endangering the life of a pilot. Lighter RPAS normally fly at low altitude and operate within relatively small areas, carrying smaller payloads.

Given their flexibility and versatility, RPAS are likely to play a very important role in border surveillance, anti-terrorist operations, coastal surveillance and law enforcement (especially in difficult weather conditions or at night). But these aircraft have proved themselves extremely useful in a wide variety of other tasks, such as fire fighting and monitoring of disaster sites (such as nuclear accidents, floods, earthquakes and volcanic eruptions).

2. The potential RPAS market

Although satellites and manned aircraft have proved to be highly versatile and sophisticated data collection tools, RPAS represent an incomparably more flexible and relatively inexpensive (especially if compared to satellite systems) alternative, due to their extremely low cost of operation and their proportionally heavier payloads. Moreover, in some cases RPAS are even able to collect data much more efficiently than either satellites or manned aircraft ever could. For instance, the Northrop Grumman “Global Hawk”, can fly at altitude over 65,000 feet and is equipped with electro-optical and infra-red sensors able to see through thick layers of clouds or in total darkness. A wide range of rotary wing aircraft is also in use or in development, especially mini helicopters for local surveillance or detection, and might prove extremely useful in urban areas due to their high manoeuvrability and their capacity to loiter or hover over targets.

European regulations distinguish RPAS on the basis of their weight: below or above 150 kg. The present analysis distinguishes the Mini RPAS from the MALE (Medium Altitude Long Endurance)/HALE (High Altitude Long Endurance) RPAS. Mini RPAS could poten-

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tially prove very intrusive for privacy and can be extremely difficult to spot or track. MALE and HALE are more sophisticated RPAS carrying high definition sensors capable of flying for more than twenty hours without refuelling, they are easier to detect and less suitable for use in confined environments. Mostly public operators or contractors normally use them for civil defence missions. Worldwide expenditure in RPAS is expected to grow from the 2,9 billion dollars of 2005 to 5,9 billion dollars in 2016¹⁰.

Currently, the United States leads the global RPAS industry both in production and development of new aircraft as well as in terms of expenditure (which is mainly driven by defence procurement). Israel holds a substantial market share, especially as regards military RPAS, while in Europe the UK is first in terms of production, development and expenditure, closely followed by France and Italy.

However, for a fully-fledged RPAS market to emerge in Europe, it is vital to address properly the civilian airspace access issue and to put in place an effective regulatory framework to discipline RPAS operations in non-segregated airspace. A few years ago the European Commission started a process of analysis of the RPAS sector in order to identify the key issues to reach this goal: certification, R&D and social impact¹¹.

The integration of RPAS into non-segregated airspace appears to be now a priority also for the US Government which recently asked the Federal Aviation Administration to develop a comprehensive integration plan within 9 months, fully integrate RPAS in the civilian airspace by 30 September 2015, design a 5-year roadmap (which should be updated annually, to take into account progress and setbacks of the plan) and establish a RPAS regulatory framework within two years¹².

On 20 March 2013, the US Senate Judiciary Committee held a hearing to discuss “the future of drones in America” and the serious privacy concerns raised by the use of these aircraft for law enforcement purposes. Moreover, the US Congress is currently discussing several bills aimed at regulating the private use of RPAS and strengthening privacy rights¹³.

This article is the outcome of recent studies, projects¹⁴ and debates dedicated to the privacy right issue raised by the civil use of RPAS.

3. The Privacy Right

The existence of a personal sphere of the individual, excluded from public eye and sheltered from government interference was recognized by Article 12 of the Universal Declaration of Human Rights of 10th December 1948, which states that “*no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks*”.

In Europe, Article 8 of the 1950 European Convention of Human Rights (ECHR) recognized the existence of the individual's “*right to respect for his private and family life, his home and correspondence,*” prohibiting any undue or unlawful interference by public authorities with the exercise of this fundamental right “*except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*”. Therefore, according to

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Article 8 ECHR, government interference into private life or correspondence is admissible only if it satisfies three main conditions.

Firstly, public authorities must collect, store and process sensitive and personal data for public purposes and in compliance with the applicable laws and regulations. This is what we might call a “*due process*” requirement for the processing of personal data. Secondly, according to Article 8, the goal pursued by the public body must be a lawful one (i.e. one of the interests and purposes listed by Article 8, which should therefore be read as a *numerus clausus* of conditions). Finally, the European Court of Human Rights has ruled that a lawful interference of public powers with the private sphere of the citizen is justifiable pursuant to Article 8 ECHR only if it is proportional to the objective or purpose pursued and absolutely “*necessary in a democratic society*”, meaning that there must not be any less invasive or intrusive way to achieve the goal pursued by the public authorities¹⁵. This is what we might therefore call a “*proportionality*” requirement.

The right to data protection was developed much later, in the 1970s¹⁶, in the wake of staggering strides in the field of information technology. To this day, the main purpose of data protection legislation is to set down conditions under which it is legitimate to process and store sensitive or personal data. This kind of legislation generally sets rules and guidelines for those who process sensitive data and empowers the data subject by granting them a panoply of rights and guarantees and a certain degree of control over the data at issue.

In spite of a roughly consistent regulatory framework and of decades on legal doctrine and case law at a national and supranational level, privacy has proven to be rather difficult to safeguard from third party or government interference, perhaps because it is an “*exoteric concept without precise, objectively discernible boundaries*”¹⁷.

The European Court of Human Rights has never provided a “*conclusive definition of privacy*”¹⁸, and in *Niemietz vs Germany* emphasized the risk of imposing excessively narrow boundaries to this right.

The notions of privacy and data protection, while inextricably linked and liable to overlap in some cases¹⁹, should however not be confused. While privacy rights apply to a wide range of conducts and practices, data protection legislation mostly concerns itself with the requirement that personal data “*must be processed fairly and for a specified purpose*”²⁰ (or in other words, according to *due process*) and with the consent of the subjects concerned.

On the basis of this broad definition of privacy, it is therefore possible to draw a physical and legal boundary between the individual's private sphere and the public area.

The spatial boundary between private property and public space is particularly relevant in the case of RPAS. There can be no doubt that the (intentional or unintentional) collection of information from satellites or aircraft or RPAS flying over private property would represent a significant threat for privacy rights.

It is much more difficult to draw a clear legal boundary between private and public sphere, and in the last century doctrine and jurisprudence have come to recognize the existence of a *penumbra* between these areas²¹, what Oliver Wendell Holmes would

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have called a “grey area where logic and principle falter”²². Lawmakers and Courts across the world have tried to provide some guidance to navigate this grey area, according to their own culture and constitutional principles, believing that “it is better to have a line drawn somewhere in the penumbra between darkness and light, than to remain in uncertainty”²³.

It has been remarked that Article 8 of the European Convention of Human Rights states that privacy rights must be balanced against other competing interests, such as freedom of information, national security, public health and law enforcement. Indeed, it is generally recognized that an intransigent, unrestricted defence of privacy rights might seriously hinder law enforcement and stifle the economic activities, which vitally rely on the free flow of information and in the collection of data.

Most national and international privacy regimes recognize the need to limit the exercise of privacy rights. The *Convention for the protection of individuals with regard to automatic processing of personal data* of 28 January 1981, “recognizing that it is necessary to reconcile the fundamental values of the respect for privacy and the free flow of information between peoples”, under Article 9 allows derogations for: “a) protecting State security, public safety, the monetary interests of the State or the suppression of criminal offenses; b) protecting the data subject or the rights and freedoms of others”²⁴.

The same derogations have been reiterated by Directive 95/46/EC²⁵ and Regulation 2001/45/EC, which allow restrictions to privacy rights in the presence of certain competing public interests²⁶.

So far, RPAS have been employed exclusively by States or public entities, and mainly for security purposes; however the cost of operation and maintenance of RPAS is today easily within reach of corporations and even private citizens, and these vehicles can be easily (and cheaply) fitted with cameras, sensors and recording devices which may collect a large number of data.

Intensive and widespread use of surveillance measures in the United Kingdom has already led to litigation and to lengthy disputes which have gone as far as to the European Court of Human Rights (ECtHR)²⁷. In these rulings, the t has drawn the line on the dissemination of personal information rather than on the simple collection and storage of said information²⁸. This peculiarly broad interpretation, which had a lasting influence on EU legislation, seems to be however difficult to reconcile with the spirit or even with the letter of Article 8, which speaks of “interference” into private and family life and not of mere dissemination of sensitive information.

Moreover, the ECtHR has left considerable leeway to public authorities in defining which aims and concerns might be considered legitimate under Article 8 ECHR. For instance, the England and Wales Court of Appeal, in what might prove to be a landmark ruling²⁹, adopted the test first put forward by Justice Harlan, holding that the assessment of whether Article 8 is engaged is inextricably linked with the question whether “there is a reasonable expectation of privacy”³⁰ on the part of the individual.

4. Privacy and Data Protection within the existing EU Legal Framework

Article 6 of the Treaty on European Union committed the European Union to accede

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accede to the European Convention of Human Rights and Article 7 of the EU Charter of Fundamental Rights (which became binding in December 2009 when the Lisbon Treaty finally came into force) replaced the right of privacy of “correspondence” with the right of privacy of “communications”³¹.

Moreover, Article 8 of the Charter states that “*everyone has the right to the protection of personal data concerning him or her*” and that such data must be processed “*fairly*” for specified purposes only and exclusively with the consent of the person concerned or on “*some other legitimate basis laid down by law*” (a clear reference to the principle of due process already enshrined in Article 8 ECHR).

The same provision establishes the right to access the data collected concerning oneself and if need be the right to have it rectified. Compliance with these rules should be subject to the control of an independent overseeing authority³².

In this provision it is clearly visible the influence of Article 286 of the Treaty establishing the European Community³³, and Directive 95/46/EC of the European Parliament and of the Council, on the protection of individuals with regard to the processing of personal data and on the free movement of such data, as well as on Article 8 of the ECHR and on the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data³⁴, which has been ratified by all the Member States.

The 1981 Convention was prompted by the need to assert the social responsibility of those who handle sensitive data as a curb to their growing information power and to “*streamline the uneven and conflicting data protection laws among the European States*”³⁵.

Directive 95/46/EC marked an overhaul of data protection legislation in Europe and had a lasting influence on EU law and jurisprudence. The Directive committed Member States to protect the individuals' right to privacy as regards the processing of personal data³⁶, defined as “*any information relating to an identified or identifiable natural person ('data subject')*”³⁷.

The purpose of the EU lawmakers was to foster a common EU-wide market for data and information without compromising or curtailing the fundamental right set out by Article 8 ECHR³⁸.

The “*controller that is the natural or legal person, public authority, agency, or any other body that determines the purposes and means of processing personal data*” must ensure compliance with Directive 95/46/EC³⁹. Furthermore, Articles 16 and 17 of Directive 95/46/EC require data controllers to take steps to ensure confidentiality of data processing and to implement all technical and organizational measures necessary to prevent infringements and abuses⁴⁰. These provisions foreshadowed the strides, which took place in the field of information technology in the following years. Moreover, the Directive provides for equitable compensation in case of damage caused by unlawful or unauthorised data collection or processing, thus recognising the important role which tortious liability can play in ensuring compliance of privacy regulations.

Directive 95/46/EC also recognizes the data subject's “right of access”, that is the right to obtain from the controller confirmation as to whether data relating to him is being processed and, in case of violation of the Directive, the right to demand rectifi-

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rectification, erasure or blocking of data⁴¹.

Pursuant to Article 3, the Directive shall not apply to the processing of personal data in the course of any activity concerning “*public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law*”⁴². This general principle is complemented by Article 13 of the Directive, which states that certain concerns and public interests might exceptionally justify restrictions to the scope of the rights of the data subjects.

Directive 95/46/EC had a profound and lasting influence on privacy regimes all over Europe, prompting the rise of “*omnibus*” privacy laws, that is to say laws that “*establish regulatory standards for a broad area*” (as opposed to “*sectorial*” or “*sector-specific*” laws)⁴³.

However, a major limitation of the regime set up by Directive 95/46/EC is that it leaves considerable (and perhaps excessive) leeway to national lawmakers in a field that would probably require a unified approach⁴⁴.

Two years later, Directive 97/66/EC⁴⁵ on privacy and electronic communications was adopted, to regulate specific areas, which had not been addressed by Directive 95/46/EC. This Directive was amended in 2002 by Directive 2002/58/EC⁴⁶ on privacy and electronic communications, also called the “*ePrivacy Directive*”. Like Directive 95/46, also the *ePrivacy Directive* recognizes the right of Member States to adopt measures, which curtail privacy rights for law enforcement reasons and other public interests⁴⁷.

Directive 2002/58/EC was in turn amended in 2009 by Directive 2009/136/EC⁴⁸, which is part of the so-called “*Telecoms package*”: a legislative framework designed to regulate the electronic communications sector, amending the existing rules⁴⁹. The “*Telecoms Package*” includes also a general framework Directive⁵⁰, and Regulation 1211/2009⁵¹, which established a Body of European Regulators for Electronic Communications (BEREC).

The model consistently adopted by EU legislation could be characterised as a “*self-management model*”, the aim of which is to provide people with control over their personal data, thus allowing them to “*decide for themselves about how to weigh the costs and benefits of the collection, use or disclosure of their information*”⁵².

This model has been strongly criticized in recent years. Critics have emphasized that firms and data handlers often fail to provide adequate notification of the data which is being processed⁵³ and that people generally lack the expertise and the know-how necessary to assess the all the implications of their acceptance of certain uses of their personal data. In spite of subsequent reforms and interventions by the European lawmakers, by the beginning of this decade it became all too evident that the existing regulatory framework is no longer able to address the challenges posed by technological progress and commercial practices.

In January 2012, the Commission published two draft instruments to radically reform the existing regulatory framework: the transformation of Directive 95/46/EC into a “*General Data Protection Regulation*”⁵⁴ (which will apply to data collection and processing by private or commercial RPAS operators) and a Directive regulating sensitive

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data processing by law enforcement authorities⁵⁵.

The Commission's proposal provides for tighter harmonization in an attempt to reduce the instances of fragmentation in the way privacy and data protection rules are implemented across the Union. Moreover, the General Data Protection Regulation might prove extremely useful to address the new challenges posed by recent developments in information technology.

The General Regulation will address several issues, largely neglected or inadequately dealt with by the existing legal framework, such as the need for specific provisions on health-related information, and will overhaul the existing rules on data processing for reasons of public interest. It is yet unclear whether the proposed instruments will be able to find a balance between the need to guarantee the right of individuals to demand the deletion of their personal data (the so-called “right to be forgotten”) and the need to provide access to the same data on grounds of public interest. An even bigger concern (insufficiently dealt with by the text put forward by the Commission) is raised by the possible use that could be made of sensitive data collected by private subjects for commercial purposes.

The General Data Protection Regulation will also clarify the issue of the forms of consent of the data subject, which should be given explicitly and by any means suitable to identify the wishes of the subject itself. According to the proposed Regulation, “*silence or inactivity should therefore not constitute consent*”.

The draft proposal also reiterates and reaffirms some of the principles established by Directive 95/46/EC, such as the right not to be subject to profiling or behavioural targeting, the right to object to the processing of personal data, the right to rectification and right to access.

The drafters of the proposal have also emphasized the importance of “*privacy by design*”, as a tool to ensure compliance, requiring controllers and data handlers to implement all appropriate technical and organizational measures to ensure security of processing. After the reform, undertakings will have to deal with (and shall be answerable to) a single national data protection authority in the Member State where they have their head offices. The same “*one-stop shop*” shall apply to private citizens, who will be able to refer to their own National Data Protection Authorities (whose powers will be considerably strengthened), even when their data is being processed in another Member State.

In order to ensure a correct and uniform application of the new data protection rules, the General Regulation establishes a so-called “*consistency mechanism*”, which requires supervisory authorities to notify to the European Data Protection Board and to the Commission the preliminary draft of any measure which might potentially affect the free flow of personal data within the EU.

Following the EU-US conference on privacy and data protection in March 2012, the Civil Liberties, Justice and Home Affairs (LIBE) Committee of the European Parliament has started debating the proposals tabled by the Commission. The rapporteurs, Mr Jan Philipp Albrecht MEP and Mr Dimitrios Droutsas MEP emphasized the need to replace Directive 95/46/EC, which has “*failed to achieve a proper harmonisation due to the different implementation of provisions in the Member States*”, with a directly appli-

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cable Regulation.

5. Do Remotely Piloted Aircraft Systems require a dedicated regulatory framework on privacy and data protection?

Existing manned aircraft or satellites may already be fitted with cameras and sensors to collect data, images and any other kind of information, and it would appear therefore that RPAS do not add anything new to the existing data-gathering tools and technologies.

However, RPAS represent a far cheaper and more versatile tool (especially if compared to satellite systems), which could be employed by a much higher number of operators. Apparently, a few million of small RPAS (up to 20 kg) already operate - sometimes illegally - in the world marketplace. Moreover, the increasing use of RPAS by public entities for security or law enforcement purposes has raised serious concerns among scholars and the general public, who have expressed serious reservations about the kind of “*Orwellian technology*”⁵⁶ which could be used to subject individuals to continuous surveillance even without their knowledge⁵⁷.

As we have seen, the existing legal framework is characterized by the lack of provisions specific to RPAS as regards the collection of sensitive data or the infringement of privacy rights. Naturally, some of the existing regulatory framework may already be applicable to RPAS, however these data-gathering tools raise serious concerns, especially as regards the enforcement of privacy rules.

Indeed, the low cost of operation and the relatively small size of certain RPAS (which are even able to operate undetected within an urban environment), together with the difficulty of controlling and regulating their use through licensing or registration systems might make enforcement high impossible without a specific body of rules. Such a body of rules should address the main shortcomings of the existing regulatory framework when it comes to regulating the use of RPAS. A step in the right direction would be to acknowledge the limits of the *self-management system* and the need for close collaboration between civil aviation authorities (CAA) and privacy and data protection authorities (DPA). Indeed, involving the aviation and certification authorities might prove to be the most effective way to protect privacy rights from the threat posed by RPAS. To this end, it might be necessary to redraw the notion of “controller” and “data handler” to include not only “*the natural or legal person, public authority, agency, or any other body that determines the purposes and means of processing personal data*”⁵⁸, but also the authority entrusted with controlling and tracking the aircraft used to collect such data. The coordination between national DPAs could lead to a harmonised approach and interpretation of the existing legal framework making the protection of privacy right more efficient.

A very effective way of protecting privacy rights might also be to “embed” privacy and data protection rules in the technology that now threatens it. Privacy by design might prove an extremely useful tool to ensure effective enforcement of EU and national legislation, especially where Mini RPAS are concerned. This tool has been made much more effective by tremendous strides in the field of artificial intelligence⁵⁹, and its importance had already been acknowledged by the EU lawmakers in Directive 95/46/EC⁶⁰. However a dedicated body of rules may now have become indispensable.

Any dedicated body of rules should also take into consideration the shortcoming of

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the principle of *expectation* of privacy, which has the significant disadvantage of leaving too much room for interpretation thus threatening the principle of legal certainty.

The law enforcement exception will also have to be redefined, and its boundaries redrawn. The *penumbra*, which has characterised the existing regulatory framework ultimately, leaves too much leeway to law enforcement agencies and governments. In an attempt to reduce the scope of the law enforcement exception and to avoid abusive practices, the US House of Representatives has been considering the possibility to prohibit the use of information collected by RPAS without a warrant or a specific court order⁶¹. This very stringent requirement, which has not failed to attract criticism due to its inconsistency with the American “plain view doctrine”⁶² has the merit of acknowledging the important role that judicial review and oversight can play in this field.

A more stringent discipline might be accompanied and complemented by codes of ethics, to help law enforcement agencies navigate this “grey area” and to promote best practices. Actually, Directive 95/46/EC had already acknowledged the importance of a code of conduct that would “*contribute to the proper implementation of the national provisions adopted by the Member States pursuant to this Directive, taking account of the specific features of the various sectors*”⁶³.

With regard to the use that police and law enforcement agencies might make of RPAS, the debate seems to be skewed by a misunderstanding on the notion of “privacy” which has riddled public debate in the last decades and by an rather uncritical assumption of the actual effectiveness of surveillance measures.

The advocates of more pervasive surveillance measures have often tended to reduce privacy to a mere form of “concealment or secrecy”, in an attempt to justify the sacrifice of the “*moral autonomy*” of the citizen for the pursuit of security concerns⁶⁴.

This brief overview of the development of privacy rights tries to provide the reader with some perspective in this regard. It should however be borne in mind that any measure which might infringe upon or curtail privacy rights should be grounded on a reasoned and careful assessment of the security gains which could actually be achieved.

Recent studies have suggested that contrary to popular belief, the closed-circuit cameras now ubiquitous in urban areas of the United Kingdom might have been actually ineffective at reducing crime⁶⁵. Given the extremely serious threat which they pose to privacy rights, it is therefore imperative to ensure that any security or law enforcement policy requiring the use of RPAS for surveillance purposes be based on more than anecdotal evidence of effectiveness.

The introduction of RPAS in the European airspace has sparked much controversy and aroused (not always rational) fears. There is a strong concern for the possible reactions to the introduction of RPAS into the civilian airspace that could lead to “*dramatize the need to rethink the very nature of privacy law*”⁶⁶.

The only way to assuage mounting fears and to guarantee the continued protection of the “*moral autonomy*” of citizens against any undue or unlawful intrusion, seems to be a decisive action on the part of the EU lawmakers: the General Data Protection Regulation currently under discussion might could be a great opportunity to this end.

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- ¹ Such information is increasingly been used to target advertising campaigns to specific users (so called “behavioural advertising” or “behavioural targeting”).
- ² The “panopticon” is a particular architectural design for correctional institutions which allows a watchman to observe (at least potentially) all the inmates in their cells at all time without allowing them to tell when or whether they are actually being watched. See FOUCAULT, Michel, *Philosophie, Anthologie*, Gallimard 2004, p. 523.
- ³ «Celui qui est soumis à un champ de visibilité, et qui le sait, reprend à son compte les contraintes du pouvoir; il les fait jouer spontanément sur lui-même; il inscrit en soi le rapport de pouvoir dans lequel il joue simultanément les deux rôles; il devient le principe de son assujettissement», FOUCAULT, Michel, *Surveiller et punir*, Gallimard 1975, p. 204.
- ⁴ The “panopticon” is a particular architectural design for correctional institutions which allows a watchman to observe (at least potentially) all the inmates in their cells at all time without allowing them to tell when or whether they are actually being watched. See FOUCAULT, Michel, *Philosophie, Anthologie*, Gallimard 2004, p. 523.
- ⁵ «Celui qui est soumis à un champ de visibilité, et qui le sait, reprend à son compte les contraintes du pouvoir; il les fait jouer spontanément sur lui-même; il inscrit en soi le rapport de pouvoir dans lequel il joue simultanément les deux rôles; il devient le principe de son assujettissement», FOUCAULT, Michel, *Surveiller et punir*, Gallimard 1975, p. 204.
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OUTER SPACE, TECHNOLOGY AND WARFARE

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Over five decades ago, on October 4, 1957, a Soviet space object, Sputnik I, was launched and subsequently orbited the Earth over 1,400 times during the following three month period. This heralded the dawn of the space age, the space race (initially between the USSR and the United States), and the legal regulation of the use and exploration of outer space. Since then, laws relating to activities in outer space have developed that significantly improve the standard of living for all humanity. The prospects for the future use of outer space offer both tremendous opportunities and challenges for humankind, and law will undoubtedly continue to play a crucial role in this regard.

The journey of Sputnik I immediately gave rise to difficult and controversial legal questions, involving previously undetermined concepts. Although the USSR had not sought the permission of other States to undertake the Sputnik mission, there were no significant protests that this artificial satellite had infringed on any country's sovereignty as it circled the Earth. This international (in)action confirmed that this new frontier of human activity - outer space - did not possess the elements of sovereignty that had already been well established under the international law principles regulating land, sea and air space on earth.

The law of outer space has developed within the context of general public international law. Since the launch of Sputnik 1, this process of evolution has been remarkably rapid, largely driven by the need to agree on rules to regulate activities in this new 'frontier.' There is now a substantial body of law dealing with many aspects of the use and exploration of outer space, mainly codified in and evidenced by Treaties, United Nations General Assembly resolutions, national legislation, decisions of national courts, bilateral arrangements, and determinations by Intergovernmental Organisations.

Five important multilateral treaties have been finalised through the auspices of the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS), the principal multilateral body involved in the development of international space law. These are:

(i) 1967 Treaty on Principles Governing the Activities of States in the Exploration and

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Use of Outer Space, including the Moon and other Celestial Bodies (Outer Space Treaty);

(ii) 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (Rescue Agreement);

(iii) 1972 Convention on International Liability for Damage Caused by Space Objects (Liability Convention);

(iv) 1975 Convention on Registration of Objects Launched into Outer Space (Registration Convention);

(v) 1979 Agreement Governing the Activities of States on the Moon and other Celestial Bodies (Moon Agreement).

These United Nations Space Treaties confirm *inter alia* that outer space is to be regarded as a 'global common' area and that the use and exploration of outer space is to be for 'peaceful purposes' (article IV), although this principle has been highly controversial - arguments still persist as to whether this refers to 'non-military' or 'non-aggressive' activities.

The United Nations Space Treaties were formulated in an era when only a small number of countries had space-faring capability. The international law of outer space thus, at least partially, reflects the political pressures imposed by the superpowers at that time. Indeed, even the question of where air space ends and outer space begins has not been definitively determined from a legal viewpoint, although more recently a consensus as to a demarcation point (100 kilometres above mean sea level) has begun to emerge¹.

The United Nations General Assembly has also adopted a number of space-related Principles, and guidelines, dealing with such important issues as the application of international law and promotion of international cooperation and understanding in space activities, the dissemination and exchange of information through transnational direct television broadcasting via satellites and remote satellite observations of earth, and general standards regulating the safe use of nuclear power sources necessary for the exploration and use of outer space and the problematic issue of space debris.

It is generally agreed that Resolutions of the General Assembly are non-binding, at least within the traditional analysis of the 'sources' of international law specified in article 38(1) of the Statute of the International Court of Justice². In the context of the regulation of the use and exploration of outer space, these principles and guidelines have therefore largely been considered as constituting 'soft law'³, although a number of specific provisions may now represent customary international law.

Yet, despite all of these developments, it is clear that the existing legal and regulatory regime has not kept pace with the remarkable technological and commercial progress of space activities since 1957. This represents a major challenge in relation to the ongoing development of effective legal principles, all the more in view of the strategic and military potential of outer space in an era of globalization.

As a consequence, there are many factors to consider when assessing the regulation of activities in outer space. Indeed, it is unlikely that there can be a 'one size fits all'



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model of regulation for this ever-changing environment. As is the case in many areas of scientific development, the technology that drives outer space activities has progressed far more rapidly than the specific law that regulates it, which to the outsider appears to be lagging far behind.

It is clear that many of these new activities could not even have been within the contemplation of the drafters of the United Nations Space Treaties that underpin the main principles of outer space. That does *not* mean that the fundamental principles of space law do not apply to those activities; we cannot simply say that there is 'no law' that applies to such situations. Yet, even the fundamental space law principles that are set out in those treaties may not be enough, and we thus need to establish appropriate modes by which general international law principles can be utilised to fill these lacunae.

This is complicated further by the fact that outer space, once primarily the domain of States (and, even then, only a small number of them), is now 'host' to a vast array of actors, each with differing goals, capacities, agendas and expectations. The growing numbers of space-capable States are still crucial players - and will probably remain the principal space participants for the foreseeable future - but they are now complemented by a range of alternate entities, including intergovernmental organisations, public and private corporations, universities and scientists, and even individual space entrepreneurs.

Moreover, given the sometimes fluid nature of global and regional geopolitics, the future development of the regulation of space in a changing world undoubtedly will also be full of surprising twists and turns. This is no less true with respect to the regulation of the military uses of outer space to which this article now turns. This is an important and dynamic area of outer space activity, and one that has given rise to considerable debate and disagreement. Its significance arises from a number of reasons, and it is of crucial significance to the future of humankind.

A starting point for this exercise is the acknowledgement of a number of truisms: first, as noted above, the international regulation of outer space - past, present and future - is 'embedded' in international law. It is not an esoteric and separate paradigm. This is also a logical consequence of the wording of article III of the Outer Space Treaty, which requires that activities in the exploration and use of outer space are to be carried on 'in accordance with international law, including the Charter of the United Nations'.

Secondly, international law is dynamic and evolving, as has been made clear by the International Court of Justice on a number of occasions. It has tremendous breadth and tremendous depth and extends to include non-traditional areas that are not 'territorial' in nature, therefore encompassing outer space. Likewise, the application of public international law principles to the regulation of outer space is equally dynamic and evolving.

So the general concept is relatively simple to state - general principles of international law apply to activities in outer space. What is far more difficult and unclear is to determine precisely *how* this may work for specific situations, and precisely *which* principles are (or might be) directly applicable to particular space activities. In the absence of specific provisions in the *lex specialis* of international space law, can we simply 'transpose' terrestrial international law regimes to outer space? This question

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seems directly pertinent in relation to two international regulatory regimes in particular - international environmental law and international humanitarian law (also known as the laws of war, or the *jus in bello*), to which I now turn.

The disastrous consequences of armed conflict upon civilians have led to an evolving international consensus developed over many years that international legal rules should be introduced and implemented in an effort to alleviate human suffering during times of hostilities. This has seen the emergence of a number of legal principles that limit the methods and means of warfare, and prescribe the rights and protections both of civilians and non-civilians in times of hostilities, a distinction that lies at the very heart of the law of armed conflict. These rules are regarded as among the most essential of all of the law of nations particularly given the impacts rendered by armed conflict on the international community as a whole.

These laws and customs of war had their origins in the customary practices of armies on the battlefield. These have existed in various forms almost since antiquity. Since then, the rules of custom have been significantly augmented and codified by a series of important treaty instruments, with the most significant probably being The Hague Conventions of 1899 and 1907, the four Geneva Conventions of 1949, and the Additional Protocols I and II to the Geneva Conventions of 1977⁵. In (overly) simplistic terms given the space limitations of this chapter, the principal rules under the *jus in bello* can be described as follows:

1. Principle of distinction - deliberate attacks against civilians and non-combatants are prohibited. In addition, those engaged in armed conflict must not use weapons that are incapable of distinguishing between combatants and non-combatants. These represent fundamental concepts in the conduct of military activities and illustrate the strong linkages between the scope of international humanitarian law and the development of formal legal principles for the human rights of the individual;
2. Principle of military objective - attacks not directed at a legitimate military target are prohibited. The important issue is the need to distinguish between civilian persons or objects and military objectives - comprising the elements of 'effective contribution to military action' and 'definite military advantage'; and
3. Principle of proportionality - even when attacking a legitimate military objective, the extent of military force used and any injury and damage to civilians and civilian property should not be disproportionate to any expected military advantage. This demands an assessment of any potential "collateral damage" in the case of military action. However, it is often difficult to apply the proportionality principle in practice, given that different people ascribe differing relative 'values' to military advantage *vis-à-vis* civilian injury and damage. One only need recall the Advisory Opinion in the *Legality of the Threat or Use of Nuclear Weapons*, where the International Court of Justice (albeit based on a majority determined only by the Court President's casting vote), could not say categorically that the threat or use of nuclear weapons would in every circumstance constitute a violation of international law.

In the past, it has been suggested that, with regard to these rules of international humanitarian law as applied to activities in outer space, the correct approach is to first try to apply the existing principles to armed conflict involving space technology, and only if we conclude thereafter that these are not adequate or sufficient, should we elaborate on new additional principles for application to outer space.

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This seems also to be the general viewpoint of, for example, the International Committee of the Red Cross (ICRC). At a conference in Bruges in 2010, at which the ICRC kindly asked me to speak, I questioned whether the existing *jus in bello* would be adequate and sufficient to regulate all aspects of a space conflict. I suggested that, instead, we should aim towards a complete prohibition of all types of weapons and weapons-related systems involving outer space as an additional *jus in bello specialis* for outer space⁶. However, the prevailing view at the time of many who attended that conference seemed to be that the existing principles *were* adequate and that ‘new’ forms of armed conflict would somehow ‘fit into’ the existing fundamental rules.

I am not entirely in agreement on this point for a number of reasons. Traditionally, the principles of international humanitarian law have been regarded as being ‘one war too late’. This reflects the typically ‘reactive’ nature of international law, where, rather than seeking to establish rules beforehand, it develops new rules (or adapts existing international law rules) to *respond* to certain, perhaps unforeseen, situations that arise. Whilst it is true that certain fundamental customary law principles codified in the space law treaties - including those that were aimed at minimising the possibility of conflict and the risk of contamination - might be exceptions to this rule of thumb in that they were designed to *prevent* certain situations from arising, the reality is that much of the codification of international law, particularly, as noted above, in areas where technology moves forward very quickly, is (and can only be) responsive in approach. This certainly extends to areas where humans are engaged in conflict - as demonstrated in the area of international humanitarian law, as well as in international criminal law and international human rights law.

Indeed, with reference to space activities, the question arises as to whether, even if we wanted to, we are in a position to be proactive in relation to areas where we still do not fully understand the technology, and the risks and consequences associated with the utilisation of that technology, even where the activity may be ‘desirable’ and, in theory, ‘permissible’. One example is that of space ‘tourism’ - are we really able to create international legal standards at this point, before the fact? Isn’t there a risk that, if we attempt to do so, we may be setting standards that subsequent experience will show were not appropriate⁷?

With regard to regulating the conduct of armed conflict - which, by contrast, involves the specification of ‘undesirable’ and ‘impermissible’ actions - I would suggest that a more proactive approach *is* warranted. Weapons-related technology, as well as the advent of different type of (non-State actor) participants in armed conflict has meant that the traditional mode of warfare no longer represents the absolute norm. More and more we will see the incorporation of sophisticated weapons related systems, involving cyber technology, remote controlled weapons systems (for example drones), robotics and, of course, satellites to help to fight wars. These present very significant challenges to the application of existing legal frameworks without further adaptation and addition. One might argue that to continue to rely solely on existing rules that were developed in a previous technological era - as important as they are - is akin to applying 20th century rules to 21st century technology.

Indeed, the advent of this weapons-related technology offers both opportunities and challenges. One interesting opportunity that deserves further consideration is that, to the extent that it allows for greater target selectivity and accuracy, it might have the capacity to both minimise casualties during armed conflict and reduce the probability

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of collateral damage. Both of these consequences would, of course, be welcome and in keeping with the fundamental *jus in bello* principles; so much so that one might be tempted to argue that it therefore obligates a combatant to use this technology during the conduct of armed conflict.

On the other hand, there are real dangers inherent in this continued resort to 'zero casualty' warfare. Apart from the increased likelihood of error during the course of any long distance engagement⁸, there is a real possibility that the physical detachment of the perpetrator from the injury/destruction may give rise to a greater moral and even ethical disengagement, and perhaps even lower the minimum threshold of adherence to standards of military conduct. Some commentators have spoken about a 'play station mentality', given that the operation of many of these systems is not dissimilar to using a computer keyboard. Whilst I am in no way qualified to comment on these suggestions in a meaningful way, history has repeatedly shown that the greater the sense of moral disengagement, the greater the likelihood that the *jus in bello* principles will be violated. This is clearly a cause for considerable concern and reflection.

As regards outer space, satellite technology now also plays an integral part in armed conflict. The first Gulf War in 1991 is often referred to as the first 'space war', in that its conduct was significantly dependent upon satellite capabilities. This trend has ratcheted up considerably in the two decades since that time, in parallel with a period of increasing commercialization of outer space. This has led to the growing reliance of States on continuous and reliable access to privately operated satellites, in order to protect their (real or perceived) national security interests.

A combination of factors - the increasing dependence by military and strategic forces within (the major) powers on the use of satellite technology; the inability of Governments to satisfy such demands for reasons associated either with costs or the lack of technological expertise (or both); and the advent of commercial satellite infrastructure and services that are responsive, technologically advanced, available and appropriate to meet these demands - means that military 'customers' are now regularly utilising commercial satellites to undertake military activities.

Thus, we have become familiar with the concept of 'dual-use' satellites. Indeed, the concept of a dual-use facility or resource - typically a commercial facility or resource that is also utilised by the military for military purposes - has become a common feature of contemporary technological society. It is also one that international law has had difficulties with.

This presents particular difficulties for those conducting armed conflict, since an asset that could *prima facie* be regarded as a legitimate military target on the basis of the *jus in bello* principles might also - even at the same time - be operating for civilian/commercial uses. It is sometimes very difficult, or indeed impossible, to 'quarantine' what is the civilian/commercial aspect of a facility from the military component. Given that such an increasingly important group of space assets used for military purposes are these dual-use satellites, one is also drawn to the question of whether, and in what circumstances, such a satellite can (ever) be regarded as a legitimate target of war. Certainly, it is possible that, taking into account at least the first two *jus in bello* principles described above (distinction and military objective), one could construct an argument that, in particular circumstances, a satellite *would* in fact constitute such a target.

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This issue seemingly conflicts with the fundamental principles of article IV of the Outer Space Treaty. Moreover, the resolution of the question I have posed involves not only a consideration of the *jus in bello*, but also the *jus ad bellum*. Also relevant will be the scope of the inherent right to self-defence as articulated under article 51 of the United Nations Charter, and possibly as modified under customary international law (is there now a right of pre-emptive self-defence under customary international law?).

Moreover, very significant - perhaps insurmountable - difficulties would arise in attempting to apply the principle of proportionality in assessing the legality of a strike against a satellite, or perhaps also other acts that would destroy or damage the capability of the satellite to perform its normal functions. Once again, we simply do not fully understand the consequences of such actions, which makes an objective (in reality subjective) evaluation of that threshold requirement mere guesswork in most cases, particularly with respect to a dual-use satellite.

In these circumstances, therefore, my suggested proactive approach would ideally involve the conclusion of a binding treaty instrument that would comprehensively prohibit *all* weapons in outer space, as well as an acts designed to permanently - or even temporarily - damage or destroy an operative satellite (the latter would thus include attempts to jam, or otherwise render inoperative, a functioning satellite). Naturally, the devil would be in the detail, and great care would be required to craft the most appropriate wording for such an instrument. This is not to say that the important *jus in bello* principles would not also be relevant - they would, for example, directly apply to acts directed towards the destruction of, say, a ground station upon which the functioning satellite is dependent for its operative capability; rather, this would add to and complement those principles to the extent that they apply the regulation of activities and assets in outer space. I am not naïve enough to suggest that agreeing the most appropriate regulatory framework would be an easy task, but, given the uncertainties of relying solely upon the existing principles, I firmly believe that it is a necessary one.

Of course, when one moves to such considerations, one is dealing with areas that are heavily influenced with political considerations. This translates into a willingness - or not, as the case may be - on the part of States to conclude, let alone adhere to, binding international law agreements in relation to the legal regulation of outer space. Discussions among international lawyers are, at times, predicated on an assumption that States actually want such binding rules. But do they really in every circumstance?

In this regard, the international diplomatic discussions on this issue have moved away from a path forward based on binding legal rules to one that is centred on that increasingly worn mode of 'transparency and confidence building measures' (TCBMs). For many complicated and mainly political reasons, it seems clear that the main space powers do not yet feel that there is sufficient mutual trust such as would 'justify' negotiations leading to a binding instrument addressing this issue. Indeed, given the difficulties that some see as far as verification is concerned, it is certainly not likely that such a treaty will be concluded in the foreseeable future.

Of course, reference to TCBMs is quite common in the various United Nations General Assembly resolutions that deal with various aspects of the use and exploration of outer space, so those involved in areas relating to space law are not unfamiliar with

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the concept. Indeed, it does make sense for the protagonists to develop cooperative and friendly relations in matters relating to space security, so as to increase the possibility that we might eventually see binding rules.

However, the concern as I see it is that non-binding TCBMs are, in fact, for all practical purposes considered as the 'end game' on this issue, so that the formalisation of binding obligations may *never* eventuate. This makes the application of general principles of international law more complicated with respect to this very important area and, in any event, is not satisfactory given the added flexibility that such measures may give to States, who may feel at some point that they no longer wish to abide by whatever voluntary guidelines have been specified, irrespective of the political cost.

This highlights again the increasing reliance in the regulation of outer space on so-called 'soft law'. Putting aside any objections to that title, there is much debate about the legal status of such instruments. Certainly, it appears that some non-binding space instruments have a higher legal 'value' than others. However, in (again overly) simplistic terms, at their core they are merely guidelines or recommendations that do not necessarily have the force of law, unless they are to be regarded as reflecting rules of customary international law. Given our increasing reliance on such measures in a whole range of space-related matters, do we run the risk that they will work only until they don't? Shouldn't they always be regarded only as interim measures, until traditional international law principles can be agreed and applied? And, indeed, is this approach feasible given the multitude of risks associated with the continued development of space related weapons technology?

These are difficult questions that require a much careful thought. They very much reflect the challenges of regulating outer space in a changing world. Law must play an integral role in addressing these issues. No doubt the terrestrial principles of the *jus in bello* are very important elements in a broader framework, but they are not necessarily sufficient to cover the challenges that lie ahead. Additional specific legal principles will be required. As we work towards that goal, it is important to recognise the fundamental sentiment of 'humanity' that underpins both space law and international humanitarian law, a consideration that will, hopefully, allow for an appropriate model of peaceful regulation to be implemented for the benefit of all of us.

¹ See, for example, Steven Freeland, 'The 2008 Russia / China Proposal for a Treaty to Ban Weapons in Space: A Missed Opportunity or an Opening Gambit?' (2008) 51 *Proceedings of the Colloquium on the Law of Outer Space* 261.

² 1 U.N.T.S. 16 (ICJ Statute). Article 38(1) of the ICJ Statute provides as follows:

'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law.

³ See Steven Freeland, 'For Better or For Worse? The Use of 'Soft Law' within the International Legal Regulation of Outer Space', (2011) XXXVI *Annals of Air and Space Law* 409-445.

⁴ For a discussion of the applicability (or otherwise) of the terrestrial international environmental law regime to the regulation of outer space, see, for example, Ulrike Bohlmann and Steven Freeland, 'The Regulation of Space Activities and the Space Environment' in Shawkat Alam, Md Jahid Hossain Bhuiyan, Tareq M.R. Chowdhury, and Erika J. Techera (eds), *Routledge Handbook of International Environmental Law* (2013) 375-391.



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⁵ For a comprehensive discussion of the various *jus in bello* treaty instruments, see Adam Roberts and Richard Guelff (eds), *Documents on the Laws of War* (2005).

⁶ See Steven Freeland, 'Legal Regulation of the Military Use of Outer Space' (2011) 41 *Collegium - the Journal of the College of Europe* 87-97.

⁷ For a discussion of the legal challenges posed by the predicted advent of (large-scale) commercial space tourism, see, for example, Steven Freeland, 'Fly Me to the Moon: How Will International Law Cope with Commercial Space Tourism?' (2010) 11:1 *Melbourne Journal of International Law* 90-118

⁸ See, for example, an analysis of the various bombing errors giving rise to significant civilian casualties during the NATO bombing campaign in Serbia and Kosovo in 1999 ('Operation Allied Force') in Steven Freeland, 'The Bombing of Kosovo and the Milosevic Trial: Reflections on Some Legal Issues' (2002) *Australian International Law Journal* 150-175 .

SPACE POLICY IN RUSSIA: NEW TRENDS AND TOOLS

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The last century space industry demonstrated revolutionary changes in knowledge transforming the fundamental forms of human life, society and the state. From the very limited scope of interest of scholars and science fiction writers of the nineteenth and twentieth centuries, it has transformed into the area of basic and applied research in a wide range of natural sciences. Since the second half of the twentieth century, people started thinking and suggested ideas about the civil use of the results of space activity and their commercialization. At the present time, a balance between defense and civil aspects of space activity is constantly shifting from one side to the other by the efforts of more than 50 countries.

1. The legal framework for space activities

The law “On space activity” was adopted in 1993 in Russia, according to which space activity encompassed any activity that is related to the research and the use of outer space, including the Moon and other celestial bodies. Thus was formalized a system of legal regulation for space industry. This document specified the fundamental directions of space activity including scientific space research and manned spaceflights; observation of objects and occurrences in outer space, technical testing and the production of materials and other products in the space environment; the remote probing of Earth from space, including state ecological monitoring (state monitoring of the environment) and meteorology; the use of satellite navigation and surveying systems, space materials and space technology for communication, television and radio broadcasting, as well as activities in the interest of the defense and security sectors of the Russian Federation. This law provided opportunities for other types of activities that were ongoing with the help of space technologies. In this way, the space activity includes the development and preparation of laboratory specimen products, the testing and introducing into production of new technologies, the placement of spacecraft into orbit, the exploitation of space technologies and services related to the use of outer space, the provision of onboard life support systems in manned spacecraft as well as the international cooperation of the Russian Federation in research and the use of space.

Currently in Russia the attention to this sector of economy is growing. The legal framework of a new management system for this sector has been developed, and a number of new regulatory documents have been adopted. The development of strategies in the space sector is closely connected with the definition of long-term trends affecting the development of this sector and the priority setting.

Space activity in Russia is regulated by a complex of legislative and strategic documents, among which the Law of the Russian Federation of 20 August 1993 No. 5663-I, “On space activity” (with amendments from 29 November 1996, 10 January 2003, 5 March and 22 August 2004, 2 February and 18 December 2006, 30 December 2008,

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21 November 2011); the Concept of long-term socioeconomic development of the Russian Federation until 2020 approved by the Federal Government on 17 November 2008, No. 1662-r; the Strategy of innovative development of the Russian Federation for the period until 2020, approved by the Federal Government on 8 December 2011, No. 2227-r; the Main provisions of the Principles of state policy of the Russian Federation in the field of space activities for the period up to 2030 and beyond, approved by the President of the Russian Federation on April 19, 2013, No. Pr-906.

In the last document the principles of state policy in the area of space activity are defined. It primarily formulated the need for the comprehensive development of scientific and technical, production and technological capabilities and creation of a unique experimental base of the domestic aerospace industry for the development and production of competitive space technology to meet socio-economic and scientific needs.

According to the above mentioned documents, the basic objective for space activity in the international arena is the defense of the state interests of the Russian Federation in the area of space activity, indentified by all available international legal means and methods including the UN Charter that recognizes the right to self-defense, and the provision of guaranteed access of Russia to space from its own territory, excluding the potential risks of its using ground-based space infrastructure abroad. It also noted the strict fulfillment of Russia's international obligations in the field of space activities and the generally recognized principles and norms of international law, as well as the development of partnerships with the Republic of Belarus in the framework of the Union State, the Republic of Kazakhstan and cooperation with other countries, both members of the Commonwealth of Independent States and other foreign countries on the basis of principles of equality and mutual benefits.

The fundamentals determine the necessity of increasing the development of the scientific-technical and personnel potential of the space industry and its infrastructure; the further accumulation and improvement of scientific knowledge of Earth and outer space; the creation of scientific and technological potential with the goal of ensuring the preparedness and the realization of wide-scale space projects via a deepened study of the Universe and the Solar System (in the first place in near-Earth space, the Moon and Mars).

In such a way Russia currently is formulating a system of legislative documents that determine the basic understanding and key directions of the development of space activity in the long term.

2. The industrial capacity in the space area

Currently the Russian government solves complex strategic challenges faced by the industry, taking into account national interests, socio-economic, scientific and technological priorities. In particular, the regulation of space activities facilitates the development of the interaction of related industries and the industrial capacity in the space area. One of the documents recently adopted as a basis for such a system interaction is the presidential decree "On the approval of the priority directions of science and technology development in the Russian Federation and the list of critical technologies of the Russian Federation".

The decree was signed on July 7, 2011 and provides the legal basis for the

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technological development of all sectors of the Russian economy. It is the result of research carried out by scientists from different fields of knowledge, who, in the course of multistage expert discussions, compiled lists of priority directions of scientific and technological development. Among these priorities were mentioned security and counterterrorism, nanosystems, information and telecommunication systems, life sciences, advanced types of weapons, military and special equipment, environmental management, transportation and space systems, energy efficiency, energy conservation and nuclear energy.

Thus, transportation and space systems are probably one of the most important future priorities implying the development of space technologies for the implementation of the boldest ideas in the field of development of near and far space, particular developments include:

- Clusters of small spacecraft (micro -, nano- and picosatellites) for remote sensing of the Earth, the deployment of broadband telecommunications systems and traffic control vehicles,
- Air and spacecraft for suborbital launch of small satellites,
- Wireless power transmission systems for transportation and space systems,
- System of high-precision autonomous landing of aircraft and landing vehicles, navigation and maneuvering of the land and water vehicles,
- Extra-long flexible parts to create static and dynamic space tethered systems of length and "space elevator",
- Advanced materials for extreme conditions of space flight, high-speed movement in terrestrial and aquatic environments,
- Processes specific to advanced transport and operation of space assets,
- Virtual design, simulation and optimization of the transport systems and their elements using supercomputing and grid-technologies.

This initiative has stimulated a further refinement of technology priorities in organizations related to the development and use of space. In particular, the strategic documents, defining the direction of the technological development of individual segments of the space industry, were identified as breakthrough technologies that are expected to be in demand, according to forecasts, in the period before and after 2030¹:

- Domestic spacecraft created on the basis of existing breakthrough technical solutions capable to provide within the next 2-3 years for internal (public and private) consumers and customers from developing countries services with better quality at a lower price,
- Aggregation of functions within the spacecraft and integrated space groups,
- Orbital maintenance of long-lived space vehicles,



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- Creating an open, modular spacecraft structure ("LEGO-principle"),
- Integrated design and technological solutions for next generation competitive standardized space platforms of different dimensions,
- Remote sensing in optical and radio-wavelengths, geophysical activity monitoring and control,
- Creating high reliable components and systems of onboard avionics resistant to the space factors,
- High-power space nuclear energy systems and their elements,
- Target equipment, sensors, on-board electronic equipment, power supply systems for spacecraft for various purposes,
- Life support systems for long-term space missions,
- Large board antenna reflectors of sub millimeter wavelength range for new generation of space vehicles,
- Coordinate-time and navigation software for flight control in deep space, and space-time support of activities at the surface and in the close proximity of Solar System planets,
- Series of launch vehicles of heavy and extra heavy classes, including technologies of large diameter tank structures and other elements based on advanced composite and other perspective materials, line of rocket engines, including the hydrogen-oxygen liquid rocket engines with high thrust reusable launch, technical issues to ensure reusability of launch vehicles.

Breakthrough technologies that were identified during the process of forecasting studies and expert estimates revealed the industrial capacities in the space area that can be used for tackling the challenges of global, national and industrial scale in the run up to 2030.

The goals contained in the project "Strategy for Russian space activities development until 2030 and beyond" are included in determining the capacity development of the space industry. In particular, among the most important priorities were mentioned support for socioeconomic sphere, basic space research programs, manned space programs, development of launch vehicles, spaceports, and ground-based space management systems (see Fig. 1).

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2015	2020	2030	Beyond 2030
Recovery of opportunities	Consolidation of opportunities	Breakthrough	Development of breakthrough
Implementation of existing plans and programs: <ul style="list-style-type: none"> • full orbital constellation • leading positions in space launch vehicles and manned flights • world level Russian spacecrafts with the use of foreign electronic components • the first phase of the Eastern Spaceport • technological basis for large-scale projects in outer space R&D • creation of vertically integrated diversified enterprises 	Fixing Russia in the group's leading space-faring nations in all major areas of the space activities: <ul style="list-style-type: none"> • orbital constellation deployment • high-quality electronic component base • independent access to space • ISS preparation for the descent from orbit • heavy manned spacecraft of new generation • research in astrophysics, solar physics and near-Earth space, lunar exploration • network of research stations at Mars, conducting missions to Venus, Jupiter and asteroids • leading position in the developing countries markets • practical application of space activities 	Beginning of large-scale projects on the use of near space, research and exploration of deep space: <ul style="list-style-type: none"> • deployment and maintenance of spacecraft orbital groups meeting requirements of the socio-economic sphere, science, defense and security • common information area for relaying data in the managerial structure and country's information systems, objects in the near and outer space • information model of the Earth as ecosystem • put the Eastern Spaceport into operation • demonstrating manned flight around the Moon • active research of the Moon, Mars, Venus, Jupiter, Saturn, asteroids by automatic space vehicles with international cooperation • competitive position in the global market of space technologies and services • active participation in multilateral international space projects 	Practical implementation of large-scale development projects in near space, on the Moon and capacity building for manned flight to Mars: <ul style="list-style-type: none"> • research in astrophysics, solar physics and near-Earth space • common information area • regular manned missions to the Moon • deployment continuously operating stations and research laboratories on the Moon • scientific, technical and technological basis for the Russia's participation in the international cooperation for preparing manned flight to Mars

Fig. 1. Milestones and expected results of the Strategy of Russian space activities development until 2030 and beyond

Thus, in Russia there is a tendency towards the development of industrial capacity on the basis of forward-looking research in the space area, which involves experts from a wide range of participating groups in space activities – from scientists and design engineers to entrepreneurs and governments. The development of a system of planning space policies inevitably requires new instruments for its realization.

3. Public-private partnership

As shown above, Russia, in the field of space activities, has seen the development of sustainable trends in the formation of a legal and regulatory framework to ensure the qualitative changes in the management and organization of science, technology and innovation. One of them is the development of public-private partnerships. Below there are two key examples of joint effort of the government and other players in developing the space industry - technology platforms and innovation clusters.

3.1. Technology platforms

The development of the space-rocket industry, as was noted above, requires complex interdisciplinary research, the results of which can be used in various industries. These innovations should affect the entire chain of provision of space services, starting with the creation of new materials, spacecraft construction and the organization of spaceports to the launching of manned flights and of interplanetary satellites.

This problem can not be solved by individual companies, but the mechanisms for their cooperation have hardly been developed.

In the last 2-3 years public-private partnership in the form of stakeholder interaction has actively been developed for space activities – profile technology platforms, which are the mechanism of public-private partnership and involve the development of co-operation in the field of scientific and technological development and innovation.

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It is important to note that according to the Innovative development strategy for the period up to 2020, the federal executive bodies and development institutions will provide institutional, organizational and advisory support to the formation and development of technology platforms. Moreover, the results achieved by technology platforms will be taken into account in the planning and implementation of government support measures aimed at ensuring socioeconomic development, and federal authorities will ensure the inclusion of technology platform priorities in existing support mechanisms for research and development (federal target programs, government programs, basic research programs).

Within the framework of space activities two platforms currently operate: the National Space Technology Platform and the National Information Satellite System.

The goal of creating a National Space Technology Platform is to organize regular networking platform participants, a long-term strategy for scientific and applied research and systematic adjustment, as well as promoting Russian products and services.

It should be noted that the activities of technology platforms help stimulate the research and development of advanced technologies required for meeting the national interests of Russia and Russian society, as well as promotional support activities and communications with related domestic and foreign technology platforms, structures and organizations, promotional activities, organization of conferences, meetings, seminars, schools and other events.

It is suggested that more than a dozen technology groups will be developed within the framework of the platform: technology of the use of the results of space activities in various sectors of the economy and the security sphere; spacecraft launch vehicles; payloads for spacecraft communications, remote sensing, navigation, solar and magnetosphere monitoring; satellite platforms; basic technologies in the field of materials science, including nanotechnology; production technology in space and space biotechnology; space energy technologies; planetary exploration using unmanned spacecraft; existing and prospective opportunities for launch payloads; human spaceflight and space medicine; space nuclear power plants and fuel elements; spacecraft engines for various purposes, including electro-rocket, liquid, nuclear, etc.

The formation of the National Information Satellite System brought forward the need to coordinate decisions on complex educational, scientific, technical, technological and economic problems for the creation and use of advanced space systems and complexes. Its strategic goal² was to develop a "breakthrough" technology to radically improve the performance of properties of new generations of spacecraft and accessibility of personal space packet services, as well as a significant expansion on the world market for high-tech products and services in the aerospace, telecommunications and other non-space sectors.

The annual Presidential Address to the Federal Assembly of the Russian Federation issued on December 12, 2013, stated that there was a special role in the development of technology platforms for applied research and it suggested that efforts be "refocused on the support of such research tools as appropriate target programs, especially programs such as 'Research and development on priority directions of scientific-technological complex'". At the same time this document emphasized the importance of the principle of co-financing projects, with contributions from the government and business. And "technology platforms should focus on concrete results for patents and

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licenses on the practical implementation of development".

3.2. Innovation clusters

One of the successful mechanisms of public-private partnership aimed at improving the competitiveness of the domestic economy and the intensification of is the development of regional clusters.

A regional cluster is an association of enterprises, suppliers of equipment, components, specialized production and services, research and educational organizations, linked by ties of proximity and functional dependence in the production and sale of goods and services. The clusters can be deployed on the territory of both one and several subjects of the Russian Federation.

The Concept of long-term socioeconomic development of the Russian Federation was approved by Decree No. 1662-r of the Federal Government on November 17, 2008, which provides for the establishment of territorial networks and industrial clusters, realizing the competitive potential of the territories, and the formation of a number of innovative high-tech clusters in the European and Asian parts of Russia.

To date, the use of the cluster approach has become one of the key strategies of socioeconomic development in a number of Russian regions and municipalities. Some development projects implemented in regional clusters are presented below.

Within the space and rocket complex in Russia there are now two actively developing clusters – St. Petersburg and Samara.

The St. Petersburg innovative aerospace cluster was created in 2011. Its anchor scientific center is St. Petersburg State University of Aerospace Instrumentation. In this cluster providers are brought together at different levels. Preliminary estimates show that the union of the capacity of the region will form a new production and service chain and implement a range of innovative commercial and scientific projects that can have a significant and positive impact on the living standards in the region.

Cluster activities are aimed at creating scientific and production potential and a strong high-tech base in Northwest Russia, the formation of innovative start-ups for the aerospace sector and these activities also assist in the commercialization of competencies acquired in regional research organizations and universities, while maximizing the involvement of specialized capabilities of enterprises in the region. Among the main objectives of the cluster is an increase of the number of high-tech jobs in the region.

The *Samara aerospace cluster* is comprised of three industrial complexes: the rocket building, aircraft manufacturing and engine building complexes. The region has industrial and scientific institutions that have conducted research and development of innovative technologies in the manufacture of products for the missile, space and aviation technology, including missile, aircraft and industrial engines, aircraft components, new materials and processes. In the Samara region people are engaged in training highly qualified personnel and the transfer of technology to other sectors of the economy.

To date, the Samara aerospace cluster consists of three segments, including special-

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ized enterprises. These are rocketry, aircraft and engines. The core of the cluster is considered to be the three major industry enterprises: FSUE "SRP" Samara Space Center" – a leading organization in the Russian Federation, producing middle class boosters and spacecraft for remote sensing, JSC "Kuznetsov" – Russia's largest professional R&D center, which produces rocket and gas turbine engines and JSC "Aviacor Aircraft Plant". For these companies, research and training of specialists occur at the Samara State Technical University and Samara State Aerospace University named after academician S. P. Korolyov (National Research University).

Cluster members have considerable knowledge of research and production and the technical capacity to maintain the competitiveness of their products not only in the country but also on foreign markets. Enterprises and organizations of the cluster contribute significantly to the overall results of the aerospace industry.

Conclusion

An analysis of legal documents governing space activities in Russia emphasizes the significant influence of public-private partnership on the development of tools for implementing space policy. This trend should ensure the transition to target-oriented project planning in the space activities supported by key stakeholders of the industry.

The emergence of new state documents regulating this economic sphere reveals the increasing forms of government control to achieve specific goals in the long term. This tendency is associated with trends in the development of the scientific, technological and socioeconomic spheres and affects the development of innovative enterprises, that produce and consume the results of space activities.

The innovative character of these companies was vividly expressed in the emergence of new legal instruments to ensure their long-term development, such as program development and innovative public-private partnerships, including technology platforms and innovative regional clusters.

Thus, the formation of a legal framework for the innovation development supported this emerging and rapidly growing trend of the Russian economy as a whole and its space segment.

¹Strategy for Russian space activities development till 2030 and beyond (project) - <http://www.aex.ru/docs/8/2012/4/27/1561/>.

² <http://www.tp.iss-reshetnev.ru/index.php/about-project> .

EU AND ASEAN EXPERIENCE IN INTEGRATING MARKETS

Giovanna Laschena*

On 12 and 13 February 2014 Singapore hosted the first EU/ASEAN Aviation Summit.

The ground for this important meeting can be found in September 2012, when the European Commission identified ASEAN as a region offering new interesting opportunities for collaboration, including a comprehensive aviation agreement at some stage. In December 2012, the Council of the EU welcomed the EC's intention to organize, jointly with ASEAN, a EU-ASEAN Aviation Summit with the aim of enhancing EU-ASEAN aviation relations. In May 2013, the European Parliament, in its resolution on the EU's external aviation policy, called on the Council of the EU to grant the European Commission a mandate to negotiate comprehensive air transport agreements with fast-growing economies including ASEAN.

The Summit discussed the opportunities offered by the EU and ASEAN aviation markets, and the aspects (pros and cons), which both the EU and ASEAN stand to achieve from greater market access and integration in air services and, in the aviation industry, to enhance the efficiency of air traffic management and the harmonization of safety and security standards.

In particular, the Summit examined the consequences that both regions (Europe and ASEAN Countries) could enjoy from a comprehensive air transport agreement between the EU and ASEAN.

A comprehensive EU-ASEAN aviation agreement would generate significant changes for both sides, not only in terms of market liberalization but also in the field of regulatory convergence, fair competition and trade and investments.

This operation of market "globalization" has to pass through some modifications that, at this stage, seem necessary before arriving to the effective conclusion of a Comprehensive Agreement.

In fact, the air transport system of the two "bodies" - EU and ASEAN - have at the moment some evident differences that should be removed as they constitute an obstacle for the foreseen integration of the markets:

1) Intra and inter-regional integration and market liberalization

In the EU all regulations concerning the main issues of air transport are governed by a central authority after all members signed a treaty for joining the community, while in the ASEAN this figure does not exist at the moment. All the ASEAN member States maintain their territorial autonomy and have different regulations.

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The views expressed in this article are purely those of the author and they can not in any way be regarded as an official position of ENAC.



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The existence of a central authority as in the EU could be important for the ASEAN single aviation market to be successful, being such authority necessary to harmonize the differences existing in the sector of air transport in the ASEAN Countries.

The regulatory environment for civil aviation has traditionally been based on national sovereignty and on bilateral air service agreements, However, the challenges aviation is facing today cannot be addressed solely within national boundaries. The Single Aviation Market scheme needs cooperation and integration between regions. Therefore, the possible start for this operation could be the liberalization of the ASEAN market, to integrate the fragmented national air sovereignty and to create one Single ASEAN Sky. This would grant a more functional, cost-efficient and better performing aviation system that would bring benefits to airlines, airports and consumers, opening the market to a fair and transparent competition.

In this framework, one of the first steps for the creation of the ASEAN Single Aviation Market could be the provision of multiple designations in order to create for carriers of ASEAN member States the best possible conditions to compete and grow in the regional market.

The above mentioned possibility, together with a very prudent and more relaxed ownership and investment control of carriers regime in a progressive and gradual term, could be one of the possible solutions for leading the market towards a more liberal and profitable regime paving the way for the future concrete cooperation with Europe in air transport.

This gradual elimination of ownership and investment control limitations is one of the most complicated matters to study in the air transport system, which is currently being carefully considered by Europe, especially in this moment of worldwide economic crisis.

Also a more liberal provision for ASEAN carriers to establish in anyone of the ASEAN countries could help the opening of the market, the cooperation between carriers assuring a high level of competition with the relevant benefits for airlines, consumers and passengers.

2) Air Freedoms and other competition and regulatory items

From the point of view of flight operations and air services, the ASEAN Single Aviation Market cannot be implemented without a precise revision of route capacity and frequency controls.

In the EU, destination points are regarded as domestic points and *cabotage* is allowed between Member States, while in the ASEAN territory operations performed by carriers of one ASEAN Country from/ to a third ASEAN Country are considered 5/7th freedom traffic rights.

Allowing fifth and further freedom traffic rights between ASEAN Countries for passengers, scheduled and cargo flights is a necessary step for the growth of the liberalized market.

In this scheme also relaxing fare restrictions and the adoption of common passengers protection rules would be a positive solution for the integration of the market and for

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the development of fair competition between ASEAN carriers.

3) Other issues

Moreover, other EU issues that are not strictly connected to the economic regulation of air transport, such as Safety, Security, ETS (Emission Trading Scheme) policy, air management, should find a unique point of view at the ASEAN level, and a mutual recognition of the single regulations as well as the planning of standard technologies and operations among the ASEAN States.

In conclusion, the way to the ASEAN Single aviation market is not far and the EU process of liberalization of air transport can be followed and even improved.

The Joint Declaration on EU-ASEAN Aviation Cooperation, adopted at the end of the Singapore Summit, confirms the intent of both parties to collaborate.

In fact, the European Commission and ASEAN have already fixed the date of the first meeting of the ASEAN-EU Aviation Working Group for the beginning of May 2014 in Myanmar.

AIR PASSENGER'S RIGHTS: AMENDMENTS TO REGULATION (EC) no. 261/2004

Francesca Grassi

On the 5th February 2014, the European Parliament has approved a legislative resolution on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. The purpose of the revision is to ensure a system of enforceable rules to protect the passenger, clearing away some interpretative uncertainties that characterize the current text of the Regulation no. 261/2004.

An issue of paramount relevance, which has been directly affected by the revision, concerns the right to compensation in the event of long delays. The European Parliament, which accepted the proposal of the European Commission, confirmed that passengers will be entitled to compensation starting from a three-hour delay.

The decision was made taking into account several judgments of the EU Court of Justice, which recognized in case of long delays the same rights to compensation provided for flight cancellation. With respect to this, specific reference should be made to the 'Sturgeon case'¹.

The EU Court of Justice recognized the right to compensation in the form of a lump sum (from € 250.00 to € 600.00) also for delayed flights, except for cases when the delay is due to exceptional circumstances. By virtue of the principle of equal treatment, the EU Court of Justice ruled that passengers whose flights are delayed and those whose flights have been cancelled have to be considered damaged in equal measure.

The EU Court of Justice emphasized that the 'waste of time' experienced while reaching the final destination is an element common to both scenarios of delayed or cancelled flight. On this ground, the EU Court of Justice recognized the right to compensation for the damage suffered by the passengers who arrived late to their destination equal to that related to the case of flight cancellation².

The intervention of the EU Court first, and later of the European Parliament, have been a necessary step in order to amend Regulation no. 261/2004 as long as the latter was basically unprovided of any general rule for cases of delay. In fact, it establishes minimum standards of assistance to the passengers applicable to the case of a long delay to be assessed in connection with the scheduled time of departure and the length of the flight, but it does not contain provisions aimed at ensuring compensation for the inconvenience. This occurred in the light of the fact that in the process of approval of the Regulation no. 261/2004 it was deemed that the 1999 Montreal Convention (which came into force in 2004, and with which the European Union complied through regulation no. 889/2002 on air carrier liability, in order to create a uniform system of liability for international air transport) should be considered applicable to cases of damage caused by delays; subsequently, it was considered unnecessary to provide additional provisions (whether by way of indemnity) on the same matter.

MISCELLANEOUS MATERIAL OF INTEREST

A further relevant novelty introduced by the legislative resolution is the prohibition of the so-called ‘no show’. This is a widely used practice by carriers supporting their right to deny boarding of passengers on a return flight as a result of failure to use the ticket for the outbound journey. Consumer associations have often denounced this practice as unfair and causing strong prejudice to consumers’ interests.

Furthermore, the revision in question has generated a clearer and more detailed picture with respect to the exceptional circumstances³ under which Regulation no. 261/2004 excludes the passenger’s right to compensation.

The new provisions in the ambit of ticket price also secure a more extensive protection of the passenger’s rights as long as its final amount must be explicitly disclosed. The passenger must be aware from the very beginning of the outset of any additional costs to be incurred such as, for example, the costs of checking in and those related to the credit card payment.

The revision also introduces relevant provisions with respect to the amount of luggage allowed. It will be given the right to take on board, free of charge and in addition to the maximum allowed luggage, objects and personal effects, including purchases made at the airport.

On the whole, in comparison to the previous text of the said regulation, the revision puts the attention to the needs of passengers’ with disabilities or reduced mobility, introducing the prohibition to deny boarding to people without carer.

Therefore, the recent intervention of the European Parliament is aimed to ensure compliance with the principles of professional fairness of air carriers from the ‘preliminary’ stage of the contractual relationship with the passenger. This will be the aim of the new mechanisms to ensure transparency and information on prices. Finally, the revision is purported to provide for better protection of the passengers’ rights in relation to specific core issues addressed by the regulation in question; between them, it can be included the right to compensation in case of delays which has been up to now of uncertain application.

¹ EU Court of Justice, Judgment dated 19 November 2009, Cases C-402/07 and C-432/07, *Sturgeon/Condor Flugdienst GmbH and Böck and a./Air France SA*.

² EU Court of Justice, Judgment dated 23 February 2013, case C-11/11.

³ See article 5 of Reg. no. 261/2004.

**DIRECTIVE NO. 2008/101/EC INCLUDES AVIATION
IN THE EU-ETS SYSTEM: BENEFITS FOR
THE ENVIRONMENT AND CLIMATE CHANGE**

Francesca Grassi

Aviation gives significant contributions to the release of greenhouse gas emissions in the air, which sometimes severely affects the environment, being capable to generate a relevant impact on climate change. In fact, it has been appraised that in almost twenty years (1990 - 2008) the EU international aviation's emissions hyperbolically grew as of 110% compared to the past. Also, current figures demonstrate that if aviation gas emissions' keep increasing, they will be doubled or tripled by 2050 generating even greater prejudice to the environment.

The European Union Emissions Trading System (EU ETS) is a program which aims at cutting down emissions by trading and selling emissions permits on a free market in order to lower caps on annual greenhouse gas emissions. The limits concern two types of emissions: carbon dioxide emissions (CO₂) and nitrous oxide emissions.

According to the EU-ETS system, 'polluters' (eg. power stations, combustion plants, oil refineries and other industrial installations) have to apply for a number of permits equivalent to the amount of CO₂ they emitted the preceding year. Subsequently, if they are not granted with sufficient allowances in order to perform their activities, companies will need to buy them from others. On the contrary, in case they are granted with extra allowances, companies can sell them to others.

However, the European Union sets a limit on the emissions that can be emitted and, in order to do so, the EU cuts down the number of permits available on the market. The immediate consequence of such limitation is that the less the permits are, the more their price rises.

Airlines became part of the EU ETS system starting from January 1, 2012 thanks to the directive no. 2008/101/CE (amending previous directive no. 2003/87/EC). In that respect, the European Commission allocated aviation allowances for 95% of average annual emissions for the period 2013-2020. As a matter of fact, the aviation gas emissions usually outweighs the quantity of aviation gas emissions allowances expressly granted by the EU-ETS system as long as the aviation sector usually buys allowances from others (which are part of the EU-ETS) or, on the contrary, it purchases gas emissions credits from other energy projects. Each year EU-ETS gives to the aviation sector 85% of aviation gas emission allowances for free, whereas it puts 15% of aviation emission allowances on auction.

The EU-ETS system has also been at the core of judicial proceedings investigating its consistency with the relevant international law. In 2009 three American airlines filed a case arguing that the EU law on aviation greenhouse gas emission allowances generated discrimination to third States' airlines with respect to EU airlines; such a different treatment was argued to be in breach of articles 2, 3(4) and 15(3) under the EU-US *Open Skies Agreement*. In fact, according to the mentioned provisions, when the parties to the international treaty adopt environmental measures, they must do it in a non-discriminatory manner with respect to the airlines concerned. However, the plaintiffs pleaded before the competent Court of Law that this did not happened.

MISCELLANEOUS MATERIAL OF INTEREST

The case was first brought before the UK High Court, which later deferred it to the EU Court of Justice as long as the matter in question concerned specifically EU law matters. Consequently, in December 2011, the EU Court of Justice handed down the decision and found that the EU-ETS system as established by directive no. 2008/101/CE was perfectly consistent with the provisions of the aforesaid treaty. In particular, the EU Court of Justice observed that “...the European Union has expressly provided for uniform application of aerodrome situated in the territory of a Member State and, in particular, it has sought to comply strictly with the non-discrimination provisions of bilateral air service agreements with third States, like the provisions in Articles 2 and 3(4) of the Open Skies Agreement”¹. Therefore, it concluded that “Directive 2008/101, inasmuch as it provides in particular for application for the allowance trading scheme in a non-discriminatory manner to aircraft operators established both in the European Union and in third States, is not invalid in the light of Article 15(3) of the Open Skies Agreement, read in conjunction with Articles 2 and 3(4) of the Open Skies Agreement”.

In conclusion, the EU Court of Justice decision makes a significant step in the direction of innovative regional regulations that should be approved by the European Parliament in order to introduce relevant legal means capable to generate a positive impact on the environment and on climate change.

“The Court’s finding reinforces the EU’s stance on finding a cost effective way of addressing the aviation’s significant and growing contribution to climate change. (...) The focus will now shift away from obstructing its progress on the eve of its introduction and examine how such regional initiatives can form the building blocks of a global agreement”².

¹ EU Court of Justice, case C-336/10, judgment dated 21 December 2011.

² Tim Johnson, Director of the Aviation Environment Federation, Press release on 21 December 2011.

FORTHCOMING EVENTS



Recent Development in Aviation Liability and Insurance (Milan - 29 April 2014)

On next April 29th, ANIA (the Italian Association for Insurers) with the participation of ENAC (Italian Civil Aviation Authority), LS - Lexjus Sinacta law firm and Holman Fenwick Willan law firm, will hold a workshop related to aviation matters under an insurance perspective.

The event is focused on the core issues related to the new developments of recent European regulation governing ground handling services at airports and correlated insurance coverage.

The attention will be cast to the recent ENAC Circular no. APT 02B which defines the regulatory framework applicable to ground handling services within the Italian borders.

The workshop will also investigate the liability regime under which the air carriers and manufacturers operate to provide their services. In that respect, the panel will address the hidden pitfalls connected to the use of new technologies to the aviation sector. Case law will be explored in order to identify the limitations of its applicability. The civil liability involved for the wrongful use of the RPASs (Remotely Piloted Aircraft Systems) will also be addressed.

This will be an opportunity to deliver to the audience a thoughtful confrontation between many primary representatives of insurance and aviation sectors, who will meet together in order to highlight the downsides and the upsides of the new regulatory framework set by the European legislator applicable to controversies involving the responsibility for ground handling services and product liability.

For more information see

http://www.ania.it/it/sala-stampa/eventi/?month=4&year=2014#event_29-4-2014