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Contributors:

Adeliana Carpineta

Isabella Colucci

Alessandra Laconi

Nunzia Maria

Paradiso

Doriano Ricciutelli

Nitin Sarin

Filippo Tomasello

Yao-dong Yu

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LEGAL STATUS OF AIRSPACE OVER EEZ: PROBLEMS AND SOLUTIONS

Yao-dong Yu*

1 BACKGROUND

Exclusive Economic Zone (hereinafter referred to as EEZ) is a new marine zone introduced by the United Nations Convention on the Law of the Sea of 1982 (hereinafter referred to as UNCLOS). As the legal regime of EEZ results from compromise, the wording of the rules is deliberately vague in some places, and there is a subtle balance between the concerned parties in rights and duties. This often leads to disputes regarding the appropriate behavior in EEZ.

UNCLOS lacks detailed provisions about the airspace over EEZ, and this worsens the situation and causes problems when more and more activities are held in the airspace over EEZ. For example, with the United States strategic shift to Asia-Pacific region, the presence of its air force in this region increases substantially and its surveillance platforms such as Global Hawks, EP-3s, U-2 are becoming more active in the airspace over EEZ of China¹. With the escalation of their maritime disputes, China and Japan are sending more military aircrafts or public service aircrafts to keep watch over each other's activities in the East China Sea². With the development of Iran nuclear crisis, the conflict in the airspace between Iran and its opponents is almost bound to intensify.

With rapid advance in science and technology, new equipment has been made and used to collect intelligence³. A typical of such equipment is the aerial drone. With the wide use of aerial drone, more countries are complaining that the aerial drone has violated their sovereignty and threatened their national security. The use of new equipment exerts pressure on the necessity to review the rules concerning the legal status of airspace over EEZ.

Sometimes intelligence collection activity in foreign EEZs can end in disaster. For instance, on April 1 of 2001, a United State EP-3 was conducting intelligence collection activity in airspace over the EEZ of China

*Associate professor of Law School of Shanghai Maritime University and attorney-at-law of Dacheng Law Offices LLP.

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about 70 nautical miles southeast of Hainan Island of China, and it collided with one of the two intervening fighter aircrafts of China, resulting in the loss of life of a young Chinese pilot, the total loss of the Chinese fighter aircraft and the heavy damage to the EP-3. In this case, China not only protested but also started to take action against what it saw as intrusive activity. In order to assure the national security, some States have established air defense identification zone (hereinafter referred to as ADIZ) covering part or whole of the airspace over their EEZs.

All of the above indicates that the conflicts and/or disputes among States in regard to activities in airspace over EEZ shall intensify. This calls for reflections of scholars and practitioners of law of the sea and law of the airspace. As a response to the call, the author shall address the issues and try to find a way out.

2 LEGAL REGIME OF EEZ UNDER UNCLOS

According to Article 55, the EEZ is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established under the UNCLOS, under which the rights and jurisdictions of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of the UNCLOS. Article 57 provides that the EEZ shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. Article 86 stipulates that high seas are all parts of the sea that are not included in the EEZ, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. The above articles of the UNCLOS, interpreted as a whole, tell us that the EEZ is a marine zone that is located between territorial sea and high seas and has a special legal status different both from territorial sea and from high seas.

According to Article 56, the coastal State has, in the EEZ, the following sovereign rights and jurisdictions: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; (b) jurisdictions as provided for in the relevant provisions of the UNCLOS with regard to (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; (iii) the protection and preservation of the marine environment; (c) other rights and duties provided for in UNCLOS. This Article also imposes duties on the coastal

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State saying that in exercising its rights and performing its duties in the EEZ according to the UNCLOS, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of the UNCLOS. In order to further specify the limits of rights and jurisdiction of the coastal State, Article 58 lists the freedoms enjoyed by all States in the EEZ of the coastal State, stipulating that in the EEZ, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of the UNCLOS, the freedoms referred to in Article 87 of navigation and over-flight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of the UNCLOS. The Article 87 mentioned here is an article which qualifies the high seas as open area for all States and which elaborates on the freedoms enjoyed by all States on the high seas. The Article 58 continues to state that some rules relating to high seas and other pertinent rules of international law apply to the EEZ in so far as they are not incompatible with the legal regime of the EEZ and that in exercising their rights and performing their duties under UNCLOS in the EEZ, other States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of UNCLOS and other rules of international law in so far as they are not incompatible with the legal regime of the EEZ.

The above provisions show us that the legal regime of the EEZ is a complicated compromise between the coastal State and other States, because in the EEZ it gives the coastal State some rights and jurisdictions on the one hand and entitles other States some rights and freedoms on the other hand. These provisions also show us that the legal regime of the EEZ tries to keep a balance between the coastal State and other States, indeed a subtle and dangerous balance because sometimes the rights and jurisdictions of the coastal State may fight with the rights and freedoms of other States. In addition, the legal regime of the EEZ has not covered all activities in EEZ, in other words, there are blind spots in the legal regime regarding the relationship between the coastal State and other States. Having realized this, the law-makers of the UNCLOS put an article in the UNCLOS with a hope to resolve the possible conflicts between the coastal State and other States in regard to the use of EEZ. The Article says that in cases where the UNCLOS does not attribute rights or jurisdiction to the coastal State or to other States within the EEZ, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant

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circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole⁴. But a question still remains how this provision can be applied in an actual conflict.

3 LEGAL STATUS OF AIRSPACE OVER EEZ

On the basis of the above part, it can be concluded that the legal regime of EEZ covers a cubic space which includes not only the seabed, subsoil, water body but also the airspace over EEZ. Therefore the legal status of airspace over EEZ should be understood by taking the legal regime of EEZ as a whole.

Under the legal regime of EEZ, no other States but the coastal State can use the winds to produce energy in the EEZ. Although other States enjoy, subject to the restrictions and conditions of the UNCLOS, the freedom of over-flight in the EEZ, the coastal State can intervene in the over-flight if the over-flight is for the purpose of investigating, exploring or exploiting the natural resources of the EEZ. If the over-flight is related to the establishment and use of artificial islands, installations and structures in the EEZ, it should be subject to the jurisdiction of the coastal State. If the aerial activities cause pollution to the marine environment of the EEZ or it is used for the purpose of marine scientific research in the EEZ, it should also be subject to the jurisdiction of the coastal State.

Saying this, it can still be found unfortunately that there are not sufficient provisions under the legal regime of EEZ in regard to the legal status of airspace over EEZ and activities conducted there. This may lead to uncertainty and confusion as to what is proper behavior in airspace over EEZ. For example, when the EP-3 of the United States is engaging in intelligence gathering in the airspace over EEZ of China, the United States says that its EP-3 is enjoying the freedom of flight over international airspace, but China alleges that the United States is abusing the freedom of flight over EEZ and is threatening the national security of China. Another example is that when China's military aircrafts enter the Japanese ADIZ and are harassed, China protests against the Japanese harassment by saying that Japan is illegally intervening in the normal over-flight of Chinese military aircrafts. These cases remind us that the legal status of airspace over EEZ is not as clear and certain as it seems to be.

Unlike the legal status of airspace over EEZ, the legal status of airspace

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over territorial sea and over high seas is quite clear and certain. According to the UNCLOS, the airspace over territorial sea is subject to the exclusive and absolute sovereignty of the coastal State. Without the permission of the coastal State, no aircrafts of other States can enter that airspace. This rule is accepted by the whole international society. As to the airspace over high seas, the rule is also clear that the airspace is open to any and all international members. But when the airspace over EEZ is concerned, the situation becomes a little complicated, because both rights of coastal State and freedoms of other States exist in this area. What makes the situation worse is that the related wording of UNCLOS is deliberately vague in this regard. Some say that the legal status of airspace should be determined by the land and sea to which the airspace is superjacent. This is largely correct, but it should also be noticed that the land, the sea and the airspace have different features and are especially so in terms of transportation. For example, a foreign vessel can enjoy innocent passage through the territorial sea of the coastal State, but a foreign aircraft can't. A coastal State can lawfully establish a contiguous zone beyond its territorial sea and in its EEZ, but up to date the legitimacy of the practice of ADIZ is still in question. So it might be safe to say that the legal status of airspace over EEZ is largely determined by the legal regime of the EEZ but the airspace over EEZ keeps open for new rules designed to accommodate the features of airspace. When in 1982 the UNCLOS was created and the EEZ was born, the international airspace law did not follow up and revised its rules. Now it is time for the international airspace law to clarify the legal status of airspace over EEZ and provide new rules needed.

4 LEGITIMACY OF ADIZ

According to state practice, ADIZ is defined as an area established by a State around its territories comprising airspace over land or water in which the ready identification, location, and control of aircraft is required in the interest of national security⁵. An aircraft entering ADIZ is required to radio its planned course, destination, and any additional details about its trip through the ADIZ to an air traffic control authority. Any aircraft flying in ADIZ without authorization may be identified as a threat and treated as an enemy aircraft, potentially leading to interception by fighter aircraft. The advent of ADIZ is earlier than that of EEZ. As early as in 1950, the United States created its ADIZ. Many countries such as Canada, Australia, Japan, Italy, Iceland, Republic of Korea, India, Philippines etc. followed up and established respectively their own ADIZs. In the wake of the September 11 attacks, more States have established or are considering establishing their own ADIZs. As an ADIZ usually covers part or whole airspace over EEZ⁶, this naturally brings

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about a question whether the establishment of ADIZ is in conformity with the international law, in other words, whether it is legitimate according to the UNCLOS or other related international rules.

The UNCLOS does not formally recognize the legitimacy of ADIZ, and at the same time it does not expressly deny the legitimacy either. Supporters of ADIZ quote, as a legal basis for establishment of ADIZ, the provisions of the UNCLOS regarding the jurisdictions of the coastal State over EEZ, and stress that other States should have due regard to the jurisdictions of the coastal State and should comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the UNCLOS and other rules of international law in so far as they are not incompatible with the legal regime of the EEZ. Frankly speaking, this argument is a little remote as the rights and jurisdictions of coastal State in the EEZ are in nature economic or economy-related rights and jurisdictions, but the main purpose of ADIZ is for national security. If they cite the principle of equity of the Article 59 of the UNCLOS and argue that, taking consideration of “all the relevant circumstances” and taking into account of “the respective importance of the interests involved to the parties as well as to the international community as a whole”, the interests of the coastal State in the national security outweigh the interests of other States in the freedom of over-flight and therefore the establishment of ADIZ is legitimate, this argument would be more convincing. If the coastal State can establish a contiguous zone beyond and adjacent to the territorial sea in the EEZ, it can be argued, by analogy, that the coastal State can also establish an ADIZ in part or whole of the airspace over the EEZ.

Opponents of ADIZ cite the freedom of over-flight in EEZ as a legal basis for opposing the establishment of ADIZ. It is a very curious phenomenon that the United States as a country that strongly insists the freedom of over-flight in EEZ has at the same established its EEZ and ADIZ. It indicates that if interpreted cleverly the EEZ and ADIZ might coexist harmoniously.

It should be noticed that the ADIZ concerns both law of the sea and law of the airspace. Up to date, the main international conventions on airspace, such as the Convention Relating to the Regulation of Aerial Navigation of 1919, the Convention for the Unification of Certain Rules to International Carriage by Air of 1929, the International Civil Aviation Covenant of 1944 and their protocols, have failed to systematically address the issue of ADIZ. But with more and more States establishing their ADIZs, there is a trend that ADIZ might be recognized as a general

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practice and gain legitimacy. It can be seen from the history of international law that necessity leads to practice and practice makes law, so is the case for territorial sea, for contiguous zone, and for EEZ, thus it can be hoped that the strong need of coastal State to safeguard its national security shall make the ADIZ a general practice and then an accepted rule.

It can be foreseen that the legal regime of EEZ under UNCLOS shall exert great influence on the codification of rules in regard to establishment of ADIZ. Firstly, the ADIZ should in no case exceed the 200 nautical miles as determined by UNCLOS in regard to breadth of EEZ. Secondly, the establishing of ADIZ should in no case entitle the coastal State any territorial right to any part of EEZ⁷. Thirdly, the principle of freedom of over-flight in EEZ should remain when establishing ADIZ. As a key player in the evolution of international law, the United States has repeatedly announced that it does not claim sovereignty over ADIZ but only monitors and requests information of objects entering the ADIZ of the United States for reasons of national security. Other States having established their own ADIZs also express the will to respect the freedom of over-flight.

In view of the differences in state practice in regard to ADIZ, there shall be a hard work to unify the rules so as to assure at the same time the national security of the coastal State and the maximum freedom of over-flight of other States. The unification of the rules can be achieved either by a review of the law of the airspace or by a revision of the law of the sea.

5 LEGITIMACY OF INTELLIGENCE COLLECTION ACTIVITY IN AIRSPACE OVER EEZ

With rapid advance in surveillance technology and equipment, intelligence collection activities are increasingly conducted in the airspace over foreign EEZs. These activities cause tensions and even crises among the concerned States. Unfortunately the UNCLOS has not adequately dealt with these activities and the concerned States can't reach agreement on what are appropriate behaviors in this regard.

In the case of the collision of the EP-3 of the United States Navy with the fighter aircraft of China, the position of the United States is that its EP-3 enjoys the freedom of over-flight in EEZ of China according to the Article 58 of the UNCLOS. When China accuses the EP-3 of conducting intelligence collection activity against China, the United States defends

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itself by saying that such activity is an internationally lawful use of the sea associated with the operation of aircraft. When China emphasizes that it is in the airspace over EEZ of China, the United States stresses that it is in the international airspace.

The term of international waters and the term of international airspace are frequently used by the United States to defend its military activities in foreign EEZs. But these terms can't find their way under the legal regime of EEZ because the UNCLOS defines the EEZ as a new marine zone standing between the territorial sea and high seas. Many countries such as China, Brazil, India, Pakistan, Malaysia, Uruguay and Peru have expressly declared when signing or ratifying the UNCLOS that no other States could conduct without their consent military activities in their EEZs⁸.

China also alleges that the intelligence collection activity of the EP-3 is an abuse of freedom of over-flight and violates the rule of having due regard to the rights and duties of the coastal State and complying with the laws and regulations adopted by the coastal State in accordance with the provisions of UNCLOS and other rules of international law.

In addition, China argues that the intelligence collection activity of the EP-3 constitutes a threat of use of force because the activity is conducted by the United States military and is an act of preparation for battle field. Therefore, in the opinion of China, the activity threatens China's national security and thus is a violation of the UN Charter and the UNCLOS. The UN Charter prohibits the use of armed force in international relations⁹. The UNCLOS adopts the principle of peaceful use of the sea. EP-3, Global Hawk and other electronic warfare platforms can penetrate sophisticated detection systems to collect detailed information, for this reason, coastal States see the intelligence collection activity of these platforms in their EEZs as a threat to their national security.

Here a crucial question arises. Is the airspace over EEZ, from viewpoint of law, open to this intelligence collection activity? In other words, is the activity is inconsistent with the UN Charter and the UNCLOS so as to be classified as a threat to national security? Up to the date there is no universally accepted answer to this question, but there is a positive progress in this regard because, for example, both of the United States and China have realized the urgent need to address this question and are making efforts to reach some sort of understanding¹⁰.

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6 POSSIBLE SOLUTIONS

The clarification of the legal status of airspace over EEZ, the codification of state practice of ADIZ and the unification of the increasing intelligence collection activities in EEZ are interrelated issues which need to be addressed as a whole. The global peace, the regional security and the friendly bilateral relationships rest on the successful dealing with these issues.

In my view, there are several possible ways forward to address the issues. They are as follows:

(1) By revision of UNCLOS

It can be seen that all the problems or most of the problems are caused by the vague, and sometimes conflicting, provisions in regard to the legal regime of EEZ under the UNCLOS. Although it is understandable that the UNCLOS can not foresee the rapid advances in technology and equipment and take them into account when designing the legal regime of EEZ, there is no reason to maintain the status quo. Now that more than 30 years has passed since the UNCLOS was adopted in 1982, it is time to revise the UNCLOS with a hope to clarify the legal status of airspace over EEZ, to legalize the general practice of ADIZ and to lay down rules for intelligence collection activity in EEZ.

(2) By updating the rules in law of airspace

The legal status of airspace over EEZ and the rules thereof are closely connected with the law of the airspace. But regrettably, when the UNCLOS has introduced a new marine area--the EEZ, the law of the airspace failed to follow up and did not adjust itself accordingly. Because the establishment of ADIZ and the activity of aerial intelligence collection are more closely related to the law of the airspace than to the law of the sea, it is suitable for the law of the airspace to address these issues by developing the rules. In the process of updating its rules, the law of the airspace should take into account of the progresses in the law of the sea.

(3) By regional agreement

Some regions see more tensions/conflicts in regards to the activities in the airspace over EEZ. For example, in the South China Sea, many incidents occurred in the past and more shall be there in the future. In the Persian Gulf, the situation may get worse with the increase of aerial

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intelligence collection activity both in frequency and severity. For the benefit of regional security, it is time for the regional States concerned and outside States affected to negotiate a regional arrangement for forging an understanding among the States regarding appropriate behavior in the airspace over the region. The arrangement might be a joint declaration, a code of conduct or a set of guidelines.

(4) By bilateral agreement

For example, because the United States often encounters with China in the airspace over EEZ of China, the two countries should sit down and work out together a bilateral agreement to avoid potential conflicts and manage crises¹¹. China and Japan also need such kind of bilateral agreement because the two countries frequently face each other in the East China Sea especially after Japan nationalized the disputed Diaoyu Islands (Japan calls it Senkaku Islands) in 2012. History tells us that, during the era of the Cold War, the United States and the former Soviet Union once reached an agreement in regard to avoiding maritime conflicts, which had substantially reduced the maritime confrontation between them. This practice can be followed by the countries suffering the nowadays' EEZ conflicts.

¹ China believes that the US military air and sea surveillance and survey operations in EEZ of China have led to military confrontation between the two countries and calls on the US to reduce and gradually put an end to these operation. Please refer to the report China Urges US to Reduce Surveillance Operations, <http://www.globaltimes.cn/china/diplomacy/2009-08/461874.html>, visited on December 12, 2012.

² Refer to the report "Japan's Reconnaissance Missions Undermine China's security interests", Xinhua News Agency, October 26, 2010.

³ Seth Robson, Maritime Drones Make Waves among Navies Worldwide, Star and Stripes, August 3, 2011.

⁴ Please refer to Article 59 of the UNCLOS.

⁵ Please refer to the United States Code of Federal Regulation: 14 CFR Part99—Security Control of Air Traffic.

⁶ For example, ADIZ of the United States extends approximately 200 miles off the national coastlines.

⁷ George K. Walker, Information Warfare and Neutrality, Vand. Journal of Transnational Law, Volume 33, 2000, pp. 1155-1156.

⁸ Shi-chen Tian, Military Activities in EEZ—A Commentary on Guidelines for Navigation and Over-flight in EEZ Drafted by EEZ Group 21, A Research on the Trends of International Law of the Sea, Beijing: Ocean Press, 2007, p. 151.

⁹ Refer to Article 2 of the UN Charter.

¹⁰ In order to strengthen military maritime safety, the Department of Defense of the United States and the Ministry of National Defence of the China signed an agreement to establish a consultation mechanism in 1998. Facing the new challenges posed by the aerial intelligence collection activity, the two countries are trying to bring the potential conflicts under control.

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¹¹ Since the signing of the Agreement between the Department of Defense of the United States of American and the Ministry of National Defense of the People's Republic of China to Establish a Consultation Mechanism to Strengthen Military Maritime Safety in 1998, the two countries have held many annual meetings and working group meetings to deal with maritime military matters including the US aerial intelligence collection operations in EEZ of China.

THE CAPE TOWN CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND ITS APPLICABILITY IN INDIA

Nitin Sarin*

1 INTRODUCTION

The Cape Town Convention on International Interests in Mobile Equipment (hereinafter referred to as the “Convention”) is a unique instrument of international law, which was signed in Cape Town, South Africa on the 16th of November 2001 (with UNIDROIT being designated as the depository). The Convention is unique in the sense that it works as a base Convention, with each Country having the option to ratify certain “Protocols” based on its requirements for the Convention to be applicable to “Aircraft”, “Railway Rolling Stock” or “Space Assets”. As Aircraft, Railway Rolling Stock and Space Assets are high value assets, which usually see a complex structure of financing by multiple parties, the need for such a Convention was realised. The Convention seeks to facilitate the financing of the acquisition and use of such high value equipment by establishing clear rules, ensuring that the interests in such high value equipment are recognised and protected for the mutual economic benefit of all interested parties. It seeks to enforce these tenets through two broad means, firstly, by requiring the contacting State to introduce rules / laws in its own territory and secondly, by establishing an international registration system whereby interests of parties involved in such transactions are protected.

India, being one of the largest emerging aviation markets in the world acceded to the Cape Town Convention on the 31st of March 2008 with the Convention coming into force on the 1st of July 2008. The Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (hereinafter referred to as the “Protocol”) was also acceded to and brought into force on the same dates. At the time of accession, India made declarations under Articles

*B.A., LL.B., LL.M., (AIR AND SPACE LAW) SARIN & CO. Managing Partner of Sarin & Co. Nitin completed his B.A.; LL.B from the Army Institute of Law, Mohali, India. He has also completed his Advanced LL.M. in Air and Space Law from Leiden University, Leiden, Netherlands, and is currently pursuing a diploma in Aircraft Acquisition and Financing from the IATA. He is a licensed advocate with the Punjab and Haryana High Court.

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39(1)(a), 39 (1)(b), 40, 52, 53 and 54 (2) of the Convention and Article XXX (1), (2) & (3) of the Protocol. This article aims to provide the reader with a brief and concise guide to the effect of the Convention being applicable in India and the pros and cons of the same in relation to creditors / lessors of aircraft, aircraft engines and helicopters seeking to lease their valuable asset to Indian Operators. Recently, this has become of high importance owing to the worst Indian airline bankruptcy in history, which saw many aircraft leasing companies trying to repossess their aircraft and also dealing with the problem of cannibalization.

Further, as this article aims to give the reader a deep insight into the working of the Convention in India, we shall focus on the declarations made by India under the Convention and the Protocol and the affect thereto. It also presupposes the readers' basic knowledge regarding the function and working of the International Registry and the other basic tenets of the Convention.

2 INDIA'S DECLARATIONS UNDER THE CAPE TOWN CONVENTION

India has made certain declarations under the Convention, which shall now of analysed.

Liens/Arrest/Detention of the aircraft, engine or helicopter

Article 39 (1) (a) of the Convention deals with "Rights or interests subject to declarations by Contracting States" whereby a Contracting State may declare categories of non-consensual rights or interests which (*under the States law*) would have priority over any interest in an object (*in this case an airframe, aircraft engines or helicopters*) equivalent to that of the holder of a registered international interest (*an airframe, aircraft engine or helicopter which has been registered with the International Registry of Mobile Assets*). The Article further goes on to state that such non-consensual rights or interests, as declared by the State, would have a priority over registered international interests (*whether in or outside of insolvency proceedings*). Under Article 39 (1) (a) of the Convention, India has made the following declaration:

"The following categories of non-consensual right or interest have priority under its laws over an interest in an aircraft object equivalent to that of the holder of a registered International interest

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and shall have priority over a registered international interest, whether in or outside insolvency proceedings, namely:

- (a) Liens in favour of airline employees for unpaid wages arising since the time of a declared default by that airline under a contract to finance or lease an aircraft object;*
- (b) Liens or other rights of any authority of India relating to taxes or other unpaid charges arising from or related to the use of that aircraft object and owed by the owner or operator of that aircraft object, arising since the time of a default by that owner or operator under a contract to finance or lease that aircraft object; and*
- (c) Liens in favour of repairers of an aircraft object in their possession to the extent of service or services performed on and value added to that aircraft object.”*

The most commonly asked question by any interested party in a leasing transaction of an aircraft into India is whether any authority or person can exercise a lien over their aircraft or engines. According to the declaration made by India under Article 39 (1) (a) it is clear that airline employees could exercise a lien over the leased aircraft for unpaid wages. However, it must be made clear that such unpaid wages must be due (for payment) after a default by the airline under the lease or finance agreement. A “declared default” has to be studied on a case-to-case basis and is completely dependent on the default clauses on the lease or finance agreement. Further, any authority of India may exercise its lien for payment of taxes or other charges arising from the use of the said aircraft arising since the time of default by the airline or owner of the aircraft. Once again, the lien can be exercised over the aircraft for amounts due only after a default by the airline / owner. An “authority” of India would usually inter-alia cover the Airports Authority of India, Income Tax Department and Fuel Companies. The third category of persons who can exercise a lien over a leased aircraft or engine are the repairers of the said object. Provided that the said aircraft or engine is in their possession, they may exercise their lien to the extent of amounts due for services performed and value added to the said aircraft or engine. This would also include the right of Maintenance, Repair and Overhaul (M.R.O.) organizations to exercise their lien over the said aircraft or engine.

Article 39 (1) of the Convention gives a right to a State or a state entity, intergovernmental organization or other private provider of

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public services to arrest or detain an (aircraft) object under the laws of the State for payment of amounts owed directly relating to the services provided in respect of that (aircraft) object or another object. Under Article 39 (1) (b) of the Convention, India has made the following declaration:

“Nothing in this Convention shall affect its right or that of any entity thereof, or any intergovernmental organization in which India is a member, or other private provider of public services in India, to arrest or detain an aircraft object under its laws for payment of amounts owed to the Government of India, any such entity, organization or provider directly relating to the service or services provided by it in respect of that object or another aircraft object.”

The declaration made by India above in respect of Article 39 (1) (b) gives a definite right to the organizations providing Air Navigation Services, etc (*which in the case of India are Government Organizations, i.e. the AAI, etc*) to exercise a lien over a particular aircraft object or another aircraft object. The theory of a “fleet lien” is a controversial one, whereby an entity (*usually Government owned*) can exercise a lien over the whole fleet of an airline for payment pertaining to one or more specific aircraft. This has recently been seen in a case where the Airports Authority of India, refused to let lessors who had repossessed aircraft, fly out of Indian territory¹ until and unless, the whole amount due from the bankrupt airline was paid². It was seen that certain private agreements were reached between the lessor and the AAI and on the payment of undisclosed sums of money; the lessor was allowed to fly the aircraft out of India. The hope of this scenario changing in the case of post Cape Town lease agreements seems to have been shattered in light of India’s’ declaration under Article 39 (1) (b) of the Convention.

Non consensual rights or interests registrable

Article 40 of the Convention gives a State the power (*at any time*) to list the categories of non-consensual rights or interests which shall be registrable as in relation to any category of object as if the right or interest were an international interest and it also states that the same shall be regulated accordingly. India has, at the time of deposit, listed certain rights and interests, which shall be registrable under this head. Under Article 40 of the Convention, India has made the following declaration:

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“The following categories of non-consensual right or interest shall be registrable under the Convention as regards any category of aircraft object as if the right or interest were an international interest and shall be regulated accordingly, namely:

- (a) Liens in favour of airline employees for unpaid wages arising prior to the time of a declared default by that airline under a contract to finance or lease an aircraft object;*
- (b) Liens or other rights of an authority of India relating to taxes or other unpaid charges arising from or related to the use of an aircraft object and owed by the owner or operator of that aircraft object, arising prior to the time of a declared default by that owner or operator under a contract to finance or lease that aircraft object; and*
- (c) Rights of a person obtaining a court order permitting attachment of an aircraft object in partial or full satisfaction of a legal judgment.”*

In comparison to the rights and interests mentioned in the declaration by India under Article 39 (1) (b), India’s declaration under Article 40 of the Convention is in relation to unpaid wages of airline employees arising or accruing PRIOR to the time of a declared default. Similarly, the rights and interests of an authority of India in relation to taxes or other unpaid charges, under the declaration under Article 40 is in relation to such unpaid charges or taxes arising prior to the time of a declared default by the owner or operator. India also recognizes that any plaintiff who has been successful in obtaining an order of attachment³ of the aircraft shall have a registrable right under the Convention.

Applicability of the Convention in India

Under Article 52 of the Convention, India has made the following declaration:

“The Convention shall apply to all its territorial units”.

Relevant courts for determination of claims under the Convention

Under Article 53 of the Convention, India has made the following declaration:

“All the High Courts within their respective territorial jurisdiction

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are the relevant courts for the purposes of Article 1 and Chapter XII of the Convention.”

The declaration by India under Article 53 of the Convention is beneficial for all parties interested in leasing or financing aircraft or aircraft engines or helicopters into India. This declaration declares that all high courts of India shall be the relevant Courts for the purposes of the Convention. Article 13 of the Convention deals with relief pending final determination of a claim, under the said Article, a creditor who files a claim before a court may, obtain speedy relief (*the reliefs stated in Article 13 of the Convention must be agreed between the parties*) from the said court in the form of preservation of the aircraft or engines; possession, control or custody of the aircraft or engines; immobilization of the aircraft or an order granting lease or management of the aircraft and engines and the income therefrom.

These powers, though available previously to parties under the Code of Civil Procedure, have become more relevant owing to the fact that India has nominated the high courts as the relevant courts for the purposes of the Convention. This practically means that a lessor trying to establish its claim in a court of law in India, may now approach the high court directly and will save valuable time by not having to file its claim in the district courts (*in India, a suit or claim is usually instituted in the lowest court, i.e. the trial court after which an appeal lies to the Lower Appellate Court, then the High Court and finally the Supreme Court of India*). Unfortunately, India is plagued with a slow judicial system due to the fact that the courts are overwhelmed with work and as such, it can take several years to receive a judgment from a court. In light of the slow judicial system, India has rightly bestowed the power to adjudicate the said claims to the high courts, which are usually quicker in their determination⁴. The motive behind the said declaration by India is to give maximum relief to interested parties by allowing them to file claims in the high courts of India, which would, theoretically provide a distressed lessor with a quick remedy in law⁵.

At this point, it would be relevant to refer to India's declaration under Article X of the Protocol, (*Article X (2) deals with the definition of “speedy” in relation to the reliefs specified in Article 13 (1) of the Convention*). Under Article XXX (2) in respect of Article X of the Protocol, India has made the following declaration:

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“India will apply Article X of the Protocol in its entirety and the number of working days to be used for the purposes of the time limit laid down in Article X (2) of the Protocol shall be that equal to no more than:

- (a) Ten (10) working days in respect of the remedies specified in Article 13(1)(a), (b) and (c) of the Convention (respectively, preservation of aircraft objects and their value, possession, control or custody of aircraft objects; and, immobilization of aircraft objects); and*
- (b) Thirty (30) working days in respect of the remedies specified in Article 13(1)(d) and (e) of the Convention (respectively, lease or management of aircraft objects and the income thereof; and sale and application of proceeds from aircraft objects).”*

From the declaration mentioned above, an aggrieved creditor / lessor can approach the relevant high court for relief and the High Court, on the receipt of such application should within 10 days provide the relief of either preservation of the aircraft or aircraft engine and their value, possession, control or custody of the aircraft or engine or immobilization of the aircraft or engine. Further, on an application received to lease or take over management of the aircraft or engine and / or to receive income thereof, the high court should order such a relief within 30 days of presentation of such application. It goes without saying that the High Court may impose any of the security measures mentioned in Article 13 (2) of the Convention and may also issue notice to other interested persons under Article 13 (3) of the Convention. Further, such relief must be sought in a “commercially reasonable manner” (see Article 8 (3) of the Convention) and the application of the Convention does not prohibit an aggrieved creditor / lessor to approach the court seeking interim relief under the Code of Civil Procedure, 1908 under Order XXXIX. In consonance with Article 14, which describes procedural requirements being those prescribed by the law of the place where such a remedy is to be exercised, one can easily conclude that the Code of Civil Procedure, 1908 would be applicable to such actions before the high Court.

Self help remedies in India

Further, in relation to “self help remedies” which in the experience of the Author, are quite limited in India. India has made the following declaration under Article 54 (2) of the Convention:

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“Any and all remedies available to the creditor under the Convention which are not expressed under the relevant provisions thereof to require application to the court may be exercised without court action and without leave of the court.”

Under the Convention, an aggrieved creditor / lessor could theoretically pursue any of the remedies i.e. take possession or control of the aircraft or aircraft engine, sell or grant a lease or collect or receive any income or profits arising from the management or use of such aircraft or aircraft engine, without the leave of the high court. These remedies, which would require substantial access to airside areas for which prior security clearance is required, would be difficult if not impossible to pursue without the intervention of the court.

The Convention role when the operator/airline is being wound up

It is observed that more often than not, any action by a creditor / lessor to repossess its asset is coupled with the ongoing threat of insolvency or dissolution of the airline. In the recent past, with a leading Indian airline going through major financial difficulties, aircraft lessors and other interested parties have been looking very carefully towards all proceedings which have been initiated against the airline for its winding up. In India, winding up of a Company incorporated under the Companies Act can be of 3 variations:

- i. Compulsory winding up upon the company’s failure to pay off its debts
- ii. Members’ voluntary winding up
- iii. Creditors’ voluntary winding up (e.g. where creditors are associated with the winding up process, and have the right to appoint a liquidator of their choice).

Winding Up proceedings in India are somewhat protracted and are not expeditious as one would desire. The time taken is factored on the amount of time taken by the (provisional or official) liquidator to collate the claims of the secured and unsecured creditors; as well as the claims of workmen as well as governmental authorities, all of whom are treated *pari passu* with secured creditors. The process of valuation of the assets of the company in liquidation

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also consumes a fair amount of time - especially if the assets include real estate or other sizeable immovable assets. During the winding up process, the primary concern of the liquidator is to liquidate the assets of the company and to make payments to the workmen, government and creditors in accordance with law. The statutory provisions empower the liquidator to “carry on the business of the Company so far as may be necessary for the beneficial winding up of the Company”⁷. Upon the passing of the winding up order (which effectively strips the Directors and Management of their powers), the liquidator would not be expected to continue the conduct the Company’s business except to facilitate the beneficial winding up. It is practically rare and the general practice is to effectively shut down the business. The Supreme Court of India has endorsed this view and said “*Ordinarily when a winding up order is made, the business of the Company would cease to continue and even if the Liquidator is authorized to carry on the business, such continuance would be only for the beneficial winding up of the Company and the logical and inevitable end would be the ultimate discontinuance of the business.*”⁸

In a Court supervised (*compulsory*) winding up, the official liquidator is required to report to the company court following almost every action undertaken and this necessarily entails delays. In contrast, in a voluntary winding up process there is very little court interference in the winding up process and is therefore likely to be a faster process in theory. However the claims of workmen etc. are usually a matter of contention and can delay the process if any petitions are filed on their behalf before the Company Court.

The Protocol has taken into account the possibility of airlines becoming insolvent and has provided for certain remedies available to a lessor. Article XI of the Protocol deals with such remedies and gives contracting States the option to opt for one of two options, namely “Alternate A” and “Alternate B”. India has through declaration opted for “Alternative A” which states that on the occurrence of an insolvency related event, the insolvency administrator (*in the Indian context, the “liquidator”*) or the debtor, as applicable, shall, (*with the exceptional situation where the liquidator or debtor may retain possession of the aircraft, engine or helicopter where, after the passing of 2 calendar months if all defaults have been cured apart from a default caused by the initiation of winding up proceedings itself and where the debtor has agreed to perform all its future obligations*) give possession of the aircraft,

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engine or helicopter to the creditor no later than the earlier of end of the waiting period (*which in the Indian context by declaration is 2 calendar months*) and the date on which the creditor would be entitled to possession of the aircraft, engine or helicopter in case the State had chosen (*by not making a declaration pursuant to Article XXX(3)*) not to apply Article XI.

Taking into consideration the high value and fragile nature of the assets, the Protocol states that the liquidator or debtor (*until the creditor / lessor is given the opportunity to take possession as mentioned in the preceding paragraph*) shall preserve the aircraft, engine or helicopter and maintain it and its value in accordance with the lease agreement, this includes the use of the asset under an arrangement designed to preserve and maintain the aircraft, engine or helicopter and maintain its value. It is also left open to the creditor / lessor to apply for any other form of interim relief available under the applicable law of India.

In case of remedies exercised under Article IX(1) of the Protocol (*i.e. to procure the de-registration and export and physical transfer of the aircraft, engine or helicopter from Indian territory*) the DGCA (*which is the registering authority in India*) shall de-register the aircraft no later than 5 working days after the date on which the creditor / lessor notifies it that it is exercising such a remedy. Similarly, the Protocol calls upon the DGCA to expeditiously cooperate with and assist the creditor / lessor in procuring such de-registration, export and physical transfer of the aircraft, engine or helicopter. The Protocol, also recognizes the fact that an aircraft, engine or helicopter, if kept out of service, causes a grave loss to the creditor / lessor, hence, it states that none of the remedies provided to such creditor / lessor under the Convention of the Protocol may be prevented or delayed after the expiry of 2 calendar months (*from the occurrence of an insolvency related event*) or on the expiry of the date on which the creditor / lessor would be entitled to possession of such aircraft, engine or helicopter if Article XI did not apply.

The Protocol further states that no obligations of the debtor under the agreement may be modified without the consent of the creditor / lessor and that the liquidator shall have the authority to terminate the agreement so entered into between the creditor / lessor and the debtor. In case of insolvency proceedings, registered interests or rights shall have priority over all other rights and interests⁹, except the non-consensual rights or interests as declared by India under Article 39(1) of the Convention.

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In cases where insolvency proceedings have been initiated in a State other than the State in which the aircraft, engine or helicopter is situated with the aim to provide even more effective assistance to the creditor / lessor, Indian Courts shall provide the maximum amount of assistance and shall co-operate to the maximum extent possible with such foreign Courts or insolvency administrators in carrying out the provisions laid down by Article XI.

Irrevocable de-registration and exports request authorisation
(I.D.E.R.A.)

The Protocol under Article XIII provides for the filings of an Irrevocable De-registration and Export Request Authorization or IDERA to be filed with registering Authority in the State. India, by declaration has opted to apply Article XIII of the Protocol. The form and substance of the IDERA is contained in the Annexure to the Protocol and contains all the relevant information including, name of the airline / operator / lessee, name of the creditor / lessor, manufacturers serial number (M.S.N.), aircraft manufacturer, aircraft type, aircraft registration mark and a statement to the effect that the airline / lessee irrevocably issues in favour of the creditor / lessor the right to procure the de-registration of the aircraft from the DGCA's aircraft register and procure the export and physical transfer of the aircraft from India. The IDERA further records the consent of the airline / lessee to allow the creditor / lessor to apply for such de-registration or export without the prior consent of the said airline / lessee. Further, the airline / lessee cannot revoke the IDERA without the written consent of the creditor / lessee.

On the production and submission of an IDERA to the DGCA (*which is the registering authority in India*) the said authorization shall be recorded by the DGCA. Only the person in whose favour such an IDERA is issued can exercise the remedies as specified in Article IX (1) of the Protocol. The authorized person (usually the creditor / lessor) can further designate another person / law firm to exercise the said remedies acting on the IDERA.

Apart from the IDERA, it is recommended that a creditor / lessor also obtain from the airline / lessee a De-registration Power of Attorney authorizing the creditor / lessor to apply for de-registration of the aircraft and also authorizing the DGCA to honour such a request.

The International registry in India

Article 16 of the Convention establishes an International Registry (*which is relation to the Aircraft Protocol is based in Ireland*) whereby inter-alia, interests and assignments can be registered thereby creating a priority over any other interest subsequently registered and over an interest which is not so registered¹⁰. Creditors / lessors leasing their valuable aircraft, engine or helicopter assets to Indian operators / airlines can also now register their interest in such asset with the International Registry. Apart from the International Registry set up by the Convention, the Directorate General of Civil Aviation also maintains a register (*which is a public document / register*) which records the name and address of the owner of the aircraft object along with the MSN and registration mark assigned to the particular aircraft. The International Registry is accessible at www.internationalaircraftregister.aero and the national aircraft register maintained by the DGCA is available at www.dgca.nic.in.

3 CONCLUSION

To conclude, one can sum up that accession to the Cape Town Convention is a very positive move whereby the need of the growing aviation sector has been recognized by way of providing security to creditors / lessors thereby allowing Indian carriers to procure more aircraft on lease in a more cost effective manner. Despite the fact that India has not incorporated the Convention explicitly in any local Act or legislation, however, through the declarations made by it, it can clearly be deciphered that the Convention is in full force in the Country and that a Court of law would too recognize the power and force in the Convention. At the time of publication of this article, the Author is not aware of any instances where any lessor has invoked the remedies of the Cape Town Convention, however, significant mention of the same was made by the DGCA in a previous matter concerning the bankruptcy of a regional carrier in relation to pre-Cape Town lease agreements. This goes to show that the DGCA recognizes the force of the Convention and would, in the ordinary course of things, allow a creditor / lessor to take recourse of its remedies. The application of the Convention and Protocol to India has resulted in definitive growth in the aircraft, aircraft engine and helicopter leasing market in India. Of course, it shall be interesting to see how Courts in India would react to dealing with the Convention - a conclusion, which only time will reveal.

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- ¹ <http://www.thehindubusinessline.com/industry-and-economy/logistics/aai-refuses-to-allow-kingfisher-lessors-to-take-back-aircraft/article3731044.ece>.
- ² <http://timesofindia.indiatimes.com/business/india-business/AAI-gets-Rs-1cr-allows-lessor-to-repossess-2-planes-of-Kingfisher-airlines/articleshow/15578944.cms>.
- ³ Oder XXXVIII of the Code of Civil Procedure, 1908.
- ⁴ Thought it has been the experience of the author that even claims in high courts can remain pending for over 2.5 decades.
- ⁵ High courts, in the authors experience, are quick to realize the gravity of situations and understand the consequences of a high value asset being stuck “*in limbo*” awaiting a court decision. Though extremely difficult to predict timelines, one could assume that interim relief can be obtained fairly quickly from a high court in India.
- ⁶ Airside access can be obtained by getting the necessary security clearances from the Bureau of Civil Aviation Security (B.C.A.S.).
- ⁷ Section 457 (1) (b) of the Indian Companies Act, 1956.
- ⁸ National Textile Workers Union & Others Vs P.R. Ramakrishnan&Ors, AIR 1983 SC 75.
- ⁹ It must be borne in mind that the said interest or right must have been effective prior to the commencement of the insolvency proceedings and must have been registered in conformity with the Convention. (Article 30 of the Convention).
- ¹⁰ See Article 29 of the Convention.

OCCURRENCE REPORTING REGULATION

Filippo Tomasello*

Safety experts say that 'reactive' safety is not enough, but that it should be complemented also by 'proactive' safety: i.e. collecting information even on minor occurrences which could potentially lead to safety hazards, integrating and sorting such information and use it for safety analysis (i.e. emphasis not on the investigation on a single occurrence, for which the required resources would be disproportionate, but on statistical analysis of a significant number of occurrence reports organised according to a consistent taxonomy).

Therefore in 2003 the EU legislator, building upon the technical reporting requirements developed by national experts in Eurocontrol and the Joint Aviation Authorities (JAA) adopted Directive 42 establishing a scheme for occurrence reporting in the EU. The Directive initiated the promotion of the 'just culture' and led to increase in the number of collected reports. It also standardized the software (i.e. ECCAIRS) to be used for data collection and analysis and established a centralized EU data base (European Central Repository = ECR) at the Joint Research Centre (JRC) in Ispra.

Directive 2003/42/EC has in fact established the basis for a proactive and evidence-based aviation safety management system in the EU by imposing the reporting of occurrences. However the EU and its Member States (MS) are currently not sufficiently able to use experience feedback for preventing accidents since the Directive has a number of shortcomings.

Firstly it appears that, whilst data is vital to identify safety hazards, there is not sufficient awareness of all safety occurrences. This situation is partly due to the discrepancy in the scope of reportable occurrences between the MS. It also comes from the fact that individuals are still afraid to report (the "Just Culture" issue). Indeed to reach the goal of full reporting, individuals must have full confidence in the system because they are notably asked to report mistakes they may have made

*Rulemaking Officer, EASA

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or contributed to. However, individuals are not equally protected among MS and they fear being punished by their hierarchy or even being prosecuted by the judicial administration. In addition, the lack of EU obligation to establish voluntary reporting scheme to complete the mandatory schemes and the insufficient clarity in occurrence reporting obligations and in the flow of information are also contributing to the increased, but still insufficient collection of occurrences.

Secondly, occurrence data integration is not harmonised and is unstructured causing a low quality of information and lack of completeness of data. This situation affects the consistency and the usefulness of information and limits its use for safety purposes.

Thirdly there are legal and organisational obstacles which prevent adequate access to information contained in the European Central Repository at Ispra. In fact the Directive and associate implementing rules oblige the de-identification of certain information. Although the purpose of such provisions is to protect sensitive safety information, its practical consequence is that important safety related facts, such as the actual description of the occurrence, are not available to all competent aviation authorities, including to the European Aviation Safety Agency (EASA).

Finally, the current legislation does not include provisions indicating how MS should use the data collected. However, since the adoption of the Directive, principles related to the analysis and follow up of the information collected through occurrence reporting systems have been agreed at international level but not yet transposed into EU legislation. Therefore this has led to quite diverse and divergent approaches among MS.

For the reasons listed above, on 18 December 2012, through Communication COM(2012) 776 final, the European Commission (EC) has presented to the EU Parliament and Council a legislative proposal to correct the shortcomings of the Directive of 2003, while turning it into a Regulation.

The specific objectives of this legislative proposal are to:

- (1) Ensure that all occurrences which endanger or would endanger aviation safety are collected and are providing a complete and clear picture of safety risks in the EU and its MS;
- (2) Ensure that data issued from reported occurrences and stored

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in the national databases and in the ECR are complete and of high quality;

(3) Ensure that all safety information stored in the ECR is accessed adequately by appropriate authorities including EASA, and that they are used strictly for safety enhancement purposes;

(4) Ensure that reported occurrences are effectively analysed, that safety hazards are identified and addressed where relevant and that the safety effectiveness of actions taken is monitored.

The legislative proposal will now undergo the ‘ordinary’ legislative procedure (or ‘co-decision’) requiring positive vote by European Parliament and by the Council.

CIVIL - MILITARY SYNERGIES IN EUROPEAN EARTH OBSERVATION MISSIONS

Nunzia Maria Paradiso*

1 INTRODUCTION

After the end of the Cold War, Europe witnessed the development of two parallel processes which are still in progress. These two processes have one characteristic in common: a dual nature. On one side, there was the launch of the European Security and Defence Policy (ESDP, now Common Security and Defence Policy, CSDP) with its civilian and military components; on the other side, the space industry, together with those of aviation and defence, was experiencing a process of restructuring and consolidation, linking together civilian and defence production lines within single transnational companies¹. They both represent the European response to the new political and economic environment. They both highlight a European willingness to play a more active political and economic role at international level. As regarding Earth Observation (EO) satellites, both processes are affecting the development of this sector. The launch of the CSDP, with its call for the development of capabilities to enable European Union (EU) countries to take autonomous decisions and actions in the fields of security and defence, means an increasing demand for EO satellites systems and data. The consolidated European aerospace and defence industry, on the other side, is promoting a technological convergence between civilian and military space activities which also means dual use of EO satellites. Considering the cuts in defence budgets, which have been representing a constant since the end of the Cold War, at least in some EU countries, and given the comprehensive civil military approach adopted by the EU for crisis management, the abovementioned technological convergence is being considered by some EU countries as a viable solution.

2 THE EUROPEAN SECURITY AND DEFENCE POLICY (ESDP) AND ITS COMPREHENSIVE CIVIL-MILITARY APPROACH TO CRISIS MANAGEMENT

At political level, the end of the Cold War had offered an opportunity for Europe to act as a regional power. This possibility was soon tested

*European Space Policy Institute (ESPI)

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by the breaking out of the Balkans wars which exposed the unpreparedness of the EU countries. Most of all, the Balkans wars demonstrated that Europeans lacked the capacity for taking autonomous decisions and actions to conduct the so-called “Petersberg tasks” (later comprised under the general umbrella of ‘crisis management’)². The Petersberg tasks were those enumerated first by the Western European Union (WEU) in 1992 and then by the Amsterdam Treaty as the tasks that the EU should be able to conduct under the Common Foreign and Security Policy (CFSP)³. The Franco-British Joint Declaration on European Defence, issued at the Saint-Malo summit in 1998, stated that “[t]he European Union needs to be in a position to play its full role on the international stage. This means making a reality of the Amsterdam Treaty [...] This includes the responsibility of the European Council to decide on the progressive framing of a common defence policy in the framework of the CFSP [...] To this end, the Union must have the capacity for autonomous action, backed up by credible military forces, the means to decide to use them, and a readiness to do so, in order to respond to international crisis”.⁴ These words were included in the Cologne European Council Declaration on strengthening the common European policy on security and defence.⁵ In Cologne, the EU countries launched the ESDP to provide the Union with the necessary operational capabilities for the conduct of the full range of conflict prevention and crisis management tasks and to succeed the WEU in its role of defence component of the Common Foreign and Security Policy (CFSP) in the near future.⁶ Intelligence, strategic transport and command and control were the fields where a reinforcement of capabilities was most needed. The strategy to follow was, in the short-term, to pool and share already existing capabilities and available resources, civilian and military, and, in the medium and long-term, to develop the needed capabilities coordinating member states’ efforts and instruments with those of the EU, avoiding unnecessary duplication, and to strengthen the industrial and technological defence base. Little by little, pooling and sharing, coordination, interoperability, standardization of requirements and harmonization of procurement became recurring concepts within the capabilities development strategy. Earth Observation (EO) satellites were called to contribute to the ESDP since the beginning, through the WEU Satellite Centre (now, EU Satellite Centre, EUSC), which represented the only European cooperation effort in the field of military space, and whose structures were incorporated into the EU on 1 January 2002.

Since the beginning, EU crisis management comprised a civilian component and a military component. After an initial resistance from some

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European States, this dual approach became the main feature of the EU response to crisis under the definition of ‘comprehensive approach’. The idea to have both civil and military components came as a result of the new international way to deal with crisis as it was developing during the 1990s, which was one of intensified relations between military and humanitarian actors⁷. Although created as distinct components, efforts were made to develop them in a complementary way and to coordinate the civilian and military bodies and structures towards a more efficient response to crisis, first through the adoption of the concept of Civil Military Co-ordination (CMCO) in 2003, then with the establishment of a civil-military cell (CivMil Cell) within the European Union Military Staff (EUMS) in 2004, and, more recently, through the creation of the Crisis Management and Planning Directorate (CMPD) in 2009, which is a single civilian-military strategic planning structure which also coordinate the development of civilian and military capabilities. The EU has been conducting civilian, military, and civil-military operations since 2003.⁸

3 THE CONSOLIDATION PROCESS OF THE EUROPEAN SPACE INDUSTRY AND THE PROMOTION OF THE TECHNOLOGICAL CONVERGENCE BETWEEN CIVIL AND MILITARY SPACE ACTIVITIES

At economic level, a European Commission communication of 1996, which specifically addressed the industrial space sector, affirmed that “[a]lthough it is not within the Commission’s remit to consider the military aspects of space technology applications, any European strategy should ensure the convergence of civil and military effort in order to avoid duplications and make the best use of the available public funding” and that “space is of central and growing importance for many types of military missions in the fields of telecommunications, navigation, intelligence, early warning and meteorology”.⁹ In a previous communication addressing the defence-related industry, the Commission had stated that “[t]he space industry display[d] a great degree of common ground between military and civil applications”.¹⁰ The promotion of the convergence of civil and military efforts, both at national and European level, was suggested by the Commission as a way to tackle the difficulties that the space sector, and the defence sector in general, was faced with in the middle of the 1990s. The following year, another Commission communication, which addressed the aerospace industry, described the situation of the European industry compared with the American industry.¹¹ With a 58% share of the world aerospace business (against 29% of the EU), the U.S. industry was experiencing a process of consolidation with concentration in three prime

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suppliers, out of more than twenty in 1980. The policy of the federal government to maintain the superiority in aerospace, ensuring focused and effective national investments in the sector and strengthening the public-private partnership, was facilitating the consolidation process. Contrary to the fragmentation of the European aerospace market, the U.S. industry was benefiting greatly from being heavily supported by one single government. In 1995, the NASA's space budget, combined with the Department of Defence's space budget was estimated to be about ten times that of European space budgets. Furthermore, U.S. public procurement was mostly directed at U.S. companies. As regarding research and development (R&D), the U.S. government was investing massively in both civil and military aerospace research and technological development. The U.S. Advanced Research Projects Agency (ARPA) was implementing the Technology Reinvestment Project (TRP), described by the 1995 annual report of the U.S. National Science Foundation (NSF) as "a key DOD conversion program that promoted dual-use technologies through competitively selected projects supported jointly by ARPA and the private sector".¹² In the same year, the U.S. DoD described it as a "program designed to provide affordable leading-edge technology to the Department of Defense (DoD) by leveraging commercial know-how, investments, and markets. The program does this either by finding a new market for existing defense technologies in order to significantly lower the price to DoD, or, for those areas in which commercial technology leads Defense, by providing DoD access to emerging commercial technology".¹³

3.1 The reason behind the adoption of the dual use policies

Among the reasons behind the promotion and adoption of dual use policies, the rise of electronic and information technologies occupies a relevant place¹⁴. Developed by the commercial sector since the 1960s, this new technology caught the attention of the military already during the 1970s and became the linchpin of the so-called Revolution in Military Affairs (RMA). During the first Gulf War, electronics demonstrated its potential as enhancer at all level. As Brzoska put it in 2006, the increased dependence of the American military from these technologies created a shift in public R&D and procurement spending, away from traditional defence companies and towards electronics and computer companies, many of which were not part of the defence industry culture and had had little contact with the military sector before.¹⁵ As a consequence, traditional defence-related companies started to acquire capabilities in electronics and information technology, mostly through acquisitions, and transformed themselves into systems integrators. In

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this way, they linked various industrial sectors, civil and military, to meet the changing public demand.¹⁶ The frontiers between defence and civilian technologies started to blur and so did the boundaries between the defence and civilian markets. In addition, specifically regarding the EO satellites, the launch of the very capable civilian satellite SPOT (Système Probatoire d'Observation de la Terre, developed by France with the participation of Belgium and Sweden) in 1986, whose images were available for sale (thus showing to the world the benefits of the technology and stimulating the proliferation of EO satellites), put an end to the U.S.-Soviet hegemony in the sector and opened the way to the commercial use of EO satellite data. In the same year, the United Nations General Assembly adopted the Principles Relating to Remote Sensing of the Earth from Outer Space with the Resolution 41/65.¹⁷ They recall the principle of freedom of exploration and use of outer space embodied in Art. I of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space and apply it to remote sensing (thus allowing the free overfly of any nations on Earth), on one side, and give to the sensed states the right to access the data concerning the territory under their jurisdiction “on a non-discriminatory basis and on reasonable cost terms” (Principle XII).

The end of the Cold War stimulated both the intertwining of civilian and military industrial sectors and the shift in public spending for R&D even further by lessening secrecy requirements under the pressure of Parliaments' demand for more transparency, and by decreasing defence budgets which ultimately lead to the adoption of a more cost consciousness approach also within the military establishments.¹⁸ Thus, the two characteristics which had kept the military R&D separate from the civilian R&D in the past, such as secrecy requirements and performance orientation, were losing in importance, especially in Europe, but also in the U.S. As regarding the shift in public spending for R&D, in the abovementioned report of 1995, the U.S. NSF acknowledged that “R&D funding within the “national defense” function has continued to decrease in real terms since 1993” and that “the proposed real decrease in defense-related R&D budget authority is offset by a real increase in proposed funding of civilian R&D in 1996”.¹⁹ Private R&D was also stimulated and by the late 1990s it represented already 75% of total R&D against over 60% of public funding during late '50s and early '60s²⁰. As regarding U.S. military share in total R&D, from 25 % in 1981 it reached 16 % in 2003. In the same period, OECD countries other than U.S. experienced a more pronounced decline, from 9.3 to 3.0 of corresponding military share of total R&D, while the growth of privately funded R&D was even larger. In general, with the

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exception of the U.S., both public and private funding of European countries were slowly moving away from traditional defence industry (and also from aerospace) towards new research-intensive sectors and the trend has not changed in the present day.²¹ Data collected by the European Commission in 2010 and released in ‘The 2011 EU Industrial R&D Investment Scoreboard’, for instance, show the Aerospace and defence sector to lag behind those of Pharmaceuticals & biotechnology, Technology hardware and equipment, Automobiles & parts, Software & computer services, Electronic & electrical equipment, and Chemicals to finally position itself at the seventh rank. Today, not only electronics and information technology, but also other technologies developed by the civilian sector, such as nanotechnologies, robotics and biotechnology, have caught the attention of the governments and are further pushing away public spending from traditional defence platforms.

Dual use policies in part represented a response to the new political and economic environment of the post Cold War era and exploited trends that were already in progress, in part contributed to the development of these trends even further. If we consider all those policies that promote and support the development of technologies that, once produced, are subject to dual use export control regimes, they encompass 1) acquisition of commercial technologies for defence purposes to leverage cutting-edge civilian technologies; 2) research and development of dual use technologies (also called ‘dual purpose’ technologies) funded by military and civilian (public and/or commercial) actors to serve both the military and the civilian markets; 3) commercialization of military technologies, to counterbalance cuts in military spending, leveraging on the faster innovation and production cycles of the commercial industry.

By the middle of the 1990s, the U.S. aerospace and defence industry was already represented by only three big so-called ‘primes’ which were “all active across a wide range of aerospace activities in order to balance their risks, increase their ability to cope with market cycles and take full advantage of technology and skill transfers between the different sectors”²². Among the stated reasons for the Boeing-McDonnell Douglas merger in 1996 was the wish to combine the civilian capabilities of the first with the military capabilities of the latter.²³ As a consequence, also European space, aviation and defence industries undertook a process of restructuring and consolidation, also promoted by the European Commission, which has led to the creation of two major primes which today deal with aviation and space, both at civil and military level. The sector is in fact categorized as “Aerospace and defence”.²⁴ Given the present situation, industry has an incentive to pro-

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mote the development of dual use technologies, since it can utilize a single production line to serve both civilian and defence markets and thus cope with market cycles and oscillations in public demand. Procurement of dual use technologies may also represent a viable solution for those countries with limited financial resources for defence and space. In the field of EO, the possibility to procure dual use remote sensing satellites has, in fact, been explored and implemented by some EU countries. The enormous benefits that remote sensing satellites provide to both the military and the civilian sectors (e.g. management of natural resources, disasters prevention and management) combined with the limited financial resources available and with the European Union's adoption of a comprehensive civil-military approach to security and defence matters, represent a drive for exploring new synergies between the two sectors, both at national and European Union level.

3.2 Direct consequences of the adoption of dual use policies: dual use export control regimes

To the convergence of interests between governments and industry corresponds, however, also a 'trade off' between security needs and commercial interests. While the growing phenomenon of the economic globalization, also boosted by the creation of the World Trade Organization (WTO) in 1995, has led to a world where the possibilities for a government to control import/export fluxes, to prevent technological transfers and adopt protectionist measures have decreased, dual use policies usually lead to the opposite direction. In fact, the direct consequence of their adoption is the flourishing of export control regimes for dual use goods and technologies. This, in turn, means that those same goods and technologies are excluded from a free international commercialization, thus limiting the possibilities for a company to counterbalance the costs for the maintenance of the economy of scale. This is especially true in Europe where the limited scale of national markets combined with the absence of a single European market for dual use goods and technologies forces companies to find other markets. As Flamm wrote in 1999, referring specifically to the military aerospace sector, "[t]he industry is driven by economies of scale [...] The higher the volume, the more fixed development cost and production costs can be spread across the entire production run and the greater the learning effect. As a result, with the worldwide defence downsizing, exports have become critical. This is especially true for non-U.S. producers. U.S. companies still enjoy a large domestic market, with U.S. industry accounting for roughly half of the world sales. Everyone else competes for the other half of the market. That put

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non-U.S. producers at a distinct disadvantage - basically they need exports to maintain essential economies of scale, or they die”.²⁵ Considering the present characteristics of the European space industry, included in the aerospace and defence sector, the promotion of dual use cannot be separated from the promotion of an integrated European defence and dual use equipment market, and in fact this is what is happening. The EU is promoting harmonization and standardization as first steps towards the creation of a “genuine European defence equipment market”. However, European cooperation in the field of defence is at the beginning. At the same time, the U.S. decision to include almost all space technologies into the International Trade in Arms Regulation (ITAR), which prohibits retransfer (or re-export) of items enlisted in it, given the dependence of European industries on the supply of several U.S. space technology components, has already put a another heavy limitation on European industry’s ability to export.²⁶ At this regard, progress towards autonomous development of, at least, those space technologies which are considered critical for the “European strategic non-dependence”, is already underway, promoted by the European Commission, the European Space Agency (ESA) and the European Defence Agency (EDA).²⁷

4 DUAL USE OF EUROPEAN EARTH OBSERVATION SATELLITES

4.1 The development of dual use (dual purpose) programmes at national level

As specifically regarding EO satellites missions, both the launch of the ESDP and the restructuring and consolidation of the European aerospace and defence industry have affected the sector. The ESDP was launched with the primary objective to provide the European Union countries with a capacity to take autonomous decisions and actions in the field of security and defence. Indeed, the lack of an independent access to reliable information represented the major limit to European action during the Balkans wars. EU countries recognised that they had entered the age of the information society without the necessary capabilities. While France launched its Helios second generation programme in 1998 with the participation of Spain, Belgium and Greece, the development of autonomous capabilities for space-based EO became a top priority for countries like Germany and Italy. Germany opted for an exclusively military system, the SAR-Lupe programme of five identical small SAR (Synthetic Aperture Radar) satellites operating in X- and S-band. Italy opted for an autonomous system of four small SAR satellites operating in X-band, called COSMO-SkyMed (Constellation of small Satellites for

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Mediterranean basin Observation), but within the framework of a bilateral agreement with France, also to respond to the commitments taken on at the Helsinki European Council in 1999 and contribute to the development of the GMES (Global Monitoring for Environment and Security) initiative in the framework of the European Space Strategy, as stated in the Turin Agreement of 2001.²⁸ The feature which characterises both COSMO-SkyMed and Pléiades (the French optical component of the Optic and Radar Federated Earth Observation (ORFEO) joint programme) is that they are dual use. They were designed with the clear intention to serve both the civilian and the military communities, thus in a way to be able to satisfy the different specific requirements. COSMO-SkyMed and Pléiades reflect the new trends of the post Cold War era in Europe, for they represent the synthesis of all the elements that characterise the two parallel processes that started during the 1990s (the launch of the ESDP with its call for civil-military synergies, 'pooling and sharing' and coordination in the development of capabilities, on one side, and the restructuring and consolidation of the fragmented European space industry into a transnational aerospace and defence industry, with the convergence between civilian and military production lines, on the other). They reveal the abovementioned convergence of interests between governments and industry in the field of space activities which is also affecting the progress of the EU space programmes and of the CSDP.

COSMO-SkyMed (whose completion has occurred in 2010 with the launch of its fourth satellite) is financed by the Italian Space Agency and the Ministry of Defence. It was conceived to meet mainly institutional civil (environment, civil protection, Oil&Gas) and defence objectives (surveillance). Each one of the four satellites is equipped with a radar sensor that can operate under any weather or visibility conditions and with a very high revisit frequency. The overall features of the system allow it to interoperate with other systems and to be used within the context of international agreements. In particular, the system is able to meet the stringent operating requirements of the GMES programme. The responsible for the acquisition, processing and distribution of data for civil applications is e-GEOS, a company created jointly by ASI and Telespazio.

As regarding Pléiades (whose complete name is Pléiades High Resolution Optical Satellite), the decision about its setting up was taken as a result of an in-dept study about the user needs evolution. Sweden (3%), Belgium (4%), Spain (3%) and Austria (1%) also contribute to the programme. The system is developed by CNES. It comprises two optical mini-satellites (the second of which will be launched in December

2012). Spot Image is responsible for the commercialization of Pléiades' products. Previously owned by CNES, Spot Image is now part of EADS Astrium Services - Geo-Information.

More recently, also Spain has launched an initiative for the development of a radar satellite, called PAZ, as a dual use mission designed to meet operational requirements, mainly of a defence and security nature but also with high-resolution civil applications. It is developed and implemented by the Ministry of Defence and the Ministry of Industry, Trade and Tourism and, together with the optical component INGENIO (mainly military), is part of the National Earth Observation Programme (PNOT) launched in 2007. PAZ will be owned and operated by the Spanish government satellite service operator, Hisdesat, which will also be responsible for the commercial exploitation of data. Hisdesat has signed a framework agreement with Astrium Services - Geo-Information for a joint technological development project which aims to establish a 'constellation approach' with PAZ and TerraSAR-X. TerraSAR-X is a Public-Private Partnership (PPP) initiative between DLR and Astrium Services - Geo-Information division.

4.2 The EU and the use of EO satellite programmes for CSDP purposes

While the development of dual use programmes like COSMO-SkyMed and Pléiades represent one of the way in which the "convergence of interests" between governments and industry has been expressed at national and bilateral level, other ways were, and still are, pursued at EU level. First of all, the former WEU Satellite Centre has, since 2002, been supporting the EU CFSP, and thus the CSDP. According to its mission, "[t]he Centre shall, in coherence with the European Security Strategy, support the decision-making of the European Union in the field of the CFSP, in particular of the ESDP, including European Union crisis management operations, by providing [...] products resulting from the analysis of satellite imagery and collateral data, including aerial imagery, and related services".²⁹ It mostly deals with civilian and commercial satellite imagery acquired by both European and non-European satellite operators and data distributors, in order to satisfy needs of its mainly institutional users (European External Action Service, EU member states, the European Commission, third states and the UN). Among the European providers, also the European Commission (EC) and the European Space Agency (ESA), through their Global Monitoring for Environment and Security (GMES, now renamed Copernicus) joint initiative, will provide satellite imagery data to the Centre. The EUSC (also called SatCen) has already been involved in the reflection on the GMES Security Domain and "is perceived as a key GMES European-level stake holder", as

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stated on its website. It also participates to the High Level Space Policy Group, the GMES Advisory Council (GAC), the GMES Programme Office (GPO), and in various projects related to GMES.

In 2003, EU countries decided to make space a strategic priority. The White Paper on space, issued by the EC on 11 November, clearly linked space to ESDP stating that “[s]pace has a security dimension and security has a space dimension”, and also affirming that “[n]o single Member State will ever have the means to develop and support the full range of the necessary capabilities [for security and defence purposes] and better value for money could be achieved by various forms of cooperation at the UE level. Approaches should be developed to ensure dual use of space assets in function of user requirements defined at European level”.³⁰ The European Security Strategy (ESS), issued by the EU the following month, stated that “[i]n contrast to the massive visible threat in the Cold War, none of the new threats is purely military; nor can any be tackled by purely military means”, thus openly blurring the old clear distinction between internal security (civilian) and external defence (military).³¹

The following year, the “European Space Policy: “ESDP and Space””, issued by the Council of the EU on 16 November 2004, enlisted the “several ways for the EU to have access to space assets for ESDP purposes”, following the same imperatives which were guiding the progress of the ESDP (civil-military synergies, pooling and sharing, coordination of national and EU efforts in the development of capabilities).³²

They are: 1) use of existing military assets and of multiple use capacities offered by existing civilian programmes in EU member states; 2) use of already existing assets belonging to commercial companies, if they are able to satisfy integrity requirements and availability of the services requirements also during times of crisis; 3) “to take advantage of multiple use capabilities inherent to existing civilian programmes planned in the framework of the Community programme” (at this regard, the Council of the EU specifies that many of the requirements which fulfil civilian, security and defence needs “are met by identical technological solutions” and that “[s]atellite imagery can be used either to monitor a crises or to assess a humanitarian urgency or an ecological disaster”.³³ It continues stating that ESDP requirements should be considered at an early stage of the programmes and that “[m]ultiple use technologies should be used to the maximum extent in order to avoid additional costs and unnecessary duplications”); 4) finally, when security of access is reasonably guaranteed, and in order to avoid duplication, to take into consideration the possibility to access space assets of third parties through the signing of appropriate agreements.³⁴ As specifically regarding the existing civilian EO satellite programme

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planned in the framework of the EU, Copernicus, it will contribute to the CSDP through its security services addressing border and maritime surveillance and supporting the newly established European External Action Service (EEAS), as already confirmed by the involvement of the EUSC in the programme.

In the field of research and development, the EU Framework Programmes are providing possibilities for the conducting of research and developing of space technologies with potential dual use. The GOP (Group of Personalities) Report of 2004, which drew the guidelines for the development of an EU programme in the field of security research, stated that “technology is very often multi-purpose”.³⁵ Recalling the ESS and its comprehensive civil military approach to security and defence, it continues affirming that “there is an increasing overlap of functions and capabilities required for military and non military security purposes [...] that often allows the use of the same technology for the development of both security and defence applications. Space technologies are a perfect example of this: a decision as to whether global positioning or earth observation systems [...] are to be used for defence and security purposes is primarily political in character, not technological”.³⁶ In 2006, the Parliament and Council Decision establishing the FP7 included “Space” and “Security” among the themes of the “Cooperation” area. Community research in the field of space was also meant to support Community policies, including in the field of security. Regarding the theme “Security” stressed that “security research at Community level will maintain an exclusively civil orientation” and it will address only “civil security”, it also recognized “that there are areas of ‘dual use’ technology”; that “close coordination with the activities of the European Defence Agency will be needed in order to ensure complementarity”; and that “European security research will also encourage the development of multi-purpose technologies in order to maximize the scope for their application”.³⁷

The entry into force of the Lisbon Treaty in 2009 has provided the progress towards the development of synergies between civilian and military actors in the field of space and CSDP with a further substantial stimulus. Art. 42 of the Treaty on European Union (TEU) states that the CSDP “shall provide the Union with an operational capacity drawing on civilian and military assets”.³⁸ Allowing the possibility of enhanced cooperation on matters having military or defence implication, it made possible the inclusion of the multilateral MUSIS (MUltinational Space-based Imaging System) programme (currently promoted by Belgium, France, Germany, Greece, Italy and Poland) within the framework of the EU, in particular as a programme of the European Defence Agency

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(an EU agency established in 2004). Art. 189 of the Treaty on the Functioning of the European Union (TFEU) present space as a tool for the implementation of all EU policies, thus including the CSDP. The same article states that the EU “shall establish any appropriate relations with the European Space Agency (ESA).”³⁹ Given the fact that ESA has been investigating possible synergies between civil and defence space activities since the year 2000, the signing of an Administrative Arrangement between ESA and the European Defence Agency (EDA) on 20 June 2011 can be considered a milestone in the European progress towards an increasing use of space assets for security and defence, labelled with the motto “space for security”.⁴⁰

5 CONCLUSIONS

Political imperatives and financial constraints were at the hart of the adoption of a comprehensive civil military approach for security and defence since the launch of the ESDP in 1999. At the same time, the European space industry has undergone a process of restructuring and consolidation which has led to the creation of the current European aerospace and defence industry, composed by two main transnational companies dealing with both civil and military space activities. The development of dual use EO satellite programmes at national level and the inclusion of security requirements in the Copernicus initiative have represented the synthesis of these two parallel but related processes.

Finally, it is worth mentioning that the dual use concept and all that concerns to the development of synergies between civil and military communities in the field of space-based Earth Observation represent mainly a “Westerner” issue. Emerging space faring nations do not have the same approach to the matter. EO satellites, which usually represent their first approach to space, are simply governmental satellites.⁴¹ Given the fact that EO satellites can hardly be considered arms and in fact are not perceived as such, and given the financial investment necessary to develop and put them in orbit, or to acquire them from other countries, the necessity to strictly distinguish between military and civilian EO satellites does not exist. In those countries, EO satellites are usually used for both civilian and military purpose.

¹ The European Security and Defence Policy (ESDP) was renamed Common Security and Defence Policy (CSDP) following the entry into force of the Lisbon Treaty, in 2009.

² The Final report of Working Group VIII–Defence of the European Convention (Brussels, 16 December 2002) reported the words “limits to action” when referring to

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the Balkans wars (CONV 461/02).

³The “Petersberg Tasks” are those enumerated by the Petersberg Declaration, issued by the WEU at its Council of Ministers in Bonn on 19 June 1992. They encompass humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking. The Amsterdam Treaty was adopted in 1997 and entered into force in 1999. It incorporated the abovementioned tasks in its Art. 17.2. The CFSP had been launched with the Maastricht Treaty, in 1992.

⁴Declaration on European Defence, British–French Summit, Saint-Malo, 4 December 1998.

⁵European Council Declaration on strengthening the Common European policy on security and defence, Annex III to the Presidency Conclusions, Cologne European Council, 3-4 June 1999.

⁶The WEU ceased to exist only in 2011. However, some of its structures, such as the Satellite Centre and the Institute for Strategic Studies, were included into the EU already in 2001. In 2003, with the EU taking over the role of the WEU in the relations with NATO (Berlin Plus Arrangements) another major step was taken towards the complete assimilation of the WEU into EU.

⁷For more information about the debates that flourished during the 1990s on the relations between military forces and humanitarian actors, see Rehse, Peter “*CIMIC: Concepts, Definitions and Practice*”, Institute für Friedensforschung und Sicherheitpolitik (IFSH), University of Hamburg, Heft 136, 2004.

⁸The first ever EU–led crisis management operation took place on 1 January 2003 and consisted of an exclusively civilian police “mission” in Bosnia–Erzegovina (EUPM), which replaced the UN International Police Task Force. After the disagreement on the Berlin Plus Arrangements (see next paragraph) was solved, also the first military “operation” could be launched on 31 March of the same year to take over the NATO mission in the former Yugoslav Republic of Macedonia (FYROM/CONCORDIA). The first EU civil-military “action” was launched in 2005 to support the African Union mission AMIS in Sudan/Darfur.

⁹Communication from the Commission to the Council and the European Parliament, “The European Union and Space: Fostering Applications, Markets and Industrial Competitiveness”, Brussels, 4 December 1996.

¹⁰Communication from the Commission, “The challenges facing the European defence-related industry, a contribution for action at European level”, Brussels, 21 January, 1996.

¹¹Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of Regions, “The European Aerospace Industry Meeting the Global Challenge”, Brussels, 24 September 1997.

¹²Federal R&D Funding by Budget Function: Fiscal Year 1994–1996, U.S. National Science Foundation (NSF), 1995, hereinafter referred to as “NSF (1995)”.

¹³“ARPA Extends Solicitation Release Date for TRP”, News Release, U.S. Department of Defense, 2 February 1995.

¹⁴In this paper, the definition of “dual use policy” covers all those policies that promote the development of technologies which are then defined dual use by export control regimes.

¹⁵Brzoska, Michael, “Trends in Global Military and Civilian Research and Development (R&D) and Their Changing Interface”, in *Proceedings of the International Seminar on Defence Finance and Economics, 13-15 November 2006, New Delhi, India, 2006*.

¹⁶Brzoska (2006).

¹⁷Principles relating to remote sensing of the Earth from space, United Nations General Assembly Resolution 41/65, 3 December 1986 (A/RES/41/65).

¹⁸Brzoska (2006).

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¹⁹ NSF (1995).

²⁰ Brzoska (2006).

²¹ Brzoska (2006).

²² Commission Communication (1997).

²³ Commission Communication (1997).

²⁴ European governments convinced themselves of the necessity to allow their defence-related industry to consolidate at transnational level. The governments of France, Germany, Italy and UK made a concrete step in that direction establishing, in November 1996, the Organisme Conjoint de Coopération en Matière d'Armement (OCCAR) also with the intent to encourage "the creation of transnational and truly integrated industrial prime contractors", as stated in the preamble of the agreement. Almost simultaneously, a Statement designed to facilitate the restructuring of the European aerospace and defence electronic industries was signed in December 1997 by France, Germany and UK, with the support of Italy, Spain and Sweden and was followed, in 1998, first by a Joint Statement involving France, Germany, Italy, UK and supported by Sweden, and then by a Letter of Intent concerning Measures to Facilitate the Restructuring of European Defence Industry, signed by all the six states. Finally, a Letter of Intent Framework Agreement Treaty was signed in July 2000 by the Defence Ministers of France, Germany, Italy, Spain, Sweden and UK, as a formalisation of the commitments taken in 1998, and with the expressed wish to "create the political and legal framework necessary to *facilitate industrial restructuring* in order to promote a more competitive and robust European defence technological and industrial base in the global defence market and to *contribute to the construction of a common European security and defence policy*".

²⁵ Flamm, Kenneth, "The Policy Context for Military Aerospace Offsets", (Panel 2) in Wessner, Charles W (ed.) "*Trends and Challenges in Aerospace Offsets*", Board of Science, Technology and Economic Policy, National Research Council, National Academy Press, Washington, D.C., 1999.

²⁶ Regarding the inclusion of space technologies in the US Munitions List (USML) of the ITAR, see Seebode, W. Elizabeth, "*Integration of Military and Civilian Space Assets: Legal and National Security Implications*", thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements of the LL.M degree, McGill University, Montreal, 2003.

²⁷ "European Non-Dependence on Critical Space Technologies: EC-ESA-EDA List of Urgent Actions for 2009", EC-ESA-EDA Joint Task Force, 6 March 2009. It has been followed by an updated list in 2012.

²⁸ Council Resolution of 16 November 2000 on a European space strategy (2000/C 371/02). The Turin Agreement was signed by France and Italy on 29 January 2001.

²⁹ Council Joint Action of 20 July 2001 on the establishment of a European Union Satellite Centre, as lastly amended by a Council Decision in 2011.

³⁰ White Paper: Space: a new European Frontier for an expanding Union. An action plan for implementing the European Space Policy, 11 November 2003 (COM(2003)673 final).

³¹ A Secure Europe in a Better World: European Security Strategy, 12 December 2003.

³² European Space Policy;: "ESDP and Space" 16 November 2004 (11616/3/04 REV 3), hereinafter referred to as "ESDP and Space (2004)".

³³ ESDP and Space (2004).

³⁴ ESDP and Space (2004).

³⁵ "Research for a Secure Europe", Report of the Group of Personalities in the field of Security Research, European Communities, 2004, hereinafter referred to as "GOP Report (2004)".

³⁶ GOP Report (2004).

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³⁷ Decision No 1982 of the European Parliament and of the Council of 18 December 2006 concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007–2013).

³⁸ Article 42 of the Treaty on the European Union (TEU).

³⁹ Article 189 of the Treaty on the Functioning of the European Union (TFEU).

⁴⁰ The ESA position on the possibility of civil and military synergies was expressed in the Position paper on ESA and the defence sector, Council of the European Space Agency, 1 December 2003.

THE EUROPEAN COURT OF JUSTICE DECIDES ON CARRIER'S LIABILITY FOR CHECKED BAGGAGE

Adeliana Carpineta

On 22 November 2012¹, the European Court of Justice was called to interpret the Montreal Convention, in order to the compensation for the lost of baggage, when several passengers bundle their belongings into a single suitcase.

Background

The air carrier's liability for the loss of or damage to passenger's baggage is regulated by Articles 17 and 22 of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention of 1999).

The Montreal Convention provides that an air carrier must pay compensation to each passenger, limited to 1000 Special Drawing Rights per passenger, in the event of the loss of his baggage during a flight operated by the carrier or while the baggage was in the carrier's charge. The carrier must provide passengers with an identification tag for each piece of checked baggage.

The Convention's aim is to balance the economic interests of air carriers and the protection of consumers, by imposing a system of liability in return for generous provisions and relatively strict liability standards.

Fact

The question at stake concerned a family of four people (a Spanish couple and their two children) boarded a flight from Barcelona to Paris operated by Iberia. The baggage of that family of four had been packed into two suitcases which were lost during the flight and have not been recovered.

Accordingly, the four passengers seek damages from Iberia in the amount of €4,400, corresponding to 4 000 SDR (1 000 SDR per passenger).

CASE LAW COMMENTARY

The Spanish Court hearing the case on appeal asks the Court of Justice whether an air carrier is required to compensate only passengers in receipt of baggage identification tags or whether it must also compensate a passenger who claims compensation for the loss of baggage checked in another passenger's name.

Judgement

The Court ruled in favour of the interpretation of Article 22(2) proffered by the claimants. In its judgment, the Court states that a passenger may claim compensation from an air carrier for the loss of items belonging to him which were in baggage checked in the name of another passenger. Consequently, not only a passenger who has checked in his own baggage in person, but also a passenger whose items were placed in the baggage checked in by another passenger on the same flight, must be compensated.

In fact, in combination with the provisions of Article 17(2), it is evident from the text of the Convention that whilst it was the loss or destruction of a checked piece of baggage that triggered the carrier's liability, the entitlement to compensation fell on each individual passenger. The stipulation in Article 3(3) of the Montreal Convention - according to which carriers are to deliver a baggage identification tag for each piece of checked baggage to the passenger - could not be relied upon to support a contrary interpretation.

Accordingly, in light of the Convention's objectives, if the claimant proves that the lost baggage did in fact contain his belongings, it is possible for a passenger to claim damages for the loss of baggage which had been checked in under another passenger's name. In making its assessment, the national court may take into account the fact that the concerned passengers are members of the same family, that they bought their tickets together or that they checked in at the same time.

¹ Case C-410/11, Pedro Espada Sánchez and Others v Iberia.

RECENT PERSPECTIVES ON CIVIL AVIATION SECURITY AT THE ICAO, EU AND NATIONAL LEVEL

Doriano Ricciutelli

Eleven years after the tragic events of 9/11, the ICAO organized, in Montreal, from the 12th to the 14th of September a High-Level Conference on Civil Aviation Security (HLCAS). The conference was attended by 700 delegates from 132 member states, 23 international organizations and industry stakeholders.

The event was particularly relevant because of the strategic role civil aviation plays in economic development in the world, and even more so taking into consideration the challenges which exist in the field of aviation security.

As was pointed out during the conference, it is a fact that terrorism does not respect borders. It poses a permanent threat to states, persons, structures and to the confidence which public opinion around the world has in air transport.

Of the several aspects which were deemed relevant, and which ended up in the conference's recommendations, one was the crucial importance that national competent authorities adhere to the standards and recommendations of ICAO's annex 17.

At the same time it is necessary to strike a balance with the requirement to ensure smooth and efficient airport activities.

In this respect, initiatives are being implemented to limit the risks to air cargo and mail, by means of the 'secure supply chain system', without neglecting the constant threat posed by LAG explosives. For the latter, technological solutions should be found, in order to gradually ease baggage restrictions.

On the one hand it was deemed of fundamental importance to support the actions already undertaken by ICAO to develop a new generation of processes for screening passengers, whereas, on the other, the Organization should also look into the emerging challenges connected to air traffic management, landside security and cyber threats.

MISCELLANEOUS MATERIAL OF INTEREST

Any action aimed at states and the industry adopting a risk-based approach of aviation security should be encouraged. At the same time, the rules governing the screening of airport staff should be re-examined, given the real threat which insiders might pose.

ICAO's initiative to develop a Risk Context Statement was welcomed. It should offer member states who wish to use this method valid information and should be a adequate risk assessments tool.

A crucial point during the discussions were the principles governing international security cooperation, i.e. adherence to the spirit of cooperation enshrined in bilateral and multilateral agreements in the sector, as well as the recognition of equivalent security measures, and the focus on security outcomes.

The European Commission, together with the Polish presidency of the EU, had already organized a similar conference on the 17th of September 2011¹, during which three basic conclusions had emerged regarding possible threats, i.e. the need for a more risk-based policy, more efficient control, and a proactive international agenda. The latter was interpreted to mean that there is no alternative to deep and committed international cooperation in aviation security.

It is clear therefore, that the ICAO conference offered an extraordinary occasion to further develop themes which had already been treated at European level, in particular with regard to strategies based on cooperation, improved information sharing and a proactive approach.

It is also worth noting that the (HLCAS) recommendation in support of the implementation of the Declaration of Aviation Security adopted at ICAO's 37th Assembly in 2010², will also be discussed during the forthcoming ICAO Council.

Furthermore, there is an agreement between ICAO and the EU to achieve a greater synergy in the field of security within the framework of a Memorandum of Cooperation (MOC) which entered into force this year.³

In the summary of conclusions of both the European and international conferences on security, noteworthy facts are the comprehensive sharing of passenger information, and advanced risk-analysis and technological innovations of the latest generation for screening. The delegates to the conference have asked ICAO to organize a symposium on



the latter in 2014.

Let us now have look at the state of security legislation in the EU, bearing in mind what was said on the matter within ICAO.

In particular the second generation security legislation, i.e. essentially Regulations 300/08, 272/09 and 185/10⁴, which modifies the original legislation which followed 9/11⁵, is in conformity with the conclusions of the Montreal conference.

First and foremost, there exist basic common rules concerning the above-mentioned matters such as screening technology, cooperation between the EU and ICAO and Third countries, risk assessment, and the re-examining of rules for cargo, mail and liquids.

In this context we would like to point out that the Commission has in recent times modified the provisions of the already mentioned Regulation 185/10, introducing innovative ways of dealing with the above-mentioned security matters.

As far as technology is concerned, we refer to Regulation 1147/2011, which allows for body-screening of passengers, and Regulations 711/12 and 1087/11⁶, which respectively deal with, among other issues, the standards for WTMD and EDS screening equipment.

For the delicate matters of cargo and supplies in general, including those coming from Third countries, and for LAG's (liquids, aerosols, gels), rules are laid down in implementing Regulations 173/12 and 859/11⁷.

This goes to show that the EU, in its strategic choices, dedicates a lot of effort to air transport.

The EU is, in fact, determined to pursue the goal, especially ambitious in times of crisis, of improving the state of its security, by continuing to refine and update its legislation and infrastructure.

Finally, it worth mentioning that at national level ENAC (the National Agency for Civil Aviation), has approved the national aviation security programme (second edition), in compliance to the afore-mentioned European Regulations, and that it entered into force on the 19th of September 2012⁸.

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¹ High Level Conference “Protecting Civil Aviation from Terrorism”.

² See: Agenda 5—A37-WP/1P/Revision No. 2 of 13 July 2010—Appendix 2-b2.

³ OJ L 232 of 9 September 2011; OJ L 131 of 8 May 2012; see also: Proposal for a Council Decision COM (2012) 457 final of 14 August 2012.

⁴ Regulation (EC)no. 300/2008 of the European Parliament and of the Council of 11 March 2008; Commission Regulation (EU) No. 185/2010 of 4 March 2010.

⁵ Regulation (EC) No. 2320/2002 of the European Parliament and of the Council of 16 December 2002 and related legislation.

⁶ Commission Implementing Regulation (EU) No. 711/2012 of 3 August 2012; Commission Implementing Regulation (EU) No. 1087/2011 of 27 October 2011.

⁷ Commission Implementing Regulation (EU) No. 173/2012 of 29 February 2012; Commission Implementing Regulation (EU) No. 859/2011 of 25 August 2011.

⁸ Enac (prot. 00011/DG of 19 March 2012 and prot. 0000022/DG of 25 May 2012.

EU APPROVES RESTRUCTURING AID FOR CZECH AIRLINES

Isabella Colucci

On 19 September 2012 the European Commission approved €100 million state aid in favour of the state-owned Czech Airlines stating that the restructuring plan was sufficient to address the airline's financial problems.

In May 2010, the Czech authorities notified their intention to restructure Czech Airlines with public funding. The following month, a 100 million euro loan was converted into capital by the state-owned company Osinek. In February 2011, the Commission opened an in-depth investigation because it had doubts whether the restructuring plan notified by the Czech authorities was suitable to restore the company's viability and to offset the distortions of competition brought about by the aid.

After such investigation, the Commission concluded that the revised restructuring plan, which covered a five-years period, was based on realistic assumptions and demonstrated the potential viability of the Czech airline within a reasonable timeframe. The Commission considered that the proposed capacity reduction, the sale of planes and the disposal of landing slots at European airports would avoid any undue distortion of competition. Moreover, the beneficiary of the restructuring aid had to contribute to the costs of the restructuring. Czech Airlines will do so by selling subsidiaries, an aircraft and other assets. It will also secure a private bank loan for an aircraft lease.

Therefore, the Commission concluded that the measure was in line with the requirements of the 2004 EU Rescue and Restructuring Guidelines.

REVISION OF THE ITALIAN PROVISIONS ON AIRPORT CHARGES

Alessandra Laconi

Decree No. 274 of the 25th July 2012 of the Italian Ministry of Transport and Infrastructures regarding the revision of airport charges, as provided by Decree No. 391 of the 19th November 2011, has been published on the 12th November 2012 on the Italian Official Journal.

Airport charges consist in amounts due for the use of airport facilities. They include charges for the processing of passengers and freight, aircraft landing charges and other charges deriving from the use of airport infrastructures.

The collection of airport charges due by airline companies allows airport managing bodies to recover the costs sustained for the necessary infrastructures, facilities and services in order to adequately maintain the operability of the airport system.

According to Italian law, the quantification of airport charges must be determined for every airport through a decree of the Ministry of Transport and Infrastructures, in concert with the Ministry of Economy. Single decrees of the Ministry of Transport and Infrastructures can anyway update the measure of airport charges.

The above mentioned decrees thus establish the maximum annual variation applicable to airport charges, which has to be fixed referring to the programmed inflation rate.

Other parameters which must be considered are the following:

- the necessary recovery of productivity entrusted to airport managing bodies;
- an adequate return on invested capital;
- the depreciation of the new investments, established by dedicated programme contracts stipulated by ENAC and the different airport managing bodies and ratified by the Ministry of Transport and Infrastructures in concert with the Ministry of Economy.

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Decree No. 274 of the 25th July 2012 of the Italian Ministry of Transport and Infrastructures thus rectifies the measure of airport charges in order to take into due account the variation of the programmed inflation rate (2% instead of 1,5%).

The updated quantification of airport charges is provided for every single airport in Annex 1, which constitutes integral part of the aforementioned Decree.

The examined Decree entered into force starting from the thirtieth day following the date of publication in the Italian Official Journal.

EU LEGISLATIVE OBSERVATORY

Alessandra Laconi

Commission Regulation (EC) No 6/2013 of 8 January 2013 amending Regulation (EC) No 216/2008 of the European Parliament and of the Council on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC

Paragraph 1 of Article 1 of the mentioned Regulation No 6/2013 amends Article 6 of Regulation No 216/2008, rephrasing it as follows: “1. *Products, parts and appliances shall comply with the environmental protection requirements contained in Amendment 10 of Volume I and in Amendment 7 of Volume II of Annex 16 to the Chicago Convention as applicable on 17 November 2011, except for the Appendices to Annex 16*”.

Article 2 provides for the necessary transitional measures, specifying the conditions under which until 31 December 2016 Member States may grant exemptions to the emissions production cut-off requirement established in point (d) of Volume II, Part III, Chapter 2, and paragraph 2.3.2 of Annex 16 to the Chicago Convention.

It must be underlined that such exemptions shall be granted in consultation with the European Aviation Safety Agency (EASA). Furthermore, Regulation No 6/2013 also describes the practical directives for the organizations responsible for manufacturing engines under an exemption granted in accordance with Article 2 as amended. The examined Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Commission Regulation (EC) No 7/2013 of 8 January 2013 amending Regulation (EC) No 748/2012 laying down Implementing Rules for the airworthiness and environmental certification of aircraft and related products, parts and appliances, as well as for the certification of design and production organizations

Commission Regulation (EC) No. 7/2013 amends Regulations No. (EC)

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748/2012, establishing the necessary implementing rules for the airworthiness and environmental certification of aircraft and related products, parts and appliances, as well as for the certification of design and production organizations.

As everybody knows, with Regulation No (EC) 748/2012 the Commission provides for the appropriate measures for the implementation of common essential requirements in the field of airworthiness, taking into account the unavoidable reflection of the state of the art and the best practices, worldwide aircraft experience and scientific and technical progress.

The examined Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

A PROGRESS REPORT ON THE NEW AIRPORT SLOTS REGULATION

Alessandra Laconi

The European Commission examined the agreement reached on the Airport Slots Regulation in the Transport Council of the 29th October 2012; the text of this general approach has been substantially inspired by the original version previously proposed by the Commission.

In the Commission view, the agreement laid down by the Council lacks ambition and needs further time for cautious and in-depth consideration. In fact, it must be considered that the updated version of the Airport Slots Regulation has substantial economic implications for the entire aviation sector, representing a fundamental part of the “airports package”.

In particular, the main goal of the Commission is to maintain that the allocation and use of airport slots in congested airports is effective, guaranteeing and promoting fair competition among operators: airports are more and more busy, causing an unavoidable costs increase to the detriment of consumers.

Undoubtedly, the high level of congestion and the scarcity of slots are likely to influence airlines’ decisions regarding which destinations they serve, and may also have a negative influence on the connection of regions to such airports.

The mentioned problematic consequences deriving from the actual slot allocation system are thus not compatible with the expected increase in demand for air travel.

The European Parliament has recently considered the examined General Approach before sending it back to the Council. On the 12th December 2012 the Parliament voted in support of proposed measures to help a capacity increase of the European airports, reducing delays and improving the quality of services offered to passengers.

It must be underlined that in its vote on the “airport package” European Parliament gave strong support to the Commission’s proposal to improve slot allocation, as well as the transparency of noise decisions. It must be incidentally noted that Parliament also referred the pro-

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posals on ground handling back to the relevant Parliamentary Committee for further consideration.

The Parliament voted to support the Commission's proposals for the introduction of secondary trading slots, but it added additional measures in order to guarantee the real independence of the slot coordinators operating in the EU airports and higher transparency of information regarding slots.

The rules on slots (and noise) will now be considered and analyzed by the Council, which has to try to reach a complete and ambitious agreement.

ANTITRUST: UNITED, LUFTHANSA AND AIR CANADA OFFERED THEIR COMMITMENTS

Alessandra Laconi

As known, Council Regulation (EC) No 1/2003 of 16 December 2002 concerns the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (now Articles 101 and 102 of the TFEU).

In certain cases, the European Commission can adopt a decision requiring:

- that an infringement is brought to an end;
- and that the concerned parties offer commitments in order to meet the concerns expressed in the preliminary assessment phase.

According to Article 9 of the aforementioned Regulation, in such cases the European Commission can decide to declare those commitments binding on the undertakings.

As set forth in Article 27(4) of the Regulation, the Commission shall publish a brief summary of the case and the essential contents of the commitments, so that interested parties can be able to submit their observations within the provided time limit.

In the examined case, on the 19th June 2008 the Star Alliance members Air Canada, United Airlines, Continental Airlines and Lufthansa, announced their intention to form a joint venture in order to cover all air transport services on transatlantic markets for their passengers.

Through the joint venture the parties can thus actively cooperate on key elements of competition like pricing, capacity, schedules and marketing strategies. Therefore, on the 25th July 2008 the Commission opened an informal investigation of the cooperation between the mentioned airlines.

On April 2009, the Commission opened a formal investigation into the cooperation of the listed Star Alliance members. In 2010 Continental and United merged, creating the holding company United Continental Holdings Inc.

With the preliminary assessment of the 10th October 2012, the Commission took the provisional view that the described joint venture agree-

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ment is likely to infringe Article 101 of the TFEU, exposing as a main concern the possible restriction of the competition on the Frankfurt - New York route with regard to premium passengers (time sensitive and flexibility focused passengers).

Moreover, the cooperation could cause relevant anti-competitive effects for these passengers, considering that such customers are quite price inelastic and deprived of buyer power.

The Commission concluded that the previous competition existing between Lufthansa and Continental Airlines was eliminated by the cooperation, and that the lost fair competition cannot be maintained by any existing competitor or by potential new entrants due to material barriers to expansion and entry (as slot constraints, hub and frequency advantages).

The parties are thus likely to have a higher quality of service than their competitors, for which the customers have to pay higher prices, in breach of EU antitrust provisions.

The companies subject to the proceedings have communicated their commitments according to Article 9 of the Regulation EC (No) 1/2003 in order to alleviate the Commission's competition exposed concerns, underlining that it does not constitute an acknowledgement of the alleged infringement of EU competition rules