

Chapter 1

Introduction

The regulation of air transport is a topic of current interest because of the great media impact that has characterized it in recent years and which today drives both international and EU lawmakers to regulate two of its aspects more stringently: safety and efficiency. Up to a few years ago the two aspects seemed to run along two parallel tracks without the risk of dangerously overlapping. Today, however, there has never been greater need for legal instruments to ensure their coexistence with a view to improving the protection of individuals, whether as passengers or consumers, but in any event as users of air transport services.

As those lawmakers follow their guidelines they must keep very much in mind the impact which their choices have on the rights of individuals, which are many and, inevitably, of varying significance; moreover some intersect and some overlap, coming into conflict, making it necessary to sacrifice one right in favour of another. Against this background, the rights of individuals may be classified as ‘primary’ or ‘secondary’ and may also be subdivided into various degrees within the two.

The difference between ‘primary’ and ‘secondary’ rights of individuals and the extent to which they may rely on them are the common thread informing the analysis of a plethora of legislative and case-law data, in search of an acceptable point of balance. In order to do this, I have decided to analyse a few ‘primary’ rights in the air transport sector such as the right to life and to safety, but also to personal dignity and the protection of privacy, and a few ‘secondary’ rights, such as the right to enjoy efficient and competitive service, between which there are points of contact and of conflict, leading the legislature to articulate and complex choices.

At EU level the aim is to find a balance between the will to liberalise as much as possible a market which has long been far from competitive and the need to ensure the highest possible level of passenger protection and safeguard.

In Europe liberalisation was not entered into lightly. It took many years to reach adequate liberalisation measures, which brought together a number of distinct national markets, previously interlinked by bilateral air services agreements, into a single market.

The process of the liberalisation of air transport in Europe was achieved gradually in three successive stages, concluding with the adoption in July 1992 of a 'legislative package' that resulted in a total opening-up of the market.¹

Previously, the preference had been for a policy of conservation and protection of markets through a massive use of bilateral talks which (inevitably) favoured the 'flag carriers', thus precluding other undertakings from access to this market sector.

An essential factor in the liberalisation process was certainly the judgment of the Court of Justice in the *Nouvelles Frontières* Case² of 1986 in which it endorsed the application of the competition rules to air transport. This judgment removed the role of the Member States with respect to approving fares, based on agreements between airlines, and handed it over exclusively to the European Commission in accordance with the EC Treaty. This was one of the first judgments of the Court of Justice which took Article 4(3) TEU in conjunction with Article 101 TFEU in order to establish the obligation for Member States not to impose or even maintain in force legislative or regulatory measures which were counter to the competition rules applicable to undertakings.

The first phase started in 1987 with an initial partial liberalisation of regional flights consisting of a series of provisions to prevent Member States from being able to object to the introduction of new fares and to simplify the approval process by introducing the principle of tacit approval.

The second phase of liberalisation ended in 1990 and allowed European airlines to carry passengers to and from their home countries to the EU Member States (Third and Fourth ICAO Freedoms of the Air). Moreover, Fifth-Freedom flights, i.e. intra-European flights with stop-over in a third country and the right to pick-up and drop-off passengers during the stop-over, were allowed to a greater extent. Fare and capacity restrictions were also abolished.

In 1992 the third package of measures, including the common licensing of carriers and freedom of access to the market, was introduced. By then, all Community carriers were allowed to serve any international route within the European Union and were given full freedom to set fares. In 1997, as part of the third liberalisation package, all Community carriers were given the right of cabotage, i.e. the right to operate domestic routes within the whole of the EU.

All commercial restrictions for airlines flying within the EU such as restrictions on the routes, the number of flights or the setting of fares, have been removed. Prices have fallen drastically but progress has been impressive especially in terms of choice of routes. In fact, liberalisation has given rise to two parallel phenomena: a significant reduction of the role of former national monopolies and the emergence of new air passenger carriers with business and economic outcomes.

A significant consequence of the creation of the EU internal market and associated common rules has been also the gradual development of a more coordinated EU external aviation policy over the past decade, starting with the 'open skies'

¹ For further information regarding the different phases of European liberalisation packages of air transport system, see Chap. 5, Sect. 2.

² Judgment in Joined Cases 209 to 213/84 *Ministère Public v Asjes and Others* [1986] ECR 1425.

judgments of 5 November 2002.³ These judgments heralded the role of the EU by dismantling the traditional arrangement of bilateral agreements between States which had governed international air services until then.

In 2005, after the ‘open sky’ judgments, a Road Map for a common European external aviation policy was developed by the Commission and the Council. This new policy brought existing bilateral agreements under the aegis of EU law, amending the former bilateral agreements between a given third country and a Member State in order to allow any EU carrier to fly from their country to a third country. In addition it allowed the conclusion of aviation agreements with key strategic partners. On this basis the Commission conducted, not without difficulty, negotiations with the United States, which ended with the signature of a general agreement on air transport in March 2007 and with the adoption in April of the same year of Decision 2007/339/EC.⁴

The EU–USA Agreement removed every restriction on the number of aircraft, flights or routes between the United States and the European Union and opened up a number of commercial opportunities to air carriers of the United States and the European Union.

It therefore facilitated competition, particularly between hub carriers. Furthermore it established closer regulatory cooperation between the two parties. As the European Union and the United States aimed at a more effective combined response to major and constantly-evolving challenges such as the threat to aviation security and tackling aviation’s impact on the environment, negotiations for a second phase were opened in May 2008 and concluded with the signature of a second Agreement in June 2010.

This Agreement, built on the substantial benefits of the first Agreement, provides for significant further improvements including additional investment and market access opportunities. It also contributes to strengthening the framework of cooperation in regulatory areas such as safety, security and the environment.

Partial liberalisation of international air transport under the EU–USA Agreement should also allow low-cost airlines to enter the market for intercontinental routes to the benefit of competition and, in particular, consumers.

More generally, the user–consumer has already benefited from the birth of the low-cost transport phenomenon, developed initially in the United States, where it was introduced for the first time in 1971 by Southwest airlines. This was made possible by the liberalisation process which, as stated, opened up the market to

³ Judgment in Cases C-466/98 *Commission v United Kingdom* [2002] ECR I-9427; C-467/98 *Commission v Denmark* [2002] ECR I-9519; C-468/98 *Commission v Sweden* [2002] ECR I-9575; C-469/98 *Commission v Finland* [2002] ECR I-9627; C-471/98 *Commission v Belgium* [2002] ECR I-9681; C-472/98 *Commission v Luxembourg* [2002] ECR I-9741; C-475/98 *Commission v Austria* [2002] ECR I-9797; and C-476/98 *Commission v Germany* [2002] ECR I-9855.

⁴ Decision 2007/339/EC of the Council and the Representatives of the Governments of the Member States of the European Union, meeting within the Council of 25 April 2007 on the signature and provisional application of the Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand, OJEU L 134, 25.5.2007, p. 1.

competition, enabling new operators to have access to intra-Community routes and to be entirely free to decide its strategy. This is an organisational model, based on a system of direct point to point connections, that is different to that of traditional carriers in which the various routes operated by a carrier converge on a single hub (usually a single national hub) into which all traffic flows; it is based on accurately targeting customers rather than on market segmentation. It is also an innovative model in terms of the business strategies adopted, which played a crucial role in shaping the dynamics of how the other carriers did business by changing the way in which air transport services are organised in the European Union.

Despite the success of the low-cost model, there are still significant obstacles to market access for new operators, i.e. the landing and take-off rights that relate to a scheduled time of arrival or departure available or allocated for a given date and at a given airport (slots).

It is clear from the above that European policy has profoundly transformed the air transport industry by creating the conditions for competitiveness. There is also no doubt whatsoever that consumers have been able to benefit from a wider range of choices, both in locations served and in the quality and type of services. Nevertheless as traffic increases so do concerns about safety. So the question remains whether liberalisation has been a positive experience for consumers in terms of security and safety standards.

The increase in air routes within the Union has indeed led to a reduction in the price of air travel but at the same time also to an increase in passenger dissatisfaction with the service offered by many operators. It is important that passengers fully understand their rights when problems arise with flights; to this end, therefore, the Commission adopted the Charter of Passenger Rights. The improvement of transport safety in the aviation sector is one of the main objectives of the EU's common transport policy and a safe journey is the most important right for any passenger.

These matters will be amply dealt with below. But it should be clear from the foregoing that the air transport sector more than any other requires a 'reading across' of different, but closely linked material. It would therefore be useful to study carefully some of the aspects bridging recent EU laws that are moving in this direction, and examine in particular: (a) the twin concepts of passenger safety and security; (b) air carrier liability in the case of accidents; (c) the 'right to privacy' of passenger data; (d) the protection of 'secondary' rights of passengers—consumers.

The search for the right balance between the above-mentioned rights appears by now totally shared by EU lawmakers. It is not a coincidence that recently the European Union decided to treat these aspects together, considering them all essential to ensure an effective protection of passengers, as a particular subset of users—consumers. The intention was to fill a gap in the legislation, where the only international source had long been just the Warsaw Convention of 1929 for the Unification of Certain Rules relating to International Carriage by Air⁵ which, together with its

⁵ The Convention signed in Warsaw on 12 October 1929 was subsequently amended by the following legislative instruments: The Hague Protocol to the Warsaw Convention 1955 (Protocol

implementing provisions, with appropriate modifications, fed into the Montreal Convention of 1999, which shared the same title.⁶

The EU legislature's concern for the users—consumers clearly emerges from the Commission Communication on the protection of air passengers in the EU,⁷ where a campaign to make passengers aware of their rights already established by the EU was launched beginning with the publication of a Charter of Passenger Rights. Moreover, the Green Paper on services of general interest of 2003⁸ followed in the wake of the Treaty of Amsterdam that, after the amendments introduced by Article 153 of the EC Treaty (now Articles 12 and 169 of the Treaty on the Functioning of the European Union), gave consumer protection new priority. The principles laid down in that provision were then taken up in the White paper 'European transport policy for 2010' which put users—consumers at the heart of its third part.⁹

The growing concern to protect passengers—users, as the weaker partners in contracts of carriage, was again made clear in the Commission White Paper, Roadmap to a Single European Transport Area of 2011, where the EU institution places amongst its priorities that of 'develop[ing] a uniform interpretation of EU law on passenger rights and a harmonised and effective enforcement, to ensure both a level

to amend the Convention for the Unification of certain rules relating to International Carriage by Air), signed at The Hague on 28 September 1955; Guadalajara Convention 1961 (Convention Supplementary to the Warsaw Convention for the Unification of certain rules relating to International Carriage by Air Performed by a Person other than the Contracting Carrier), signed in Guadalajara on 18 September 1961; Guatemala City Protocol 1971 (Protocol to amend the Convention for the Unification of certain rules relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the Protocol done at The Hague on 28 September 1955), signed at Guatemala City, on 8 March 1971; Protocol of Montreal No. 1 of 1975 (Additional Protocol No. 1 to amend Convention for the Unification of certain rules relating to International Carriage by Air signed at Warsaw on 12 October 1929), signed at Montreal, on 25 September 1975; Montreal Additional Protocol No. 2 of 1975 (Additional Protocol No. 2 to amend Convention for the Unification of certain rules relating to International Carriage by Air signed at Warsaw on 12 October 1929, as amended by the Protocol done at The Hague on 28 September 1955), signed at Montreal, on 25 September 1975; Montreal Additional Protocol No. 3 of 1975 (Additional Protocol No. 3 to amend Convention for the Unification of certain rules relating to International Carriage by Air signed at Warsaw on 12 October 1929, as amended by the Protocol done at the Hague on 28 September 1955 and at Guatemala City on 8 March 1971), signed at Montreal, on 25 September 1975; Montreal Additional Protocol No. 4 of 1975 (Additional Protocol No. 4 to amend Convention for the Unification of certain rules relating to International Carriage by Air signed at Warsaw on 12 October 1929, as amended by the Protocol done at the Hague on 28 September 1955) signed at Montreal on 25 September 1975.

⁶ The Montreal Convention was absorbed in EU law by Council Decision 2001/539/CE of 5 April 2001, on the conclusion by the European Community of the Convention for the Unification of certain rules for International Carriage by Air (the Montreal Convention), OJEU L 194, 18.7.2001, p. 38.

⁷ Communication from the Commission to the European Parliament and the Council Protection of air passengers in the European Union, COM(2000)365 final.

⁸ Green paper on services of general interest, COM(2003) 270.

⁹ White paper—'European transport policy for 2010: time to decide', COM(2001) 370.

playing field for the industry and a European standard of protection for the citizens'.¹⁰

The central role of EU citizens, who are the passengers in question when they travel, is today more than ever a crucial matter and stands as a measure of European integration more telling than any other. Proof of this is that 2013 was nominated 'European Year of Citizens' on the occasion of the 20th anniversary of the institution of European citizenship (which was established with the Maastricht Treaty). It is an initiative aiming to increase the awareness of European citizens of the rights this status grants them, especially the newest rights, by means of an awareness-raising campaign, thus reinforcing their sense of belonging to and identifying with the Union. Amongst the latter rights are those of passengers who, when travelling, exercise their right to move and take up residence anywhere in the Union, provided for under Article 21 of the Treaty on the Functioning of the Union and Article 45 of the Charter of Fundamental Rights.

Despite the fact that much has been done, grey areas still remain in the current legislation, reflecting some of its teething problems. As a result of the action of the Court of Justice in its role of ensuring that in the application of the Treaties the law is applied and of providing judicial control by ruling on the validity and legality of legislation, to which this work will devote much attention, the Commission, in March 2013, launched a process of revision of the legislation on the 'secondary' rights of passengers.¹¹

As regards 'primary' rights, the European Union, following in the wake of international legislation, has equipped itself with a body of rules with the purpose of ensuring that passenger safety is not undermined by the profit-seeking motive driving air carriers to put their interests before those of the individual, nor put at risk by unlawful interference.

Regarding this second aspect, it is nevertheless necessary that any actions taken, especially the conclusion of recent international agreements with third countries, do not entail an unreasonable reduction of other primary rights, such as the right to privacy and, more generally, to human dignity that are now more strongly protected under the Charter of Fundamental Rights of the European Union.

The aim of the author, essentially, is to point up the inevitable overlaps and interferences between the different levels of protection of passengers, certainly as passengers—consumers, but first and foremost as individuals and, in so far as possible, to identify a solution.

¹⁰ White Paper, Roadmap to a Single European Transport Area—Towards a competitive and resource efficient transport system, of 28 March 2011, COM(2011) 144 final.

¹¹ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air, COM(2013) 130 final of 13 March 2013. The Proposal will be amply discussed.

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