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Fitness Check - Internal Aviation Market  
Report on the suitability of economic regulation of the European air transport  
market and of selected ancillary services

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**COMMISSION STAFF WORKING DOCUMENT**

**Fitness Check - Internal Aviation Market**

*Report on the suitability of economic regulation of the European air transport market and of selected ancillary services*

**COMMISSION STAFF WORKING DOCUMENT**

**Fitness Check - Internal Aviation Market**

*Report on the suitability of economic regulation of the European air transport market and of selected ancillary services*

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## Executive Summary

In the context of its "better regulation" agenda, the European Commission initiated the exercise of "fitness checks". These exercises are to assess whether the economic regulatory framework in a policy sector was fit for purpose and to identify administrative burdens, overlaps but also gaps and inconsistencies. The findings will feed into programming of upcoming Commission services work. DG MOVE chose economic regulation of air transport services and distribution services for its Fitness Check. The evaluation exercise started in January 2011 with a Fitness Check roadmap and involved five studies by an external consultant and four meetings with stakeholders with wide representation of all industry interests and of regulators.

The Aviation Fitness Check covered the following issues:

- market access (leasing, non-scheduled services and restrictions of traffic rights),
- computerised reservation systems,
- insurance requirements,
- price transparency,
- assistance to passengers affected by airline insolvency.

The broad conclusion of the Fitness Check is that the regulatory framework in place continues to serve the aims it was designed for. While a number of follow-up actions have been identified, overall there is no demand or need for new regulation at this stage. There is no call for de-regulation.

The Fitness Check identified issues where more detailed guidance would be useful, where enforcement should be continued and strengthened and where further coordination, in particular between national enforcement authorities, would be beneficial. The exercise also helped to detect a number of new industry developments which will require the Commission services' monitoring.

The Fitness Check confirmed that the objectives of Regulation (EC) 1008/2008 on common rules for the operation of air services in the EU to consolidate the existing liberalisation legislation and to provide some clarifications have been achieved. Stakeholders consider current rules as adequate and well suited to prevailing market circumstances. Issues that have been identified as problematic are either outside of the scope of the Regulation (access of non-scheduled services to extra-EU markets), require some technical guidance (leasing, restriction of traffic rights), necessitate better dissemination of best practices among enforcement bodies (public service obligations, price transparency, passenger protection in case of insolvency) or merely require continuing monitoring and enforcement. At this stage, no legislative changes are warranted.

Regulation (EC) 80/2009 on a Code of Conduct for Computerised Reservation System is perceived as necessary and adequate to tackle possible distortions that cannot be addressed through competition policy enforcement. The Commission services will continue carrying out their enforcement mandate under the current rules and no legislative changes are necessary at this stage.

Harmonisation brought about by Regulation (EC) 785/2004 on insurance requirements for air carriers and aircraft operators is perceived as useful. At this stage no legislative change is necessary. The Commission services should nonetheless continue to monitor new market developments (remotely piloted aircraft systems in particular).

Rules on price transparency are considered as crucial to safeguard fair competition between airlines and to ensure that passengers are not misled by unfair promotional practices. No legislative changes are envisaged at this juncture, but policy action includes guidance on best practices and a voluntary agreement amongst airlines abolishing excessive payment fees.

With regard to the issue of passenger protection in case of airline bankruptcies, the Commission services will be closely following actions undertaken by Member States and voluntary agreements adopted by the industry. The Fitness Check concluded that, at this stage, no legislative action is required. The Commission engaged to further action in a March 2013 Communication on passenger protection in the event of bankruptcy.

Finally, the Fitness Check updated data on employment and information on working conditions in the aviation sector.

The Fitness Check did not uncover any significant burden on Member States' administration or on companies having to comply with the legislation at hand, in terms of enforcement cost or cost of compliance.

## 1. Introduction

A "Fitness Check" is a comprehensive policy evaluation assessing whether the regulatory framework for a policy sector is fit for purpose. Its aim is to identify excessive regulatory burdens, overlaps, gaps, inconsistencies and/or obsolete measures which may have appeared over time, and to help to identify the cumulative impact of legislation. Its findings should serve as a basis for drawing policy conclusions on the future of the relevant regulatory framework.<sup>1</sup>

In 2010, the European Commission has launched four pilot Fitness Checks in policy areas relating to environment, transport, employment/social policy and industrial policy.<sup>2</sup>

DG Mobility and Transport chose the aviation sector for its Fitness Check. The aviation market is a fast-moving market and an evaluation of the effects of the applicable regulatory framework seemed therefore particularly useful.

Liberalisation and the creation of an internal market enabled the aviation sector to enter into a new phase of its development, with enormous benefits and some challenges. European policy has profoundly transformed the air transport industry by creating the conditions for competitiveness and ensuring both quality of service and the highest level of safety. Consumers, airlines, airports and providers of related services have all benefited as this policy has led to more activity, new routes and airports, greater choice, low prices and an increased overall quality of service. The liberalisation process was achieved through regulation, and in particular completed by the so-called "third package" of 1992. This liberalisation legislation brought benefits without creating significant administrative or regulatory costs to market operators.

The regulatory framework in the aviation sector comprises a large policy area, but the Commission services decided to focus on economic regulation as a means of constructing an internal market in the sector and as a tool to ensure that consumers fully reap the benefits of the internal market. Issues concerning air traffic management, environmental protection, Single European Sky and safety and security issues as well as the external dimension of the EU aviation policy have not been covered by this Fitness Check. Other policy areas which have an effect on the aviation sector (such as competition policy or consumer protection policy) are referred to where relevant<sup>3</sup>.

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<sup>1</sup> Definition of Fitness Checks:

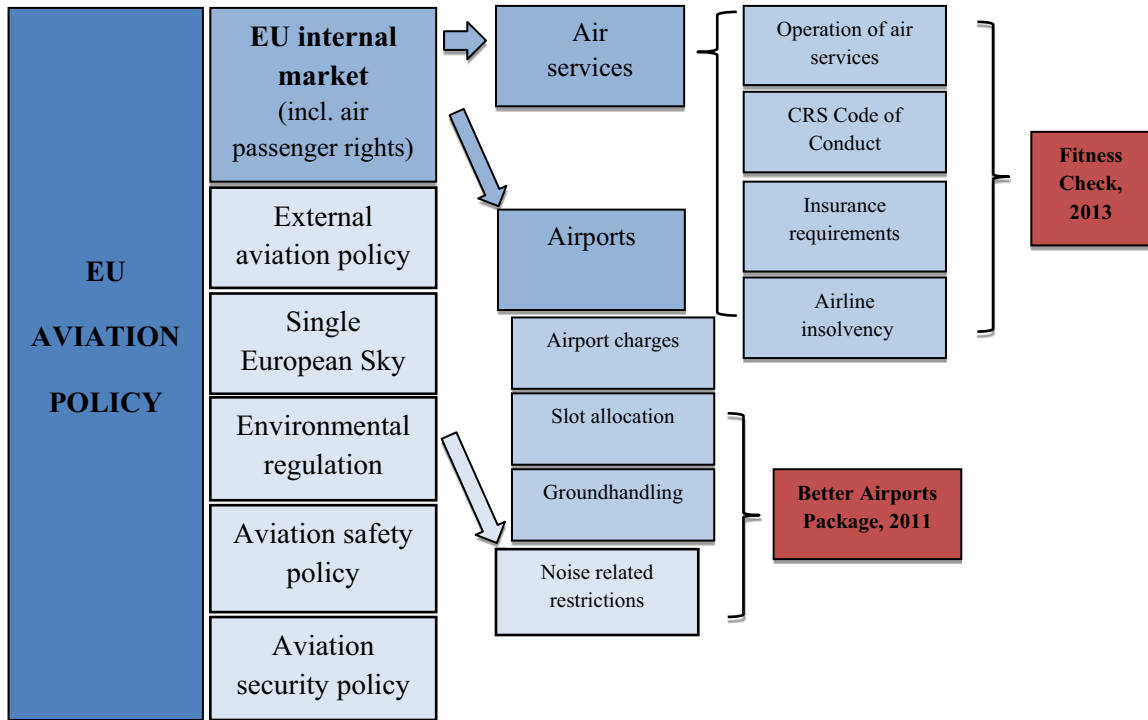
[http://ec.europa.eu/dgs/secretariat\\_general/evaluation/docs/fitness\\_checks\\_2012\\_en.pdf](http://ec.europa.eu/dgs/secretariat_general/evaluation/docs/fitness_checks_2012_en.pdf)

<sup>2</sup> For more information see: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Smart Regulation in the European Union , COM(2010) 543final, 8.10.2010

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0543:FIN:EN:PDF>

<sup>3</sup> See Chapter 3 of this Report.

**Figure 1: Aviation Policy of the European Union**



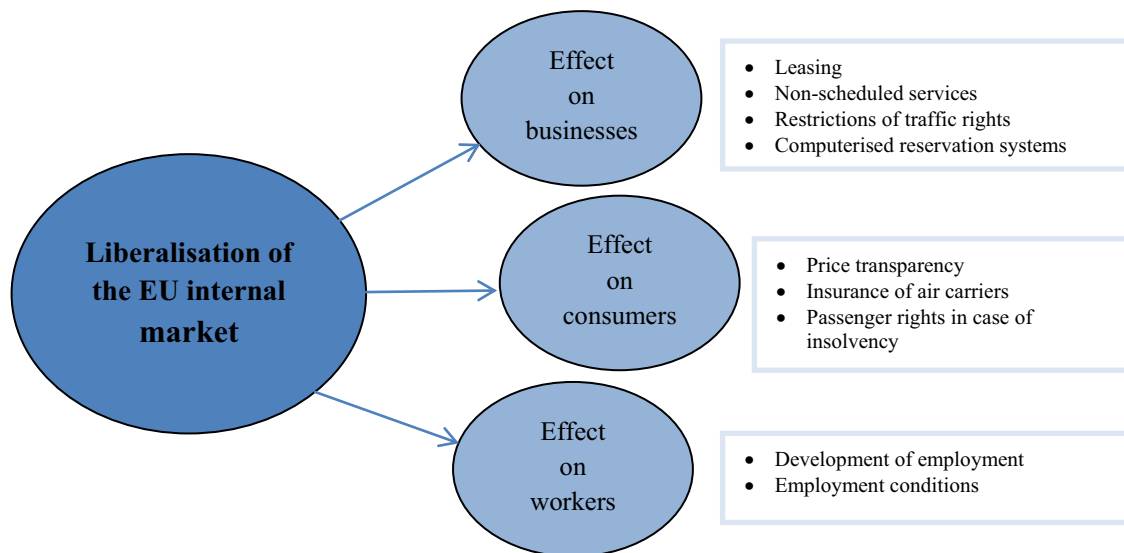
The Fitness Check focused on the air services sector and some related services (such as distribution of air transport services) and identified three themes where a detailed scrutiny was deemed to be warranted<sup>4</sup>:

(1) Market access and fair competition: the rules on leasing and the treatment of non-scheduled services, existing restrictions on the exercise of traffic rights and rules pertaining to competition in the market for distribution of air transport services (computerised reservation systems).

(2) Consumer protection in relation to price transparency, insurance and protection of passengers in case of insolvency.

(3) Employment and working conditions: the impact of liberalisation and ensuing market developments.

**Figure 2: Issues identified for the Fitness Check**



The Fitness Check covered certain provisions of three central pieces of legislation for the internal aviation market:

- Regulation (EC) 1008/2008 on common rules for the operation of air services in the EU<sup>5</sup> ("Air Services Regulation" or "Regulation 1008/2008"),
- Regulation (EC) 80/2009 on a Code of Conduct for Computerised Reservation System<sup>6</sup> ("CRS code" or "Code of Conduct" or "Regulation 80/2009"),

<sup>4</sup> Roadmap: Fitness check – internal aviation market, 18.01.2011, p. 3-5.

<sup>5</sup> Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast), OJ L293 of 31.10.2008, p. 3-20.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:293:0003:0020:EN:PDF>

<sup>6</sup> Regulation (EC) No 80/2009 of the European Parliament and of the Council of 14 January 2009 on a Code of Conduct for computerised reservation systems and repealing Council Regulation (EEC) No 2299/89, OJ L35 of 4.2.2009, p. 47-55.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:035:0047:0055:EN:PDF>

- Regulation (EC) 785/2004 on insurance requirements for air carriers and aircraft operators<sup>7</sup>, and ("Insurance Regulation" or "Regulation 785/2004").

Economic regulation of the aviation sector and of consumer-protection related matters is not limited to these regulations. The Fitness Check is not an exhaustive review and considers only a selected part of EU sectoral legislation applicable to aviation (see figure 1 and Chapter 3).

First, it needs to be noted that the Fitness Check did not look at all aspects of regulation of market access. This is because the Air Services Regulation and its provisions on market access were analysed and validated in the context of the recast of the "third package" by the impact assessment (2006) and there was therefore no need to proceed to a broad evaluation of all provisions of the Air Services Regulation.<sup>8</sup> Instead, based on internal expertise and experience of the Commission services, specific issues that might require corrections were selected for an in-depth study and a public consultation. These issues were leasing of aircraft, treatment of non-scheduled services and legitimate restrictions to market access (public service obligation, traffic distribution, emergency measures, and environmental measures) and price transparency.

Furthermore, other issues related to the EU internal aviation market have not been covered because they are subject to other on-going regulatory actions. This is the case of regulation of the functioning of airports: regulation of slot allocation, of groundhandling services and of environmental operating restrictions; these have been subject to revision under the so-called Better Airports package<sup>9</sup>. The regulatory field concerning passenger rights in case of delays and cancellations has also been subject to a separate evaluation and legislative action<sup>10</sup>.

Also, at the time of the initiation of the Fitness Check, regulation of airport charges was too recent to draw any meaningful observations but a report from the Commission on its functioning is due in 2013<sup>11</sup>.

Finally, with regard to the evaluation of liberalisation effects on employees and working conditions, the Commission's action has consisted in gathering and updating data on

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<sup>7</sup> Regulation (EC) No 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators, OJ L138 of 30.4.2008, p. 1-6.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:138:0001:0006:EN:PDF>

<sup>8</sup> For more information see: Commission Staff Working Document – Impact Assessment: Proposal for a regulation of the European Parliament and of the Council on common rules for the operation of air services in the European Community(recast), SEC(2006) 943, 18.7.2006.

<sup>9</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Airport policy in the European Union - addressing capacity and quality to promote growth, connectivity and sustainable mobility, COM (2011) 823.

[http://ec.europa.eu/transport/modes/air/airports/index\\_en.htm](http://ec.europa.eu/transport/modes/air/airports/index_en.htm)

<sup>10</sup> Communication from the Commission to the European Parliament and the Council – A European vision for passengers: Communication on passenger rights in all transport modes, COM (2011) 898 final. 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, 13 March 2013, COM(2013) 130 final.

<sup>11</sup> Directive 2009/12/EC of the European Parliament and of the Council on airport charges dates from 11 March 2009 and had to be transposed by 15 March 2011. According to Article 12, the Commission shall submit, in 2013, a report on the application of this Directive.

employment and working conditions in the aviation sector. This Fitness Check did not evaluate the social legislation applicable to the aviation sector.

The Fitness Check exercise has a double-purpose. On the one hand, it was a major fact-finding exercise whereby the Commission services gathered, organised, confirmed known information about the sector or verified their hypotheses about the developments in the sector. This aspect is extremely important considering the fast market developments in the sector in terms of commercial practices, technology, business organisation and innovation. On the other hand, the Fitness Check gathered feedback on the existing legislation and evaluated the functioning, accuracy and "fitness" of the existing rules. The Fitness Check examined whether these regulations continue to be proportionate tools, fit for the purpose they were designed for.

A number of methodological limitations should be taken into account in examining the Fitness Check. Given that the three legal acts deal with separate issues, the scope of insights concerning their interaction was limited.

The Commission services did not examine the impact of the legislation on small and medium size enterprises specifically. This is because this legislation has effects mostly on airlines, on providers of distribution services (computer reservation systems), and, indirectly and to a limited extent, on airports, which all tend to be large companies. It cannot be excluded that some small and medium size enterprises might be impacted by this regulation (e.g. small travel agents working with computer reservation systems) and the wide public consultation that the Commission services conducted would have made it possible to hear their specific concerns. However, no such concerns specific for small and medium size enterprises have been raised.

The explanations of the scope and coverage of this pilot exercise indicate a project design very specific to the current regulatory cycle in this sector, excluding regulatory aspects subject to earlier/recent reviews or proposals for regulatory amendment.

The Fitness Check reflects the state of play to the end of 2012. Stakeholders' consultations were done mainly in 2011 and in the spring of 2012 and external consultants completed their reports in the course of 2012.

A wide spectrum of stakeholders representing all possible interests in each area was consulted. Combined with the Commission staff expertise, and that of external consultants, the process was designed to ensure objectivity of the findings.

The broad conclusion of the Fitness Check is that the regulatory framework in place continues to serve the aims it was designed for. While a number of follow-up actions have been identified, overall there is no demand or need for new regulation at this stage. There is no call for de-regulation.

Despite these generally positive findings in terms of appropriateness, efficiency and *raison d'être* of EU legislation, the Fitness Check identified issues where more detailed guidance would be useful, where enforcement should be continued and strengthened and where further coordination, in particular between national enforcement authorities, would be beneficial. The exercise also helped to detect a number of new industry developments, which will require the Commission services' monitoring. The Fitness Check will feed into programming of upcoming Commission services work.

The Fitness Check did not uncover any significant burden on Member States' administration or on companies having to comply with the legislation at hand, in terms of enforcement cost or cost of compliance.

The document is structured as follows. After this introduction, Part 2 provides information on the characteristics of the aviation sector from the completion of the liberalisation in 1992 to this date. It also explains how the internal market for aviation services has been built and what its main challenges are today. Part 3 explains the methodology used in the Fitness Check exercise as well as defines and justifies the scope of the Fitness Check. Part 4 provides an overview of the internal market legislation that has been subjected to this Fitness Check.

Parts 5, 6 and 7 describe the state of play and explain the findings of the Fitness Check (stakeholders and Member States' views and conclusions), following the sequence of its three main themes: market access and fair competition, consumer protection and employment and working conditions, respectively.

## 2. Aviation industry in an internal market

### 2.1 Building the internal market for aviation

The growth of the EU aviation market in the last decades is largely due to the creation of a single market for aviation in the 1990s. Air transport had been traditionally a highly regulated industry, dominated by national flag carriers and state-owned airports. Three Council Regulations known as the "third package"<sup>12</sup> created a unified air transport market. Any legal or physical person, irrespective of its nationality, can set up an air carrier anywhere within the single EU market and operate routes wherever opportunities might exist within the single market. Certified and licensed air carriers are entitled to operate without having to be designated by a government. The internal market has removed all commercial restrictions for EU airlines operating air services within the EU, such as restrictions on the routes, the number of flights or the setting of fares. By imposing a public service obligation, Member States can maintain certain routes, which are not economically viable, but have to be served for reasons of territorial cohesion.

As a result of an intensified competition, prices tended to decrease, in particular on the most popular routes. But it is especially in terms of choice of routes that progress is impressive. European policy has profoundly transformed the air transport industry by creating the conditions for competitiveness and ensuring both quality of service and the highest level of safety. Consumers, airlines, airports and employees have all benefited as this policy has led to more activity, new routes and airports, greater choice, low prices and an increased overall quality of service. The following section shows some quantitative indicators of the significance and growth of the sector.

### 2.2. The internal market for aviation in figures

Aviation plays a fundamental role in the European economy both for EU citizens and industry. The sector makes a vital contribution to economic growth, employment, tourism, people-to-people and business contacts. Aviation is key for regional and social cohesion within the EU and for providing access to global markets, including emerging economies, for European businesses.<sup>13</sup> Aviation supports 698,200<sup>14</sup> direct and some 1.6 million indirect jobs<sup>15</sup>.

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<sup>12</sup> Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers OJ L240, 24.8.1992, p. 1–7. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1992:240:0001:0007:EN:PDF>

Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, OJ L240, 24.8.1992, p. 8–14.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1992:240:0008:0014:EN:PDF>

Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services, OJ L240, 24.8.1992, p. 15–17.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1992:240:0015:0017:EN:PDF>

<sup>13</sup> For more information, see White Paper: Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system, COM (2011) 144 final, 28.3.2011.

<sup>14</sup> 1,090,200 direct jobs if the aircraft manufacturing sector and regulators are included.

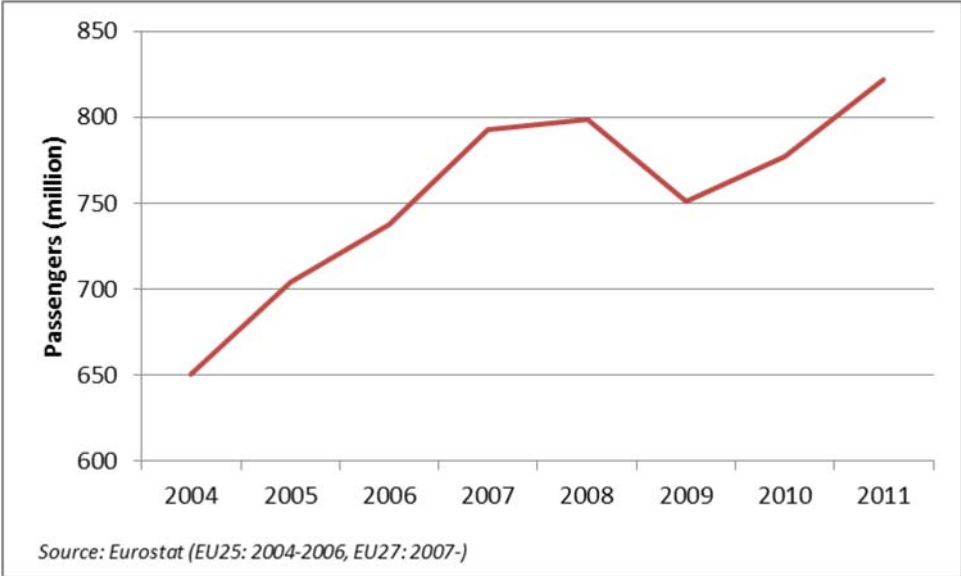
<sup>15</sup> Study by Steer Davies Gleave, for details see section 7.2.1. In total, the study speaks of 2,690,200 jobs (direct, including aircraft manufacturing and regulators, and indirect). A recent industry report speaks of 5.1 million jobs, covering direct, indirect and induced effects, a geographical area of larger Europe (EU

Airlines carry about 40% (by value) of Europe's exports and imports, and transport 822 million passengers per year to and from Europe.<sup>16</sup> EU passenger traffic by air has grown at an average rate of 3,4% between 2004 and 2011. Within this period, the industry reflected with economic recession by a negative annual average growth of -0.7% during 2008-2010, while outside of this period it enjoyed over 6% average annual growth.

The size and characteristics of the sector can be illustrated by various indicators: number of passengers, size of cargo, number of routes (density of the network), seasonality of routes (business cycle fluctuations) or number of service providers.

*Passenger transport - size in terms of passengers*

**Figure 3: Passenger traffic in the European Union (in millions), 2004-2011**



<sup>16</sup> 27 and beyond , in particular Russia, Ukraine and Turkey) and a large sector definition. "Aviation: Benefits Beyond Borders" by Oxford Economics for ATAG, March 2012. Eurostat, EU27, 2011.

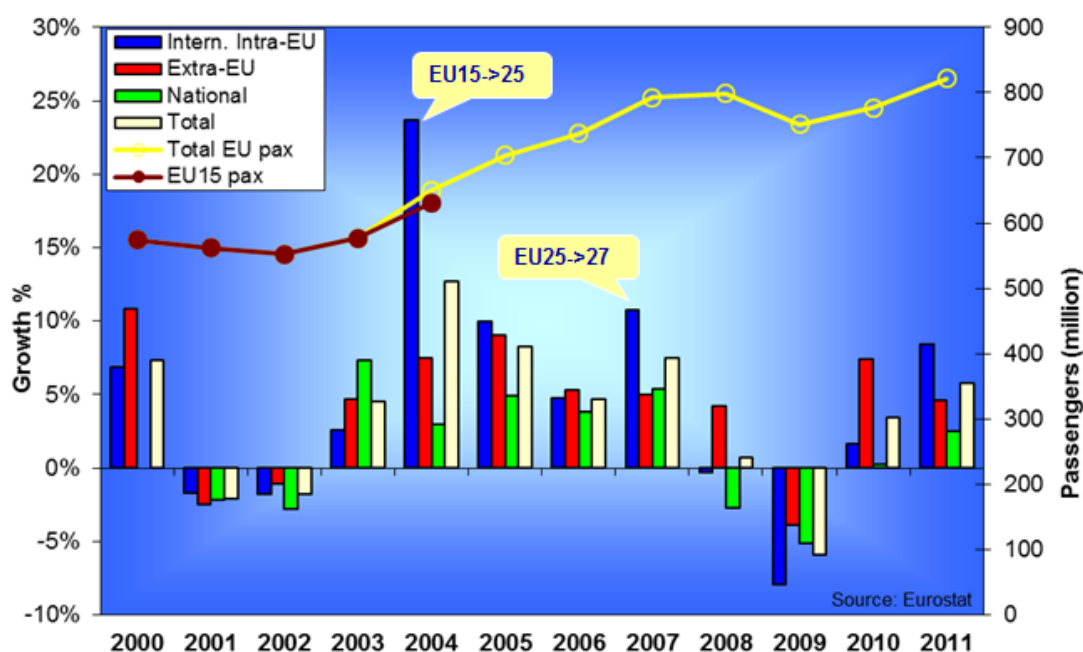
**Table 1: Evolution of passenger traffic in the European Union, 2004-2011**

Year	International Intra-EU	Change %	Extra-EU	Change %	National	Change %	Total EU passengers (millions)	EU
2004	271,182,274	-	224,792,246	-	153,265,711	-	649	25
2005	298,334,182	10.0%	245,041,677	9.0%	160,783,619	4.9%	704	25
2006	312,467,326	4.7%	257,943,080	5.3%	166,872,790	3.8%	737	25
2007	346,064,769	10.8%	270,838,789	5.0%	175,796,890	5.3%	793	27
2008	345,010,171	-0.3%	282,346,697	4.2%	170,973,717	-2.7%	798	27
2009	317,502,696	-8.0%	271,325,950	-3.9%	162,231,774	-5.1%	751	27
2010	322,816,790	1.7%	291,425,911	7.4%	162,609,049	0.2%	777	27
2011	350,097,934	8.5%	304,763,916	4.6%	166,711,949	2.5%	822	27

Source: Eurostat, EU25: 2003-2006, EU27: 2007-2011

The following graph (Figure 4) shows the impact of the 2004 and 2007 enlargement on the growth of the sector. It also shows that the EU15 market has already seen a temporary shrinkage in the not so distant past with a drop in 2001 and 2002.

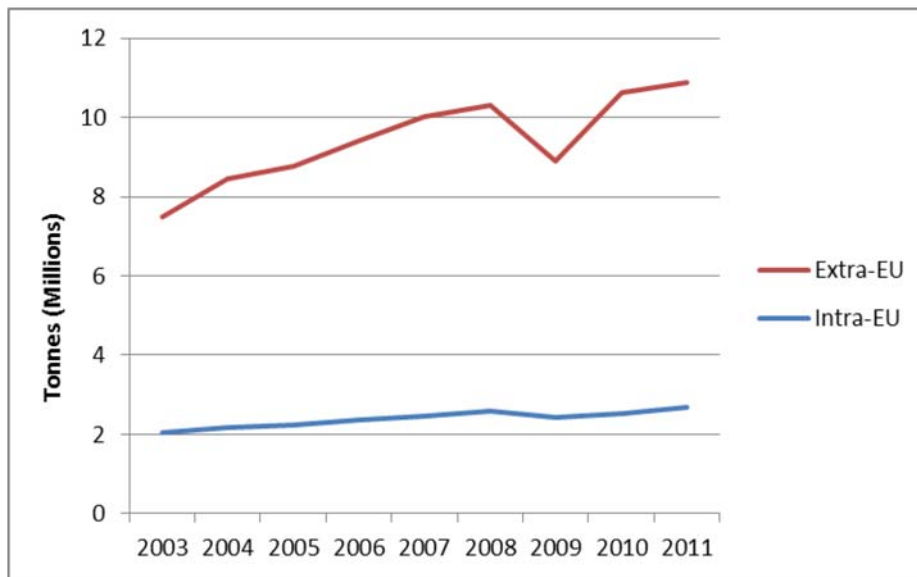
**Figure 4: Growth of passenger traffic in the EU - Impact of enlargement 2004 and 2007 on the EU internal aviation market**



*Cargo transport – size in terms of tons of cargo transported*

In terms of cargo transport, the same trend can be observed, with a steady growth between 2004-2008, then in 2009 a shrinkage to 2005 levels (in particular for extra-EU traffic) followed by a boost exceeding pre-crisis levels as of 2010.

**Figure 5: Volume of cargo (freight), both intra-EU and extra-EU, 2003-2011**



Source: Eurostat, EU25: 2003-2006, EU27: 2007-2011

**Table 2: Volume of cargo (freight), both intra-EU and extra-EU, 2003-2011**

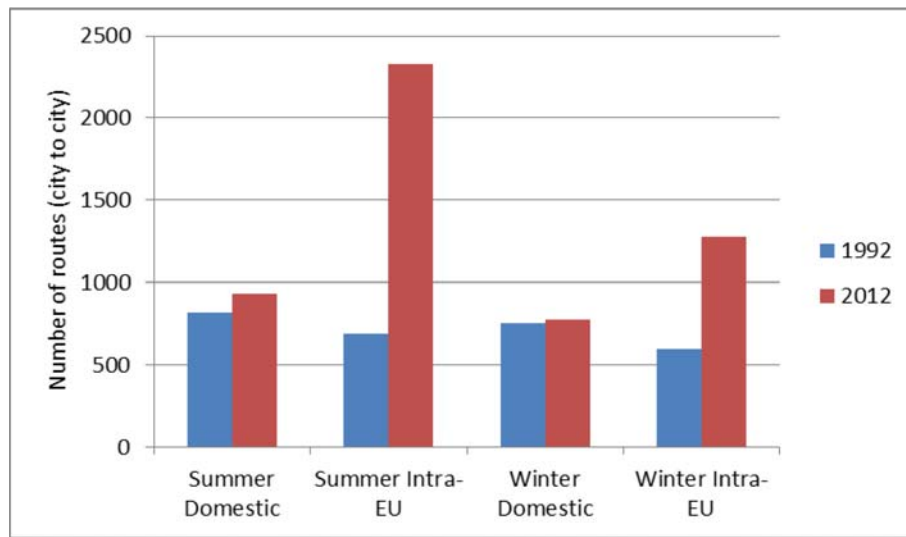
Year \ tonnes	Intra-EU	Change %	Extra-EU	Change %	Domestic	Change %	Total
<b>2003</b>	1,310,385	-	7,500,932	-	718,594	-	9,529,911
<b>2004</b>	1,434,953	9.5%	8,449,479	12.6%	751,974	4.6%	10,636,406
<b>2005</b>	1,547,849	7.9%	8,757,904	3.7%	675,747	-10.1%	10,981,500
<b>2006</b>	1,698,984	9.8%	9,396,613	7.3%	655,536	-3.0%	11,751,133
<b>2007</b>	1,822,842	7.3%	10,012,939	6.6%	635,366	-3.1%	12,471,147
<b>2008</b>	1,936,708	6.2%	10,315,115	3.0%	653,513	2.9%	12,905,336
<b>2009</b>	1,833,008	-5.4%	8,886,236	-13.9%	595,521	-8.9%	11,314,765
<b>2010</b>	1,928,735	5.2%	10,616,345	19.5%	581,700	-2.3%	13,126,780
<b>2011</b>	2,066,685	7.2%	10,874,115	2.4%	609,845	4.8%	13,550,645

Source: Eurostat, EU25: 2003-2006, EU27: 2007-2011

#### *Passenger transport – size in terms of the number of routes*

The increase in passenger and cargo traffic was accommodated by a significant increase in the number of routes operating within the European Union, as Figure 6 illustrates. While the number of domestic routes in the EU15 almost stagnated between 1992 and 2012, intra-EU15 flights (e.g. from one Member State to another) registered a huge surge, increasing from 864 in 1992 to 3151 in 2012, partly due to the on-going liberalisation of the air services sector. The number of summer routes increased by almost 240% (from 692 to 2332), while the number of winter routes grew by almost 115% (from 597 to 1278). These numbers also highlight the increasingly seasonal character of the airline sector. This figure abstracts from the effects of enlargement in order to obtain comparable data on the organic, rather than geographical, growth of the sector following liberalisation, between 1992 and 2012.

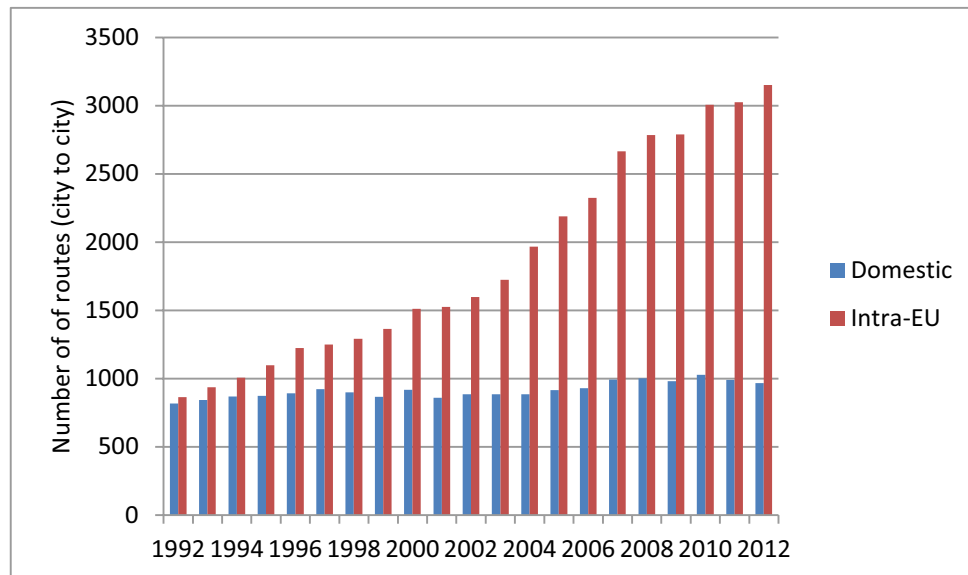
**Figure 6: Number of EU15 routes (summer and winter) after 20 years of liberalisation**



*Source: OAG schedules, EU15*

Naturally, similar comparison can be made taking into account the geographical expansion of the internal market in 2004 and 2007. The following figure 7 shows that a similar growth trend was registered in the EU27 Member States in the past 20 years. The growth in the intensity of intra-EU air services (265%) is even more pronounced when compared to that of domestic air services (18%). For the purposes of these figures, it is assumed that countries that joined the EU in 2004 and 2007 had been part of the internal market since 1992.

**Figure 7: Number of EU27 summer routes, 1992-2012**



*Source: OAG schedules, EU27*

Table 3 provides detailed data on summer routes portrayed in Figure 7 and also highlights that the growth in number of intra-EU routes offered was unmatched by the offerings of extra-EU routes, which increased by only 153% between 1992 and 2012.

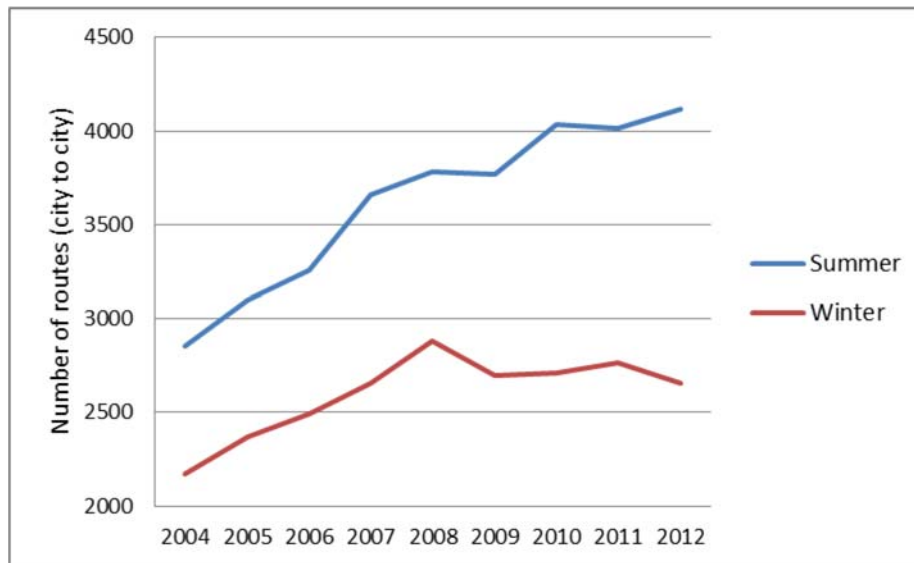
**Table 3: Summer routes EU27, 1992-2012**

<b>Year</b>	<b>Domestic</b>	<b>Intra-EU</b>	<b>Extra-EU</b>	<b>Total</b>
<b>1992</b>	818	864	996	2678
<b>1993</b>	843	936	1086	2865
<b>1994</b>	870	1007	1121	2998
<b>1995</b>	873	1099	1206	3178
<b>1996</b>	893	1224	1320	3437
<b>1997</b>	922	1251	1352	3525
<b>1998</b>	899	1292	1394	3585
<b>1999</b>	868	1365	1620	3853
<b>2000</b>	919	1511	1638	4068
<b>2001</b>	860	1525	1623	4008
<b>2002</b>	886	1598	1578	4062
<b>2003</b>	886	1725	1571	4182
<b>2004</b>	885	1967	1758	4610
<b>2005</b>	915	2188	1844	4947
<b>2006</b>	929	2325	1984	5238
<b>2007</b>	993	2665	2108	5766
<b>2008</b>	1002	2784	2202	5988
<b>2009</b>	981	2790	2268	6039
<b>2010</b>	1028	3007	2467	6502
<b>2011</b>	990	3025	2471	6486
<b>2012</b>	968	3151	2522	6641

*Source: OAG schedules, EU27*

Data for the enlarged European Union after 2004 show a similar seasonal trend to that of the EU15. While in 2004 there were about 30% more summer routes than winter routes in the domestic and intra-EU market, this difference has grown to be more than 50% by 2012. Notably, looking at the EU27, the number of winter season routes has even decreased since 2008.

**Figure 8: Number of intra-EU27 and domestic routes per season (summer vs. winter), 2004-2012**

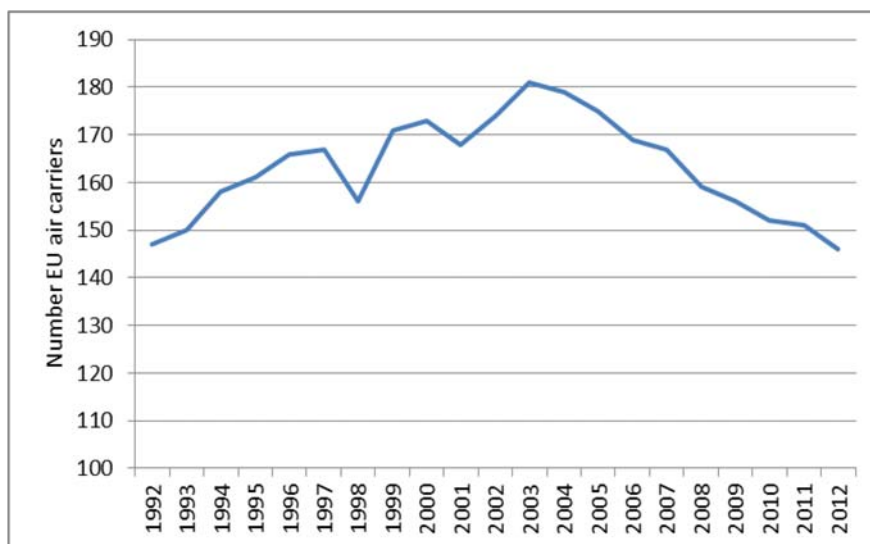


Source: OAG schedules, EU27

*Passenger transport – size in terms of number of service providers*

The following graph (Figure 9) illustrates the growth in the number of service providers following the third liberalisation package of 1992 as well as a steady decrease after 2004. The number of carriers offering scheduled passenger services has steadily decreased from 179 (2004) to 146 (2012) in EU member states. This suggests a certain consolidation of the sector in recent years, considering that passenger numbers and routes numbers have been, on the contrary, increasing,

**Figure 9: Number of intra-EU27 carriers in scheduled passenger services, 1992-2012**



Source: OAG schedules, EU27

Table 4 illustrates, for one year, the fluctuation in the sector in terms of new operators and exits from the market for various reasons. In 2011, several new airlines of significance entered the EU market (93 of which 6 only temporarily). However, a larger number of airlines at least temporarily ceased operations (148), due to various reasons, for instance insolvency. Disregarding airlines that entered the market only temporarily, there were 87 entrants in 2011. Taking into account only definitive cancellations of operating licences, there were 92 exits in 2011.

**Table 4: Major market new entries and exits in the intra-EU aviation, 2011**

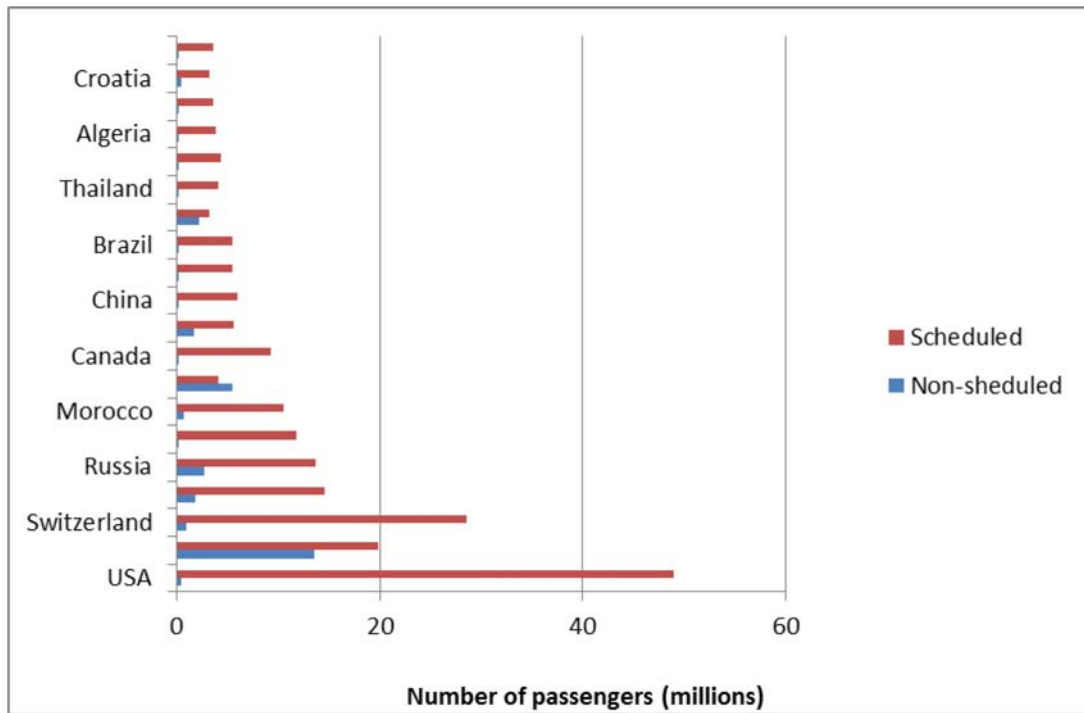
<b>Operating Licences</b>	<b>Quantity</b>	<b>Comments</b>
<b>Granted</b>	85	79 + 6 only temporarily
<b>Revived</b>	8	3 from Germany, 1 from Lithuania, 1 from Netherlands, 1 from Romania, 2 from UK
<b>Suspended</b>	56	11 from UK, 11 from Italy, 14 from Germany, 5 from Netherlands, 4 from Romania, 4 from Spain, 2 from Greece, 2 from Sweden, 1 from Cyprus, 1 from Hungary, 1 from Portugal and 1 from Poland
<b>Voluntary surrender of operating services</b>	1	Spain
<b>Revoked</b>	91	
<b>Any changes</b>	76	20 of name of the licence holder, 34 of address of the licence holder, 16 of category, 1 of validity, 6 of category transported

*Source: The Commission's internal documents, based on information provided by Member States on licensing*

#### *Non-scheduled services*

Figure 10 below illustrates the relative size of operators providing non-scheduled services. Since Regulation 1008/2008 does not make a distinction between scheduled and non-scheduled services in the internal market, figures for non-scheduled services are only available for extra(non)-EU countries. The graph below compares scheduled and non-scheduled passenger services in 2011 with 20 main EU partners. The USA, Turkey and Switzerland were EU three most important non-EU destinations. Scheduled services dominate in almost all countries, except for Egypt, where non-scheduled services take over. The share of non-scheduled services is also significant in other major non-EU "holiday" destinations, such as: Croatia, Tunisia, Israel and Turkey.

**Figure 10: Number of passengers flown by extra(non)-EU carriers in both scheduled vs non-scheduled passenger services, 2011**



Source: Eurostat, EU27

Aviation industry ranks 5th amongst 30 service industries<sup>17</sup> and first amongst transport industries according to the Market Performance Index (MPI), which is a composite index taking into account some key aspects of consumer experiences in the EU<sup>18</sup>. Interestingly and in contrast to what is observed for most of market surveys, the MPI for the aviation industry is higher in the EU12 Member States than in the EU15 (81.3 versus 79.3). However, if the augmented version of the MPI, which includes also consumers views of the adequacy of choice (MPIc), is considered, the aviation industry ranks 8th out of 27 service industries.

### ***2.3 Current challenges for the aviation industry***

However, the aviation industry has also been hit by the economic downturn in the Eurozone and in the world. The competitive position of EU airlines faces many challenges and threats, both in the internal and the external, non-EU markets<sup>19</sup>. Among these challenges, not necessarily connected to the on-going economic crisis, are increasing competition from non-EU carriers in fast growing regions such as the Asia-Pacific region, and challenges of managing available capacity efficiently. One particular challenge is to handle the social aspect of the industry transformation and particularly the changing business models (notably the

<sup>17</sup> Source: Consumer Markets Scoreboard (8th edition – December 2012).

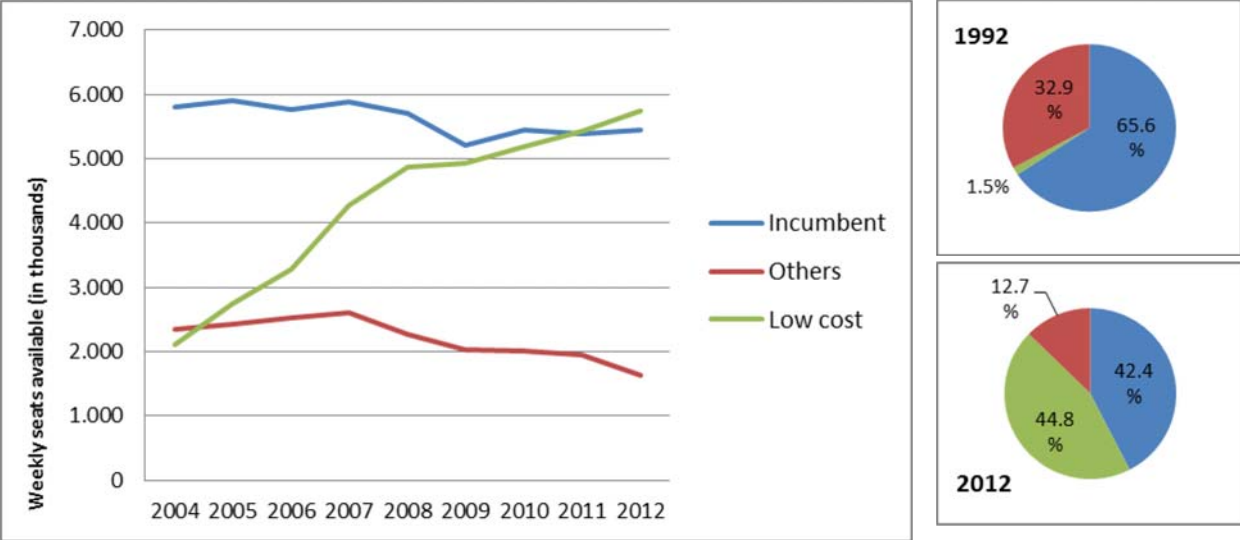
<sup>18</sup> The aspects considered are the following: ease of comparing offers, consumers trust in retailers/providers, problems experienced and tendency to complain, product/service being up to expectations). Clearly, the views expressed by European consumers are on the services experienced regardless of the nationality of the air carriers.

<sup>19</sup> While forecasting a total net profit of 3 billion USD for the world's commercial airlines, in its June 2012 financial forecast IATA forecasted a net loss of 1.1 billion USD for European commercial airlines.

low-cost model), which bring about questions on the status and of the social protection of transnational mobile workers<sup>20</sup>.

The following figures illustrate the increasing significance of low-cost carriers. In 2012 low-cost carriers have reached a market share in terms of available seat capacity of 45%. It is also worth noticing that, in the period 2007-2012, the size of the market remained practically the same, while low-cost companies continued to grow.

**Figure 11: Per seat market share of carriers (in thousands), 2004-2012**



Source: OAG summer schedules, EU27<sup>21</sup>

In 1992, a majority of seats belonged to incumbent air carriers (65.6%, while only 1.5% to low-cost carriers). In 2011 for the first time, low-cost airlines (42.4%) exceeded the market share of incumbent air carriers (42.2%). The trend continued in 2012 (44.8% for low-cost and 42.4% for incumbent).

<sup>20</sup> This Fitness Check does not evaluate the social legislation applicable in the aviation sector.  
<sup>21</sup> The category "others" covers independent carriers, regional carriers and charter carriers.

**Table 5: Weekly seat available in the EU 1992-2012 (20 years perspective)**

	<b>Incumbent</b>	<b>%</b>	<b>Others</b>	<b>%</b>	<b>Low-cost</b>	<b>%</b>	<b>Total</b>
<b>1992</b>	3,526,193	65.60%	1,770,784	32.90%	79,602	1.50%	5,376,579
<b>1993</b>	3,537,474	64.60%	1,875,684	34.20%	65,800	1.20%	5,478,958
<b>1994</b>	3,458,278	62.10%	2,023,120	36.40%	83,396	1.50%	5,564,794
<b>1995</b>	4,128,595	66.40%	1,975,140	31.80%	111,750	1.80%	6,215,485
<b>1996</b>	4,392,317	64.20%	2,289,859	33.50%	155,628	2.30%	6,837,804
<b>1997</b>	4,525,419	61.80%	2,523,888	34.40%	278,006	3.80%	7,327,313
<b>1998</b>	5,349,335	69.20%	2,026,664	26.20%	354,143	4.60%	7,730,142
<b>1999</b>	5,856,259	68.50%	2,280,862	26.70%	413,907	4.80%	8,551,028
<b>2000</b>	6,135,032	67.00%	2,428,297	26.50%	599,793	6.50%	9,163,122
<b>2001</b>	6,350,578	67.90%	2,272,516	24.30%	726,859	7.80%	9,349,953
<b>2002</b>	5,768,520	63.50%	2,288,086	25.20%	1,026,450	11.30%	9,083,056
<b>2003</b>	5,582,195	60.50%	2,183,546	23.70%	1,456,424	15.80%	9,222,165
<b>2004</b>	5,813,030	56.60%	2,341,170	22.80%	2,112,186	20.60%	10,266,386
<b>2005</b>	5,902,877	53.30%	2,428,462	21.90%	2,750,642	24.80%	11,081,981
<b>2006</b>	5,770,155	49.90%	2,517,281	21.80%	3,273,522	28.30%	11,560,958
<b>2007</b>	5,892,391	46.10%	2,608,795	20.40%	4,279,079	33.50%	12,780,265
<b>2008</b>	5,704,734	44.40%	2,268,523	17.70%	4,864,437	37.90%	12,837,694
<b>2009</b>	5,213,124	42.80%	2,034,421	16.70%	4,928,603	40.50%	12,176,148
<b>2010</b>	5,456,515	43.10%	2,014,157	15.90%	5,197,611	41.00%	12,668,283
<b>2011</b>	5,393,364	42.20%	1,959,410	15.30%	5,420,902	42.40%	12,773,676
<b>2012</b>	5,445,185	42.40%	1,632,883	12.70%	5,750,954	44.80%	12,829,022

*Source: OAG summer schedules, EU27*

### **3. Methodology of the Fitness Check**

At the start of this evaluation exercise, the Commission services prepared a Roadmap for the Fitness check. This Roadmap was discussed at a meeting on 11 January 2011 by representatives of various Commission Directorates-General and then finalised on 18 January 2011. The Roadmap outlined a number of evaluation questions, which then guided the research and consultation process.

Accordingly, the Fitness Check evolved mainly around the following questions:

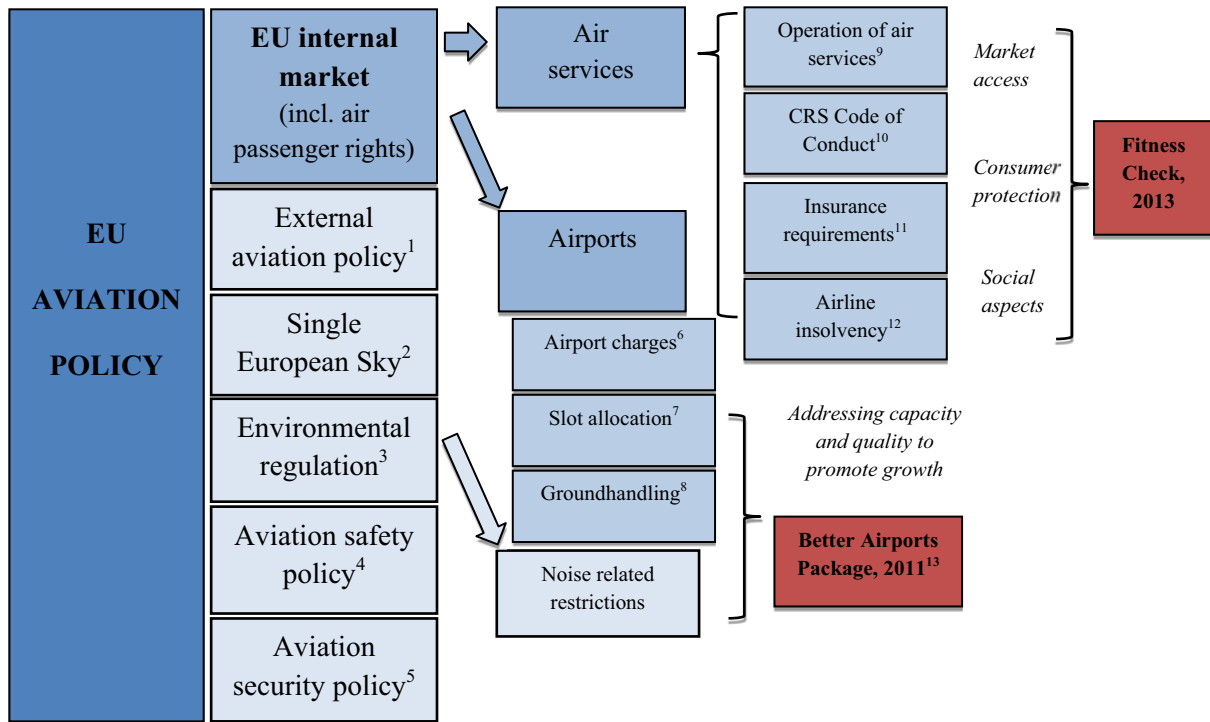
- *What was the objective of the intervention? Was there an actual need to legislate?*
- *What has been the main outcome and impact of the Regulations? Has the objective been achieved?*
- *Do the relevant actors find that the Regulations address the issues they are meant to address, appropriately? Are there shortcomings that need to be still addressed?*
- *Are they still fitting the needs of the changing world or changes are needed?*
- *What kind of changes would the actors propose to the current legislative framework?*

This set of questions framed the public consultation as well as the work of the external consultant. Findings presented in this document therefore, directly or indirectly, answer these questions. The document does not analyse in detail the question *whether there is any additional administrative burden caused by the reviewed legislation* because the issue of the existence of an excessive administrative burden has not been raised by stakeholders in the consultation process. Similarly, the question of subsidiarity (*Without the EU intervention, would self-regulation be a more effective alternative to some regulatory measures and what has been the EU added value?*) is only analysed for topics where it is relevant, such as protection of consumers in case of airline insolvency.

#### **3.1 Scope of the Fitness Check**

The EU regulatory framework, in which air transport operates, contains a wide array of rules, which all contribute to building a safer, cleaner and more competitive sector, while safeguarding rights of EU citizens at large. The EU aviation policy is built around the following pillars: economic regulation of air transport services as a tool of completing the internal market; regulation of the functioning of airports including allocation of time slots, ground-handling and airport charges; external aviation policy as a means to extend the benefits of an internal market beyond EU borders; Single European Sky designed to address the heavy airspace congestion and the strain on Europe's airports' capacity; environmental regulation on emissions and noise; aviation safety policy comprising of common safety rules and aviation security policy aiming at preventing acts of unlawful interference into the operation of an aircraft.

**Figure 12: Aviation Policy of the European Union**



Main legislative acts in each policy area:

<sup>1</sup>Regulation (EC) No 847/2004 on the negotiation and implementation of air service agreements between Member States and third countries. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – The EU's External Aviation Policy – Addressing Future Challenges, of 27.9.2012, COM (2012) 556 final.

<sup>2</sup>Regulation (EC) No 549/2004 laying down the framework for the creation of the single European sky, Regulation (EC) No 550/2004 on the provision of air navigation services in the single European sky, Regulation (EC) No 551/2004 on the organisation and use of the airspace in the single European sky, Regulation (EC) No 552/2004 on the interoperability of the European Air Traffic Management network - Amended by Regulation (EC) No 1070/2009 in order to improve the performance and sustainability of the European aviation system. See also Roadmap: Update to the second package of the Single European Sky initiative (SES2+), with accompanying implementing measures and a recast of Regulations 549-552/2004 and a complementary update to Air Safety Regulation (EC) No 216/2008.

<sup>3</sup>Directive 2002/30/EC on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports, Directive 2002/49/EC relating to the assessment and management of environmental noise.

<sup>4</sup> Regulation (EC) No 1194/2009 amending Regulation (EC) No 1702/2003 laying down implementing rules for the airworthiness and environmental certification of aircraft and related products, parts and appliances as well as for certification of design and production organisations, Regulation (EEC) No 3922/91 on the harmonization of technical requirements and administrative procedures in the field of civil aviation (EU-OPS).

<sup>5</sup>Regulation (EC) No 300/2008 on common rules in the field of civil aviation security and repealing Regulation (EC) No 2320/2002.

<sup>6</sup>Directive 2009/12/EC on airport charges.

<sup>7</sup>Regulation (EC) No 95/93 on common rules for the allocation of slots at Community airports.

<sup>8</sup>Directive 96/67/EC on access to the groundhandling market at Community airports.

<sup>9</sup>Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community.

<sup>10</sup>Regulation (EC) No 80/2009 on a Code of Conduct for computerised reservation systems and repealing Council Regulation (EEC) No 2299/89.

<sup>11</sup>Regulation (EC) No 785/2004 on insurance requirements for air carriers and aircraft operators.

<sup>12</sup>Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Passenger protection in the event of airline insolvency, of 18 March 2013, COM(2013)129 final. 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 repealing Regulation (EEC) No 295/91, can be applied to passenger protection in case of insolvency, while Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community contains provisions for the financial monitoring of airlines. Moreover Regulation (EC) No 261/2004 is currently under revision: Communication from the Commission to the European Parliament and the Council – A European vision for passengers: Communication on passenger rights in all transport modes, COM (2011) 898 final; 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, 13 March 2013, COM(2013) 130 final.

<sup>13</sup>Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Airport policy in the European Union - addressing capacity and quality to promote growth, connectivity and sustainable mobility, COM (2011) 823. On groundhandling: Proposal for a Regulation of the European Parliament and the Council on groundhandling services at Union airports and repealing Council Directive 96/67/EC, COM (2011) 824 final; on slots: Proposal for a Regulation of the European Parliament and the Council on common rules for the allocation of slots at European Union airports, COM (2011) 827 final; on noise-related restrictions: Proposal for a Regulation of the European Parliament and the Council on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Union airports within a Balanced approach and repealing Directive 2002/30/EC of the European Parliament and of the Council, COM (2011) 828 final.

All the above mentioned policy areas in some way affect the aviation industry. Moreover, also policy areas such as competition policy, environmental policy, policy on consumer protection or employment and social policy have effects on the functioning of the aviation industry. The purpose of a Fitness Check is to evaluate whether the regulatory framework for a policy sector is fit for purpose. To carry out an in-depth evaluation, it was necessary to choose a homogenous policy area and the Commission services selected the area of economic regulation of the aviation sector (internal market regulation). Economic regulation describes the legislative framework designed to manage the process of liberalisation and of building up the common market and safeguarding its benefits (it is not all regulation with an economic impact on the aviation industry).

From the area of economic regulation of the aviation sector, the Commission services then excluded areas currently subject to regulatory action under the so-called "Better Airport Package"<sup>22</sup>: allocation of slots in airports<sup>23</sup> and regulation of ground-handling services<sup>24</sup>. Similarly, the directive on airport charges<sup>25</sup> was not covered by the exercise. It entered into

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<sup>22</sup> Communication from the Commission, COM(2011)823, see footnote 8.

<sup>23</sup> Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports, OJ L14, 22.1.1993, p. 1–6 ("Regulation 95/93")

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1993:014:0001:0006:EN:PDF>

Proposal for a Regulation of the European Parliament and of the Council on common rules for the allocation of slots at European Union airports, of 1 December 2011, COM(2011)827 final

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0827:FIN:EN:PDF>

<sup>24</sup> Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports, OJ L 272, 25.10.1996, p. 36–45 ("Directive 96/67")

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1996:272:0036:0045:EN:PDF>

Proposal for a Regulation of the European Parliament and of the Council on groundhandling services at Union airports and repealing Council Directive 96/67/EC of 1 December 2011, COM(2011)824 final

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0824:FIN:EN:PDF>

<sup>25</sup> Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges, OJ L 70, 14.3.2009, p. 11–16 ("Directive 2009/12")

force only in March 2009 and Member States were required to transpose it by 15 March 2011, i.e. only some months after the Fitness Check Roadmap was adopted. The practice was simply not ripe for any evaluation. In any case, the Commission committed to submit to the European Parliament and the Council a report on the implementation and transposition of the Directive in 2013 (as foreseen by the Directive).

Having so determined the legislative framework that was to be included in the Fitness Check, the Commission services then identified a number of issues where a detailed scrutiny was deemed to be warranted<sup>26</sup>. As already mentioned in the Introduction, these issues can be grouped under three themes.

The first theme guiding the Fitness Check was market access and fair competition. The Commission services undertook a preliminary screening of Regulation 1008/2008 and, based on in-house expertise, chose a number of issues warranting a closer scrutiny: the rules on leasing and the treatment of non-scheduled services and existing restrictions on the exercise of traffic rights. The Commission services also looked at rules pertaining to competition in the market for distribution of air transport services (computerised reservation systems).

The second focus was to evaluate some aspects of consumer protection, considering the effect that market opening has had on consumers. The Commission services looked at rules on price transparency, insurance and protection of passengers in case of insolvency.

The third theme was to evaluate the impact of liberalisation and ensuing market developments on employment and employment conditions. Rather than evaluating the social legislation applicable to the aviation sector, the Commission services gathered data on the social impact of the single aviation market on employment and working conditions.

### ***3.2 Information gathering***

The Commission services have adopted a method that relies on three basic elements: external studies and reports; in-house work and stakeholder consultations. Since, in the period of assessment of this Fitness Check, no complaints have been filed and no infringement cases have been launched on the application of any of the three scrutinised regulations, no information comes from this source.

#### *External studies*

The Commission contracted the following five external studies:

- a) *Price transparency provisions in Regulation 1008/2008 and other relevant EU legal texts*<sup>27</sup>;
- b) *Mid-term evaluation of Regulation 80/2009 on a code of conduct for Computerised Reservation Systems and repealing Council Regulation 2299/89*<sup>28</sup>;

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<sup>26</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:070:0011:0016:EN:PDF>

<sup>27</sup> Roadmap: Fitness check – internal aviation market, 18 January 2011, p.3-5.

<sup>28</sup> Not yet publicly available. Final report of January 2012.

<sup>28</sup> Not yet publicly available. Final report of September 2012.

- c) *Mid-term evaluation of Regulation 785/2004 on insurance requirements for air carriers and aircraft operators*<sup>29</sup>;
- d) *Passenger protection in the event of airline insolvency*<sup>30</sup>;
- e) *Study on the effects of the implementation of the EU aviation common market on employment and working conditions in the Air Transport Sector over the period 1997/2010*<sup>31</sup>.

One more study was executed by an external consultant, Mott McDonald. It concerned the issue of transnational mobile workers. It was commissioned to interview management and employee representatives of European airlines as well as airline and employee organisations. However, only employee representatives accepted to answer to the consultation launched by the consultant. The consultant's report therefore did not allow the Commission services to obtain a balanced view of the situation. This is also the reason why the Commission services do not present this study in the present Fitness Check report. Moreover, as the Commission services informed the organisations to be interviewed by letter on 6 July 2011, the Commission services did not intend to publish the summary of the consultant's report and intended this report to serve Commission services only informally, subject to the possible application of rules on public access to documents.

Only two of these studies (on passengers' protection in the event of airline insolvency and on insurance) are already available for public. Three other studies (on price transparency, computerised reservation systems and social conditions and employment) had already been received by the European Commission (DG MOVE), and will be published in parallel with the present Working Document. For reasons explained above, the study by Mott McDonald will not be published by the Commission.

#### *In-house work*

Other aspects of Regulation 1008/2008 were evaluated through in-house work (airports' systems, public service obligations, market access).

#### *Public consultations*

Two types of public stakeholder consultations were organised: either in-house by the Commission services or by the Commission's external consultant where a study was commissioned.

First, the Commission services organised a workshop dedicated to the issue of passenger protection in the event of insolvency of an airline, which took place on 30 March 2011. The workshop gathered representatives of airline associations, consumer associations, insurance companies and travel agents. The results of this workshop were presented on the European

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<sup>29</sup> Final report of July 2012:  
[http://ec.europa.eu/transport/modes/air/studies/doc/internal\\_market/2012-07-insurance-requirements.pdf](http://ec.europa.eu/transport/modes/air/studies/doc/internal_market/2012-07-insurance-requirements.pdf)

<sup>30</sup> Final report of March 2011:  
[http://ec.europa.eu/transport/passengers/studies/doc/2011\\_03\\_passenger-rights-airline-insolvency.pdf](http://ec.europa.eu/transport/passengers/studies/doc/2011_03_passenger-rights-airline-insolvency.pdf)

<sup>31</sup> Not yet publicly available. Final report of August 2012.

Commission website (DG MOVE)<sup>32</sup>. In addition, by a letter of 17 April 2012, the Commission consulted Member States on this topic. The Commission asked two questions:

1. *What specific measures or arrangements (either legal or practical) Member States may have in place to fully exploit the powers granted by Regulation 1008/2008 (Art.5, 8.4, 8.6 and 9),*
2. *What specific measures or arrangements (either legal or practical) Member States may have in place to support passengers when the airline insolvency occurs?*

21 out of the 27 EU Member States, and Iceland (22 countries in total, out of 28), replied within the deadline (mid-May 2012). The replies are summarized in section 6.1.3 and 6.2.3 below<sup>33</sup>.

Furthermore, the Commission services organised a stakeholder consultation on the Fitness Check of Regulation 1008/2008. This consultation took place on 27 and 28 June 2011 and the following topics were discussed: public service obligations, restrictions of traffic rights (traffic distribution between airports and environmental and emergency measures), market access issues (non-scheduled flights/charter services and leasing), state of play on airline insolvencies and social dimension (i.e. employment and working conditions in the aviation sector).

Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Netherlands, Poland, Portugal, Slovakia, Sweden, the United Kingdom and Norway were present. Among stakeholders, the following categories were identified, invited and consulted by the Commission and/or by external consultants: air carriers and representative bodies; aircraft operators and representative bodies; airport operators; insurers and representative bodies; insurance brokers; travel agents and representative bodies; national enforcement authorities; consumer bodies and consumer organizations; social partners; unmanned aircrafts (RPAS<sup>34</sup>) stakeholders.

Short papers were sent to stakeholders ahead of the meeting. Other topics have been raised by stakeholders. The outcome of the stakeholders' consultations has been published on the European Commission website.<sup>35</sup>

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<sup>32</sup> Minutes of stakeholder workshop on Commission initiative on Passengers protection in the event of airline insolvency for stand-alone air tickets, 30 March 2011.

[http://ec.europa.eu/transport/themes/passengers/studies/doc/2011\\_30\\_03\\_minutes.pdf](http://ec.europa.eu/transport/themes/passengers/studies/doc/2011_30_03_minutes.pdf)

<sup>33</sup> See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Passenger protection in the event of airline insolvency, of 18 March 2013, COM(2013)129 final.

<sup>34</sup> Remotely piloted aircraft systems.

<sup>35</sup> Stakeholder consultation meeting - Agenda:

[http://ec.europa.eu/transport/air/doc/2011\\_06\\_27\\_stakeholder-consultation-fitness-check-agenda.pdf](http://ec.europa.eu/transport/air/doc/2011_06_27_stakeholder-consultation-fitness-check-agenda.pdf)

Stakeholder consultation meeting - Fitness check internal aviation market, Brussels, 27 June 2011,

Industry: [http://ec.europa.eu/transport/air/doc/2011\\_06\\_27\\_stakeholder\\_meeting\\_-\\_minutes.pdf](http://ec.europa.eu/transport/air/doc/2011_06_27_stakeholder_meeting_-_minutes.pdf)

Stakeholder consultation meeting - Fitness check internal aviation market, Brussels, 28 June 2011,

Member States: [http://ec.europa.eu/transport/air/doc/2011\\_06\\_28\\_stakeholder\\_meeting\\_-\\_minutes.pdf](http://ec.europa.eu/transport/air/doc/2011_06_28_stakeholder_meeting_-_minutes.pdf)

Stakeholder Consultation 27/28 June 2011: Market access

[http://ec.europa.eu/transport/air/doc/2011\\_06\\_27\\_stakeholder-consultation-market-access.pdf](http://ec.europa.eu/transport/air/doc/2011_06_27_stakeholder-consultation-market-access.pdf)

Stakeholder Consultation 27/28 June 2011: Public service obligations/PSOs

[http://ec.europa.eu/transport/air/doc/2011\\_06\\_27\\_stakeholder-consultation-psy.pdf](http://ec.europa.eu/transport/air/doc/2011_06_27_stakeholder-consultation-psy.pdf)

Thirdly, the Commission services convened a stakeholders meeting dedicated to the issue of price transparency and in particular to discuss preliminary findings of the study on this topic prepared by a Commission external consultant. The Commission services met industry representatives on 23 November 2011 and Member States enforcement authorities on 24 November 2011. The Commission's external consultant presented his preliminary findings and four issues were discussed in particular: Breakdown of Taxes, Fees and Charges; advertisements; reimbursement of taxes; and ancillary services. The outcome of the stakeholders' consultations will be published on the Commission website in parallel with this Working Document<sup>36</sup>.

Finally, a stakeholders meeting took place on 16 April 2012 to discuss preliminary findings of the study of a Commission's external consultant concerning the employment aspects<sup>37</sup>.

The Commission services endeavoured to open these public consultations to a variety of actors to guarantee a balance of interests. Where such a balance could not be achieved (for example the study on transnational mobile workers by Mott McDonald), the Commission services were not able to consider such findings as sufficiently reliable.

In the framework of their studies, external consultants cooperating with the Commission on the Fitness Check also consulted stakeholders.

In the framework of the study on computer reservation systems<sup>38</sup>, discussions were held with computer reservation systems providers and their industry representative bodies, airlines (major and smaller carriers) and their representatives, other transport providers, travel agents / tour companies and their representatives, technology companies which focus on search and booking tools and the one consumer organisation that responded.

The study on price transparency<sup>39</sup> involved a wide spectrum of stakeholders and research including a website screening of 100 websites (67 airlines and 33 travel agents), simultaneous pricing review of 20 airlines, views of national organisations with responsibility for enforcement of the relevant legislation, European Consumer Centres and other relevant national consumer bodies, European passenger and consumer bodies, airline representatives and travel agent and other industry representatives.

In the context of the mid-term evaluation of rules pertinent to insurance<sup>40</sup>, the consultant approached civil aviation authorities of eight Member States, a number of individual aircraft carriers and operators selected so as to cover a mix of different business models and geographical locations. In addition, the consultant conducted interviews with the national enforcement authority of the United Kingdom and with five associations active in the field of insurance. Altogether thirty-seven organisations answered to the questionnaire (either face-to-face, over phone or in writing), which the consultant considered to be a representative sample.

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Stakeholder Consultation 27/28 June 2011: Restriction of traffic rights

[http://ec.europa.eu/transport/air/doc/2011\\_06\\_27\\_stakeholder-consultation-traffic-rights.pdf](http://ec.europa.eu/transport/air/doc/2011_06_27_stakeholder-consultation-traffic-rights.pdf)

<sup>36</sup> Not yet publically available.

<sup>37</sup> List of participants: European Low Fares Airlines Association (ELFAA), Association of European Airlines (AEA), European Transport Workers Federation (ETF), International Air Carrier Association (IACA), European Cockpit Association (ECA), Airport Council International – Europe (ACI-Europe), Aviapartner, DHL, SAFRAN.

<sup>38</sup> See footnote 28.

<sup>39</sup> See footnote 27.

<sup>40</sup> See footnote 29.

The Fitness check therefore relied on a set of studies on separate aspects of EU regulation concerned, assessments of the Commission services and a broad set of activities consulting stakeholder opinion.

### ***3.3 Commission's internal consultation***

An Inter-Service Steering Group on the Fitness Check has been set up. The group was led by DG MOVE and consisted of representatives of other services of the Commission: Secretariat General (SG), DG Internal Market (MARKT), DG Competition (COMP), DG Health and Consumers Protection (SANCO) and DG Employment (EMPL). The Group was open also to other Commission services.

The first meeting of the Steering Group took place on 11 May 2011. Its second meeting took place on 22 October 2012. It was attended by SG, EMPL, JUST, SANCO, TRADE, ENTR and MOVE.

### ***3.4 Communication tools***

A website about this Fitness Check was set up to inform stakeholders and interested citizens, easily accessible from the Aviation sector page on the DG MOVE website. It started operating in March 2011.<sup>41</sup>

### ***3.6 Timing***

The Fitness Check was performed between May 2011 and December 2012. The timing of the final output stemming from the Fitness Check was considerably delayed compared to the December 2011 target declared in the Roadmap. This was due to the time needed to contract and finalise the studies and to organise stakeholders' consultations. Apart from the timing, there were no other deviations from the 2011 Roadmap (in terms of methodology, scope and content).

### ***3.7 Presentation of the findings of the Fitness Check***

Part 4 first presents an overview of the legislation under scrutiny in the Fitness Check exercise. The purpose is to explain the rationale underlying the legislation as well as the principal provisions. Part 4 concludes with a summary intervention logic diagram outlining the logic of the scrutinised legislation, the state of play following the entry into force of the legislation and an outline of possible issues requiring further discussion. These discussion issues form in turn the basis of the Fitness Check exercise itself.

The document then pursues by presenting the findings of the Fitness Check. The document is divided in three parts. Part 5 deals with the theme of market access and fair competition, part 6 with the theme of consumer protection and part 7 with the theme of employment and working conditions in the aviation sector.

In parts 5 and 6, on each topic analysed (for example computerised reservation systems or insurance requirements), the first section (5.1 and 6.1) presents a first set of findings of the Fitness Check, which are of factual nature. The Fitness Check sought in the first place to

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<sup>41</sup> [http://ec.europa.eu/transport/modes/air/internal\\_market/fitness\\_check\\_en.htm](http://ec.europa.eu/transport/modes/air/internal_market/fitness_check_en.htm)

gather data, to accurately describe the current situation in the sector in qualitative and quantitative terms as well as to inform on a state of play regarding the application of each rule. To this end, data and facts gathered in the course of the Fitness Check from stakeholders' consultations, external studies or in-house analysis are presented in this first section titled State of Play.

The second section (5.2 and 6.2) then presents findings of the Fitness Check in terms of evaluation of the scrutinised legislation by stakeholders and Member States. These sections seek to respond to the evaluation questions described above. Depending on the topic, it has not always been possible or meaningful to answer in detail to each of these evaluation questions. The stakeholders' consultations or external studies have not been formally structured around these questions and therefore the results do not always directly answer to each of these questions. Nonetheless, the consultations and studies ultimately provided an answer to the thrust of these questions: is the legislative framework appropriate and, if not, what are the loopholes and how to address them. It is with this in mind that the Fitness Check findings should be read.

Finally, the third section (5.3 and 6.3) presents the Commission services conclusions and recommendations.

Part 7 is devoted to the theme of employment and working conditions. This theme is not analysed in the same manner than the other themes and topics. Although Regulation 1008/2008 makes reference to social aspects of liberalisation, there is no actual regulation on this issue in the internal aviation market legislation. Evaluating social legislation applicable in the aviation sector was outside of the scope of this Fitness Check. Instead, the Commission services were interested in learning what the situation in employment and working conditions is fifteen years after the completion of the sector liberalisation. The state of play is presented in part 7.

#### 4. Overview of the legislative framework under examination

On 23 July 1992 the final stage in the liberalisation of air transport in the EU was reached with the adoption of the three Council Regulations known as the "third package".<sup>42</sup> This constituted the continuation of two previous "packages" of measures, adopted in December 1987 and June 1990.

At the beginning of the 21<sup>st</sup> century, more than ten years after its entry into force, the "third package" has largely played its role, allowing unprecedented expansion of air transport in Europe at affordable fares. However, despite its success, most of the EU's airlines continued to suffer from overcapacity and from the excessive fragmentation of the market. The inconsistent application of the "third package" across Member States and the lingering restrictions on intra-EU air services and on extra-EU air services due to the surviving provisions from old bilateral agreements between Member States lead to the revision and consolidation of the "third package" in Regulation 1008/2008. This regulation is the cornerstone regulation promoting greater market access and fair competition and enhanced consumer protection in the provision of EU air services.

As the success of the liberalisation of air services may have been compromised by existing restrictions in ancillary activities on which air traffic depends, accompanying measures were taken around the adoption of the "third package". In this context, European rules with regard to computerised reservation systems<sup>43</sup>, the allocation of slots in airports<sup>44</sup> and groundhandling<sup>45</sup> were defined and later complemented by regulation of insurance requirements for airline operators<sup>46</sup> and by regulation of airport charges<sup>47</sup>. For reasons explained in the introduction and in the chapter concerning the methodology used by the Fitness Check, out of this regulatory framework complementing the "third package" as recasted in 2008, two instruments have been chosen for evaluation: the regulation on computerised reservation systems and the regulation on insurance requirements.

#### ***4.1 Regulation 1008/2008 on common rules for the operation of air services in the Community***

##### **4.1.1 Regulatory environment existing at the time of adoption (2008)**

The inconsistent application of the "third package" across the Member States and the lingering restrictions on intra-EU and extra-EU air services due to surviving provisions from old bilateral agreements between Member States translated into the following effects:

- Absence of a level-playing field: market efficiency was affected by competition distortions (e.g. varying application with regard to the requirements of the operating

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<sup>42</sup> See footnote 12.

<sup>43</sup> Regulation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computerised reservation systems, OJ L220, 29.7.1989, p. 1–7, later repealed by Regulation 80/2009, see footnote 6.  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1989:220:0001:0007:EN:PDF>

<sup>44</sup> See footnote 23.

<sup>45</sup> See footnote 24.

<sup>46</sup> See footnote 7.

<sup>47</sup> See footnote 11.

licence; discrimination between EU carriers on the basis of nationality; discriminatory treatment concerning routes to third countries; etc.);

- Inconsistent application of rules governing the leasing of aircraft from third countries with crew, with consequent distortions of competition and social implications;
- Divergent practices between Member States with regard to code-sharing with third country carriers and price setting on 6<sup>th</sup> freedom routes<sup>48</sup>, with resulting limited economic benefits stemming from the liberalisation of external relations (e.g. price and the choice of connections with third countries will depend on the place of departure in the EU);
- Passengers unable to fully reap the benefits of the internal market because of a lack of price transparency or because of discriminatory practices in pricing on the basis of the place of residence.

The "third package" was recast by Regulation 1008/2008 into one in order to modernise and adapt the legal framework to the expectations of a more mature liberalised market.

#### **4.1.2 Policy objectives of Regulation 1008/2008**

- Increase market efficiency through creating a level playing field between competitors by way of a more homogeneous application of the EU legislation (see Recital 18). This is achieved via stricter and more precise application criteria (e.g. for operating licences, leasing of aircraft, public service obligations and traffic distribution rules) (see Recitals 5, 8, 11 & 13).
- Enhance the safety of air services through, on the one hand, tightening of the monitoring of air carriers' financial viability and, on the other hand, through stricter requirements for the leasing of aircrafts (see Recitals 5 & 8).
- Reinforce the internal market by removing inconsistencies between the internal aviation market and services to third countries. This was to be achieved by lifting still existing restrictions on the provision of air services stemming from old bilateral agreements between Member States, such as on code-sharing on routes to third countries and on price setting on 6<sup>th</sup> freedom flights (see Recital 10).
- Enhance consumer rights by promoting price transparency through the publication of air fares inclusive of all applicable taxes, charges and fees and by promoting non-discrimination through the access to all air fares and air rates irrespective of the customers' place of residence (see Recitals 15 & 16).

#### **4.1.3 Main provisions of Regulation 1008/2008**

The Regulation comprises the rules on the economic framework for the provision of air transport services, and in particular on:

- Licensing of Community air carriers – granting, financial conditions and revoking.
- Provision of intra-EU air services.
- Insurance requirements.
- Operational flexibility (code-sharing, leasing).
- Public service obligations.
- Traffic distribution.
- Environmental and emergency measures.

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<sup>48</sup> Sixth freedom routes are routes between third countries with an intermediate stop in the Member State of origin of the airline.

- Pricing of intra-EU air services.

In the following, specific policy objectives/rationale of each of these subject-matters is explained.

#### **4.1.3.1 Licensing of Community air carriers – granting, financial conditions and revoking**

Chapter II of the Air Services Regulation reinforces the requirements for the granting and revoking of an operating licence in order to create a level-playing field between Community air carriers. The Regulation requires Member States to strengthen the supervision of the operating licences and to suspend or revoke it when the requirements of the Regulation are no longer met (Articles 3 to 10). Furthermore, in order to reduce the bankruptcy rates of new air carriers, the Regulation foresees better financial information to be provided to the competent licensing authorities of the Member States and obliges the latter to regularly check that the air carriers fulfil the requirements of EU law. Thus, if an air carrier can no longer meet its actual and potential obligations for a 12 month period, the authority shall suspend or revoke the operating licence. Pending a financial reorganisation, and provided that safety is not at risk, the authority may grant a temporary licence, not exceeding 12 months (Article 9(1)). To ensure efficient supervision (given the growing importance of air carriers with operational bases in several Member States) the Regulation also stipulates that the same Member State shall be responsible for the Air Operator Certificate (AOC) and the operating licence (Article 4).<sup>49</sup>

#### **4.1.3.2 Provision of intra-EU air services, including aircraft leasing**

To ensure market access, Article 15 of the Air Services Regulation specifies that an undertaking that has been granted an operating licence by a Member State in accordance with the Regulation is considered as a Community air carrier and is entitled to provide air services throughout the European Union, in and between all the Member States. The Regulation incorporates measures aiming at ensuring that air carriers can benefit from a maximum of operational flexibility, where commercial decisions are taken without any undue influence from public authorities, while aiming at the highest possible standard in matters of safety, security, environmental protection and passenger protection (price transparency and supervision of financial viability of air carriers). In particular, the Regulation seeks to lift restrictions on the code sharing on routes to third countries<sup>50</sup>, and regulates in more detail the recourse to leased aircraft<sup>51</sup>.

A leased aircraft is an aircraft used under a contractual leasing agreement between the owner of the aircraft (the "lessor") and the air carrier that will use it (the "lessee"). A wet-leased aircraft includes a crew; a dry-leased aircraft does not include a crew. The distinction is

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<sup>49</sup> While the AOC certifies the technical capacity of an undertaking to safely provide air services, the operating licence confers the right to provide commercial air services. Hence, while the AOC is basically a safety document, the operating licence is an economic document. The AOC is a prerequisite for obtaining an operating licence.

<sup>50</sup> By virtue of Article 15 of the Air Services Regulation, free code-sharing is extended to arrangements between EU and third country air carriers to, from or via any airport in their territory from or to any points in third countries. As a safeguard, the article also stipulates that Member States may impose restrictions if the third country does not provide reciprocity, to the extent that these do not restrict competition, and are proportionate and non-discriminatory between Community air carriers.

<sup>51</sup> Article 13 of the Air Services Regulation.

important as a wet-leased aircraft remains registered in the Air Operators Certificate of the lessor<sup>52</sup>, while a dry-leased aircraft has to be included in the Air Operators Certificate of the lessee<sup>53</sup>. This distinction therefore affects the state responsible for the oversight.

Article 13 of the Regulation introduces stricter requirements with regards to aircraft leasing in order to minimize the risk of adverse social consequences and to enhance safety. Subject to compliance with safety requirements, free wet-leasing of aircrafts registered within the Community is introduced.

According to Article 13, point 3, wet-leasing of aircrafts registered in a third country is possible, but subject to a prior (temporary) approval from the competent licensing authority under the condition that the safety standards applied are deemed to be equivalent to EU safety requirements and (i) where the carrier demonstrates an exceptional need, or (ii) where the carrier demonstrates seasonal capacity needs, or (iii) where the carrier demonstrates that the leasing is necessary to overcome operational difficulties in case of temporary operational problems. Under the two latter cases ((ii) and (iii)), the Regulation explicitly mentions that it must not be, respectively, "possible" and "possible or reasonable" to lease the aircraft needed within the Community.

With regard to the dry-lease, the Air Service Regulation says that it shall be subject to prior approval in accordance with applicable Community or national law on aviation safety (Article 13, point 2).

Aircraft leasing is also covered by the Free Trade Agreement concluded between the EU and Korea<sup>54</sup>, by the Caribbean Community (Cariforum)-EU Economic Partnership Agreement<sup>55</sup> and the Association Agreement between the EU and Chile<sup>56</sup>, as well as by Free Trade Agreements with Colombia and Peru<sup>57</sup> and with Central American States<sup>58</sup>, which have not been published yet.

#### **4.1.3.3 Insurance requirements**

To promote consumer protection, Article 4(h) of the Air Services Regulation stipulates that in order to be granted an operating licence an air carrier must be insured to cover liability in case of accidents with respect to passengers, cargo and third parties as provisioned by Regulation 785/2004 on insurance requirements for air carriers and aircraft operators. According to Article 11 of the Air Services Regulation, notwithstanding Regulation 785/2004, obligations should also be placed upon air carriers for insurance to cover liability in case of accidents with respect to mail (for more details see part 4.3).

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<sup>52</sup> Article 2, point 25 of the Air Service Regulation.

<sup>53</sup> Article 2, point 24 of the Air Service Regulation.

<sup>54</sup> Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L127, 14.5.2011, page 1172.

<sup>55</sup> Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, OJ L289, 30.10.2008.

<sup>56</sup> Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, OJ L352, 30.12.2002.

<sup>57</sup> <http://trade.ec.europa.eu/doclib/press/index.cfm?id=810>

<sup>58</sup> <http://trade.ec.europa.eu/doclib/press/index.cfm?id=815>

#### **4.1.3.4 Public service obligations**

Articles 16 to 18 of the Air Services Regulation recognise that public service obligations ("PSO") are, under certain conditions, justifiable restrictions of market access and are legitimate tools to ensure territorial cohesion and economic and social development in remote regions or on islands. However, in order to lighten the administrative burden and to attract more competitors in tender procedures, the rules applicable to PSOs were revised. For example, the maximum concession period when the route is being restricted to one single operator (after a call for tender) has been increased from three to four years (and even five years for ultra-peripheral regions). The Regulation also foresees the possibility of an emergency procedure to designate an alternative airline in situations of failure of the airline servicing the PSO route. While recognising the importance of PSO, the Regulation also seeks to avoid abuse of the PSO system. Therefore it explicitly states the necessity of respecting the proportionality between the obligations imposed and the economic development goals pursued. Furthermore, in case of doubt, it confers the right to the Commission to request a detailed economic report from the Member State concerned justifying the need for the PSO.

#### **4.1.3.5 Traffic distribution**

The objective of the Air Services Regulation regarding traffic distribution between airports was to clarify and simplify the applicable rules. Article 19 of the Regulation stipulates that Member States have the right, after consultation with interested parties and respecting the principles of proportionality and transparency, to distribute traffic between airports serving the same city or conurbation on the condition that the airports are linked (reachable within 90 minutes). The application or modification of traffic distribution rules is subject to the Commission's prior approval.

#### **4.1.3.6 Environmental and emergency measures**

By virtue of Articles 20 and 21 of the Air Services Regulation, Member States may limit or refuse the exercise of traffic rights when serious environmental or unforeseeable and unavoidable circumstances exist. General principles of transparency, non-discrimination and proportionality apply. The objective of the Regulation was to recognise that Member States should have the possibility to react to sudden problems resulting from unforeseeable and unavoidable circumstances, which make it technically or practically very difficult to carry out air services. That was the case during the 2010 ash-cloud crisis that resulted in the temporary closure of the European airspace.

#### **4.1.3.7 Pricing of intra-EU air services**

The key principle is the freedom of pricing: Community air carriers and, on the basis of reciprocity, air carriers from third countries are free to set air fares and air rates for intra-EU services. To remove inconsistencies between the internal aviation market and services to third countries, according to Article 22 of the Regulation all restrictions stemming from old bilateral agreements between Member States on price setting (incl. price leadership) on routes to third countries with an intermediate stop in another Member State (6<sup>th</sup> freedom flights) should be lifted. Additionally, third country air carriers may also price lead on intra-EU air routes provided there is reciprocity by the third country.

#### 4.1.3.8 Price transparency and non-discrimination

The objective of the pricing provisions in the Air Services Regulation is to enable consumers to have access to all air fares and air rates irrespective of their place of residence within the EU or their nationality, and irrespective of the place of establishment of the travel agents within the EU (Recital 15). The pricing provisions sought to ensure that consumers be able to compare effectively the prices of different providers and therefore the final price should at all times be indicated (Recital 16).

Article 23 of the Regulation provides for transparent and non-discriminatory pricing of air services. To avoid misleading customers and enable them to effectively compare the prices of air services, price transparency is improved by clarifying that the final price is to be understood as including all applicable fares, charges, taxes and fees (a breakdown of which should also be specified).<sup>59</sup> Optional price supplements shall be communicated in a clear, transparent and unambiguous way at the start of any booking process and their acceptance by the customer shall be on an "opt-in" basis. Article 22 bans price discrimination on the basis of the place of residence or the nationality of the customer or the place of establishment of the travel agent. For the same product – i.e. the same seat on the same flight booked at the same moment – there should be no price differences based on the place of residence or the nationality of the passenger. In its Article 24 the Regulation calls Member States to ensure compliance with the rules and to lay down effective, proportionate and dissuasive penalties for infringements thereof.

Apart from the Air Services Regulation, price transparency issues are also tackled more generally in the Unfair Commercial Practices Directive (Directive 2005/29)<sup>60</sup>, the Unfair Contract Terms Directive (Directive 1993/13)<sup>61</sup>, the E-Commerce Directive (Directive 2000/31)<sup>62</sup> and the Consumer Rights Directive (Directive 2011/83)<sup>63</sup>.

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<sup>59</sup> This in essence applies the provisions of the Unfair Commercial Practices Directive (Directive 2005/29/EC, see footnote 60) to the specific sector of air services.

<sup>60</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L149 of 11.6.2005, p.22-39.

<sup>61</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF>  
Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L95 of 21.4.1993, p. 29-34.

<sup>62</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1993:095:0029:0034:EN:PDF>  
Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L178 of 17.7.2000, p. 1-16.

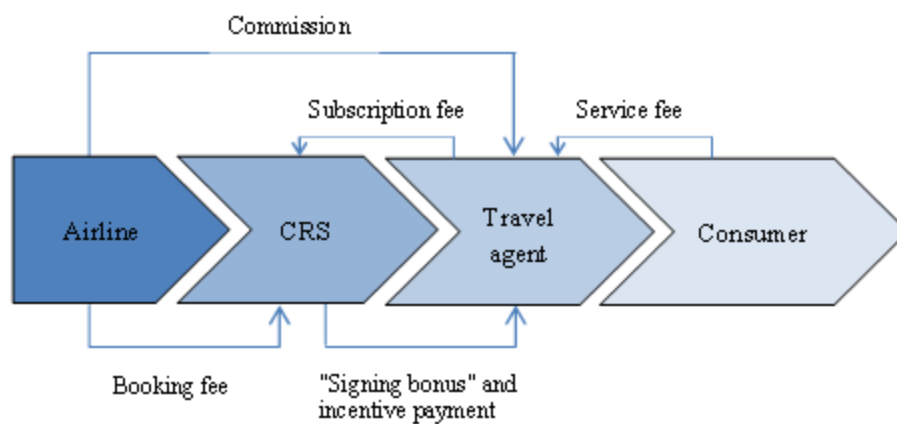
<sup>63</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:178:0001:0016:EN:PDF>  
Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L304 of 22.11.2011, p. 64-87.  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:EN:PDF>

## 4.2 Regulation 80/2009 on a Code of Conduct for computerised reservation systems

### 4.2.1 Regulatory environment existing at the time of adoption

Computerised reservation systems ("CRS") are worldwide computerised reservation networks used by travel agents, online reservation sites, and large corporations as a single point of access for booking airline seats, hotel rooms, rental cars, and other travel related items. They are also called Automated Reservation System ("ARS") or Global Distribution System ("GDS"). The premier CRS operators are Amadeus, Travelport and Sabre, originally owned and operated as joint ventures by some major airlines notably ("parent carriers"). The presence of such 'parent carriers' created in the past potential competition issues on this highly critical market. A first CRS Code of Conduct was therefore adopted in 1989.<sup>64</sup>

Figure 13: The CRS market



Even though the 1989 Code of Conduct on CRS proved successful in preventing abuses of market power, it had some unintended consequences due to its becoming increasingly ill-adapted to deal with changing market conditions:

- Firstly, the Code's non-discrimination requirements stifled price competition and innovation, because they restricted the airlines' and CRS providers' freedom to negotiate booking fees and fare content offered via the CRSs. The ensuing lack of competition kept booking fees at a higher level than necessary.
- Consequently, airlines tended to distribute an increasing share of their tickets via the alternative channels such as their own Internet websites, thereby reducing the travel options available to travel agents using the CRSs and their customers.
- Furthermore, as CRS markets in other parts of the world have been deregulated, it was necessary to ensure that airlines and CRS providers from within and outside the EU competed on a level-playing field.
- Additionally, there was a need to update and maintain the basic safeguards included in the Code which ensured the provision of neutral information to travel agents and consumers (neutral displays) and that vertical integration between airlines and CRSs

<sup>64</sup>

See footnote 43.

did not lead to competitive abuses (e.g. the prohibition for parent carriers of a CRS to refuse the participation at the same level in other CRSs).

To address these issues Regulation 80/2009 was adopted and entered into force on 29 March 2009. In comparison to the previous EU legislation on the same subject, technological (developments linked to the internet) and market developments (airlines' direct sales to consumers) allowed for a substantial simplification of the legislative framework by giving more flexibility to CRSs and air carriers to negotiate booking fees and fare content. Regulation 80/2009 nevertheless maintained safeguards that protect against potential competitive abuses by airlines owning or controlling a CRS (parent carriers). It also introduced enhanced rules for the protection of passenger/personal data.

Measures affecting CRS services fall within the scope of the Annex on air transport services of the General Agreement on Trade and Services (GATS)<sup>65</sup>. The area is also covered<sup>66</sup> by Free Trade Agreement concluded between the EU and Korea, by the Caribbean Community (Cariforum)-EU Economic Partnership Agreement and the Association Agreement between the EU and Chile as well as by Free Trade Agreements with Colombia and Peru and with Central American States, which have not been published yet.

#### **4.2.2 Policy objectives of Regulation 80/2009**

- Substantially simplify the legislative framework to adapt the Code of Conduct to current market conditions, especially by giving more flexibility to system vendors and air carriers to negotiate booking fees and fare content (Recital 3).
- Maintain effective competition between participating and parent carriers by provisions that ensure the respect for the principle of non-discrimination in cases where CRSs and airlines are vertically integrated (see Recitals 5 to 8).
- Ensure the supply of neutral information and price transparency to consumers via unbiased initial displays and equal accessibility (see Recitals 9 to 11).
- Increase the environmental information given to consumers by the inclusion of information on CO<sub>2</sub> emissions and the fuel consumption of the flight (Recitals 16).
- Increase personal data protection in the context of CRSs (Recital 21).

In the following the partial de-regulation of the CRS market and the safeguards laid out in the Code are explained in more detail.

#### **4.2.3 Main provisions of Regulation 80/2009**

##### **4.2.3.1 Partial de-regulation of the CRS market**

The simplification of the Code of Conduct entails the lifting of restrictions with regard to fare content, access to the distribution facilities and booking fees (Article 3). This step increases the negotiating freedom of the market participants: by allowing airlines and CRS providers to freely negotiate booking fees and fare content, CRSs can increasingly compete on the basis of price and service quality. Increased market efficiency aims to reduce booking fees and attract more airline content.

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<sup>65</sup> [http://www.wto.org/english/docs\\_e/legal\\_e/26-gats\\_02\\_e.htm#top](http://www.wto.org/english/docs_e/legal_e/26-gats_02_e.htm#top)

<sup>66</sup> For references, see footnotes 54-58.

#### 4.2.3.2 Safeguards

Regulation 80/2009 maintains several provisions to protect against potential competitive abuse between parent carriers<sup>67</sup> and CRSs and to ensure the supply of neutral information to consumers.

##### *Neutral display*

Article 5 stipulates the obligation for system vendors to provide neutral and non-discriminatory displays in order to ensure neutral information for consumers and avoid any screen bias in favour of specific airlines.<sup>68</sup> The criteria used for ranking shall not be based on the carrier identity and be applied on a non-discriminatory basis to all participating carriers.

The display rules must abide by the following (Annex I to the Code of Conduct):

- Prices shall be inclusive of all the applicable taxes, charges, surcharges and fees which are unavoidable and foreseeable (in line with Regulation 1008/2008).
- At the choice of the subscriber (i.e. travel agent) travel options can be ranked either by fares or by non-stop travel options ranked by departure time or by elapsed journey time.
- In the case of code-share arrangements, each of the air carriers concerned (but no more than two) shall be allowed to have a separate display.
- Information on the bundled products shall not be featured in the principal display.
- Additionally, where train services for the same city-pair are offered on the CRS, at least the best ranked train service or air-rail service shall feature on the first screen of the display.

Some other specific provisions on air carriers subject to an operating ban in the EU, as well as identification of the operating carrier can be mentioned.

##### *Marketing information data tapes*

Article 7 of the Code stipulates that marketing booking and sales data must be offered on a non-discriminatory basis and equal timeliness to all participating carriers. Data may cover all participating carriers and/or subscribers. Moreover participating carriers shall not use the data to influence the choice of the subscriber (i.e. travel agents).<sup>69</sup> Article 7(3) adds the prohibition

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<sup>67</sup> On distribution facilities, Article 4 obliges system vendors to clearly separate the CRS systems from any airline's internal reservation system, such as to avoid privileged access to the CRS systems by parent carriers. Furthermore, the same article prohibits system vendors to reserve any distribution facilities to their parent carriers, such as to avoid competitive advantages of parent carriers over other participating carriers. According to Article 10, parent carriers are obliged to provide a CRS other than its own with the same information on its transport services or accept bookings from CRSs other than its own to avoid that parent carriers hinder competition from other CRSs. Moreover, to avoid systematic preference of the own CRS, parent carriers are prohibited to link incentives or disincentives to the use of a specific CRS.

<sup>68</sup> On relationship with subscribers too, Article 6 introduces safeguards to protect the neutral advice of travel agents, such as the prohibition for system vendors to attach exclusivity conditions to their contracts with the travel agents.

<sup>69</sup> Data stored by CRS must respect the principles of the Safe Harbor Agreement, that imposes seven strong self-regulation principles and went into effect in 2000 after negotiations between the EU and the USA, as regulatory regimes relating to privacy differ. US companies appear to tend to view private data as a valuable commercial asset rather than as an individual asset. Practically, in the United States, this

for system vendors to identify travel agents in the Marketing Information Data Tapes ("MIDT"). Where such data results from the use of the distribution facilities of a CRS by a subscriber established in the EU, the data shall not include identification of the subscribers unless the subscriber and system vendor agree on the conditions for the appropriate use of such data. Agreements between subscribers and system vendor (i.e. CRS) on the MIDT shall be made available to the public (Article 7(4)).

This provision avoids that an airline could use the data to pressure travel agents to reduce their bookings on rival airlines. In addition, agreements between subscribers and the system vendor on the MIDT could include a compensation scheme in favour of subscribers (Recital 12).

#### *Personal data*

On processing, access and storage of personal data, Article 11 contains the provisions for the protection of personal data that particularise and complement those of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.<sup>70</sup> The rules state that, when making the data available to third parties, personal data of the travel agent's customers on behalf of whom they are acting should be stored safely by the CRS providers, without identification of these customers (be it natural persons or companies).

#### *Inter-modality*

Regulation 80/2009 states (in Recital 15) that "information on bus services for air-transport products or rail-transport products incorporated alongside air transport products should, in the future, be featured in the principal display of CRSs". Furthermore Annex 1 of Regulation 80/2009 states that "no discrimination on the basis of airports or rail stations serving the same city shall be exercised in constructing and selecting transport products for a given city-pair for inclusion in a principal display".

#### *Equivalent treatment in third countries*

The safeguards contained in Article 8 allow the Commission to take measures to ensure equal treatment of EU airlines with regard to CRS systems in third countries.

### ***4.3 Regulation 785/2004 on insurance requirements for air carriers and aircraft operators***

#### **4.3.1 Regulatory environment existing at the time of adoption**

In the past, EU rules in the field of air carrier licensing merely required air carriers to "be insured to cover liability in case of accidents, in particular in respect of passengers, luggage, cargo, mail and third parties" without setting any criteria or amounts to be observed. Article 7

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<sup>70</sup> usually means the consumers must "opt out" of customer lists and sales promotions. In Europe, customers generally have to "opt in" to commercial marketing schemes.  
Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31–50  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1995:281:0031:0050:EN:PDF>

of Regulation (EC) 2407/92<sup>71</sup> (subsequently replaced by Regulation 1008/2008) required that air carriers contract insurance to cover their liability<sup>72</sup> with respect to passengers, baggage, cargo and third parties in the event of an air disaster. However, it did not indicate minimum insurance requirements or the terms and conditions of insurance.

Following the terrorist attacks of 9/11, insurance requirements in the aviation industry became topical also in the EU. The European Civil Aviation Conference responded in 2002 by deciding on higher minimum levels of insurance cover for persons and third parties. Also in 2002, in order to ensure transparent, non-discriminatory and harmonised application of minimum insurance requirements, the Commission proposed a separate legislative act on the issue.

Regulation 785/2004 entered into force on 30 April 2005. It imposes transparent, non-discriminatory and harmonised minimum insurance obligations in respect of the liability for passengers, baggage, cargo and third parties. This Regulation implements the Montreal Convention of 1999 for the Unification of Certain Rules for International Carriage by Air concluded in the framework of the ICAO. The EU adhered to this Convention in 2001. The Montreal Convention defines the rules on liability in international air transport of persons, baggage and cargo. Article 50 of the Montreal Convention requires parties to ensure that air carriers are adequately insured to cover liability under that Convention.

Article 4(h) of Regulation 1008/2008 defines that, for Community air carriers, compliance with insurance requirements of Regulation 785/2004 is a condition for obtaining an operating licence. Regulation 785/2004 (as amended by Regulation 285/2010)<sup>73</sup> defines insurance requirements for air carriers operating in the EU by establishing minimum insurance requirements for air carriers and aircraft operators in respect of passengers, baggage, cargo and third parties<sup>74</sup>. Insurance for mail is regulated by Article 11 of Regulation 1008/2008.

#### 4.3.2 Policy objectives of Regulation 785/2004

- To provide each airline a possibility to meet its financial commitments in case of accidents and enhance consumer protection, by ensuring a proper minimum level of insurance to cover the aviation specific liability of in respect of passengers, cargo and third parties (Recitals 1, 9,13 and 14).
- To extend the list of insurable risks – in light of the events of the 11 September 2001 terrorist attacks – with war and terrorism related risks (Recital 4).

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<sup>71</sup> See footnote 12.

<sup>72</sup> It is important to understand the difference between insurance requirements and liability. If an incident happens and the airline is found liable, then it must indemnify the parties concerned. Depending on the circumstances, liability may either be capped or unlimited, and either strict or fault-based. Regulation 785/2004 sets minimum levels of insurance that airlines and aircraft operators must carry, but does not impact their liability. If the airline is liable for less than the minimum amount it is insured for, then its insurance covers the liabilities. If the liability is greater than the minimum amounts of insurance purchased, then the airline would have to pay the difference out of its reserves or assets. Where liability is unlimited, this difference could be substantial.

<sup>73</sup> Commission Regulation (EU) No 285/2010 of 6 April 2010 amending Regulation (EC) No 785/2004 of the European Parliament and of the Council on insurance requirements for air carriers and aircraft operators, OJ L 87, 7.4.2010, p. 19–20

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:087:0019:0020:EN:PDF>

<sup>74</sup> Third-party in this context means any legal or natural person, excluding passengers and on-duty members of flight and cabin crew (Article 3(h) of Regulation 785/2004).

- To create a level playing field for all European and third-country aircraft operators by applying the provisions of the Regulation to all aircraft flying within, into, out of, or over the territory of a Member State, including its territorial waters (Recital 9).
- To ensure that, without a valid insurance corresponding to the minimum criteria and its certificate or other evidence of possession of insurance deposited at relevant authorities no aircraft (with some exemption, Recital 12) shall fly within, into, out of, or over the territory of a Member State (Recital 17 and 18).
- The objective of the 2010 amendment was to update the minimum insurance cover for liability in respect of baggage and cargo in commercial operations due to inflation.

### 4.3.3 Main provisions of Regulation 785/2004

#### *Scope*

Regulation 785/2004 applies to all air carriers and aircraft operators flying within, into, out of or – to a certain extent – over EU territory, with the exception of State aircraft, model aircraft with a maximum take-off mass (MTOM) of less than 20 kg, foot-launched flying machines, captive balloons, kites and parachutes (Article 2).

#### *Principle of insurance*

The basic principle of the Regulation is the requirement for all air carriers and aircraft operators to be insured as regards their aviation-specific liability in respect of passengers, baggage, cargo and third parties. The insured risks include acts of war, terrorism, hijacking, acts of sabotage, unlawful seizure of aircraft and civil commotion (Article 4).

#### *Insurance liability*

For liability in respect of passengers, the minimum insurance cover shall be 250 000 SDRs<sup>75</sup> per passenger. This is higher than the minimum requirement prescribed by the Montreal Convention (113,100 SDRs). However, for non-commercial operations by aircraft with a maximum take-off mass (MTOM) of 2,700 kg or less, Member States may allow a lower minimum insurance cover of at least 100,000 SDRs per passenger.

For liability in respect of baggage, the minimum insurance cover shall be 1131 SDRs per passenger in commercial operations.

For liability in respect of cargo, the minimum insurance cover shall be 19 SDRs per kilogram in commercial operations.

With respect to liability for third parties, the minimum insurance cover per accident depends on the maximum take-off mass of the operated aircraft (see Article 7). It is to be noted that with regard to third party liability, the Regulation goes beyond the Montreal Convention, which does not regulate third-party liability. The minimum insurance cover per accident varies depending on the MTOM of the aircraft, from 0.75 million SDRs for aircraft with an MTOM of less than 500kg, to 700 million SDRs for aircraft with an MTOM of 500,000kg or more. The minimum applies per accident for each and every aircraft.

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<sup>75</sup> "SDR" means a Special Drawing Right as defined by the International Monetary Fund. Article 3e) of the Regulation. 1EUR = 0.8367SDR and 1USD = 0.6536SDR (06/11/2012)

For overflights (without a take-off or landing in the EU) by non-EU carriers or operators using aircraft registered outside the EU, the minimum insurance requirements for passengers, baggage and cargo shall not apply. These flights are only required to comply with the requirements for insurance against liability to third parties.

#### *Insurance certificate*

The Regulation requires air carriers, and when required aircraft operators, to deposit an insurance certificate or other evidence of valid insurance at the competent national authority.

#### *Sanctions*

Member States are required to ensure compliance with the Regulation and sanctions for any infringement should be effective, proportional and dissuasive. For non-EU carriers and aircraft operators using aircraft registered outside the EU the sanctions may include refusal of the right to land on the territory of a Members State.

## ***4.4 Passengers' protection in case of airline insolvency***

### **4.4.1 Current regulatory environment**

The creation of the single market in aviation has been accompanied by a process of regulatory convergence in various fields and notably passengers' protection. Although a number of passenger rights have been regulated at EU level, the specific case when a passenger has purchased a stand-alone air ticket and the air carrier goes insolvent has not been solved yet. This fact makes a contrast with the protection that is available if the passenger had bought a ticket as part of a travel package under Directive (EC) 90/314/EEC<sup>76</sup>. In addition to the Package Travel Directive, two pieces of EU legislation deal with air carriers' financial capacity and passenger protection: Regulation 1008/2008 and Regulation 261/2004 of 11 February 2004<sup>77</sup>.

### **4.4.2 Relevant provisions of Regulation 1008/2008**

Some provisions of Regulation 1008/2008 pursue the policy objective to improve the financial capacity of air carriers. Supervision is to be carried out by the competent licensing authority (Articles 5, Article 8(4), Article 8(6) and Article 9).

Article 8 requires airlines to present timely audited accounts to their competent licensing authorities, and requires competent licensing authorities to monitor on-going compliance with the provisions on financial capacity set out in the Regulation. In particular, they must review the position of airlines two years after the granting of a new operating licence, when a potential problem is suspected, and at the request of the Commission.

Article 9 requires a competent licensing authority to suspend or revoke an operating licence if it is not satisfied that the airline can meet its actual and potential obligations for a 12-month period. It may grant a temporary licence valid for up to 12 months (subject to safety considerations) to allow financial reorganisation. Where there are clear signs of financial difficulty, the airline must within 3 months make an in-depth assessment of the financial situation.

### **4.4.3 Relevant provisions of Regulation 261/2004**

Regulation 261/2004 establishes common rules on compensation and assistance to passengers, notably in the event of flight cancellation. According to the text, the trouble and inconvenience to passengers caused by cancellation of flights should first be reduced by inducing carriers to inform passengers of cancellations before the scheduled time of departure and in addition to offer them reasonable rerouting, so that the passengers can make other arrangements (Recital 12). In case their flight is cancelled at short notice (less than 15 days before the flight schedule time) regardless of the reason that triggers the cancellation,

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<sup>76</sup> Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L158, 23.6.1990, p. 59–64.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1990:158:0059:0064:EN:PDF>

<sup>77</sup> Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 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 repealing Regulation (EEC) No 295/91 (Text with EEA relevance) - Commission Statement, OJ L46, 17.2.2004, p. 1–8.

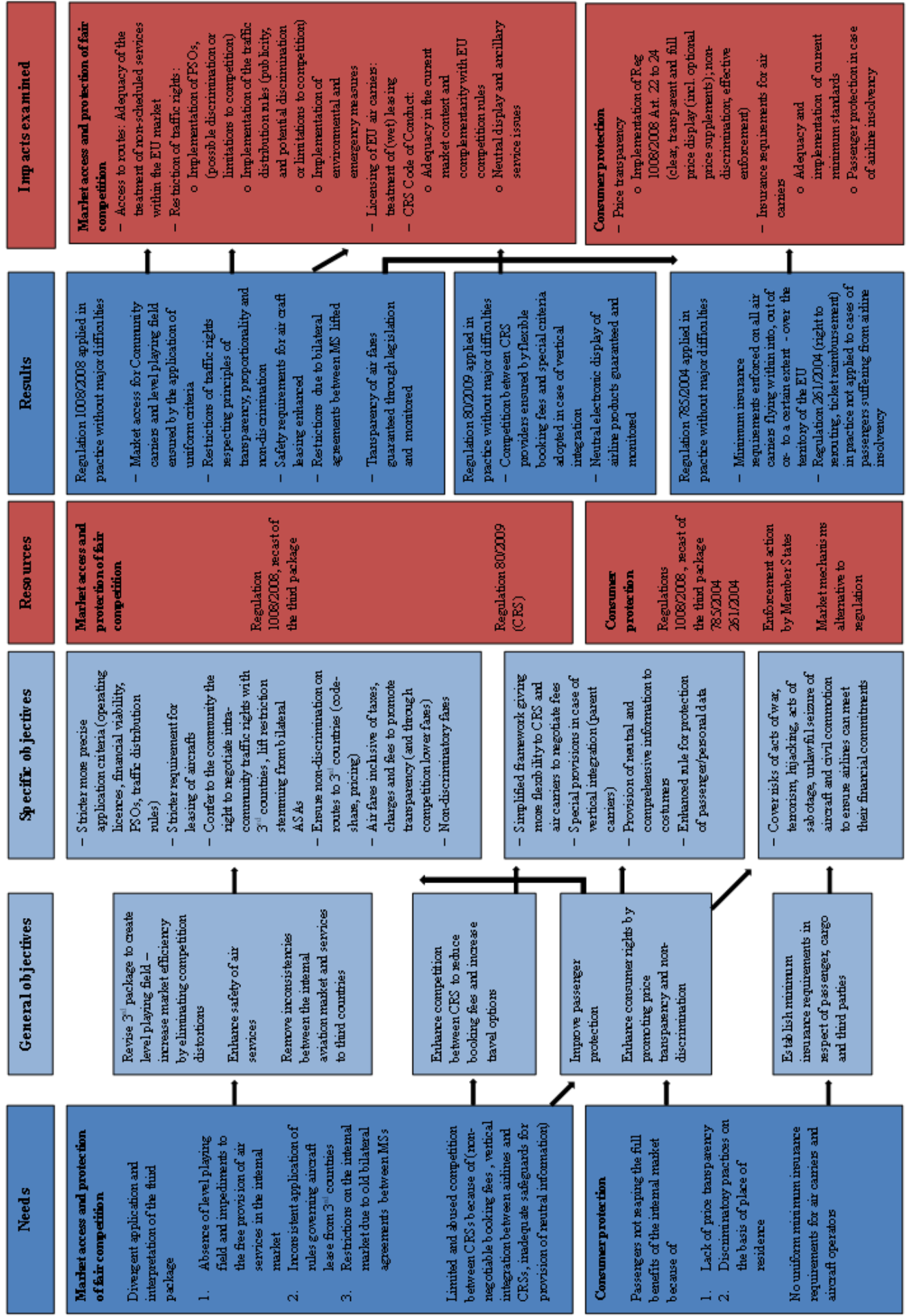
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:046:0001:0007:EN:PDF>

passengers should be able either to obtain reimbursement of their tickets or to obtain re-routing under satisfactory conditions, and should be adequately cared for while awaiting a later flight (Recital 13).

Rights granted to passengers under Regulation 261/2004 are not affected by the financial situation of an airline. In fact, all rights are granted to "passengers", i.e. to holders of a ticket within the meaning of Article 2(f) of Regulation 261/2004. Therefore, principles laid out in Regulation 261/2004 also apply to passengers whose flights have been cancelled due to insolvency. Re-routing and care, as the case may be, should be provided to those passengers in accordance with this Regulation.

#### ***4.6 From regulation to evaluation – intervention logic***

The following intervention logic diagram explains the path from the decision to undertake a legislative action (here the above-described three pieces of legislation scrutinised in this Fitness Check), through the implementation phase to evaluation of the effects of this legislative action. The last column then represents issues that were selected for an in-debt analysis in this Fitness Check.



## **5. Market access and protection of fair competition**

One of the cornerstones of the internal market, and of the Air Services Regulation, is the freedom to provide air services within the EU. Already the "third package" had largely played its role, allowing unprecedented expansion of air transport in Europe at affordable fares. But some lingering problems, hindering an effective functioning of the market, were identified. The Air Services Regulation tackled these issues, in an effort to remove those last barriers and to allow Member States, carriers and consumers to reap the full benefits of the internal market.

Ancillary to the provision of air services is the area of distribution of these services: rules governing the functioning of the market for computerized reservation systems are also based on this common rationale of market access as well as the rationale of safe-guarding a level playing field and fair competition.

This chapter looks at these two topics and in this order. It first presents in section 5.1 factual observations on the functioning of the sector and the application of the rules in practice. In section 5.2, the findings of the Fitness Check in terms of evaluation of the rules by stakeholders and Member States are presented. The chapter then draws conclusions, indicating that, whereas no legislative action is required at this stage, some regulatory action would nonetheless be welcome.

### ***5.1 State of implementation***

#### **5.1.1 Air Services Regulation**

The Fitness Check did not look at all aspects of market access regulation governed by the Air Services Regulation because some were already analysed and validated in the context of the recast of the "third package" by the impact assessment. Instead, based on internal expertise and experience of the Commission services, some issues requiring corrections *prima facie* were selected for an in-depth study and a public consultation. Naturally, stakeholders were not prevented from raising other points of controversy. These issues were leasing of aircraft, treatment of non-scheduled services and legitimate restrictions to market access (public service obligation, traffic distribution, emergency measures, and environmental measures).

##### **5.1.1.1 Licensing of Community air carriers – the issue of leasing<sup>78</sup>**

Air transport is characterised by strong needs in terms of capital, which leads air carriers to resort to leasing, operational and financial, as a critical tool to ensure that enough capacity is available<sup>79</sup>. Leasing is a widespread method used by air carriers to obtain equipment or increase their fleet capacity. To recall, a leased aircraft is an aircraft used under a contractual leasing agreement between the owner of the aircraft (the "lessor") and the air carrier that will use it (the "lessee"). A wet-leased aircraft includes a crew; a dry-leased aircraft does not include a crew.

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<sup>78</sup> For a description of applicable rules see section 4.1.3.2, page 38-39.

<sup>79</sup> Coroller, Jean (2006) "Managing risks in Air Transport", in "Air Transport: winning together", Editions Publisud, 2006.

According to ICAO, the use of leased aircraft plays a significant role for the provision of air services, reflecting the economics and flexibility of leasing over purchasing<sup>80</sup>. This significance is marked in terms of the European fleet figures as well. Out of the 4503 commercial passenger or cargo aircrafts in operation in 2011 in the EU, only 1425 or 32% was operator owned. This means that 68% of aircraft was leased. The overwhelming majority of the 3078 leased aircrafts was dry-leased (2809 or 91%). Finally out of the 269 wet-leased commercial aircraft in service only 26 was leased from a third country.<sup>81</sup>

The Commission already acknowledged the importance of leasing in the internal market in the preparatory work preceding the adoption of the Air Services Regulation. Nonetheless, the Commission also noted that the varying practices between Member States with regard to aircraft leasing created competition distortions in the internal market and undermined social conditions of airline staff<sup>82</sup>.

The Air Services Regulation expands and clarifies the conditions for leasing with the objective of ensuring a harmonised application in the EU. The Regulation introduces the principle that EU carriers can freely lease aircraft (through dry or wet lease agreements) as long as they continue at all times to operate at least one aircraft under their own Air Operator's Certificate (AOC). Prior approval shall be required in some cases and particularly when the EU carrier wet leases an aircraft registered outside the EU.

The Commission services held two stakeholders meetings to gauge the stakeholders' perception on the rules of leasing, first with industry representatives and then with Member States.

In the stakeholder consultation meeting with industry on 27 June 2011, the International Air Carrier Association (IACA) identified as a shortcoming of Article 13 of the Air Services Regulation a lack of clarity regarding intra-EU dry lease. While Article 13(3) explicitly lays down the rules pertaining to the wet-lease of third country aircraft, the Regulation does not mention the possibility for EU airlines to dry lease an aircraft registered in a third country, thereby giving the impression that such dry-lease is not allowed. Such restriction on leasing practices would be strange, as dry-leased aircraft are flown by EU crew and under EU operating licence.

In the Stakeholder consultation meeting with Member States on 28 June 2011, Portugal and Italy mentioned a problem in relation to wet leasing by Category B carriers of larger aircraft, which are outside the scope of their licence. There is a problem for providing justification for the non-approval in these cases and the Regulation could be clearer on this point.

Ireland also indicated that there could potentially be issues of approval for Member States authorities, when an EU carrier seeks to wet lease aircraft from a country with which the EU has an aviation agreement but when the insurance requirements in that third country are not equivalent to the minimum limits required within the EU stipulated in Regulation 785/2004.

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<sup>80</sup> ICAO, "Manual on the Regulation of International Air Transport", Second Edition, 2004.

<sup>81</sup> Source: The Ascend database covers all commercial aircrafts in service with the exception of aircrafts below 16 seats, piston engine aircrafts and helicopters.

<sup>82</sup> Proposal for a Regulation of the European Parliament and of the Council on common rules for the operation of air transport services in the Community (recast), COM(2006) 396 final, paragraph 3.2.2, page 10.

### **5.1.1.2 Access to routes/market access – the issue of non-scheduled services**

With the evolution of the distribution channels (internet) and the ability to make seat only sales, the distinction between scheduled and non-scheduled services has almost become a moot point for the intra-EU market<sup>83</sup>. The distinction is no longer significant. Therefore, the Air Services Regulation, as the "third package" before, does not differentiate between scheduled and non-scheduled services in relation to the freedom to provide intra-EU air services.

However, many non-scheduled services, particularly taxi and charter services, may be affected when offering their services in the EU market for operations outside the EU. The Regulation being silent on this aspect, their operations, although tendered exclusively to EU passengers, continue to be subject to national legislation, which may lead to discrimination on the basis of nationality<sup>84</sup>. Although benefitting from the freedom of establishment, many carriers providing non-scheduled services lack the size or manpower to create these establishments, which are not indispensable for their efficient operations. Conversely and since charter services are rarely regulated by bilateral treaties, they cannot benefit from a "designation provision" ensuring non-discrimination from third countries.

In their two stakeholders meetings with industry and the Member States, the Commission services were primarily interested in whether stakeholders thought the issue of non-scheduled services should be addressed on the European level.

### **5.1.1.3 Restriction of traffic rights – public service obligations (PSO)<sup>85</sup>**

Public Service Obligations (PSOs) are to be considered as an exception to the freedom to provide air services as defined in Article 15 of the Air Services Regulation. The role of PSOs is to set fixed standards of continuity, regularity, pricing or minimum capacity to ensure access to isolated regions or when a Member State finds that objectives of regional development policy will not be met adequately if only left to a free play of market forces.

An important feature of PSOs in the air transport sector is the clear distinction between the PSOs and the exclusive concessions: the imposition of public service obligations does not necessarily create the right for the Member State concerned to restrict the access to the air route to a single operator or to grant compensations for the fulfilment of the PSO. When PSOs have been imposed, any Community air carrier shall at any time be allowed to commence scheduled air services meeting the requirements of the PSO. A Member State may then refuse or withdraw the traffic right of an air carrier that does not fulfil the public service obligations. Only if the market does not provide air services in conformity with the PSO, Member States can restrict the access to the route in question to a single air carrier and to eventually compensate its losses. However, PSOs must respect the principles of non-discrimination and proportionality and they must not go beyond what is needed to attain the policy objectives.

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<sup>83</sup> Balfour, John (1995), "European Community Air Law", Chapter 6.2.5, Butterworths, 1995.

<sup>84</sup> In 2009, the Commission services received specific complaints about discriminatory treatment of carriers intending to operate non-scheduled services from Member States to third countries, and being refused the authorisation on a "First Refusal" basis. The complaints were withdrawn once the discrimination stopped. A "First Refusal" is a requirement that the carrier intending to operate a non-scheduled service has to provide evidence that no national carrier is in a position to provide the same service on similar or identical conditions.

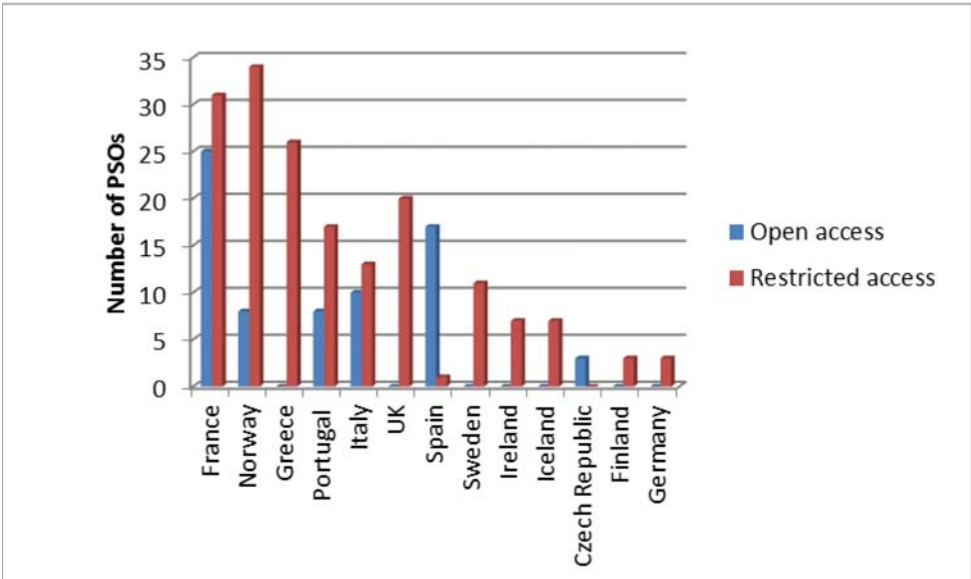
<sup>85</sup> For a description of applicable rules see section 4.1.3.4, page 40.

As PSOs are an exception to the general principle of free provision of services, any restrictions arising from the imposition of PSOs need to be interpreted narrowly. Member States enjoy a discretionary power - under the supervision of the Commission - to judge the need for a PSO<sup>86</sup>, which, however, should not lead to an excessive recourse to PSOs or to obligations disproportionate to the economic and social objectives pursued.

The number of PSOs in operation has expanded considerably since the adoption of the Air Services Regulation. In 2011, a total of 267 PSOs are imposed, an increase of 312% since 1997 (65 PSOs).<sup>87</sup> This increase might have occurred for justifiable reasons; nevertheless PSOs might have also served as deterrence to competition and new entrants and for market protectionism.

In 2012, 11 Member States and 2 European Economic Area countries had PSO routes in operation: the Czech Republic, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Norway, Portugal, Spain, Sweden, and the UK. France had the largest number of PSO routes (56) followed by Norway (42). Figure 14 below shows the distribution of operational PSO routes based on whether they have open access to all air carriers fulfilling the PSO or restricted access. The majority of PSOs routes belong to the second group, which means that an exclusive concession has been granted to an airline following a call for tender as foreseen in Article 16(10) of Regulation 1008/2008.

**Figure 14: Distribution of operational PSO routes, 2012**



Source: The Commission's internal database, based on the information provided by Member States

**5.1.1.4 Restriction of traffic rights - traffic distribution<sup>88</sup>**

Other exceptions to the freedom to provide air services are defined in Articles 19 to 21 of the Air Services Regulation. Accordingly, Member States have the right, after consultation with

<sup>86</sup> Balfour, John (1995), "European Community Air Law", Chapter 6.4.1, Butterworths, 1995.

<sup>87</sup> See introduction to Stakeholder Consultation 27/28 June 2011 - Public Service Obligations: [http://ec.europa.eu/transport/modes/air/doc/2011\\_06\\_27\\_stakeholder-consultation-pso.pdf](http://ec.europa.eu/transport/modes/air/doc/2011_06_27_stakeholder-consultation-pso.pdf)

<sup>88</sup> For a description of applicable rules see section 4.1.3.5, page 40.

interested parties, to distribute traffic between airports serving the same city or conurbation on the condition that the airports are reachable within 90 minutes and have good public transport connections to the city/conurbation they serve.

Examples are Milan, London, Berlin and Paris. The rules shall respect the principles of proportionality and transparency, and shall be based on objective criteria. This concept has evolved from the original treatment under Regulation 2408/92<sup>89</sup>, that relied on a pre-definition of an "Airport System" to be made, in which traffic could be subsequently distributed under the control of the Commission<sup>90</sup>. Regulation 1008/2008 introduced new criteria to define airports to be covered by a traffic distribution measure. This possibility might create distortions in potentially leading Member States to favour their national carrier(s) over other carriers in the sense that national carriers might get slots at the best connected airport.

Since no request under Article 19 has been made since the entry into force of the Air Services Regulation, the Fitness check assessed the impact that these rules allowing justified restrictions on market access/traffic rights may have on the way the internal market operates. This type of measures raises some important issues, particularly in relation to the justification and proportionality of the measures, and as to the need or not of reinforcing the coordination at EU level.

In the stakeholder consultation meeting with industry on 27 June 2011, IACA mentioned that Article 19.2 of the Regulation does not mention the type of traffic among the grounds for prohibition of discrimination. IACA considers that this could lead to discrimination between business models.

#### **5.1.1.5 Restriction of traffic rights - environmental and emergency measures<sup>91</sup>**

Member States may also limit or refuse the exercise of traffic rights to deal with serious environmental problems or to deal with sudden problems of short duration resulting from unforeseeable and unavoidable circumstances. Such actions shall respect the principles of proportionality and transparency and shall be based on objective and non-discriminatory criteria. Environmental measures shall also be limited in time.

### **CASE-STUDY**

#### **Prohibition on very short haul flights in Belgium**

1. On 31 October 2006, the Belgian Federal transport minister adopted a ministerial decree with the objective to prohibit very short haul flights between close airports. The decree aimed at prohibiting flights to/from/within Belgium if they did not exceed 150 km. The rationale of this measure was to prevent energy wasting and pollution. This measure seems in line with the European law as long as certain simple conditions are fulfilled.

<sup>89</sup> Part of the "third package". See footnote 12.

<sup>90</sup> At the time of the adoption of Regulation 2408/92, 8 airport systems were included in a list in annex II of Regulation. The airport system of Stockholm-Arlanda/Bromma was added at the moment of accession of Sweden on 1 January 1995.

<sup>91</sup> For a description of applicable rules see section 4.1.3.6, page 40.

2. The first ban concerned flights of the Marrocan carrier Jet4You from Casablanca, which were to make a stop-over both in Liège and Charleroi, situated some 80km from each other. Instead, the region provided a bus to transfer some 40 passengers concerned.

3. The bilateral EU-Marocco agreement was the law applicable in this matter. This open-skies agreement allowed for traffic restrictions for environmental reasons (Article 17). The ban imposed by Belgium was therefore legal, as long as it remained non-discriminatory.

4. The EU law applicable to the decess at the time of its adoption was the third liberalisation package of 1992. Regulation 2408/92 (as the Air Service Regulation) allowed for restrictions of traffic rights for environmental reasons as long as they were non-discriminatory, limited to three years, renewable, neutral in terms of competition and proportionate to the objective sought by the measure. The Commission was able to oppose such a restriction within a month if it deemed it contrary to EU law. This provision of Article 9 of Regulation 2408/92 has never been used before and after the Belgian case.

5. The Commission did not oppose the 2006 ministerial decree but considered that, in order to take account of each specific situation, a case-by-case analysis would be necessary for each ban between two given airports. For example, while it is important to consider environmental benefits of such a ban, it is also crucial to take into account possible costs related to disappearance of certain connections at Brussels Airport.

### **5.1.2 Regulation 80/2009 on a Code of Conduct for computerised reservation systems**

The Fitness Check focused on four areas treated in the Code of Conduct:

- neutral display,
- marketing information data tapes,
- personal data,
- inter-modality.

A fifth topic, not regulated by the Code of Conduct, has also been analysed by the Fitness Check: ancillary services. Unbundling the passenger air transport service has become an important trend in the aviation industry globally. Ancillary services, such as seat reservation, checked baggage or meals were traditionally included within the air fare, but now an increasing number of airlines charge passengers for various add-on services. While most low-cost carriers have always relied on unbundling and ancillary revenues, network carriers have now entered this marketing model that allows increasing their revenues in this area. The Fitness Check tried to respond to two basic questions: should all avoidable fares be displayed by the CRS? Are CRS able to display all fares?<sup>92</sup>

#### **5.1.2.1 Current business model**

The air distribution market consists principally of three major groups of stakeholders – airlines, travel agents and distribution technology providers including CRS providers – with

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<sup>92</sup> Developments outside the EU have also been scrutinised by Steer Davies in its study.

complex commercial interactions, rather than a “linear” industry where business relationships are conducted on a one-to-one basis (see Figure 13, p.42).

Travel agents use CRSs for a variety of reasons: CRSs provide travel agents with technology enabling them to conduct a single search to access hundreds of airlines’ inventories (as well as hotels and other travel products) and to display the information in a format that is understandable by the agent and, ultimately, by the customer. CRSs allow agents to book and ticket complicated itineraries involving, if required, more than one airline. When a customer books his or her travel, the airline pays a fee to the CRS, which, in some cases, gives a share of this fee to the agent. CRSs often also provide the equipment and/or software that travel agents use for their front office tasks (the booking of customers' travel requirements) and back office tasks (accounting systems, airline billing and settlements, customer relations, etc.).

All network airlines consulted shared the view that they had to participate in all CRSs, even in their home markets: they do not view participation in one CRS as substitution for participation in another CRS. They therefore considered that CRS providers continue to have strong market positions at regional level. They perceive that CRSs are essential for network and leisure carriers to ensure that their products can be distributed at the other end of the route. With CRS companies concentrated by geography, airlines felt that it gives CRSs a strong commercial position enabling them to contract terms that airlines would otherwise not agree to. One airline noted that CRSs are particularly important in countries with a low internet penetration rate. A low-cost carrier noted that its business model and its distribution requirements differ significantly from network carriers, with less dependency on indirect sales. However, this low-cost carrier has tickets available on two CRSs, with plans for a third.<sup>93</sup>

For their part, CRS providers consulted disagreed with claims that their commercial position effectively compelled airlines to participate in CRSs and to agree contract terms, which they would not normally accept (for example in Full Content Agreements<sup>94</sup>). In contrast, the CRS providers stated that major airlines’ strong position in their home countries gave them leverage in negotiations with CRS providers, and that this had allowed them to achieve significant reductions to average fees. More generally, it was claimed by a CRS provider that average costs per segment have reduced at each renegotiation of the FCA with the airline involved. CRS providers also claimed that some airlines’ own commercial positions allowed them to use techniques such as applying surcharges to and withholding ancillary services information from travel agents using CRSs disfavoured by the airline.

All travel agents consulted thought that CRSs continue to be the best solution for online and offline travel bookings, by maintaining a centralised connection to virtually all airlines, while facilitating agents’ front and back office operations and promoting the efficiency of business customers’ travel policies. However, agents noted the pressure from the airlines to move to direct connect services as well as multi-sourcing gaining in importance in the last five years and is putting additional workload on travel agents for the booking processes and back office coordination. One agent noted that in spite of a developing usage of the internet by travel agents for multi-sourcing, this had not been translated into a decline in CRS usage. For the

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<sup>93</sup> Steer Davis Gleave final report, p.65. See footnote 28.

<sup>94</sup> Full content agreements (FCAs) are commercial contracts between the CRS providers and the network airlines, which, require airlines to give all of their fare content to the CRS provider across all geographic markets, subject to any exceptions which may be negotiated (whether in terms of fare content or geographical coverage), in return for receiving a discount on booking fees.

agents, one central point of access for the data is preferable and this is how they hope the market will remain in the future.<sup>95</sup>

Because of the complexity of these systems as well as the staff training required to run the systems, most travel agents rely on only one CRS provider and tend to change their CRS provider only rarely. According to the American Society of Travel Agents, at the end of 2009, 86% of travel agents in the US used only one CR and only 15% of travel agents in the US had changed their CRS provider in the last seven years.<sup>96</sup>

The nature of the travel agent – CRS relationship is an area of dispute in the industry, with airlines suggesting that travel agents are "locked" into CRS relationships, whereas CRS providers recall that a significant number of large travel agents use multiple CRS providers, including 24 out of the 25 largest European agents. Some stakeholders state that travel agents often have a secondary CRS provider as a backup system rather than as a principal provider.<sup>97</sup>

### 5.1.2.2 Cost and price policy of airlines

Evidence suggests that globally the share of direct sales (i.e. by airlines directly to customers, not involving a travel agent) has significantly grown between 2008 and 2011. These sales are predominantly using airline websites. SITA's IT Trends Report of 2011<sup>98</sup> indicates that 2011 was a turning point with direct sales channels accounting for more than half of airline ticket sales. SITA estimates that this trend will continue for the foreseeable future.

However, examining the market shares of the CRS providers in the EU shows the dominance of individual CRSs on a number of national markets. In 2010, in 14 out of 27 Member States, one CRS handled more than 70% of indirect bookings (i.e. bookings not made directly with the airline, whether online or offline).<sup>99</sup>

In the past ten years, individual commercial negotiations between airlines and CRS providers have allowed significant decrease of indirect distribution cost for airlines. The exact percentages vary per company and constitute business secrets, but an average 10-15% drop range in the EU has been orally mentioned to the Commission's services from several CRS sources.

According to information provided by one North-American and three European network airlines to Steer Davies Gleave, the average CRS booking fee in 2010 was in the range of 3.70 Euro to 5.20 Euro<sup>100</sup> per segment. According to Steer Davies Gleave, this is broadly consistent with information from one CRS provider, which indicates that the average booking fee for its top three EU and top two US airline customers was 3.61 Euro in 2010. The airlines and CRS providers strongly disagree about how CRS charges compare with the costs of other distribution channels. Airline stakeholders considered that CRS fees were much higher than the fees incurred for the use of other channels, including their own websites. CRS providers

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<sup>95</sup> Steer Davis Gleave final report, p.68. See footnote 28.

<sup>96</sup> EU-specific data of this type are not available. Nonetheless, the consultant considered that the market structure is the same in the EU and trends outlined here for the US market are illustrative for the EU by analogy.

<sup>97</sup> Steer Davis Gleave final report, p. 3. See footnote 28.

<sup>98</sup> <http://www.sita.aero/content/airline-it-trends-survey-2011>

<sup>99</sup> Steer Davis Gleave final report, p. 2. See footnote 28.

<sup>100</sup> Airline companies consider that distribution costs are a major source of cost cutting. The industry is characterised by narrow profit margins, which explains airlines' price sensitivity to amounts, which may appear relatively small.

reject this comparison, stating that it is not comparing like with like, and that the figures quoted for non-CRS transactions do not capture the full cost, including overheads.

An indication of the range of distribution costs for airlines using different distribution channels can be obtained by considering selling costs per passenger segment on low-cost carriers. easyJet, for example, sells the vast majority of its seats through its own website and, based on its published 2011 Annual Report, had “selling and marketing costs” per passenger segment of 2.36 Euro in 2010 (based on exchange rate of £1 = 1.25 Euro).

While it is not possible from publicly available data to identify the exact composition of the selling and marketing costs in easyJet’s report, it is reasonable to assume that selling and marketing costs include the full costs of distribution, including the operation of easyJet’s website, as well as other activities such as advertising. Based on this assumption, easyJet’s cost of sale per passenger segment (2.36 Euro), is lower than the corresponding cost of sale for network carriers using CRSs, which includes CRS usage fee (estimated to be in the range 3.60 Euro to 5.20 Euro per passenger segment based on information provided by stakeholders).

However, the limits of this comparison have to be specified. This is not a like-for-like comparison since network carriers, who tend to use CRSs, offer more complicated itineraries than low-cost carriers (who generally only allow point-to-point journeys) and need to reach wider sections of the market than low-cost carriers, in particular corporate and other travellers using travel agents. The comparison therefore does not demonstrate that CRS providers would offer lower value. However, it does indicate that, for some market segments, lower cost distribution mechanisms are available than those currently provided by CRSs. Also, commercial negotiations between individual airlines and CRS providers have allowed in the last 5 years a significant decrease of indirect distribution cost for airlines, in real terms (monetary) or relative terms (enhanced technological content of the service). The exact percentages vary per company and constitute business secrets.

### **5.1.2.3 Industry's compliance with the legislation**

#### *Neutral display*<sup>101</sup>

Steer Davies Gleave has tested two CRS providers (Amadeus and Travelport) and has not observed any issues with the requirement of neutral display. Most stakeholders, including most but not all airline respondents, have agreed that, in Europe, the Code of Conduct prevents unfair display of one carrier over another<sup>102</sup>. However, with more bookings taking place outside of the CRS, the issue of neutral display on online travel agents (OTAs) and meta-search engines (MSE) is also relevant.

One issue has been raised by a stakeholder regarding Article 5(3) on air carriers subject to an operating ban pursuant to Regulation (EC) No 2111/2005.<sup>103</sup> This stakeholder claimed that

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<sup>101</sup> For a description of applicable rules see section 4.2.3, p.44.

<sup>102</sup> Steer Davis Gleave final report, p.49. See footnote 28. In other parts of the world this may not always be the case, according to Steer Davies Gleave. For example, in the US, "biased" displays are allowed, subject to being disclosed to the end-user.

<sup>103</sup> Regulation (EC) No 2111/2005 of the European Parliament and of the Council of 14 December 2005 on the establishment of a Community list of air carriers subject to an operating ban within the Community

the airlines banned from operating in the EU were not correctly identified. Steer Davies Gleave asked one of the travel agents to test this and found that this was not the case<sup>104</sup>.

#### *Marketing information data tapes (MIDT)*<sup>105</sup>

Two aspects to the MIDT data issue can be mentioned: the first regards grouped sales of MIDT data; the second regards the issue of subscriber identification and the conditions of agreements between CRSs and subscribers.

*Grouped sales* are a current market practice where airlines are purchasing MIDT data from a CRS as a group rather than as individual airlines. The reason is that the cost of MIDT data is very high, in light of its paramount marketing and strategic value. MIDT data is derived from travel agency bookings data and is very useful for airlines as well as for other industry organisations. It provides a detailed insight into what the agencies have been booking and what air travel products the passengers have been purchasing<sup>106</sup>. Such products are available from CRS providers as well from IATA with a product called IATA PaxIS. Apart from an issue with this latter product of IATA, no notable issue with the MIDT provisions of the Code of Conduct has been detected<sup>107</sup>.

Regarding *the conditions in agreements between CRSs and subscribers*, travel agents feel that, despite the protection of their interests by Article 7(3) of the Code, in practice this protection is not necessarily effective. Travel agents claim that agreements with CRSs have been obtained in some instances by giving travel agents a very short time to respond, or an absence of answer was considered as agreement. The possibility to disagree was not always clear for travel agents. Moreover, it appears unclear how an agent could decide to withdraw its agreement if it no longer wants to be identified in marketing data.<sup>108</sup>

#### *Personal data*<sup>109</sup>

On processing, access and storage of personal data, Steer Davies Gleave study has shown that provisions of the CRS Code for the protection of personal data that particularise and complement those of Directive 95/46/EC have been respected – within the limit of available data.

All personal data collected by Travelport, a major CRS provider, through its CRS searches and transactions are physically stored on servers located in the USA under the international

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and on informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36/EC, OJ L344, 27.12.2005, p. 15–22.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:344:0015:0022:EN:PDF>

<sup>104</sup> Source: Query run on Galileo by Travelport, October 2011. Steer Davis Gleave final report, p.49-50. See footnote 28.

<sup>105</sup> For a description of applicable rules see section 4.2.3, p.44.

<sup>106</sup> Airlines can monitor the impact of promotions, identify the best airlines for alliances, define new routes, identify most productive travel agents, forecast traffic, understand origin and destination flows, etc.

<sup>107</sup> The IATA PaxIS product has resulted in a joint CRS complaint and a complaint by a travel agents association before the European Commission in June 2009. The result of this investigation conducted on the basis of the Code of Conduct is pending.

<sup>108</sup> Steer Davis Gleave final report, p.58. See footnote 28.

<sup>109</sup> For a description of applicable rules see section 4.2.3, p.45.

“Safe Harbor privacy” principles.<sup>110</sup> No clarification was received from the other CRS providers as to how and where their data is stored and safely maintained.

*Inter-modality: avoiding display bias towards flying (rather than train or bus journeys)*<sup>111</sup>

After a review of Amadeus and Galileo system displays, Steer Davies Gleave found that the two requirements as laid out in Article 5 and in Annex 1 of the CRS Code were fulfilled by the CRS providers:

- Journeys with a combination of bus/rail and flight segments are listed in the neutral availability display (Amadeus entry code AN, Galileo entry code G\*GAL) with the same sorting priority as journeys, which incorporate only flight segments.
- Where a city is served by one or more airports and a railway station, all location identifiers are automatically included in the search and the resulting travel options are listed in a neutral order. For instance, if a search for an itinerary from Cologne to Lyon is entered, both Cologne/Bonn airport (CGN) and Cologne Central Railway station (QKL) as well as Lyon airport (LYS) and Lyon Part Dieu Railway Station (XYD) are automatically considered in the search.

An OAG (Official Airline Guide) search made in July 2011 indicates that only 94 locations in Europe connected with rail or bus services can be booked over airline reservation systems.

As of July 2011, only 20 bus routes and 208 train routes were loaded into the CRSs and could be booked in combination with air tickets in the EU. A true neutral comparison based on travel time, cost or emissions of different transport modes for a particular city pair is not yet possible within the CRSs. It is debatable whether the CRS systems are capable of handling such a vast increase of information to cover other transport modes. CRSs were never intended to provide such information and currently display only a handful of bus and rail connections<sup>112</sup>.

Possible technical limitations of CRS are not the only barriers to the establishment of intermodal products in Europe. There are several reasons for the limited integration of rail and bus services in the CRS, such as:

- Rail transport providers obviously weigh the potential benefits of integration into the CRS against the costs involved. It is not only the segment fees for uploading and listing of services which are a limiting factor, but also the organisational costs of non-airline transport operators to be compliant with airline systems (e.g. billing and settlement plan participation, upload of schedules, inventory management)<sup>113</sup>.
- Pricing of rail and air services: in the case of the Rail&Fly product, there is a fixed price, independent from the distance travelled on the train. This means that no yield management techniques can be applied, a key element of pricing in all transport industries.

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<sup>110</sup> See footnote 69.

<sup>111</sup> For a description of applicable rules see section 4.2.3, p.45.

<sup>112</sup> The 3-letter code used by CRS for the 3,800 airports in the world would not be sufficient to cover the 50,000 train stations in Europe and it is understood that IATA would only be able to release 640 codes.

<sup>113</sup> These integration aspects (setting up an AIRail service) were considered as very complex even for a large transport operator like Deutsche Bahn. Study for the European Commission "Air and Rail – Competition and Complementarity", Steer Davies Gleave, 2006, case study for the route Cologne – Frankfurt.

Given the technological and organisational limitations, the German example of an integration of rail services in a global fashion with “virtual” railway connections and generic railway station location identifiers is probably the most pragmatic and practical approach. With a generic location identifier<sup>114</sup>, any railway station is accessible with a Rail&Fly ticket (a train ticket optionally available in combination with an air ticket), thereby achieving a country-wide coverage on the ticketing side without the need of uploading each railway service separately into the CRS. The success of the German Rail&Fly service with millions of tickets sold each year is a practical example for the success of this approach. Given that CRSs were never intended to store such data, it is far more likely that, at least as a first step, door-to-door multimodal travel search will be realised as the combination of systems of different types of travel operators, instead of being based just on airlines' CRS.

There exist some examples of start-ups that are specialised in multimodal searches:

- *Verkehrsmittelvergleich*<sup>115</sup> ("transport mode comparison") is a provider which offers information on prices and journey times of itineraries using railway, coach and air transport connections, as well as information on rental cars, route planners, etc. It acts as a one-stop shop for mobility in Germany. It provides direct links to the transport operators' websites, so that travel itineraries can be booked. The internet site has many features of a multi-modal platform, but a key issue remains that when different modes or transport providers are combined, users are required to enter personal and payment information on each transport providers' internet site separately. It therefore features a common information platform, but the integrated booking and payment system as envisaged by the White Paper is not yet realised.
- *Zoombu* in the United Kingdom, aiming to provide a multimodal travel search engine, was recently taken over by Skyscanner. This underlines the importance (travel) search engine providers see in integrated door-to-door travel searches for the future.

### *Unbundling and ancillary services*

Low-cost and, more recently, network airlines in the EU offer a new challenge to CRS providers with product unbundling that customers are in most cases free to choose or not. This trend has several implications for the processing of reservations. Elements of the product, which are not explicitly part of the basic fare offer of an airline, do not fall within the definition of Article 5 and Annex 1 of Regulation 80/2009, requesting CRS providers to include all applicable taxes, charges and fees in the price shown on the principal display.

The inclusion of ancillary data in CRSs presents two challenges – firstly relating to the capability of the systems themselves and secondly to the availability of the relevant data from the airlines in an appropriate form. Technological and industry standards initiatives in both these areas are both ongoing, although airlines and CRS providers seem to disagree about the level of progress and where the responsibility for any gaps lies.

- Capability of the systems: Are CRS able to display all fares?

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<sup>114</sup> A single generic location identifier allows passengers to start and end their journey at any railway station in the country (such system exists in Belgium and Germany, with the single identifier being ZWY and QYG, respectively).

<sup>115</sup> <http://www.verkehrsmittelvergleich.de/>

In short, the answer to this question seems to be that they can, provided that the airlines give them all the fares and that the CRS provide a sufficient level of functionality. In support of this, one CRS provider indicated that it had agreed deals to display ancillary service information with carriers representing about half of its European bookings. There are a number of issues about the technical solutions which may explain why some stakeholders think that the CRS cannot display all fares, whereas the CRS providers state the opposite.

A basic airline product consists of a seat and a fare. Fare information is fed into the CRSs by ATPCO20 and schedule information by OAG. ATPCO-Optional Services (or OS) facility which is, as much as possible, an industry standard, has been operational since October 2010. It enables airlines to offer customized and branded ancillary offerings in all channels, including the CRS portals. It allows airlines to communicate (but not to book) their service offerings to potential passengers. Passengers are therefore able quickly and efficiently to determine their total travel costs, including any value-added services they wish to purchase. At the time, Amadeus, Datalex, ITA Software, Sabre and Travelport all announced the ability to accept and display ATPCO Optional Services data. Through technological developments, the picture is rapidly changing in this respect. For instance, all CRS providers now propose the XML format to their individual airlines consumers for their dedicated websites at least, if not as a basis for their entire CRS platform.

- Airlines' practices: Are relevant data made available by airlines in an appropriate form?

Airlines already use ATPCO to file published and private fares, and the carriers can now file ancillary services/charges via ATPCO, with the ability to dynamically manage ancillary services. However, CRS providers consider that a number of airlines would have no interest in fully disclosing their ancillary fees via the CRSs because they may create the impression the prices they charge for travel are lower than is indeed the case when one takes into account the related services travellers need or want.

An even more advanced industry-wide solution for the distribution of ancillary services is under development - the so-called "EMD" (Electronic Miscellaneous Document) system. EMDs are electronic invoice documents used by airlines and travel agent to fulfill sales (payment and tracking) of non-fares related product (ancillaries, reservation change fee, excess baggage, etc.). The documents are stored electronically in the issuing airline's database. Usage can be tracked just like flight coupons in an electronic ticket. The EMD can be used to collect charges for all types of services. They can also be used to collect amendment fees, excess baggage charges, and to issue refunds<sup>116</sup>. It is seen by many in the industry as the missing link to getting bag fees, lounge access, on-board meals and Wi-Fi out of the airline-only channels and into the CRS and travel agency market.

Currently, the first stage of this process has been completed, namely the agreement of the system design and roll-out plan by all industry participants<sup>117</sup>. The second stage of this process i.e. implementation, is also well underway, and IATA/ARC have indicated a general industry implementation deadline of the end of 2013. Consequently, any airline wishing to sell ancillary services via an indirect channel such as a travel agency will need to have EMD-capability after the deadline. However, one pending issue is the slow take-up rate of EMDs by

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<sup>116</sup> According to IATA, Airline guide to EMD implementation, 2010.

<sup>117</sup> ATPCO, CRSs, BSPs, IATA, ARC22 and the airlines.

the airlines and the Commission services have been told by some stakeholders that the 2013 deadline seemed likely to slip.

#### **5.1.2.4 Recent developments**

An IATA resolution n°787 was adopted on 18 October 2012<sup>118</sup>. The IATA resolution prescribes a new distribution model, called New Distribution Capability ("NDC"), which IATA airlines shall have to apply when distributing enhanced content through multiple channels. Enhanced content refers to the development of ancillary services in addition to the air fare (e.g. for baggage, access to lounge, meals, etc.). NDC is distinct from EMDs: while EMDs as electronic invoice documents enable airlines to carry out ancillary transactions (payment, tracking), NDC enables shopping for fares and ancillaries. The EMD standard precedes NDC. NDC's full implementation has been announced by IATA for 2016, and its impact on airline products distribution is still to be determined.

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<sup>118</sup> <http://www.iata.org/whatwedo/stb/Documents/resolution-787.pdf>

## ***5.2 Findings of the Fitness Check - Member States' and stakeholders' views***

This section answers primarily the evaluation questions 3, 4 and 6: Do the relevant actors find that the Regulations appropriately address the issues they are meant to address? Are there shortcomings? Is administrative burden caused by these Regulations that could be reduced? Is the legislation still fitting the needs of the changing world or changes are needed?

### **5.2.1 Air Services Regulation**

#### **5.2.1.1 Licensing of Community air carriers – the issue of leasing**

In the context of the Fitness Check exercise, Member States remarked that in general the rules on leasing function well and that the prior approval of lease operations provisioned by Article 13 was and continued to be necessary to ensure safety. Stakeholders raised some issues that may require some clarification<sup>119</sup>.

To address the lack of clarity of the inclusion of dry-lease in a third country<sup>120</sup>, IACA advocated the explicit inclusion of dry-lease of non-EU registered aircraft in a new Article 13(4). IACA also expressed a wish to make a proposal to the European Aviation Safety Agency (EASA) for additional conditions for aircraft registered in a third country and dry leased on a Community operator's AOC.

Portugal and Italy called for clarifying rules on wet-leasing of category B carriers of large aircrafts outside the scope of their licence. Sweden noted a difference in Article 13(3)(b), when comparing point (i) with points (ii) and (iii) thereof, as to the preference for selecting an Community air carrier as opposed to a third country aircraft<sup>121</sup>. Sweden asked for further justification underlying these differences.

With regard to the issue raised by Ireland concerning wet-leasing from a third country where insurance requirements are not equivalent to the minimum EU requirements, Member States agreed that additional scrutiny still needed to be considered, even if rules were to be relaxed for EU licensees leasing from these countries.

#### **5.2.1.2 Access to routes/market access – the issue of non-scheduled services**

The main question discussed with stakeholders<sup>122</sup> was the opportunity and appropriateness of an action at EU level to address the issue of non-scheduled services to third countries. The question was also whether the Air Service Regulation was the best instrument to do so. EU-value added is indeed one of the evaluation questions raised by the Fitness Check (see Part 3 on methodology).

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<sup>119</sup> See Minutes Stakeholder consultation meeting – Fitness check internal aviation market, 27-28 June 2011. See footnote 35.

<sup>120</sup> See page 53 of this report.

<sup>121</sup> See page 39 of this report.

<sup>122</sup> See Minutes Stakeholder consultation meeting – Fitness check internal aviation market, 27-28 June 2011. See footnote 35.

In the stakeholder consultation meeting with industry on 27 June 2011, IACA mentioned that unscheduled flights to non-EU States outside bilateral agreements are only subject to approval by the third country; therefore this cannot be regulated at EU level.

Regarding the "First Refusal" or "no objection" procedures<sup>123</sup>, IACA mentioned that this practice should be forbidden as incompatible with the EU practice. To address the broader topic of market access, IACA also indicated that many Member States were still protecting legacy carriers through mechanisms limiting the access to the agreed routes, such as mono-designation.

The Association of European Airlines (AEA) also remarked an unease over the mixing of the internal aviation market regulation with issues outside the EU competence such as services to third countries. However, both AEA and IACA agreed that non-scheduled services should be subject to the same establishment criteria as scheduled services, otherwise it might constitute discrimination in itself. Moreover the criteria for recognition of an establishment should be as non-bureaucratic as possible.

The European Regions Airline Association (ERAA) noted that it would be helpful if the Commission could help in the recognition of EU carriers when operating non-scheduled services to third countries from a Member State other than the one licensing the carrier.

In the stakeholder consultation meeting with Member States on 28 June 2011, Member States shared the view of the industry that the Air Services Regulation, which regulates the intra-EU market, should not be extended to issues related to external EU aviation<sup>124</sup>. According to Portugal, an EU approach should be reserved for the negotiation of vertical agreements. France added that non-scheduled services to points outside the EU are subject to traffic rights under national competence. The Netherland indicated nevertheless that some problems have arisen in the past with "First Refusal" rules being applied to EU carriers by Member States, and that the harmonisation of these requirements should be explored. The United Kingdom, while recognising that the scope of the Regulation should not be enlarged, remarked that a pan- European exchange of traffic rights, granting equal access to all carriers on a fair and equal basis, was worth exploring.

On the issue of establishment criteria for non-scheduled services, Sweden indicated experience of differing establishment rules in some Member States affecting Swedish carriers. In response, the Commission services remarked that the requirement to be established in a Member State to be able to provide a service from it to a third country renders this market inflexible for non-scheduled services and that the purpose is to ensure that we develop business for EU carriers that want to work outside the EU. Germany remarked that in Germany the establishment requirement was not too cumbersome for non-scheduled services but it might be useful to look into the different criteria to be fulfilled in the Member States in order to harmonise.

To conclude, stakeholders and Member States shared the view that, although further action could be undertaken at EU level, the fact that it mainly related to services outside the scope of

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<sup>123</sup> A "First Refusal" is a requirement that the carrier intending to operate a non-scheduled service has to provide evidence that no national carrier is in a position to provide the same service on similar or identical conditions.

<sup>124</sup> Sweden, the Netherlands, Germany, Portugal and France.

the Regulation indicated that the Air Services Regulation is not the right instrument. Nevertheless, EU-wide clarifications on the interpretation of the Air Services Regulation should prove to be useful.

### **5.2.1.3 Restriction of traffic rights – public service obligations**

In the Stakeholder consultation meeting with industry on 27 June 2011<sup>125</sup>, airline associations stated that from the responses they received from their members, criteria for the establishment of PSOs are transparent and seem to be functioning well. The parties did not express dissatisfaction with the administrative burden related to PSOs. According to a majority of associations there has not been any abuse, although the European Low Fare Airline Association (ELFAA) indicated that the increase in the number of PSOs is an indication of increased political bias in the system, which could possibly lead to abuse. ELFAA advocated for more stringent rules. ERAA stated that a reason for the increase of PSOs is that airlines now have the opportunity to develop routes that in a fully commercial environment would not be sustainable and therefore it is not a cause for concern.

The associations taking the floor asked to look into the PSOs in parallel with the application of guidelines on the financing of airports and start-up aid to airlines departing from regional airports. There seems to be room for confusion on when to have recourse to PSOs and when the tools available under the State aid guidelines should be used. Stakeholders expressed more concern about the application of the guidelines than about the use of PSO's (IATA, AEA, ERAA).

In the stakeholder consultation meeting with Member States on 28 June 2011<sup>126</sup>, Member States commented that the criteria for PSOs are transparent and are functioning well. The provisions give the Member States the means to implement and monitor PSOs adequately and the Regulation is well adapted to the current situation<sup>127</sup>.

Some thoughts on possible improvements were mentioned by stakeholders:

- Reinforce the link in the application of the PSOs rules with other legislation that has some bearing on the issues (tendering procedures, application of guidelines on financing of airports and start-up aid to airlines departing from regional airports, slot allocation).
- Reinforce some elements linked to the publicity of the PSOs (publication when a PSO expires or is modified).
- Study the conditions that could be applicable to least attractive routes, for example very thin routes or where specialist equipment is required, or the possibility to conduct market research among carriers that showed interest in a tender when no actual candidate has been identified to carry out the PSO route.
- Examine the rules applicable to emergency procedures due to the sudden interruption of a service (as provisioned in Article 16(12)) and investigate the possible extension of the newly selected PSO operator's contract for the whole remaining PSO-period in order to decrease the costs of reimbursements.

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<sup>125</sup> See Minutes Stakeholder consultation meeting – Fitness check internal aviation market, 27 June 2011. See footnote 35.

<sup>126</sup> See Minutes Stakeholder consultation meeting – Fitness check internal aviation market, 28 June 2011. See footnote 35.

<sup>127</sup> Portugal, Greece, the United Kingdom, Sweden, France and Italy.

#### **5.2.1.4 Restriction of traffic rights - traffic distribution**

The Commission services asked stakeholders at the consultation meetings<sup>128</sup> whether the current criteria should be better applied or streamlined.

With regard to Article 19(2) of the Regulation, IACA identified as a gap the fact that the type of traffic is not mentioned as a ground for prohibiting discrimination. IACA fears that this wording opens an unnecessary room for interpretation, even though IACA has encountered this particular problem only in relation to slots allocation.

Related to the slots issue mentioned by IACA, the International Council of Aircraft Owner and Pilot Association (IAOPA) and the General Aviation Manufacturers Association (GAMA) remarked that more and more airfields tend to discriminate against general aviation in favour of airlines as they tend to prioritise aviation that brings in most revenue. EBAA indicated that the situation is particularly critical in regional airports that have developed on the basis of business aviation, but that are growing rapidly and trying to limit existing traffic to the benefit of higher yield traffic. A request for grandfathering of rights was made to avoid discrimination against general aviation. ELFAA pointed out that traffic distribution should take place in a transparent manner, in consultation with airlines at national level, as long as the possibility of redress at EU level exists.

In the stakeholder consultation meeting with Member States on 28 June 2011, several Member States argued that the Regulation functions well on this point<sup>129</sup>. The Netherlands remarked that some more flexibility regarding the 90 minutes rule of connection between airports could be considered.

#### **5.2.1.5 Restriction of traffic rights - environmental and emergency measures**

The main issue raised by stakeholders<sup>130</sup> was the issue of a possible ban of very short haul flight within the EU on account of environmental measures. The central question was the opportunity and appropriateness of an action at EU level (see evaluation question on EU value-added in Part 3 on methodology).

In the Stakeholder consultation meeting with industry on 27 June 2011, an airline association stated that they were against the imposition of general bans for very short haul flights at EU level. These measures should be taken at national level, as geography and circumstances vary widely across Member States. (AEA, ERAA, IACA, ELFAA, IATA). Very short haul would also be difficult to define at EU level. ERAA and IAOPA remarked that there should not be general prohibition on very short-haul flights, especially between islands. EEA remarked that for rail to be really competitive this would require huge investments and that bans based on distance should not be imposed. Even at national or local level, the imposition of a ban on very short haul flights should be preceded by a thorough impact assessment (IACA, ERAA). ELFAA remarked that EU-ETS is now the standard bearer for environmental measures and other measures should be avoided. On a general note airlines associations pressed for more transparency on environmental measures elected by Member States.

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<sup>128</sup> See Minutes Stakeholder consultation meeting – Fitness check internal aviation market, 27-28 June 2011. See footnote 35.

<sup>129</sup> The Netherlands, France and the United Kingdom.

<sup>130</sup> See Minutes Stakeholder consultation meeting – Fitness check internal aviation market, 27-28 June 2011. See footnote 35.

In the Stakeholder consultation meeting with Member States on 28 June 2011, several Member States commented that the provisions of Articles 20 and 21 were adequate and well suited to current market circumstances (France, Ireland, Netherlands, Sweden, United Kingdom). Nevertheless, Sweden indicated that the articulation between the first paragraph of Article 19 – stating that the exercise of traffic rights is subject to operational rules relating to safety, security, environment protection and the allocation of slots – and the measures described in Article 20 – that traffic rights can be restricted in case of serious environmental problems – could lead to some confusion as both articles can affect the exercise of traffic rights. Member States reacted negatively to the question whether a general EU level prohibition on very short haul flights for environmental reasons should be envisaged. They cited various reasons for not accepting such a general prohibition including differing geographic circumstances in the Member States and the fact that other modes are not *per se* less polluting.

To conclude, stakeholders have positively evaluated the relevant provisions of the Regulation and reacted negatively towards an idea of a generalised EU prohibition of very short-haul flights.

### **5.2.2 Regulation 80/2009 on a Code of Conduct for computerised reservation systems**

Even though the revision of the Code of Conduct on CRS of 2009 is relatively recent, the purpose of the Fitness Check has been in the first place to collect data on the functioning of the market. The findings were described in section 5.1.2 above. The Fitness Check then sought to determine whether the Code of Conduct has been overtaken by technological and marketing developments and whether therefore would need revision in some areas. First, general evaluation by each group of stakeholders is presented and then stakeholders' views on particular issues are outlined, issue by issue.

#### **5.2.2.1 Key comments of stakeholders<sup>131</sup>**

All CRS providers agree that the CRS Code serves a purpose and that the Code should be retained: it is “appropriate” and “promotes competition”. The CRS providers recommend some changes given the changes that have taken place in the distribution industry.

With regard to airlines and their representatives, their views summarised below are significantly more representative of the network airlines, as only a limited number of low-cost carriers have been willing to take part in the consultation. Overall, the views of airlines regarding the Code differed and, whilst some stated that it was “well-drafted”, others felt that some changes related to regulatory measures might be necessary concerning data ownership and to prevent potential abuse of market position by CRS providers, as these carriers considered that the Code is ill-adapted to the current evolution of the distribution and IT sector. Some airlines felt that the existing provisions of the Code needed to be enforced more effectively and consistently. They also advocated that only when such enforcement has taken

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<sup>131</sup> For more detail on the selection of stakeholders consulted and their identity, see Steer Davis Gleave final report, Chapter 3, p.13 and Appendix A. See footnote 28.

place would the question of whether additional changes are necessary be able to be meaningfully evaluated.

Agents share the view that the Code of Conduct is useful and necessary, with a majority indicating that it needed enhancing in the area of MIDT and travel agent identification. Another key issue for the travel agents and travel management companies<sup>132</sup> is the risk of display bias on meta-search engines and airline direct connect portals: they state that “since CRSs are the only distribution channel ensuring neutral and transparent comparison guaranteed by specific legislation, limitations to the use of CRSs are to the detriment of consumers”.

### 5.2.2.2 Detailed comments of stakeholders

#### *Neutral display*

The fact that no leisure travel focused *consumer organisation* contacted chose to take part in the stakeholder consultation may indicate that this is only a minor problem. However, it is also possible that consumers are not aware of the potential biases in these displays.

Nonetheless, because the CRS providers are subject to legal requirements to provide a neutral channel of distribution and a means of objective price and availability comparison, this has safeguarded choice and transparency for the consumers. For this reason, *CRS providers* feel that their importance to consumers and travel agencies has not changed over the last five years. However, CRS providers consider that their role as neutral and unbiased providers of travel information is threatened by the trend by airlines to withhold certain ancillary fee information for unbundled services for which extra fees must be added on the price displayed in CRSs and thus having a negative impact on transparency.

An important issue discussed in this context is the scope of the obligation of neutral display in terms of distribution channels to which this obligation applies. While on-line travel agents ("OTA"), and indeed brick and mortar travel agents, are obliged by Regulation 80/2009 to display information derived from CRSs in a neutral fashion, meta-search engines ("MSE") are not subject to this obligation of neutral display. Also other data sources such as direct search (with or without screen scraping<sup>133</sup>) on airline websites do not have to follow the rules of the CRS Code.

Consequently, currently in Europe, not all flight information is displayed in a neutral manner. The impact on customers is therefore potentially not negligible, particularly on leisure consumers who are more likely to use meta-search engines than corporate travellers. It remains nonetheless that consumers are able to switch freely between different OTAs and meta-search engines and it could therefore be argued that the forces of competition are likely to prevent any significant disadvantage to consumers from any biases in the displays provided by these distribution channels.

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<sup>132</sup> Travel management companies ("TMC") are travel agents specialised in management of business travel for large corporations.

<sup>133</sup> Screen scraping is a technique in which a computer programme extracts data from a human-readable output coming from another programme.

Some stakeholders, particularly travel agents and CRS providers, advocate that these distribution channels should also be covered by the CRS Code: they do provide information to customers similarly to CRS providers, and, even if they are not able to process bookings, they nonetheless influence customers' buying decisions.

*Airlines* agreed that regulation of neutral display is in the interest of consumers. However, one airline thought that self-regulation would be better suited than the CRS Code.

Other stakeholders, including meta-search engines and technology providers, disagree about extending the coverage of the CRS Code to these distribution channels. They argue that the Code of Conduct would need to be applied fairly across all channels (not just online), as channel specific rules would be inherently unfair. This would raise the issue of the non-participation of low-cost carriers in OTAs or meta-search engines. One stakeholder has therefore suggested that CRS display rules are necessary only in a Business to Business (B2B) environment (i.e. with CRS), but not with OTAs or meta-search engines.

#### *Marketing information data tapes (MIDT)*

With regard to the issue of *grouped sales*, CRS providers are unhappy with this practice because of a possible “competitive risk”, i.e. that airlines might analyse the data as a group and potentially coordinate their distribution strategy and travel agency strategy. However, such practice would clearly be covered by general antitrust law, so there is no *prima facie* case to include a prohibition on grouped sales in the Regulation. In contrast, excluding grouped sales and requiring that MIDT are purchased separately by each airline would substantially increase distribution costs.

With regard to the *conditions in agreements between CRSs and agents*, agents feel that even though Article 7 (3) of the CRS Code is in principle adequate to protect their interests, in practice this is not necessarily the case. They call for an appropriate enforcement of the Code<sup>134</sup>.

#### *Personal data*

The stakeholder consultation did not highlight any specific issues regarding the protection of consumer information. It should also be pointed out that a data protection legislation framework exists in Europe (the EU Data Protection Directive, which is currently under revision), which provides means to protect personal data. In that respect, the inclusion of references to personal data may have overlaps with current or new proposals on this particular issue.<sup>135</sup>

#### *Intermodality*

The stakeholder interviews have shown that airline managers are cautious when it comes to an extension of train services to be sold over CRSs. While this provides a limiting factor for air and rail intermodality, it might also give new entrants in the area of travel IT management and meta search engines an opportunity to fill this gap in the market.

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<sup>134</sup> An example is the complaint against the IATA PaxIS product. See footnote 107.

<sup>135</sup> See footnote 70.

### *Unbundling and ancillary services - Should all avoidable fares be displayed by the CRS?*

It is clear that it is in the interest of *travel agents* to be able to display, inform and book unbundled services for their customers. However, according to the Institute of Travel & Meetings, currently they can only do this with “enormous difficulty, adding significantly to purchasing and processing costs, and causing major problems for data visibility. The relative simplicity of travel purchasing has been compromised”. *CRS providers* also strongly support the view that they should be able to display all elements of fares, including those sometimes considered as “unavoidable”. For example they consider that a baggage fee should be seen as an unavoidable part of the fare on an international flight.

The *consumer organisation* participating in the study advocated for all fare conditions and additional charges (i.e. for ancillary services) to be available on one screen. It considered that the greater pricing freedom stemming from the CRS Code had resulted in significantly more disaggregated prices being displayed in the CRS and hence less transparency.

In contrast, *airlines* generally do not want avoidable charges to be displayed on CRSs. For example, in the case of baggage charges, airlines consider that it is a passenger’s choice and hence avoidable and thus does not need to be included in the fare displayed by the CRS<sup>136</sup>: clearly, the inclusion of a baggage charge would raise the apparent price on the CRS display. Airlines are interested in keeping the current flexibility provided by the provisions of the CRS Code, as it prompts travel agents and end-customers to consult their respective websites thereby building a stronger client-company relationship. Airlines also claim that the current CRS technologies are ill adapted to capture the full essence of the offer of airlines (e.g. personalised shopping).

More generally, some airlines believe that the airline product has broadened so far beyond the original concept of a seat and associated fare that CRS providers can no longer capture the essence of the full offer to the customer, and that it is therefore important for airlines to build direct relationships with end-customers for the optional elements of the product. On top of the basic product, airlines have added products such as “anytime, anywhere technology” that allows the passenger to receive and respond to new information from the airline, personalised shopping and booking (driven by the development of online shopping with different products being offered to different customers based on the identification of “who’s asking”), and integrated access to ancillary services (which may or may not require a charge depending, for example, on loyalty status). Airline stakeholders expressed a concern that CRS providers do not offer the flexibility required to appropriately differentiate the airlines’ products and that a requirement to sell airlines’ optional services through CRS providers would risk stifling innovation and reducing competition. It is of course in airlines’ interest to use more bespoke distribution technologies to help differentiate their products and to get closer to their customers.

*CRS providers*, however, dispute the assertion that airline technology is superior, noting that in many cases it is actually CRS providers who supply the technology on which airlines’ own

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<sup>136</sup> Article 23 of Regulation 1008/2008 allows airlines to handle optional elements as a separate item which is not part of the base price. Some airlines consider for instance baggage fees as such optional elements.

booking systems are hosted and pointing to the level of investment in technology and, in some cases, industry technology awards that have been received. CRS providers support some standardisation of the airline products so that these products can be successfully compared through their systems, supporting neutral display.

### 5.3 Conclusions

The conclusions of this Fitness Check are based largely on Member States' and other stakeholders' views as well as on findings of the external study on CRSs. The overall conclusion is that the regulatory environment is considered as broadly adequate in terms of ensuring a proper market access in the EU internal market and in terms of safe-guarding a level-playing field. At this stage, there is no need to change the Air Service Regulation and CRS Code. This does not mean, however, that important "softer" measures as well as enforcement measures and continuous monitoring of new industry developments are not warranted, as outlined below.

The Commission services consider that the administrative burden related to the enforcement of Regulation 1008/2008 is not excessive relative to the gains brought by the simplification gained in the Recast.

As mentioned in the Impact Assessment, for an initial period after the adoption of the Regulation, the administrative cost for airlines and national enforcement authorities was expected to temporarily increase as a result of an increased supervision of financial health of air carriers<sup>137</sup>. With regard to leasing, the Impact Assessment stated that "[w]hile the leasing of Community aircraft will be easier and less costly (no compulsory transfer of aircraft between national registers), the restrictions on leasing of third country aircraft will reduce the air carriers' flexibility to use these aircraft. This may increase the operating costs of some carriers and perhaps even reduce the number of operators on some routes."<sup>138</sup> With regard to procedures applicable to the public service obligations, the Impact Assessment concluded that the Regulation was to lead to an administrative simplification and shortening of delays for national and European authorities (a simplified information notice announcing the imposition of a PSO published in the Official Journal of the Communities). A longer permissible concession period would reduce the administrative cost related to the organisation of the tender procedures.<sup>139</sup>

The stakeholders consultations organised in the framework of the Fitness Check have not raised any problems with regard to the administrative burden. It can be assumed that the effects predicted in the Impact Assessment materialised but also that these effects can be considered as limited<sup>140</sup>.

With regard to the Code of Conduct, the issue of administrative burden on national authorities does not arise as the enforcement powers are conferred to the European Commission. Compliance with the Code of Conduct represents a certain cost for its addressees, system vendors and air carriers, equivalent in nature to the cost of compliance with general competition policy rules. As the Impact assessment for the Code of Conduct stated, the

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<sup>137</sup> Commission Staff Working Document - Proposal for a regulation of the European Parliament and of the Council on common rules for the operation of air services in the European Community (recast) – Impact assessment, 18 July 2006, SEC(2006)943, p.20.

<sup>138</sup> Impact assessment, p.23. See footnote 137.

<sup>139</sup> Impact assessment, p.26. See footnote 137.

<sup>140</sup> By way of illustration, the French Directorate General for Civil Aviation dedicates 8 persons for the enforcement of Regulation 1008/2008 (traffic rights, licensing oversight and public service obligations). In Spanish administration, 5.5 fulltime posts are dedicated to licensing oversight and price transparency and 2-3 persons are dedicated for public service obligations.

revision was expected to reduce further the already limited administrative cost of compliance<sup>141</sup>. Again, the Fitness Check has not shown any concern in this regard from the stakeholders.

### **5.3.1 Air Services Regulation**

#### **5.3.1.1 Licensing of Community air carriers – the issue of leasing**

Based on the findings of the Fitness Check, the Commission services will analyse the question of dry leasing aircraft registered in a third country and of wet leasing by Category B carriers of larger aircraft. It is clear that no amendment of Regulation 1008/2008 is needed, but clarifications might be provided to Member States through an information note.

#### **5.3.1.2 Access to routes/market access – the issue of non-scheduled services**

The consultation established that rules in Article 15 of Regulation 1008/2008 were adequate. Additional work might be needed in the context of the external dimension of aviation policy in relation to the need to have a harmonised approach for the requirements:

- a) on establishment of air carriers, both for scheduled and non-scheduled services;
- b) on approvals of non-scheduled services to points outside the EU (first refusal).

#### **5.3.1.3 Restriction of traffic rights – public service obligations**

Regular contacts between officials in charge of PSOs in the Member States and the Commission are essential to ensure a smooth functioning of the system, and that some measures can be implemented to that effect:

- a) maintaining an up-to-date network of PSO contacts, with particular care for "newcomers" (Member States and EEA States that present for the first time a PSO file);
- b) organisation of regular seminars (possibly bi-annually) with all officials (EU and national) in charge of PSOs to ensure proper dissemination of best practices and sharing of information.

The consultation established that some clarification might be needed in the articulation of Articles 16 to 18 of Regulation 1008/2008 with State aid rules, and in particular with the Community Guidelines on the financing of airports and start-up aid to airlines departing from regional airports<sup>142</sup>, currently under revision. The Commission services will analyse this question and will consider providing clarification through the revision of these guidelines. The Commission services will also consider providing further guidance to Member States.

#### **5.3.1.4 Restriction of traffic rights - traffic distribution**

The consultation established that some clarification might be needed in the articulation of Article 19 of Regulation 1008/2008. The Commission services will analyse this question and will provide clarifications to Member States, for instance through an information note. The

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<sup>141</sup> Commission Staff Working Document - Proposal for a regulation of the European Parliament and of the Council on a Code of Conduct for computerised reservation systems – Impact assessment, 15 March 2007, COM(2007)1496, p.36-37.

<sup>142</sup> OJ C 312, 9.12.2005, p. 1–14.

Commission services will continue to monitor the application of these Articles to ensure that no distortion of the internal market takes place.

#### **5.3.1.5 Restriction of traffic rights - environmental and emergency measures**

The consultation suggests that the rules in Articles 20 and 21 are adequate. There may be room for guidance on the interpretation of these Articles. In the stakeholder consultations, the idea of banning of very short haul flights at EU level was unanimously rejected; it was suggested that any limitation to the right to operate on environmental reasons should be done on a case-by-case basis, at national level, taking into account the specifics of the situation.

#### **5.3.2 Regulation 80/2009 on a Code of Conduct for computerised reservation systems**

Regulation 80/2009 sets out a code of conduct for CRSs the objective of which is to offer consumers an unbiased choice of air fares under fair conditions. In evaluating whether the Regulation is achieving this objective, it is important to consider the structure of the market in which CRS providers operate, a structure which is rapidly evolving and inherently complex.

For important sub-sectors of the market, all of the participants seem to have a strong competitive position. For example, in most EU countries a single CRS has a majority share of all CRS bookings (and generally a majority share of airline revenue sales, particularly in the business travel market). Similarly, in many EU countries, certain airlines have a majority share of at least the business travel market in their “home” country, while a small number of travel agents tend to have exclusive accounts to provide travel services for important businesses (such as financial institutions and other large corporations), which are significant users of air travel. A small number of new technology providers provide services to the travel search market.

In this competitive environment, it is important to bear in mind that consumers' interests could be undermined for example by following potential practices:

- CRS providers might charge excessive booking fees, which are ultimately passed on to consumers as higher air fares;
- Airlines might attempt to benefit from their dominance in particular markets (such as the home market of a traditional network carrier) by pushing sales towards channels where unbiased display rules do not apply, allowing them to charge supra-competitive fares;
- Travel agents might fail to use the lowest cost distribution mechanisms in response to incentives offered by other market participants, including CRS providers, passing on these higher costs to customers;
- Various actors involved (CRS providers, air carriers, railway operators) might be slow/reluctant, for technical or other reasons, to provide information in CRS on inter-modality and ancillary charges or other data<sup>143</sup>.

In this context, all major stakeholders in the aviation ticket distribution industry, including airlines, travel agents and CRS providers, support the existence of some form of regulation for computerised reservations systems, even if they do not agree about its exact form.

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<sup>143</sup> For example low-cost airlines' offer is currently under-represented in CRSs,

Although instruments proposed by EU's competition law would be able to provide sufficient remedy where major competition issues arise, there does appear to be a broad set of stakeholder opinion in favour of maintaining some form of regulation as a "lex specialis" in order to address specific issues arising over the electronic distribution of airline products.

The Fitness Check identified a number of areas where the text of the CRS Code could be marginally improved, albeit not necessarily in the immediate future.<sup>144</sup>

The scope of the CRS Code is a good example. As providers other than the CRSs continue to develop products, which provide some, but not necessarily all, of the functionalities of a CRS, it is important to consider the correct scope of Regulation 80/2009 and whether its objective should be limited to ensuring an undistorted market for air travel distribution in market segments where only CRS providers might be considered to have a strong market presence, in particular business travel (in which case the scope of Regulation 80/2009 can be limited to cover only CRSs). Alternatively, future market developments may require ensuring an unbiased choice to the consumer across all platforms (in which case Meta Search Engines in particular might be considered for inclusion). However, the Commission services consider that the relevant marketing and technological evolutions are still in progress, and need to stabilise, so that any possible future adaptations to the legislative framework allow tackling real issues in a satisfactory way.

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<sup>144</sup> Steer Davies Gleave study, part 9 "Conclusions and Recommendations". See footnote 28.

## 6. Consumer protection

This chapter will present findings of the Fitness Check on the second guiding theme: consumer protection. The single market and liberalisation in aviation opened the market for new types of business models of airlines, led to the strengthening of point-to-point travel, re-invigorated regional airports and this created jobs and growth in a significant number of European regions. Through stronger competition, numerous new entrants appeared, more routes were opened and generally fares tended to go down. Air travel genuinely opened to a wide range of consumers.

However, these positive developments for EU citizens' mobility also represented a challenge of adequate information to consumers on prices as the principal competition driver in the sector. Also, more competition brought a sector consolidation and a number of air carriers have been driven out of the market, which, at occasions, affected their passengers. As mentioned in the introduction, the Fitness Check did not look *per se* at rules concerning passenger rights in air transport, which have been subject to a regulatory action parallel to this Fitness Check<sup>145</sup>.

Instead, the Fitness Check evaluated how provisions of the Air Services Regulation on price transparency and financial viability of air carriers have contribute to an effective protection of consumers and, specifically, what protection exists for passengers affected by airline insolvencies.

The matter of insurance requirements for air carriers are also related to consumer protection.

This chapter looks first at price transparency, then on insurance and finally at passenger protection in case of insolvency. In section 6.1, first presents factual findings of the Fitness Check on the application of the price transparency rules and the insurance rules. Section 6.1 also describes the nature of protection available to passengers affected by airline insolvencies. In section 6.2, the report then presents stakeholders' evaluation of existing rules.

### 6.1 State of implementation

#### 6.1.1 Price transparency

##### 6.1.1.1 Compliance by market actors

Market opening enabled new airlines to emerge, which led to a fierce competition and this competition was and still is measured by rivalry on prices. However, practice has shown that differences between airlines in how they informed on prices and sales conditions were to the detriment of consumers who were not in the position to overview and compare offers of different airlines. For example, the advertised price might have excluded some fees, which ultimately might be unavoidable and which, if added, would result in a significantly higher final price. To prevent unfair commercial practices, the need for transparency in pricing became evident for the benefit of consumers and a level playing field between airlines.

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<sup>145</sup> 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, 13 March 2013, COM(2013) 130 final.

Accordingly, the Air Services Regulation aimed at allowing customers to have access to all air fares and air rates irrespective of their place of residence or nationality and irrespective of the place of establishment of the travel agents within the EU (Recital 15). The objective of reaching full price transparency in advertising and throughout booking of flights is to allow consumers the possibility of a 360-degree view before deciding to opt for one airline or another and to ensure that no discrimination is applied to consumers on the basis of place of residence, nationality or place of establishment of the travel agent.

Airlines are free to set prices and consumers are free to choose among offers. Nonetheless, consumers should be able to compare effectively the prices for air services of different airlines. To support this requirement for comparability and transparency, the requirement that final prices have to be always indicated when a booking is made (inclusive all taxes, charges and fees) was introduced, ensuring that the consumers are in the position to make an appropriate decision (Recital 16).

Experience shows that full price transparency has not yet been reached. Airlines are creative in developing new ticketing and pricing structures that are not always transparent. For the benefit of air travellers, a continuous and joint effort and vigilance remain needed in order to strive for full comparability and transparency in pricing.<sup>146</sup>

The evaluation done by the external consultant<sup>147</sup> distinguished three categories of non-compliance by assessing the potential impact on passengers.

Firstly, consultants found a *critical non-compliance* when (i) unavoidable taxes, fees and charges were not included in the initially presented price<sup>148</sup> and/or (ii) there were variations in fares for the same journey between different country/language versions of website<sup>149</sup> (including variations resulting from different payment fees applicable based on the State of residence).

*Significant infringements* were considered as being the following situations: (i) failure to provide a full breakdown of taxes, fees and charges<sup>150</sup>, (ii) pre-selected optional services<sup>151</sup>, (iii) impossibility to travel on a booked flight if the customer identifies himself as being from

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<sup>146</sup> In 2007, the Consumer Protection Cooperation Network, under the coordination of the Commission, carried out a market surveillance exercise, the so-called "sweep", on air tickets selling websites. "Can you trust air tickets selling sites? An internet sweep by the Enforcement network" of 30 April 2008", [http://ec.europa.eu/consumers/enforcement/sweep/sweep\\_report2008.pdf](http://ec.europa.eu/consumers/enforcement/sweep/sweep_report2008.pdf). This exercise was undertaken before the adoption of Regulation 1008/2008. In its findings, the report referred to the upcoming new regulation (that later became Regulation 1008/2008), which would introduce more detailed requirements on price transparency. In the framework of this Fitness Check exercise, the Commission's external consultant indeed studied the findings of the 2007 "sweep" report as one of the background documents. While the 2007 report and this Fitness Check scrutinise broadly the same questions of the level of price transparency, they cannot be directly compared, given that the legal framework changed in the meantime with the adoption of Regulation 1008/2008.

<sup>147</sup> Final report of January 2012. See footnote 27.

<sup>148</sup> Article 23(1) of Regulation 1008/2008.

<sup>149</sup> Article 23(2) of Regulation 1008/2008.

<sup>150</sup> Article 23(1) of Regulation 1008/2008.

<sup>151</sup> Article 23(1) of Regulation 1008/2008. The new Consumer Rights Directive (see footnote 63), which will apply from 13 June 2014, prohibits (Article 22) charging for additional services, for which the trader has inferred consumer's consent by using default options, which the consumer is required to reject in order to avoid the additional payment ("pre-ticked boxes"). Article 22 of the Consumer Rights Directive applies to passenger transport services.

a different State, and/or if the State where the flight originates is changed<sup>152</sup>, (iv) failure to provide conditions for cancellation or modification of the ticket<sup>153</sup>, (v) failure to provide terms and conditions prior to booking and/or if terms and conditions cannot be accessed or read by customers<sup>154</sup>, (vi) terms and conditions not provided in same languages as the booking process<sup>155</sup>, (vii) unmodified Annex to Regulation 889/2002 not provided, (viii) misleading advertisement of 'free' frequent flyer tickets<sup>156</sup>, (ix) inability to book flights for price advertised<sup>157</sup>.

Other infringements were classified as *minor*.

### *Study results*

The Steer Davies Gleave study<sup>158</sup> on price transparency found non-compliances with the most critical areas of the legislation on 41% of websites, comprising 24 airlines and 17 travel agents. A further 35% of websites contained other significant infringements, with the remainder exhibiting only relatively minor non-compliances. Almost all of the websites checked were non-compliant with at least some elements of the legislation.

With regards to the pricing provisions in Regulation 1008/2008 the analysis<sup>159</sup> showed that:

- 83% of airlines comply with the principle of 'Price displayed through booking process and advertising'; however, several airlines add fees at a late stage of the booking process, which, whilst theoretically avoidable, are in practice very difficult to avoid.
- 85% of airlines offer optional services on an opt-in basis; however, 24% of these airlines require consumers to actively opt-in or opt-out.
- 26% of airlines are discriminative on the basis of place of residence; other airlines usually apply service fees only applied to sales in particular Member States or payment fees avoidable by residents of a particular Member State.
- 22% provide a full and accurately labelled breakdown of taxes, fees and charges.

It is important to note that the study qualifies further the finding that only 22% of airline companies fully comply with Regulation 1008/2008. The consultant considered that the various elements of the price only have to be explicitly listed if they have been *added to* the base fare instead of being *included in* the base fare. Given that Article 22 of the Regulation allows airlines to determine the structure of the base fare, it could be interpreted that where an airline considers that, for example, taxes form an intrinsic part of the fare, these taxes would not need to be separately listed. The consultant observed that most websites presented taxes and airport charges alongside service fees, but did not provide a full breakdown between the individual elements comprising the total taxes and charges. Compliance by travel agents was even lower, with none of the websites reviewed providing the full breakdown between the

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<sup>152</sup> Article 23(2) of Regulation 1008/2008.

<sup>153</sup> Article 7 (1) and (4) (a) of the Unfair Commercial Practices Directive (see footnote 60).

<sup>154</sup> Article 23(1) of Regulation 1008/2008.

<sup>155</sup> Article 7 (2) of the Unfair Commercial Practices Directive, see footnote 60. Unfair Contract Terms Directive, see footnote 61.

<sup>156</sup> No. 20 of Annex I to the Unfair Commercial Practices Directive, see footnote 60.

<sup>157</sup> Article 6 (1) (d) of and No 5 of Annex I to the Unfair Commercial Practices Directive, see footnote 60.

<sup>158</sup> Final Report of January 2012, p. 56. See footnote 27.

<sup>159</sup> Final Report of January 2012, p. 57-58. See footnote 27.

various elements of the total fare<sup>160</sup>. On the other hand, most of the large network carriers (and some others) did provide a full breakdown of all taxes, fees and charges.

However, as a full breakdown of the total price is of relevance for consumers<sup>161</sup>, the consultant recommended reflecting on the possibility to assess whether a breakdown into refundable and non-refundable fees and taxes would be beneficial to the majority of passengers. Also, the study highlights that enforcement authorities could bring test cases against airlines, which, particularly if there was a referral to the European Court of Justice, would ultimately clarify the issue of what price elements are unavoidable and foreseeable at the beginning of any booking.

### 6.1.1.2 Enforcement

For a sample of European countries, Steer Davies Gleave identified which authorities were the national enforcement bodies designated to enforce the Air Services Regulation. The following table lists these authorities and the corresponding national laws specifying penalties for infringements of the Regulation.<sup>162</sup>

**Table 6: Enforcement of Regulation 1008/2008 - Member States authorities and penalties<sup>163</sup>**

Member State	Authority	Penalties
France	Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes (DGCCRF)	No specific penalties defined, but draft law defines administrative penalties of €3,000 for an individual or €15,000 for a corporation
Germany	Bundesministerium für Verkehr, Bau- und Stadtentwicklung (BMVBS) and Luftfahrt-Bundesamt (LBA)	Not known
Italy	Autorità Garante della Concorrenza e del Mercato (Antitrust Authority; AGCM)	No specific penalties defined, but Dir 2005/29/EC is used for enforcement
Netherlands	Consumentenautoriteit (Consumer Authority; NCA)	Wet Handhaving Consumentenbescherming (Consumer Protection Enforcement Law, 2006), administrative fine of up to €76,000 per infringement
Norway	Forbrukerombudet (Consumer Ombudsman and the Market Council; CO)	No specific penalties defined, as not yet transposed into NO law, but the Marketing Control Act provides current basis for enforcement
Poland	Civil Aviation Office (CAO)	No specific penalties defined but legislation being drafted and Act on Competition and consumer Protection used as current basis for enforcement.
Spain	Instituto Nacional del Consumo	Not known
United	Civil Aviation Authority (CAA) and	No specific penalties defined but

<sup>160</sup> Final Report of January 2012, p.23. See footnote 27.

<sup>161</sup> For example, a transparent breakdown of the final price enables customers to recognise taxes/ charges which could be reclaimed in the case of flight cancellation.

<sup>162</sup> Final Report of January 2012, p. 44-48. See footnote 27.

<sup>163</sup> The consultant states in the Final Report of January 2012, p.10: "Six of the eight States were selected as the largest aviation markets in Europe (the United Kingdom, Germany, Spain, France, Italy and the Netherlands), together with a Scandinavian state (Norway) and a central European state (Poland) to improve the geographical spread of the sample."

Kingdom	Office of Fair Trading (OFT)	legislation being drafted and Dir 2005/29/EC is used as current basis for enforcement
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With regard to the enforcement of legislation, the study<sup>164</sup> observed that:

- At the time of the research, several Member States had not introduced in their national law penalties for infringements of Regulation 1008/2008, although some States said that it was possible to take action under legislation implementing the Unfair Commercial Practices Directive.
- In some Member States there are problems in either imposing sanctions on, or collecting sanctions from, airlines that are not based within the State.
- Some Member States rely on criminal prosecution, which, according to other studies, are not effective for dealing with civil and commercial matters.
- In cases enforcement authorities have taken action to encourage compliance, the process was found slow, partly because all airlines and travel agents want to amend their practices at the same time.
- Several legal actions have been taken against airlines by consumer representatives in civil courts, mainly under the Unfair Contract Terms Directive; however, this does not appear to have led to wider changes to airline commercial practices.

Consultation with Member States' enforcement authorities confirmed also that cross-border cooperation in price transparency issues and best practices sharing was crucial to enforce legislation in an effective way. In this context, one needs also to take into account the interrelationship between Regulation 1008/2008 and other legislation having a bearing on price transparency, in particular the Unfair Commercial Practices Directive.<sup>165</sup>

### 6.1.2 Insurance requirements for air carriers and aircraft operators

The external study commissioned by the Commission for a mid-term review of Regulation 785/2004 analysed the following issues:<sup>166</sup>

- Passenger liability minimum requirement level: the study examined whether the minimum requirements were applied by insurance takers and whether the minimum requirement level for passenger liability was enough to indemnify amounts for passenger fatalities.
- Impact of currency fluctuation: the study examined whether insurance requirements that are expressed in SDR, which is made of four "hard" currencies, each with their variable exchange rate, was appealing to the insurance market.
- Insurance certificates: the study examined whether insurance certificates use standard format and are accepted by civil aviation authorities.

<sup>164</sup> Final Report of January 2012, p. 56. See footnote 27.

<sup>165</sup> See in particular Commission Staff Working Document, "Guidance on the implementation/ application of Directive 2005/29/EC on Unfair Commercial Practice", SEC(2009) 1666,p 18.

In this respect, the recent external evaluation on the Regulation 2006/2004 on Consumer Protection Cooperation-CPC has highlighted the consistency grounds for considering the inclusion of the price transparency provisions of Regulation 1008/2008 in the list of consumer protection laws falling in the scope of the CPC Regulation.  
<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R2006:EN:HTML>

<sup>166</sup> Final report of July 2012. See footnote 29.

- Mail insurance requirements: the study examined whether inclusion of mail insurance requirements in Regulation 785/2004 would be necessary.
- Non-commercial operation of aircraft with a MTOM<sup>167</sup> of less than 2,700kg: the study examined whether the differentiation of minimum insurance cover for passengers for non/commercial operations of aircraft with a MTOM of less than 2,700kg in the EU results in impediments to the free movement of persons.
- Evidence of valid insurance for overflights: the study examined whether Member States exercise their option under Article 5(3) of Regulation 785/2004 not to request evidence of insurance in the case of overflights, unless it is an overflight with dangerous goods.
- Unmanned aircrafts (RPAS): examining whether RPAS segment shall be considered as part of the review of Regulation 785/2004 and what impact would it have.
- Insurance for airports and other service providers: examining whether there should be a harmonised EU legal framework for third-party liability of airports or service providers that does not exist today.
- Other issues such as impact of sanctions, deductibles, MTOM bands for third party liability.

With regard to the majority of these points, the study concluded that there was no particular issue to be analysed further or requiring action from the Commission.

Furthermore, the study examined in detail the legislation and enforcement practices of 8 Member States (France, Germany, Italy, the Netherlands, Poland, Romania, Spain and the United Kingdom). The enforcement authorities indicated that they monitor compliance in a number of ways, including unannounced spot checks at airports and airfields and the cases of non-compliance with Regulation 785/2004 remained extremely limited. Enforcement authorities reported on one case in the Netherlands, eight sanctions in the United Kingdom and a few isolated cases in Spain.

The table<sup>168</sup> below shows the comparison of the enforcement framework in the eight Member States examined.

**Table 7: Enforcement of Regulation 785/2004 - Member States penalties**

Member State	Offense type	Possible sanction	Text
France	Administrative	Fines up to €1,500 for a person and up to €7,500 for a business/organisation	Article R160-1 of the French Aviation Code (Code de l'Aviation Civile)
Germany	Administrative	Fines up to €50,000	German Air Traffic Act (Luftverkehrsgesetz), § 58 paragraphs. 1 No. 15 and paragraphs 2
Italy	Unclear	Fine between €50,000- 100,000 for no insurance. Where insurance does not meet specified minima, fines between €30,000-60,000.	Legislative Decree 197/2007

<sup>167</sup> Maximum Take-Off Mass.

<sup>168</sup> Final report of July 2012, p. 47. See footnote 21.

Netherlands	Administrative	Up to €1,000,000	Article 11.16 of the Air law (Wet Luchtvaart)
Poland	Administrative	Fine of 0.25% of the minimum insurance cover	Article 209o of the Polish Aviation Act
Romania	Administrative	Fines of 20,000-35,000 lei (€4,750-€8,300)	Governmental Decision 912/2010 (Article 13(a) and Article 14(1))
Spain	Administrative	For commercial flights fines between €4,500 and €135,000. Fines up to €60,000 otherwise	Article 33 of Law 21/2003 of 7 July
UK	Criminal	Unlimited fine, up to 2 years imprisonment, or both	The Civil Aviation (Insurance) Regulations 2005 and Operation of Air Services in the Community Regulations 2009

Member States noted that, in addition to any sanction, carriers or operators found to be without insurance would be banned from operations in the respective State; in case of a Community carrier, the operating licence would be withdrawn and in case of a carrier or operator from a third country, traffic rights would be removed.

### 6.1.3 Passengers' protection in case of airline insolvency

#### 6.1.3.1 Identification and scope of the issue

The realisation of a single European aviation market has created new opportunities and an important increase of air traffic within the EU and towards third countries. Through stronger competition, numerous new entrants appeared, more routes were opened and generally fares went down. However, over the period between 2000 and 2010, 96 insolvencies of airlines providing scheduled services<sup>169</sup> were identified. The frequency of airlines ceasing operations has fluctuated considerably over this period: peaks of 14 insolvencies were observed in 2004 and 2008, while in 2000 and 2007 only 3 were identified. It dropped to 2 in 2011<sup>170</sup>. In 2012, seven significant airlines have ceased operations<sup>171</sup>. Consequently, passengers have been left stranded away from home, which raised significant public and political interest<sup>172</sup>. In this context, relatively few passengers are concerned but these are significantly affected. An estimated 1.4-2.2 million passengers in total were impacted between 2000 and 2010<sup>173</sup>. Of these, 12% were stranded away from home. The proportion of passengers stranded was in

<sup>169</sup> Steer Davies Gleave report, *Passenger protection in the event of airline insolvency*, Final report of March 2011. See footnote 30.

<sup>170</sup> Air Southwest (30 September) and Viking Hellas (5 December).

<sup>171</sup> Cirrus Airlines (20 January), Spanair (27 January), Malév (14 February), Cimber Sterling (3 May), Skyways (22 May), Air Finland (26 June) and Windjet (11 August). There is some relationship between the distribution of insolvencies and the size of States' aviation markets, with the largest number of insolvencies affecting carriers licensed in the UK and Spain (the first and third largest markets in the EU, measured in terms of passenger numbers).

<sup>172</sup> In a resolution adopted on 25 November 2009, the European Parliament asked the Commission to consider proposing new legislation to ensure passengers are not left stranded without accommodation or a flight home in case of airline insolvency. MEPs suggested that establishing a "reserve compensation fund" and introducing "mutual responsibility" for passengers of all airlines flying in the same direction with available seats, could help to get stranded passengers home. This concern has been recalled in three EP own initiative reports in 2012: rapporteurs Bradbourn (ECR/UK), Taylor (Greens/UK) and Bach (EPP/LU).

<sup>173</sup> Central case scenario: 1.8 million, equivalent to 0.07% of all return standalone trips. Steer Davies Gleave report of March 2011. See footnote 30.

general small in comparison to the number of passengers that could not travel, although it was higher in some specific cases, particularly Air Madrid. In all years, the number of passengers impacted was lower than 500,000. The highest number was in 2004 but even in this year only 0.17% of all passengers transported was impacted<sup>174</sup>. Between 2011 and 2020, it is estimated that 0.07% of standalone passengers will be affected by insolvency.<sup>175</sup>

Even if the proportion of passengers impacted is small, the effect on these passengers can be significant. When an airline ceases operations, passengers who have booked to travel with it may incur a number of costs, which may vary:

- Where operations ceased before the outbound flight, the passengers must choose between rearranging the trip via other means and foregoing the trip. If rearranging, passengers must pay for the additional cost of alternative travel, which is likely to be more expensive, particularly if booked at short notice. If it is not possible to arrange alternative travel, or passengers do not choose to do so, then they forfeit any non-refundable components of the trip (such as accommodation or car hire), as well as the cost of the original air ticket.
- Where the operations ceased after an outbound flight but before the completion of the inbound flight, the passenger is stranded and will have to find alternative travel in order to return home, which will usually be at very short notice and hence on average much more expensive than the original ticket. The passenger may also have to arrange additional accommodation and other costs. Stranded passengers incur the highest costs, and face most difficult situations.

Between 2000 and 2012, stranded passengers, as opposed to those yet to travel, incurred the highest immediate costs resulting from airline insolvency, over 796 Euro on average.<sup>176</sup> The costs incurred varied depending on distance; for example, a stranded passenger travelling on a scheduled short-haul "low-cost" carrier incurred average costs of €335.<sup>177</sup>

### **6.1.3.2 State of play - application of Regulation 261/2004**

Vis-à-vis difficulties encountered by passengers in case of airline insolvency, the Commission services gathered no evidence until 2011 that existing protection under Regulation (EC) 261/2004 applied in practice to the particular case of airline insolvencies<sup>178</sup>. Of the states that did not experience airline insolvencies between 2008 and 2010, four national authorities (France, Denmark, Ireland and Luxembourg) informed Steer Davies Gleave that it was not within their remit to provide assistance in the case of airline insolvencies. Although the Spanish government did organise some short-term assistance to stranded passengers after the failures of Air Comet and Air Madrid, these were exceptional political decisions partly

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<sup>174</sup> Steer Davies Gleave report of March 2011, p. 41-44. See footnote 30.

<sup>175</sup> The numbers will vary from year to year, but will tend to increase, due to traffic growth and the decline in the proportion of passengers travelling on packages - all things being equal, i.e. if the Package Travel Directive does not cover dynamic packages in the future. On average the number of passengers affected will increase from 325,000 in 2011 to 480,000 in 2020. Of these, 12% are likely to be stranded. Steer Davies Gleave report of March 2011, p. 41. See footnote 30.

<sup>176</sup> These costs are an average estimated to have been incurred by stranded and booked passengers. This average is significantly raised by the very high costs incurred by the large numbers of passengers stranded in Latin America after the Air Madrid insolvency.

<sup>177</sup> Steer Davies Gleave report of March 2011, p. 46-52. See footnote 30.

<sup>178</sup> See Steer Davies Gleave report of March 2011, table 4.3 p. 44 - assistance provided by national authorities during airline insolvencies 2008-2010. See footnote 30.

prompted by the fact that both airlines failed shortly before Christmas. Spain emphasised that it had no obligation to do this<sup>179</sup>.

Nonetheless, the Commission services have been able to detect a more recent application of certain rights in case of flight cancellation laid out in Regulation 261/2004 to insolvency cases. In 2012, in the cases of Spanair and Malév, passengers have been informed, rerouted quickly and taken care of much better than in previous airline insolvencies<sup>180</sup>.

### **6.1.3.3 State of play - application of Regulation 1008/2008**

Regulation 1008/2008 imposes financial supervision by EU Member States. Airline associations emphasised that these provisions must be implemented (IACA). Article 9 obliges licensing authorities to suspend airline operations in case of financial problems of the airline (AEA). Regulators, when granting a licence, have a duty to ensure themselves that airlines had sufficient cash resources and access to capital backing to safely accept forward sales for long periods ahead. Consistent with this, regulatory bodies should exercise their responsibility of oversight of airlines, requiring carriers, which show signs of financial difficulty (e.g. non-payment of airport charges, taxes etc.), to be subject to more frequent and closer financial reporting to the regulator. When clear signs of financial weakness, such as non-payment of taxes to Government, were emitted, it would be open to regulators to impose a limit on an airline's permitted forward-selling interval, thus limiting the number of passengers at risk. This would offer passengers more valuable protection before the event, rather than rescue following it (*ELFAA*).<sup>181</sup>

In some Member States, provisions of Regulation 1008/2008 have helped ensuring that obligations under Regulation 261/2004 are fully taken into account during the lifespan of air carriers, as it is the case for other obligations from the rest of the aviation *acquis*. In the UK notably, this has allowed early contingency plans, which should not be seen as a hint of financial difficulties, but as a routine, systematic request from the licensing authority. Such contingency plans have allowed preparing how to handle a large amount of stranded passengers long before the financial situation has become too fragile.

In this context, it has been proven crucial to identify well in advance carriers who have entered a problematic terrain. Regulatory authorities' practices go from annual and biannual review of management accounts, to monthly review of all airlines licensed in the Member State in the best case scenario. Depending on resources available in the national regulatory authority, such enhanced investigation cover all airlines licensed in the Member States, or focus on some carriers identified by a number of objective criteria (size, geographical coverage, past financial records).

Once a regulatory authority has identified air carriers that are facing potential financial difficulties, it has proven helpful to engage with them at an early stage to discuss what options might be available to address those problems. To limit the impact on passengers, some national authorities have sought to agree an organised run-down of an air carrier's activities and the timing of when operations would cease.

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<sup>179</sup> See Steer Davies Gleave report of March 2011, p. 44. See footnote 30.

<sup>180</sup> In this context the Commission requested Member States to provide information on legal and practical arrangements in place to mitigate effects of airline insolvencies on passengers (see Part 3 on methodology).

<sup>181</sup> Minutes from the stakeholders' workshop of 30 March 2011. See footnote 32.

- Although there is never an optimum time for an airline to cease operations, clearly the failure of an air carrier in peak season (for example Christmas or Easter) would have a greater impact on passengers than otherwise, due to a shortage of alternative capacity<sup>182</sup>.
- Disconnecting the moment of the cease of operations and the bankruptcy itself allows company staff to reroute passengers with the active help of other airlines before the carrier is declared insolvent and orders its liquidation.
- Airlines can progressively phase out certain non-profitable and/or distant routes/destinations where passenger assistance has been made more difficult in case of failure.

Competent authorities have also contemplated persuading a carrier to accept certain restrictions to mitigate losses, for example through the use of escrow accounts to protect the money of passengers who have yet to travel, thereby reducing the potential impact of a failure.

Of great relevance here is also the question of institutional set-up.

- Recent experience has shown that the anticipation of passenger rights issues within the financial monitoring of airlines is better dealt with when the national authorities under Regulations 261/2004 and 1008/2008 are the *same* body or at least work closely together.
- Where the authorities enforcing the two Regulations are different, good communication between the two has proven crucial. Informed by the licensing authority, the authority under Regulation 261/2004 is able to identify where passengers might be stranded (getting data from the airline), set up a coordinated plan of action that involves relevant stakeholders (other carriers and airports, notably) and prepare to inform passengers.
- Some Member States have also drawn the attention of the Commission on the merits of increased collaboration between authorities of various Member States, within the limits allowed by confidentiality due to business secrets. A licensing authority of a Member State holding worrying information or data on a given carrier could draw the attention of the licensing Member State on the need to closer monitor this airline. In the same line, a licensing authority concerned with the possible bankruptcy of one of its carriers could liaise with the competent authorities in those Member States where this carrier have a relevant market share, to allow them to be prepared for an early response in case of insolvency.

#### **6.1.3.4 Initiatives going beyond current obligations in EU law**

##### *Member States' initiatives*

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<sup>182</sup> For instance, on 3 February 2012, Malév grounded all planes and cancelled all flights because planes were held overseas for unpaid debts. On 14 February 2012 only the Metropolitan Court of Budapest declared Malév Ltd. insolvent and ordered its liquidation. Similarly, Spanair ceased operations on 27 January 2012 and filed for bankruptcy on 30 January. Incidentally, the failing company and the national authorities have made every effort so the company would cease operations after the peak Christmas period, allowing reducing dramatically the number of passengers impacted.

Several Member States have sought to extend the scope of the cover offered by the Package Travel Directive<sup>183</sup> to passengers who purchase standalone air tickets. In *Denmark*, the Rejsegarantifonden, the fund which provides protection under the Package Travel Directive was extended on 1 January 2010 to offer passengers the option of this protection on all flights from Denmark on carriers established in Denmark<sup>184</sup>. A similar extension has been introduced in Flanders in *Belgium*.<sup>185</sup>

#### *Voluntary insurance by passengers*

In recent years, Scheduled Airline Failure Insurance (SAFI) has allowed standalone passengers in some States (in particular the UK and Ireland<sup>186</sup>) to insure themselves against some of the costs resulting from the insolvency of an airline on which they are booked. This scheme is available from some insurers on a commercial basis and covers the costs of rerouting if the passenger is stranded, or reimbursement for the cost of the original flight tickets in case that the passenger cannot recover it. SAFI does not usually cover the cost of purchasing another ticket on a different carrier at short notice (except where the passenger is stranded away from home), other elements of the trip which may be non-refundable such as accommodation or car hire, or other additional costs, such as additional accommodation if stranded. At present, the cover provided excludes any carriers publicly known to be in financial difficulty. According to the insurance sector, there is room for increased use of optional niche market insurance products like SAFI, although it cannot by definition become a mass market product.

Purchases by credit card in some Member States allow consumers to claim a refund from the card-issuing bank in the event of insolvency of the airline (or any other service provider). However, this solution is limited to the cost of the original tickets and in some cases is subject to a minimum value. This protection also applies to purchases with some debit cards.

#### *Voluntary agreements in the industry*

Network airlines may issue tickets for journeys involving segments on different airlines, where the ticket is issued by one (issuing) airline and valid for all others (interlining). The issuing airline receives payment for the ticket, and retains it until the passenger completes their journey. If the carrying airline becomes insolvent the passenger could be reimbursed by the issuing airline, or if the passenger is stranded, the ticket could be valid on other airlines which are participating in the interlining agreement. However, in the past many airlines have denounced such agreements vis-à-vis partner airlines that had gone insolvent.<sup>187</sup>

Payments for tickets purchased via IATA-accredited travel agents are held by a central payment mechanism before being passed on to the airline, in settlements at regular intervals (usually monthly). If the airline becomes insolvent, passengers whose payments have not yet

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<sup>183</sup> Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L 158, 23.6.1990, p. 59.

<sup>184</sup> Steer Davies Gleave report of March 2011, p. 32. See footnote 30.

<sup>185</sup> Steer Davies Gleave report of March 2011, p. 33. See footnote 30.

<sup>186</sup> While the markets in the UK and Ireland are the largest, there are also significant markets in Germany, Holland, Sweden, and the Czech Republic. For example, SAFI is available in Germany for €5 - <http://www.reiseversicherung.de/de/versicherung/weitere-reiseversicherungen/ticketsafe.html>

<sup>187</sup> Steer Davies Gleave report of March 2011, p.31. See footnote 30.

been passed on to the airline should be able to recover what they paid through this IATA Billing Settlement Plan (BSP). So far, IATA – on a voluntary basis - has handled the BSP in a way to allow the largest possible number of passengers to get their ticket reimbursed.<sup>188</sup>

Finally, assistance has in some cases been provided by other airlines. In particular, ELFAA (the European association of low fares airlines) members have entered into a voluntary agreement to provide assistance at a ‘nominal fee’ to affected passengers, subject to availability. In 2011 most airline associations expressed the intention to extend the scheme to their airline members.<sup>189</sup> A further positive development can be mentioned: in July 2011, the main airline associations<sup>190</sup> jointly informed the Commission's services that airlines could assist Member States to reroute passengers, by making available existing (or possibly additional) capacity when insolvency occurs.

## ***6.2 Findings of the Fitness Check – Member States' and stakeholders' views***

### **6.2.1 Price transparency**

The Fitness Check sought to evaluate whether existing provisions on price transparency were adequately protecting consumers at all times during the booking process and in advertising, how these provisions were applied in practice, whether current provisions adequately covered all relevant aspects of price transparency, and whether further actions at EU level should be taken. The Fitness Check provided the following evaluation.

The external study on price transparency<sup>191</sup> found that, overall, Regulation 1008/2008 has been partially effective in meeting the [price transparency] objectives. The main reasons why the Regulation has not been fully effective were:

- Some airlines and travel agents are not complying with these provisions of the Regulation, and they do not necessarily have an incentive to do so, because to date enforcement has not been sufficient in all States.
- Some airlines and travel agents have adopted practices<sup>192</sup>, which, whilst not necessarily inconsistent with the text of the Regulation, are clearly inconsistent with its objectives.

Having said this, many stakeholders interviewed for the study considered that the requirement to provide a full breakdown of government taxes, airport taxes and other fees was not helpful in improving transparency, arguing that only the total price is of relevance to consumers.

The external study shows that airlines and travel agents have made significant steps towards a transparent way of booking and advertising and compliance with Regulation (EC) 1008/2008 is relatively good. Nonetheless, the following deficiencies have been identified<sup>193</sup>:

First, the question has been raised whether the payment processing fee (e.g. credit card fee) is fairly displayed – since such fees are often only theoretically avoidable for most consumers, they should be indicated from the very beginning of a booking and not at the payment stage

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<sup>188</sup> Steer Davies Gleave report of March 2011, p, 31-32. See footnote 30.

<sup>189</sup> Steer Davies Gleave report of March 2011, p, 45-46. See footnote 30.

<sup>190</sup> Association of European Airlines (AEA), European Low Fare Airlines Association (ELFAA), International Air Transport Association (IATA), and ERAA (European Regional Airlines Association).

<sup>191</sup> Final Report of January 2012, p. 61. See footnote 27.

<sup>192</sup> Such as levying substantial payment charges, very difficult to avoid in practice.

<sup>193</sup> Final Report of January 2012, Executive Summary, p. iv-vi. See footnote 27.

only – and whether the amount collected is in line with the Unfair Commercial Practices Directive<sup>194</sup>.

Further, the study found that breakdown of taxes, fees and charges is not always done in an appropriate way.

Finally, with regard to enforcement, several Member States did not introduce in their national law sanctions for infringements of Regulation 1008/2008.

The external study on price transparency found that stakeholders have not reported any increased administrative burdens as a result of this legislation.<sup>195</sup>

With regard to the question of subsidiarity (whether self-regulation would be a more effective alternative to regulation), the study found that: "[...] The objectives could not have been achieved without legislation, because due to strong (headline) price competition and low profit margins airlines are reluctant to change their practices unless their competitors have already changed their own practices."<sup>196</sup>

Based on consultations with Member State enforcement authorities and on the study, the Fitness Check has not identified any overlapping or redundant measures in the legislations relevant to price transparency. It has been reported that at Member State level the set-up empowerment of enforcement authorities varies, yet it does not mean any ineffectiveness or inconsistency were identified.

## **6.2.2 Insurance requirements for air carriers and aircraft operators**

As described above in section 6.1.2., the Fitness Check in the first place sought to obtain a factual overview of the situation in Member States regarding the insurance of third-party liability for air carriers and aircraft operators. The study also assessed whether other actors in the aviation system (for example airports) have specific problems of getting insurance coverage for third-party liability in case of terrorist attacks. Finally, the purpose of the Fitness Check was to determine whether Regulation (EU) 785/2004 was still fit for purpose. The Fitness Check exercise led to the following evaluation.

The study found that the Regulation 785/2004 has largely achieved the objective of harmonising the minimum insurance requirements, is proportionate and has a useful impact and no stakeholder suggested that minimum requirements should be removed<sup>197</sup>.

National enforcement authorities have stated that cases of non-compliance with the Regulation have remained extremely limited<sup>198</sup>.

All stakeholders overwhelmingly supported Regulation 785/2004 and thought the Regulation addressed the issues it was meant to address. Relatively few issues were raised by the stakeholders. No stakeholders suggested that minimum requirements for insurance should be removed. In any case, a removal of minimum insurance requirements would result in:

- A conflict with the Montreal Convention which requires the States to establish minimum requirements of liability insurance;

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<sup>194</sup> See footnote 60.

<sup>195</sup> Final Report of January 2012, p. 61. See footnote 27.

<sup>196</sup> Final Report of January 2012, p. 61. See footnote 27.

<sup>197</sup> Final Report of July 2012, p. 59. See footnote 29.

<sup>198</sup> Final Report of July 2012, p. 46. See footnote 29.

- A risk that some airlines operating into the EU might not have appropriate liability coverage in place and therefore a risk that potential EU and non-EU victims of accidents would not receive adequate compensation;
- EU Member State would have to establish their own minimum liability insurance requirements, which would distort the single market for air transport and increase the administrative workload for insurers and operators. Although commercial airlines might already exceed any national requirements, it could create barriers to cross-border movement of light aircraft.<sup>199</sup>

While the study has found no major issues regarding the relevance of the Regulation, it has identified some potential risks and recommended to monitor market developments in some specific areas. The area where significant market developments are underway and which is only regulated to a limited extent is touching upon remotely piloted aircraft systems (RPAS).<sup>200</sup> In this respect, the study recommended that the Commission first considers defining one or two lower weight bands for third-party liability to avoid creating a disproportionate and unnecessary burden for very light, usually unmanned, aircrafts. In a longer term, the study recommended a specific legislative instrument on unmanned aircraft and study in that context whether the standard approach to third-party liability insurance enshrined in the Regulation is appropriate for RPASs.

The stakeholders consulted and the study have not identified any major administrative burden. However, the study has found that national authorities all check the insurance certificates for each air carrier and aircraft operator operating to/from their airports, and in some cases also through their national airspace. It means that multiple authorities check the same certificate and there is no mutual recognition of the validity of the controls undertaken by other Members States. The study affirmed that although this is a thorough approach which minimises the risk of an inadequately insured operation, arguably it creates an unnecessary administrative burden for both air carriers and enforcement bodies. This could be addressed if, at least for Community air carriers, national authorities agreed to accept that a carrier was adequately insured if it had a valid operating licence, as the licensing authority would have been obliged to check this already.<sup>201</sup>

### **6.2.3 Passengers' protection in case of airline insolvency**

The purpose of the Fitness Check was to review existing practices concerning assistance to passengers affected by airline insolvencies, including information on available measures, rerouting of passengers stranded as a result of airline insolvencies and possible reimbursement of the costs of original tickets paid over by affected passengers. It also looked what alternative market-driven solutions existed for passengers outside of obligations existing in EU law. This was summarised in section 6.1.3 above.

Having established the factual situation on the market, the Fitness Check exercise sought to evaluate whether under Regulation 261/2004 passengers were protected against the effects of air carriers' insolvency when the protection of the Package Travel Directive does not apply. It also sought to establish whether financial viability rules under Regulation 1008/2008 could contribute to a better application of Regulation 261/2004 to insolvency cases, notably through

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<sup>199</sup> Final Report of July 2012, p. 59. See footnote 29.

<sup>200</sup> Final Report of July,2012, p. 60-61. See footnote 29.

<sup>201</sup> Final Report of July 2012, p.4. See footnote 29.

improved prediction (advance warning) of airline insolvencies. The Fitness Check led to the following observations.

As discussed above, protection of the passengers in the event of bankruptcy should be ensured, albeit not directly, by two Regulations: Regulation 261/2004, which in theory should apply to passengers affected by airline insolvency, and Regulation 1008/2008, which, through control of financial viability of airlines, should help preventing extreme cases of stranded passengers.

The Fitness Check has shown that the objective of these Regulations has not been fully achieved in respect of a passenger protection against or assistance in case of airline insolvency. Except for important recent occurrences, existing protection under Regulation 261/2004 has not been applied in practice to the particular case of airline insolvencies. This lack of application of EU law has created two issues: firstly, neither the carrier nor the competent authorities have been able to ensure sufficiently in advance that the necessary arrangements are taken to re-route standalone passengers and provide the other rights (information, assistance, and reimbursement). Secondly, and consequently, certain rights according to Regulation 261/2004 have not been fulfilled by the failing carrier, in particular rerouting of stranded passengers and reimbursement of the tickets, leaving passengers on their own (stranded away from home).

Consequently, protection of passengers has been limited so far:

- Of the passengers affected by insolvency when purchasing standalone tickets between 2000 and 2010, 76% did not have any form of protection other than Regulation 261/2004. Of the remainder, 14% had paid with credit cards, 8% had purchased from IATA travel agents within the time-frame to obtain a refund, and 2% had purchased SAFI. Assistance to passengers was only provided by national authorities in a very limited number of insolvencies.<sup>202</sup>
- The proportion of the costs incurred, which were recovered, depended on the passenger type and the available cover. All but those who purchased SAFI were limited to recovery of costs of original tickets. Those that did not travel were in principle able to recover almost all of their costs. However, those that rebooked were only able to recover approximately 60-70% of their costs, as the incremental costs of new flights were not covered. Those stranded recovered most of their costs if they had a specific type of insurance (SAFI)<sup>203</sup>, but not under the other schemes. Note that the protection for passengers covered by the IATA BSP only refers to those passengers who booked within the remittance period, i.e. more or less 30 days. Passengers booking via an IATA travel agent but further in advance would not have been protected, and therefore would not have recovered any costs.<sup>204</sup>

With regard to Regulation 1008/2008, some Member States indeed successfully implemented the requirements on financial viability, which was translated in various types of preventive measures (e.g. regular monitoring of financial capacity, contingency plans, organised run down of airline activities). This arguably led to a better preparedness for cases of airline insolvencies and lower impact on actually affected passengers.

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<sup>202</sup> Steer Davies Gleave report of March 2011, p.47-48. See footnote 30.

<sup>203</sup> On SAFI, see section 6.1.3, p.89 above.

<sup>204</sup> Steer Davies Gleave report of March 2011, p. 46-52. See footnote 30.

Recent application of certain rights in case of flight cancellation laid out in Regulation 261/2004 to insolvency cases, and the fact that, in some Member States, provisions of Regulation 1008/2008 have helped ensuring that obligations under Regulation 261/2004 are fully taken into account during the lifespan of air carriers, show that the issue at stake is insufficient enforcement of existing rules.

*Member States* provided the Commission with information on their practices in this area and some are described above in section 6.1.3. There was a consensus among Member States that the most desirable outcome for passengers was an air carrier being able to continue operations without them having to care about any financial issues. The monitoring practices of regulatory authorities vary from annual and biannual management account reviews, to monthly evaluations of the airlines licensed. Certain Member States target resources where they consider there is a greater risk to passengers based on objective criteria including the size and type of operation, geographical coverage or past financial results. Some Member States have required contingency plans on how to organise a wind-down of operations so as passengers are protected. A number of Member States drew the attention of the Commission to the merits of an increased cooperation among Member States, for instance an authority holding information of concern on the financial situation of an air carrier could draw the attention of the licensing Member State on the need for a closer monitoring. Similarly, a licensing authority concerned with a possible insolvency of a carrier it licenses could liaise with authorities in other Member States to allow them to make contingency preparations. Some Member States stated that the consequences of a possible failure could be mitigated by promoting a progressive phasing out of unprofitable and/or distant routes/destinations where passenger assistance could be more difficult to arrange.<sup>205</sup>

As mentioned above, stakeholders were in agreement that the existing regulatory framework does not fully or adequately address the issue of passengers affected by airline insolvency. The level of dissatisfaction with the existing legislation and ways to address deficiencies differ greatly between various stakeholders.

From the *aviation industry's* point of view, competition must be preserved between airlines. The risk of disproportionate measures must be taken seriously given the very low number of stranded passengers concerned. The sector has been badly hit financially, an additional financial burden will be added in the framework of the European Emission Trading System (ETS) and all these costs add up. Coverage of the insolvency risk is a commercial decision that should be taken by each airline individually. Aviation industry (airline operators) therefore rejected the idea of a general reserve fund. The industry does not consider that there is a need to introduce new legislation but supports better enforcement or enhancing of existing arrangements between airlines to reroute stranded passengers.<sup>206</sup>

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<sup>205</sup> Source: replies of Member States to the Commission's letter of 17 April 2011. See p.32 above.

<sup>206</sup> For more detail comments, see Minutes from the stakeholders workshop of 30 March 2011. Airlines were represented in particular by Association of European Airlines (AEA), European Low Fares Airlines Association (ELFAA), European Regions Airlines Association (ERA), International Air Carrier Association (IACA) and International Air Transport Association (IATA). See footnote 32.

*Insurance companies* considered that an EU-wide compulsory insurance scheme is not feasible.<sup>207</sup>

From the *consumer* point of view, the study demonstrates that passengers with a seat-only ticket affected by an airline failure are badly hit by such an event. Package travels and seat-only tickets have the same feature of being paid in advance. There is no reason why passengers holding a ticket in the same plane should be submitted to different regimes. Stressing this discrimination of seat-only tickets, consumers' representatives therefore do not consider the existing regime to be sufficient and call for new legislation, in particular to introduce a compulsory insurance scheme.<sup>208</sup>

*Travel agents* take very similar views. On fair competition grounds, and referring to the Package Travel Directive, they also consider that there is no reason why companies selling similar products such as travel packages should be submitted to different obligations and costs.<sup>209</sup>

According to the Steer Davies Gleave study<sup>210</sup>, in current circumstances, *Member States* would be unwilling to pay for passenger relief out of existing budgets, and would therefore need to fund it in some other way. If all stranded passengers were required to be covered, this option would then be equivalent to a restricted version of a general reserve fund. If the coverage was intended to be restricted to passengers unable to obtain assistance through other means, it would be difficult to prevent passengers from foregoing other forms of protection in favour of the free protection offered by the State. The only way in which the number of passengers could be limited would be if the assistance offered by the State were to be discretionary.

Since the stakeholders' consultation in March 2011, from its contacts with stakeholders, the Commission services have observed some development on these positions. While *consumers* and *travel agents* have not changed position, recent experience has shown that in some *Member States* where airlines have got insolvent, passenger protection under Regulation 261/2004 as to rerouting, assistance information and sometimes reimbursement has been put in place by other air carriers and airports under the initiative and monitoring of national authorities. Travel agents challenge the efficiency of such arrangements so far.

No provision was identified as redundant or inconsistent. The question of effectiveness of existing rules, i.e. genuine enforcement by regulatory authorities of all Member States, indeed was identified as the main problem. The issue of administrative burden has not been invoked in the stakeholders' consultation.

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<sup>207</sup> Minutes from the stakeholders workshop of 30 March 2011, p.6. See footnote 32. Insurers represented by European Insurance and Reinsurance Federation (CEA) and International Passenger Protection Ltd (IPP).

<sup>208</sup> Minutes from the stakeholders workshop of 30 March 2011. See footnote 32. Consumers represented by Bureau Européen des Unions de Consommateurs (BEUC) and Which?GTravel.

<sup>209</sup> Minutes from the stakeholders workshop of 30 March 2011, p.6. See footnote 32. Travel agents represented by Group of National Travel Agents' and Tour Operators' Associations within the EU (ECTAA).

<sup>210</sup> Steer Davies Gleave report of March 2011, p. 71. See footnote 30.

## 6.3 Conclusions

Based on these findings, the Commission services conclude that the regulatory environment is considered as broadly adequate in terms of ensuring price transparency and assisting passengers affected by airline insolvencies. Harmonised insurance requirements are considered as useful. At this stage, there is no need to change the Air Service Regulation or Regulation 785/2004 on insurance requirements. The Fitness Check identified some issues that require an enforcement focus or further reflexion on the best regulatory answer as well as new industry developments warranting continuous monitoring, as outlined in the following.

Concerning the question of administrative burden, the Commission services consider that enforcement of and compliance with Regulation 1008/2008 and Regulation 785/2004 does not represent an excessive administrative burden<sup>211</sup>.

With regard to compliance with rules on price transparency, the impact assessment estimated higher administrative costs for airlines as they will have to make an effort to provide transparent information and be careful about discriminatory treatment.<sup>212</sup> It can be assumed that these costs indeed had to be borne by air carriers and were most likely related to the adjustment of IT systems to the enhanced price transparency requirements. However, the stakeholders' consultation in the context of the Fitness Check has not raised any issue in this regard and it can therefore be assumed that the costs of compliance are not considered as excessive.

Similarly with regard to the enforcement of Regulation 1008/2008 as a way of preventing and minimising effects of insolvencies on passengers, the administrative cost on the side of national administrations does not seem excessive.

Finally, compliance with Regulation 785/2004 certainly represents a cost for air carriers. Nonetheless, the public consultation has not shown any dissatisfaction with the level of these minimum insurance requirements.

### 6.3.1 Price transparency

The Commission services consider as imperative that a full price transparency – that is compatible with Regulation 1008/2008 as well as the Unfair Commercial Practices Directive<sup>213</sup>, the E-commerce Directive<sup>214</sup> and the Consumer Rights Directive<sup>215</sup> – is reached and consumers are well aware of any payment and charges ahead and during the procedure of a booking.

In terms of *enforcement support*, the Commission services believe that informal consultation with national enforcement bodies would deliver satisfactory results. The Commission services thus plan to call for a dedicated forum of enforcers to discuss issues related to enforcement of price transparency rules at Member State level and to examine sanctions. Also, in short term, a *guideline of good practices* should be developed by and validated through a consultation of

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<sup>211</sup> See comments on p.75 above.

<sup>212</sup> Impact assessment, p.28. See footnote 137.

<sup>213</sup> See footnote 60.

<sup>214</sup> See footnote 62.

<sup>215</sup> See footnote 63.

national enforcers. This consultation then might pave the way for potential changes in the legislation in a longer term, if needed.

*Upcoming entry into force of new legislation:* On fees for the use of certain means of payment, the new Consumer Rights Directive<sup>216</sup> states in Article 19 that "Member States shall prohibit traders from charging consumers, in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of such means". Article 19 of the Consumer Rights Directive applies to passenger transport services. Until the provisions of the Directive enter into application from 13 June 2014, the Commission services together with Member States will attempt to reach a *voluntary agreement* among airlines to abolish excessive payment fees.

Regarding the appropriate breakdown of taxes, fees and charges, the Commission services are investigating the possibility of requiring a break-down into refundable and non-refundable batches. They will analyse whether a *voluntary agreement or changes in the legislation* would be the appropriate regulatory instrument.

### **6.3.2 Insurance requirements for air carriers and aircraft operators**

Regulation 785/2004 seems "fit for purpose". The Commission services continue to monitor the latest developments and particularly remotely piloted aircraft systems (RPAS). There is a need to assess how to address any possible concerns – including insurance issues – raised by the use of civil RPAS<sup>217</sup>. The Commission services will assess whether a specific legislative instrument on RPAS may be necessary.

With regards to mutual recognition of insurance certificates, the Commission services accept that there may be scope for simplification and the Commission services will consider whether an amendment to the Regulation and other legislative acts may be necessary.

The Commission services will equally assess whether a definition of model and heritage aircraft would be beneficial.

### **6.3.3 Passengers' protection in case of airline insolvency**

When an air carrier ceases operations due to insolvency, the impact on an individual passenger of such a failure is significant, and in particular on holders of flight-only tickets stranded away from home. Regulation 261/2004 already provides an appropriate legal framework for passenger assistance in cases of insolvency. However, experience has shown that this Regulation can be difficult to apply and to be enforced where an air carrier is closing down its activities unless, using Regulation 1008/2008, a carrier has been required to plan ahead and put in place measures to protect passengers for the event of losing its Operating licence.

Proactive engagement by national regulatory authorities can significantly improve the situation for affected passengers. Therefore, before considering new legislation in this area, the Commission services consider it essential to strengthen the licensing oversight of Community air carriers under Regulation (EC) 1008/2008.

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<sup>216</sup> See footnote 63.

<sup>217</sup> The first step in this direction would be a Roadmap on the RPAS integration to airspace referred to in the Commission Staff Working Document of 4.9.2012 Towards a European strategy for the development of civil applications of Remotely Piloted Aircraft Systems (RPAS), SWD (2012) 259 final.

Pursuant to the findings of the Fitness Check, on 18 March 2013 the Commission adopted a Communication on Passenger Protection in the event of airline insolvency<sup>218</sup>. In this Communication, the Commission engaged to:

- Encourage the national authorities competent for the enforcement of Regulation (EC) No 1008/2008 and Regulation (EC) No 261/2004 to coordinate their actions to ensure appropriate monitoring of the financial position of air carriers and where necessary adopt a coordinated approach to the suspension of their operations to minimise the impact on passengers;
- Encourage greater cooperation and sharing of best practice and information between the regulatory authorities of Member States;
- Engage with EU air transport associations to formalise the existing voluntary agreements on the provision of rescue fares and their effective promotion;
- Engage with EU airport associations to develop voluntary arrangements to complement "rescue fares" for example offering reduced airport charges in such situations to minimise the costs to passengers;
- Engage with industry to encourage the wider and more systematic availability of SAFI or similar insurance products across the EU;
- Engage with IATA to encourage the adoption of a service level agreement to ensure that the Billing Settlement Plan (BSP) is used to ensure the largest possible number of passengers recover what they paid before an air carrier is declared insolvent;
- Encourage the wider and more systematic availability of information about credit card refund schemes or similar products in a Member State to allow passengers to protect themselves against the risk of insolvency under national law<sup>219</sup>.

The Commission also declared that it "will closely monitor the application of these measures. Two years after the adoption of this text, the Commission will review their performance and effectiveness and assess whether a legislative initiative is needed to guarantee the protection of passengers in the case of airline insolvency."<sup>220</sup>

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<sup>218</sup> See footnote 33.

<sup>219</sup> See point 40 of this Communication.

<sup>220</sup> See point 41 of this Communication.

## 7. Employment and Working Conditions<sup>221</sup>

### 7.1 Current regulatory environment

The EU social standards applicable to the aviation sector are twofold:

- the general EU social standards, common to all economic activities, which lay down a core of minimum requirements, to support and complement the activities of the Member States in the area of social policy;
- the legislation specific to air transport, gradually harmonised at EU level, which has a social dimension.

#### 7.1.1 General EU social standards

The objective of these horizontal European rules is to support and complement the national standards in Member States in order to guarantee a fair functioning of the single market and to improve working conditions and the rights of employees.

European legislation, through Council Directive 89/391/EEC and Council Directive 91/383/EEC<sup>222</sup>, lays down the guiding principles and the minimum standards regarding health and safety of workers at work in all economic sectors including air transport. The information and consultation rights of employees in their companies at national level are provided for by Directive 2002/14/EC<sup>223</sup>, Directive 2001/23/EC<sup>224</sup> and Directive 98/59/EC<sup>225</sup>. At EU level, information and consultation through European Works Councils is foreseen by Directive 2009/38/EC<sup>226</sup>. The Directive 2003/88/EC of 4 November 2003<sup>227</sup> concerning certain aspects

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<sup>221</sup> It needs to be reminded that the ambition and mandate of this Fitness Check has been only to assess the social impact of the single aviation market on employment and working conditions and not to evaluate the social legislation applicable to the aviation sector. This legislation is described in chapter 7 of this report purely for information purposes.

<sup>222</sup> Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29.6.1989, p. 1–8. Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or temporary employment relationship, OJ L206, 29.7.1991, p.19-21.

<sup>223</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1989:183:0001:0008:EN:PDF>  
Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ L 80, 23.3.2002, p. 29–34.

<sup>224</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:080:0029:0033:EN:PDF>  
Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses OJ L 82 of 22.3.2001, p.16-20.

<sup>225</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:082:0016:0020:EN:PDF>  
Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225 of 12.8.1998, p.16-21.

<sup>226</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:225:0016:0021:EN:PDF>  
Directive 2009/38/EC of the European Parliament and the Council of 6 May on the establishment of the European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purpose of informing and consulting employees (Recast), OJ L 122 of 16.5.2009, p.28-44.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:122:0028:0044:EN:PDF>

of the organisation of working time aims to improve the working environment by setting standards for working time, rest, breaks, leave etc. It covers more specifically non mobile workers in the aviation sector as flight crew benefits from a specific Directive.

EU provisions on labour legislation also cover working conditions for temporary agency workers, part-time workers, workers on a temporary contract<sup>227</sup>, workers' rights in the event of transfers of the undertakings or business<sup>228</sup> and the law applicable for contractual obligations<sup>229</sup>.

European legislation has since 1971 been coordinating the Member States' social security schemes in order to guarantee equality of treatment regardless of nationality and to protect the workers' acquired rights in a cross-border context. This legislation clarifies which national social security legislation should apply and prevents gaps in protection or double payment of contributions.

The specificity of mobile workers in aviation has been tackled recently through the amendment brought by Regulation (EU) No 465/2012<sup>231</sup>, which introduces the concept of 'home base' for air operations, which means that flight crew are entitled to access social security benefits applicable in the country from which they normally start and end their duty period<sup>232</sup>. Ensuring this connection between the flight and cabin crew members and the legislation directly applicable in the Member State where their "home base" is located facilitates the correct application of Regulation (EC) No 883/2004 in the air transport sector. All new contracts with flight and cabin crew members concluded after 28 June 2012 should be assessed on the basis of the new Article 11(5) of Regulation (EU) No 465/2012. As the transitional period is of 10 years, the flight and cabin crew members who were hired before 28 June 2012 are not affected by the new rules unless their situation changes or they ask to be subject to the new rule. The reference to this home base can be also found in recital 9 of the Air Service Regulation stating that *"With respect to employees of a Community air carrier*

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<sup>227</sup> Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9–19.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:299:0009:0019:EN:PDF>

<sup>228</sup> Directive 2008/104/EC on temporary agency work, OJ L 327, 5.12.2008, p. 9–14.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:327:0009:0014:EN:PDF>

<sup>229</sup> Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p.16-20.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:082:0016:0020:EN:PDF>

<sup>230</sup> Regulation (EC) No 593/2008 on the law applicable to contractual obligations, OJ L 177, 4.7.2008, p. 6–16.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:EN:PDF>

<sup>231</sup> Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004, OJ L 149, 8.6.2012, p. 4–10.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:149:0004:0010:EN:PDF>

<sup>232</sup> "The home base" is defined as the location nominated by the operator to the crew member from where the crew member normally starts and ends a duty period or a series of duty periods and where, under normal conditions, the operator is not responsible for the accommodation of the crew member concerned. Council Regulation (EEC) 3922/91 as regards to common technical requirements and administrative procedures applicable to commercial transportation by aeroplane, OJ L 373, 31.12.1991, p. 4–8.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1991:373:0004:0008:EN:PDF>

*operating air services from an operational base outside the territory of the Member State where that Community air carrier has its principal place of business, Member States should ensure the proper application of Community and national social legislation."*

Directive 96/71/EC<sup>233</sup> protects the rights and working conditions to be applied to an employee temporarily posted in a Member State other than where he usually works. The set of minimum mandatory rules on posting covers a wide range of issues, such as maximum work periods and minimum rest periods, minimum paid annual leave, the minimum wage, equal treatment and conditions of provision of workers, in particular the supply of workers from temporary agencies. This legislation also addresses issues of health and safety at work, and includes measures to protect working conditions of pregnant women, children and young workers. The new Commission proposal adopted in March 2012 concerning the enforcement of the provision applicable to the posting of workers in the framework of the provision of services<sup>234</sup> is a positive step forward for employees of the air transport sector as it clarifies the notion of posting and provides for new tools to ensure an effective control of the rights applicable to posted workers.

### **7.1.2 The legislation specific to air transport with a social dimension**

The creation of the single market in aviation has been accompanied by a process of regulatory convergence in various fields and notably on the conditions governing the practice of specific jobs.

The mobile staff in civil aviation is covered by the minimum standards of Directive 2000/79/EC<sup>235</sup> on the organisation of working time of mobile workers in civil aviation. Its purpose is to implement the European Agreement on the organisation of working time of mobile staff in civil aviation<sup>236</sup> concluded on 22 March 2000 between social partners of the civil aviation sector. It lays down specific requirements relating to health and safety protection, including the organisation of working time of mobile staff in civil aviation.

In addition to this Directive, Regulation (EC) 1899/2006<sup>237</sup>, known as EU-OPS regulation, was adopted in 2006 to ensure safety of operation and the protection of passengers. Among other technical rules, the EU-OPS Regulation includes harmonised minimum standards aimed

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<sup>233</sup> Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, p. 1-6.

<sup>234</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1997:018:0001:0006:EN:PDF>  
COM(2012) 131. Proposal for a directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

<sup>235</sup> Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA), OJ L 302, 1.12.2000, p. 57–60.

<sup>236</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:302:0057:0060:EN:PDF>  
<sup>237</sup> [http://ec.europa.eu/employment\\_social/dsw/public/actRetrieveText.do?id=11367](http://ec.europa.eu/employment_social/dsw/public/actRetrieveText.do?id=11367)

Regulation (EC) No 1899/2006 of the European Parliament and of the Council of 12 December 2006 amending Council Regulation (EEC) No 3922/91 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation, OJ L 377, 27.12.2006, p.1-175.  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:377:0001:0175:EN:PDF>

at avoiding excessive fatigue of aircrew for the purpose of ensuring safe air transport for passengers. These aircrew fatigue rules are currently under review<sup>238</sup>.

The single aviation market has also led to the development of other standards specific to air transport, which include a social dimension. These standards are also driven by the will to increase safety standards throughout the European Union. Commission Regulation (EU) No 805/2011<sup>239</sup> aims at improving the operation of the air traffic control system within the Union through the issuing of an air traffic controller licence based on common licensing requirements. It has superseded the Directive 2006/23/EC which created for the first time a Community air traffic controller licence. As for air crew, Council Directive No 91/60 laid down the first principles for a mutual acceptance of personnel licences for the exercises of functions in civil aviation. It was replaced by a new regulation in 2011<sup>240</sup> detailing rules for certain pilots' licences and for the conversion of national pilots' licences and of national flight engineers' licences into pilots' licences, as well as the conditions for the acceptance of licences from third countries. Rules for pilots' medical certificates, the conditions for the conversion of national medical certificates and the certification of aero-medical examiners are also set out in that Regulation. The amendments brought by Commission Regulation 290/2012 are mainly the provisions of rules on cabin crew qualifications and related attestations<sup>241</sup>.

## ***7.2 Reports on employment in the aviation sector***

In agreement with the European Parliament, the Commission regularly reviews and reports on the consequences of the internal market on employment in order to evaluate the need for specific measures in this matter.

Previous studies evaluating the impact of the single aviation market on employment<sup>242</sup> and the resulting Commission's staff working document of 2010<sup>243</sup> covered the period starting from 1997 up to 2007, during which European air transport underwent a profound transformation that redefined the outlines of the whole sector. Due to the liberalisation of air transport market within the EU, the notion of State air carriers focused solely on their national market gave

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<sup>238</sup> Opinion No 04/2012 of the European Aviation Safety Agency of 28th September 2012 for a Regulation establishing Implementing Rules on Flight and Duty Time Limitations and rest requirements (FTL) for commercial air transport (CAT) with aeroplanes.

<sup>239</sup> Commission Regulation (EU) No 805/2011 of 10 August 2011 laying down detailed rules for air traffic controllers' licences and certain certificates pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, OJ L 206, 11.8.2011, p.21-38.

<sup>240</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:206:0021:01:EN:HTML>  
Regulation (EU) No 1178/2011 of 3 November 2011 laying down technical requirements and administrative procedures related to civil aviation aircrew pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, OJ L 311, 25.11.2011, p.1-193.

<sup>241</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:311:0001:01:EN:HTML>  
Commission Regulation (EU) No 290/2012 of 30 March 2012 amending Regulation (EU) No 1178/2011 laying down technical requirements and administrative procedures related to civil aviation aircrew pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, OJ L 100, 5.4.2012, p.1-56.

<sup>242</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:100:0001:01:EN:HTML>  
ECORYS (2007): Social developments in the EU air transport sector: A study of developments in employment, wages and working conditions in the period 1997-2007 and Booz & Co (2009): Effects of EU Liberalisation on Air Transport Employment and Working Conditions.

<sup>243</sup> SEC(2010) 503 final. Impact assessment of the Single Aviation Market on employment and working conditions for the period 1997-2007.

way to a transnational approach. The arrival of new competitors meant that legacy carriers had to adapt in order to become more competitive by optimising costs and rationalising the companies' operations, which often led to Union-wide mergers and acquisitions. The ensuing substantial restructuring and outsourcing processes had an impact on all transport professionals.

Taking account of these changing circumstances, the above-mentioned Commission's staff working document of 2010 led to three main conclusions. First, the surge in air transport activity had a positive impact on the level of direct employment in the aviation sector within the EU, even if there are substantial differences from one country to another. However, the scope of this verdict was limited because, due to the lack of statistics, the impact on indirect or induced employment by the air transport sector could not be analysed. Second, the development of more competitive economic models, which required increased cost control and in-depth change in the employment structure, brought about an increase in work productivity and employment flexibility. Last but not least, the free movement of capital, the freedom of establishment and the freedom to provide services within the single market led the aviation sector to follow a development strategy already followed in other sectors, that of establishing groups at Union level, which contributed to a substantial development in transnational employment and increased challenges for social partners and industrial relations.

Since 2007, there have been continuous changes to the structure of the EU air transport sector, including steady growth in the market share of the low-cost sector, continued consolidation amongst network carriers, the bankruptcy of a number of air carriers and the fall in employment due to the crisis. To obtain an updated and more complete picture of employment and working conditions in the sector, the Commission commissioned in 2012 two independent studies, one carried out by Steer Davies Gleave (SDG) on the effects of the implementation of the EU aviation common market on employment and working conditions in the air transport over the period 1997-2010<sup>244</sup>, and a second study carried out by Mott MacDonald on transnational mobile workers in the EU airline industry<sup>245</sup>.

The study carried out by SDG aimed at collecting information on direct and indirect employment in the EU air transport sector (EU 27 + Switzerland) over the period 1997-2010 and to deliver qualitative assessment of employment. It also provided forecasts for how employment could develop over the period up to 2020.<sup>246</sup>

In cooperation with DG EMPL, the intermediate report was presented and discussed with the social partners on 16 April 2012 in Brussels.

The findings of the consultant are presented in the following sections.

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<sup>244</sup> See page 31 under point e) and footnote 31.

<sup>245</sup> See page 31 and footnote 259.

<sup>246</sup> The 2010 Commission staff working document did not include data for the period 2007-2010. This is what the 2012 external study completed. Moreover, the 2012 external study extended the scope to indirect employment and gave more attention on the quality of employment in the sector.

## 7.2.1. Level of employment in the aviation sector for the period 1997-2010

### 7.2.1.1 Direct and indirect employment

According to the study, there were 698,200 direct employees<sup>247</sup> in the EU air transport sector in 2010: 418,700 employed by air carriers, 123,300 by airports, 42,400 by Air Navigation Service Providers (ANSP) and at least 113,000 with other ground-based service providers, including independent ground handlers and aircraft maintenance organizations. In addition, there were approximately 389,000 people employed in the aircraft manufacturing sector, and at least 3,000 in regulatory functions. In total, this means 1,090,200 direct jobs.

Over the period 1998-2002, there was a 9% increase in EU air transport operator employment, but after 9/11 and the subsequent decline in traffic, the level of employment was only 4% greater in 2003 than 1998 levels. Although there were brief recoveries in employment in 2004 and over 2006-2007, the number of direct employees declined again after 2007, returning to 1998 levels by 2010.

The total air carrier staff decreased by 1% between 1998 and 2010, partly due to the outsourcing of some services. For instance, the direct groundhandling employment by air carriers declined by 36%, which represents around 31,400 employees. The consultant estimated that 45% of ground handling employees worked for independent companies and the remainder for airports and airlines. It is nevertheless important to underline the 40% increase in the recruitment of cabin crew and the 28% increase in flight crew employed by air carriers. In 2010, cabin crew employment represented 29.7% of overall air transport operator employment whereas flight crew accounted for 12.6%.<sup>248</sup>

The number of airport employees has increased over the period in most Member States. Of the largest Member States, Germany, France and the UK showed positive average annual growth rates at 1.3%, 1.2% and 1.1% respectively.<sup>249</sup> However, it is difficult to get a full and accurate picture as not enough reliable data is available.

Over the period 2002-2010, the total direct employment provided by Air Navigation Service Providers (ANSPs) across the EU27 and Switzerland increased by 5.9%, an average annual growth rate of 0.7%. 31% of ANSP employees were air traffic controllers (ATCOs) working in operations, and 23% were technical support staff.<sup>250</sup>

To complete the picture, the Commission services have asked for figures related to indirect employment in the air transport sector. Indirect employment includes all employees not directly engaged in providing air transport services but whose jobs directly depend on the activities of these organisations and provide them with a service (maintenance services, computer services, etc.).

Over 1997-2010, it has been estimated that air carriers and airports respectively provide 1.3 million and 343,000 additional indirect jobs which means for instance that 4.2 jobs are

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<sup>247</sup> By comparison they were 702.600 employees in 2000, 715.500 in 2007, 724.700 in 2008 and 709.300 in 2009.

<sup>248</sup> Steer Davies Gleave study of August 2012, p. 22-36. See footnote 31.

<sup>249</sup> Steer Davies Gleave study of August 2012, p. 37-41. See footnote 31.

<sup>250</sup> Steer Davies Gleave study of August 2012, p. 49-60. See footnote 31.

generated in the wider economy for each worker employed at airlines and 2.2 jobs for the ones employed at airports. Significant as they may be, those figures are below the ones generally quoted by the industry, which takes also into account induced employment such as airport retail outlets<sup>251</sup>.

#### **7.2.1.2. Increased competition led to important productivity improvements**

Despite traffic growth, employment in the EU air transport sector has slightly decreased over this period, as increased competition led to important productivity improvements<sup>252</sup>.

Low-cost airlines, which have a growing market share in the intra EU traffic, have traditionally a lower number of employees per passenger. Accordingly, all EU airlines and their direct service providers such as groundhandlers have significantly reduced their operating costs and have increased the number of passengers transported in each aircraft with the adoption of higher seating densities and load factors.

As a result, labour productivity in the air transport sector has increased faster than productivity in the wider economy. Eurostat estimates labour productivity improvement of 3.7 % per year over 2001-2007 in air transport, compared to 1.3% in the economy as a whole<sup>253</sup>. According to SDG, the productivity improvement for EU airlines calculated on the basis of passengers per employee was of 33% between 2000 and 2010 (or 3.9 % on average each year). If productivity was measured in terms of airline and ground handling employees per flight KM, it would be approximately 10%.

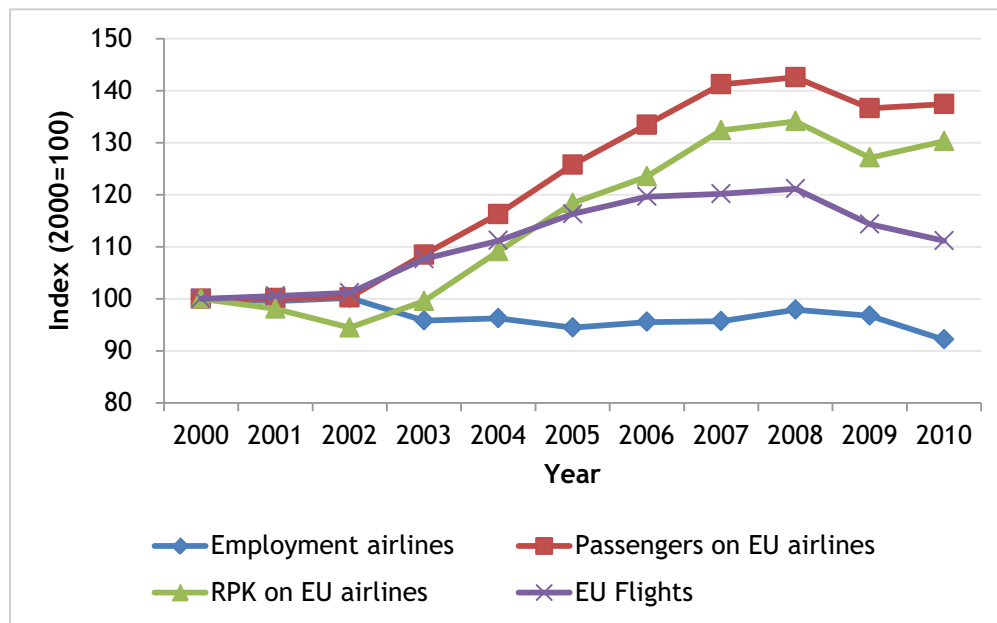
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<sup>251</sup> Steer Davies Gleave study of August 2012, p 69-78 and Appendix A. See footnote 31.

<sup>252</sup> Steer Davies Gleave study of August 2012 , p. 103-120. See footnote 31.

<sup>253</sup> Steer Davies Gleave study of August 2012, p 119. See footnote 31.

**Figure 15: Traffic growth (flights, total passengers, total passengers per kilometer - RPK) versus employment at airlines, 2001-2010<sup>254</sup>**



Source: Eurostat, Eurocontrol, Ascend airline database, SDG analysis

To some extent, these changes will continue to occur as the sector continues to expand and competition to increase. However, some of the productivity improvements that have been achieved are one-off, and it is not expected that such significant change will occur over the next 10 years. Therefore, if air traffic volumes increase as forecasted in the period up to 2020, employment in the sector should also increase, in contrast to the period 2000-2010. On the basis of the traffic growth forecast (3.4% per annum), the consultant estimated that, by 2020, direct employment in the sector will be 719,000 - 796,000, depending on the trend in productivity<sup>255</sup>.

## 7.2.2 Employment quality and working conditions<sup>256</sup>

### 7.2.2.1 Outsourcing, contractual relations, unionisation and wages

Outsourcing is not new in the aviation sector, particularly for non-core activities (such as airlines outsourcing groundhandling, or groundhandlers outsourcing aircraft cleaning). However, some airlines are now outsourcing also core services such as the provision of flight and cabin crew. The European Cockpit Association estimates that approximately 20% of flight and cabin crew are outsourced through agencies or self-employment. Many airports also outsource services such as security and provision of assistance to passengers with reduced mobility. Evidence indicates that airlines will continue to outsource support functions and they will increasingly outsource core functions such as flight and cabin crew. Such outsourcing appears to result in poorer social conditions, lower levels of trade union representation and an increased concern about job insecurity<sup>257</sup>.

<sup>254</sup> Steer Davies Gleave study of August 2012, p 104. See footnote 31.

<sup>255</sup> Steer Davies Gleave study of August 2012, p 117. See footnote 31.

<sup>256</sup> Steer Davies Gleave study of August 2012, p.79-102. See footnote 31.

<sup>257</sup> Steer Davies Gleave study of August 2012, p.85-86. See footnote 31.

The nature of contractual relations in the air transport sector has also changed. The types of employment contract are evolving towards those providing employers with greater flexibility. There has been also a significant increase in the amount of part-time work within the sector: the Eurostat Labour Force Survey results show the share of part time workers increased from 14% on average between 1999 and 2004, to 18% on average between 2005 and 2010. Concerning the use of temporary agency workers, although it has increased in the wider economy, there is no clear evidence of such an increase in the air transport sector.

Trade union membership differs between different parts of the air transport sector and between States. Unionisation is still relatively strong within network carriers. However, the unions' relative power and ability to negotiate have overall diminished, largely due to the expansion of low-cost carriers with low or zero union presence. Some industry sectors such as ANSPs remain strongly unionised.

Salaries of the highest skilled staff (pilots) have been maintained and even increased in some countries whilst less skilled staff had come under pressure to reduce their salaries<sup>258</sup>.

#### **7.2.2.2 Transnational mobile workers**

The Mott Mac Donald study aimed at investigating how the EU and Member State regulatory environment impacts on 'trans-national' mobile workers (primarily flight crew and cabin crew) in the airline industry. The approach was to conduct confidential interviews with airline management and employee representatives covering a broad cross-section of the European airline industry<sup>259</sup>.

Pilot and cabin crew representatives have raised important issues. Some airlines tend to hire pilots in countries with the lowest employment costs and to post them to their bases in other countries. A trade union in one country has no legal authority to negotiate or challenge terms and conditions for a contract under the jurisdiction of law in another country. Moreover there is a huge variation regarding the enforcement and oversight of law at national level.

### **7.3 Conclusions**

Employment in the air transport is affected, on the one hand, by traffic growth following the liberalisation of the aviation internal market but also, on the other hand, by new business strategies adopted by companies, by productivity increases and the general economy in the European Union and worldwide.

Economic regulation of the air transport sector does not address directly those issues. Having said this, it is the role of the Commission services to monitor the situation and deliver regularly a review on employment and working conditions in the air transport sector. One key constraint is the fragmented availability of employment data in the air transport sector. The Commission services considered hosting a database, which would enable Member States to update employment data on an on-going basis. However, given the limitations and

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<sup>258</sup> See Steer Davies Gleave study, p 95

<sup>259</sup> Only employee representatives did accept to answer to the consultation, which allowed the Commission services to only get a partial view of the subject.

inconsistencies of the data currently collected by Member States, the Commission services have serious reservations as to whether this would actually generate data sufficiently reliable to be the basis of a useful analysis of employment in the sector. As an alternative, the Commission services will closely work with Eurostat.

Core social legislation at EU level applies in general to all sectors including aviation. Some issues are, however, dealt with specific measures and legislation, if appropriate. Horizontal measures need to consider systematically the implications for specific categories of workers, like mobile workers in the aviation sector, that may require more targeted rules. DG MOVE is working closely with DG EMPL in order to tackle horizontal social issues (e.g. amendments of the regulation on the coordination of social security systems). The two DGs are currently working in a Task Force on highly mobile workers, which could lead to a Communication or a paper of Commission services.

## **8. Regulation of the aviation internal market – Fit for purpose**

Twenty years after the internal air services market was liberalised and opened for competition, this Fitness Check has shown that regulation continues to be needed to safeguard the gains consumers and the industry realized thanks to this liberalisation. Even more so, the Fitness Check has demonstrated that the existing regulatory environment, reviewed by the exercise, broadly offers an appropriate tool to achieve this.

Regulation of market access (including operational modalities such as leasing of aircraft and traffic rights restrictions) and of the functioning of distribution channels (computerised reservation systems) was shown to have ensured a level playing field in what became a highly competitive market. A fiercer competition in a liberalised environment brought about the need to protect consumers and this has been done, among other, through measures concerning price transparency, insurance requirements and effects of airline insolvencies.

The Fitness Check confirmed that the objectives of the Air Services Regulation to consolidate the existing liberalisation legislation and to provide some clarifications have been achieved. Stakeholders consider current rules as adequate and well suited to prevailing market circumstances. Issues that have been identified as problematic are either outside of the scope of the Regulation (access of non-scheduled services to extra-EU markets), can be further clarified by a technical guidance (leasing, restriction of traffic rights), necessitate better dissemination of best practices among enforcement bodies (PSOs, price transparency, passenger protection in case of insolvency) or merely require continuing monitoring and enforcement. At this stage, there is no need for further consideration to be given to legislative changes.

The CRS Regulation sought to bring the existing Code of Conduct closer to evolving market circumstances. Stakeholders perceive the Regulation as necessary and adequate to tackle possible distortions that cannot be addressed through competition policy enforcement. The conclusion of the Fitness check is that the Commission should continue carrying out its enforcement mandate under the current rules and that no legislative changes are necessary.

Furthermore, harmonisation brought about by the Regulation on insurance requirements for air carriers and aircraft operators is perceived as useful. At this stage, there is no need for further consideration to be given to legislative changes. The Commission services should nonetheless continue to monitor new market developments (RPAS in particular).

Rules on price transparency are considered as crucial to safeguard fair competition between airlines and to ensure that passengers are not misled by unfair promotional practices. At this stage, there is no need for further consideration to be given to legislative change, but action should be taken to adopt guidance on best practices and to support a voluntary agreement amongst airlines abolishing excessive payment fees.

With regard to the issue of passenger protection in case of airline bankruptcies, the Commission services should continue closely following actions undertaken by Member States and voluntary agreements adopted by the industry. The Fitness Check concluded that, at this stage, there is no need for further consideration to be given to legislative action. Nonetheless, in a March 2013 Communication on passenger protection in the event of bankruptcy, the Commission engaged to a number of non-legislative measures in this area.

Finally, the Fitness Check updated data on employment and information on employment conditions in the aviation sector. Gaps in terms of data availability were identified. While a number of follow-up actions have been identified, overall and at this juncture, there has been no call or need for new regulation or for de-regulation in any of the scrutinized areas. Stakeholders nonetheless drew the Commission's attention to a number of issues that need to be addressed in the near future. "Softer" regulatory tools as outlined above as well as close monitoring of new developments – in terms of technology, innovation, marketing practices and the like – in the sector may be necessary.

This fitness check will feed into the planning and programming of the Commission services work. The following areas are identified for further action:

**Table 8: Overview of follow-up actions suggested in the Fitness Check**

Issue	Suggested follow-up actions
<b>Market access and protection of fair competition</b>	
<b>Licensing of Community air carriers – the issue of leasing</b>	Preparation of a clarifying information on the question of dry leasing of aircraft registered in a third country and wet leasing by Category B carriers of larger aircraft.
<b>Access to routes – the issue of non-scheduled services</b>	Preparation of a clarifying information on acceptable practices in relation to the approval of non-scheduled services to points outside the EU (first refusal). Examination of alternative solutions for the treatment of scheduled and non-scheduled services in negotiations with third countries.
<b>Restriction of traffic rights – public service obligations (PSOs)</b>	Upkeep of the network of PSO contacts, with particular care for "newcomers"; organisation of regular seminars with EU and national officials in charge of PSOs to ensure sharing of information and dissemination of best practices. Provision of clarification on the interplay between rules on PSOs under Regulation 1008/2008 and State aid rules, notably through the revision of State aid Guidelines to airports and airlines, and through an information note to Member States, if deemed necessary.
<b>Restriction of traffic rights - traffic distribution</b>	Analysis of the possible grounds for discrimination in the provisions of Article 19 of Regulation 1008/2008 and provision of clarifications to Member States through an information note, if deemed necessary.
<b>Restriction of traffic rights - environmental and emergency measures</b>	Examination of the room for interpretation found in the provisions of the Articles 20 and 21, possible clarification through an information note.
<b>Computerised Reservation Systems (CRS)</b>	No action. Marketing and technological developments need to stabilise before any issues (e.g. in terms of scope) can be confirmed along with any need for them to be tackled by any adaptations to the legislative framework.
<b>Consumer protection</b>	
<b>Price transparency</b>	Call for an informal consultation with national enforcers to identify all price transparency related issues and help establish a guideline of good practice. Investigation of a possible requirement for a break-down of taxes, charges and fees into refundable and non-refundable parts either through voluntary agreement or future changes to the legislation. Facilitation, in cooperation with Member States, of a voluntary agreement amongst airlines abolishing excessive payment fees until the Consumer Rights Directive enters into force.
<b>Insurance requirements for air carriers and aircraft</b>	Assessment of the need for an RPAS specific legislative instrument. Consideration of an amendment to the current legislation which would simplify

<b>operators</b>	the mutual recognition of insurance certificates. Investigation of whether a definition of model and heritage aircraft would be beneficial.
<b>Passengers' protection in case of airline insolvency</b>	Expedition of a strengthened licensing oversight of Community air carriers under Regulation 1008/2008, to encourage the proactive engagement from the national regulatory authorities.
<b>Employment</b>	
<b>Employment and Working Conditions</b>	Regular assessment of the employment and working conditions in the single air transport market. Examination of alternative ways to acquire sufficiently reliable data for future analysis. Continued collaboration between the responsible DGs for the treatment of horizontal issues (e.g. highly mobile workers).