

THE AVIATION LAW  
REVIEW

TENTH EDITION

Editor  
Sean Gates

THE LAWREVIEWS

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REVIEW

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# PREFACE

*The Aviation Law Review* continues to be among the most successful publications offered by The Law Reviews, with the online version massively increasing its reach within the industry not only to lawyers but to all those involved in the various aspects of management touched by laws and regulations the complexity, mutual inconsistency and occasional judicial incomprehensibility of which provide an endless source of debate and dispute between industry participants and their legal advisers. The *Review* is a source of guidance internationally and its provision of an introduction to experts in so many jurisdictions in this vital and complicated field is something of which we are justly proud.

This year I welcome new contributions from Brazil and Malta, and I extend my thanks and gratitude to all our contributors for their continued support. I would emphasise to readers that the contributors donate very considerable time and effort to make this publication the premier annual review of aviation law. All contributors are carefully selected based on their knowledge and experience in aviation law and we are fortunate indeed that they recognise both the value of the contribution they make and the further value it constitutes in the broader context of the *Review*.

After several years of pandemic-related issues affecting aviation and its insurance-related services, the attention of the aerospace industry has shifted dramatically to Russia's war on Ukraine. In the United States, the United Kingdom and the EU, providing goods and services to Russian entities has been prohibited, as has overflight of EU, UK and US territories. Russia has responded by allowing Russian airlines to re-register on the Russian register from March 14 planes leased from foreign companies and therefore already registered in countries other than Russia, where they will also be issued local certificates of airworthiness. This enables Russian operators to keep their foreign-leased aircraft, valued at over \$12 billion, and to operate the planes on domestic and a few international routes, while making it harder for foreign companies to reclaim their jets without Russian government approval. This action by Russia is in transparent breach of Article 18 of the Chicago Convention, on which I comment further below.

While a small number of such aircraft have been repossessed by leasing companies, clearly such repossessions are unlikely to be permitted in the territories under the control of Russia, nor apparently in the territories of some states that have not adopted the Western sanctions-based approach to Russia's bellicose activity. This has inevitably forced lessors to consider their alternative options. Attention has focused on the possibilities of recovery from insurers and this battle has already been joined in various jurisdictions.

The overwhelming majority of Russian-operated aircraft are primarily insured by Russian companies, which then reinsure all or a large proportion of their risk in overseas markets, primarily in the United Kingdom and the EU. Those reinsurance policies have been affected by the standard AVN 111 Sanctions and Embargo Clause, which provides:

*if, by virtue of any law or regulation . . . applicable to an Insurer . . . providing coverage to the Insured is or would be unlawful because it breaches an embargo or sanction, that Insurer shall provide no coverage*

Insurers usually have to give notice to cancel a policy and notice was given in many cases when sanctions were first introduced in February, well in advance of the re-registration decision by Russia on 14 March, which could well have been regarded as the event of confiscation called for in those policies that might otherwise respond. However, there are other difficulties for insurers given that such policies have a mechanism for the protection of lessors in the AVN 67b clause, which preserves lessors' rights in the event of cancellation of the policy and may create a stand-alone policy (although this proposition has not been tested in court). Another difficulty arises as to the law governing the reinsurance policy and the jurisdiction in which claims may be made. The underlying policy will in most cases be subject to Russian law and jurisdiction. The reinsurance policy may address this in its terms. If Russian law and jurisdiction apply, the lessor, if it has rights by way of a cut-through or similar clause in the reinsurance policy, may be entitled to sue the reinsurers in Russia but would be unlikely to succeed, given the new Russian law permitting re-registration. If the law is that of the jurisdiction of the lessor or lead reinsurer, or is specified by the reinsurance policy, the lessor may be able to have a hearing where the issues of sanctions, severability of AVN 67b and recoverability under sanctions provisions and policy exclusions for state seizure can be addressed.

As a further complication for lessors, the aggregation provisions in some policies limit the recovery from insurers for each event – a clause of this kind gave rise to extended litigation in the United State following the 9/11 destruction of the twin towers in Manhattan, and in respect of which the mechanism for sharing the available proceeds between lessors has yet to be resolved. Relief may be available to some lessors that may have taken out contingent or possessed policies addressing the failure of the operator's policy to respond to lessors' claims. These policies have an advantage in that the lessor will be the named insured with a clear right to take direct action in its own name, and to recover if the circumstances of the loss are sufficiently clearly addressed in the wording.

Given that there are significant assets in many jurisdictions either in the name of Russian state entities or traceable via third parties to the Russian state, insurers that have identified significant exposure ought to be researching their rights to pursue those assets urgently, as there are likely to be numerous competing claimants. Finally, on a sombre note, it has to be pointed out that all the relevant policies will exclude damage caused by nuclear explosions.

As I have mentioned above, the actions of the Russian state in reflagging aircraft are in breach of that country's obligations under the Chicago Convention. As I explained last year in the context of the actions of Belarus in seizing an overflying foreign aircraft, the Council of the International Civil Aviation Organization (ICAO) has the power to investigate breaches of the Convention, and an obligation to report to contracting states any infraction of the Convention, as well as any failure to carry out recommendations or determinations of the Council. A minimum of 10 states have the power to convene an extraordinary session of the



ICAO Council and a majority of states have the power to take appropriate action, including suspending a Member State. Whether these steps will be taken will depend on the will of the majority.

Readers of the preface in earlier editions of *The Aviation Law Review* will be aware of the recurrent theme relating to the approach of the Court of Justice of the European Union (ECJ) to the interpretation of the EU Flight Compensation Regulation (Regulation 261)<sup>1</sup> governing passengers' rights arising from delays to and the cancellation of flights.

On 21 December 2021, the ECJ decision in *Airhelp Limited v. Laudamotion GmbH* addressed the facts of the scenario in which the carrier brought its scheduled flight forward by six hours and notified the passengers' travel agent more than two weeks prior to departure, although the agent failed to tell the passengers. Improbably, but in further pursuit of its rampage against common sense when the rights of passengers are at issue, the Court held that the carrier had to prove that the passengers had been given notification in due time, regardless of whether the failure to do so was the fault of the passengers' own agent.

In a deeply depressing decision of the UK Supreme Court, in *Bott v. Ryanair*, the Court held by a narrow majority that the claimant solicitor was entitled to recover its costs from the airline regardless of the fact that the firm had undertaken minimal work and that the claim was unlikely to be disputed, primarily by reference to the perceived need to bolster the rights of citizens to access the Court. The decision is presently limited to the rights of solicitors, but it is to be expected that non-solicitor claims companies will pursue their own claims for recovery on analogous principles.

Finally, in what has been described as a populist decision, the UK Department for Transport (DfT) has launched a consultation on post-Brexit passenger rights, including on whether Regulation 261 as applied in the United Kingdom should be changed so that compensation for delayed domestic UK flights is calculated as a percentage of the ticket price, and whether the length of delay that triggers compensation rights for domestic UK flights should be reduced from the existing threshold of three hours. The DfT is seeking views on the introduction of a sliding scale: 25 per cent of the ticket price for a delay of one to two hours; 50 per cent of the ticket price for a delay of two to three hours; and 100 per cent of the ticket price for a delay of over three hours. The DfT is also seeking views on similar rules for flight cancellations and denied boarding. It would seem that the United Kingdom has caught the carrier-critical mindset of the ECJ!

Airlines in Europe need to stand united to resist the continued assault of Regulation 261 on their very existence, for without such unity, to paraphrase Aesop, division can only produce disaster.

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1 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.

Once again, many thanks to all our contributors to this volume, including, in particular, those who have newly joined the group to make *The Aviation Law Review* the go-to aviation legal resource.

**Sean Gates**

Gates Aviation Ltd

London

July 2022

# ITALY

*Anna Masutti*<sup>1</sup>

## I INTRODUCTION

The primary domestic legislation governing the aviation sector in Italy is the Italian Navigation Code (INC), introduced by Royal Decree No. 327/1942, which deals with the main civil, administrative, criminal and procedural aspects of this field. The INC also regulates drones, which are classified as remotely piloted aircraft systems (RPAS).<sup>2</sup>

Following the issue of Decree No. 190/2020 of 23 December 2020, the administration of Italy's air navigation sector is overseen by the Ministry of Infrastructure and Sustainable Mobility (MIMS), which has replaced the former Ministry of Infrastructure and Transport (MIT), the Italian Civil Aviation Authority (ENAC), the National Agency for Flight Safety (ANSV) and the Aero Club of Italy, and management of the operational profiles for air navigation has been conferred on ENAC.

In particular, ENAC is the agency in charge of regulating aviation in Italy, as provided by Article 687 of the INC and by Legislative Decree No. 250/1997. It is ENAC's responsibility to supervise and regulate air carriers and to lay down implementing rules for air traffic services.<sup>3</sup> Furthermore, ENAC has the duty of imposing fines on airlines in breach of Regulation (EC) No. 261/2004.<sup>4</sup> Additionally, ENAC drafted the Passenger's Charter and the Charter of Airport Standard Services, a vade mecum of national, European and international regulations on air passenger protection, detailing the claims and compensation procedures available to passengers in cases of non-compliance with the rules set out in the above-mentioned Regulation. The Charter of Airport Standard Services sets out the minimum quality standards that airport operators must observe in providing their services.

In addition, Law No. 214/2011<sup>5</sup> established the Regulatory Transport Authority (ART), which carries out important functions in regulating, promoting and ensuring fair competition in the transport sector. ART also performs supervisory functions regarding airport charges and oversees tender notices to ensure they do not contain discriminatory

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1 Anna Masutti is a partner at RP Legal & Tax.

2 In addition to the INC, the regime governing drones in Italy encompasses Regulation (EU) 1139/2018, Commission Delegated Regulation (EU) 945/2019 and Commission Implementing Regulation (EU) 947/2019. Drone legislation is addressed in more detail throughout the chapter and specifically in Section IX.

3 ENAC Regulation on Air Traffic Services, second edition, 8 June 2015.

4 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.

5 As subsequently amended by Law No. 27/2012.

conditions or obstruct competitors from other market. With Resolution No. 136/2020 of 16 July 2020, ART has approved the update of the models for the regulation of airport charges previously approved with Resolution No. 92/2017. In particular, considering the debate between the main Italian airports (i.e., Milan, Rome and Venice) in favour of the dual-till system, and air carriers asking for a single-till or hybrid approach, ART has decided to apply the single-till airport charges system. However, Measure 19.1 of Annex A of Resolution No. 136/2020 has established that, should the transparency criteria set out in Measure 19.2 be applied, implementation of the dual-till system is allowed and the airport operator can establish how and to what extent the margin deriving from accessory activities can be taken into account in determining the charges. Moreover, on 4 January 2021, the Italian Supreme Administrative Court issued judgment No. 5/2021, affirming that the transport activities carried out by air carriers are necessarily to be included in the regulatory powers attributed to ART, as it is explicitly established<sup>6</sup> that ART is to carry out all the functions of supervisory authority in the airport sector where this role consists in overseeing relations between airport operators and users as regards the setting of airport charges.

Another entity that comes into play in regulating the aviation sector is the Italian Antitrust Authority. Established under Law No. 287/1990, it is an independent authority in charge of reporting unfair commercial practices and misleading advertisements, with the power to levy fines. The Antitrust Authority has already fined several air carriers for unfair commercial practices relating to underpricing or mispricing of tariffs and other reimbursable elements of cost, which tend to prejudice passengers' interests in cases of flight cancellation. The Antitrust Authority also considers unfair the practice of acceptance of insurance policies by passengers given that this service is normally preselected during the carrier's online booking process. As a consequence, consumers who are not interested in purchasing the service would be forced to opt out.

A notable feature of the Italian legal system is its regional administrative courts and the Supreme Administrative Court. The regional administrative courts have jurisdiction over ENAC and Antitrust Authority decisions, and their judgments can be challenged before the Supreme Administrative Court.

## II LEGAL FRAMEWORK FOR LIABILITY

Air carriers' liability for death or injury to passengers, for loss of or damage to goods or baggage, and delay in international transport is governed by the Montreal Convention of 28 May 1999 on International Air Transport, which entered into force in Italy on 28 June 2004 following its simultaneous ratification by 13 Member States of the European Community (now the European Union), the Community itself and Norway. It replaced both the Warsaw Convention of 1929 and subsequent protocols and the Guadalajara Convention of 1961.

With the entry into force of the Montreal Convention, the European Parliament and the Council adopted Regulation (EC) No. 889/2002 of 13 May 2002, which amended Regulation (EC) No. 2027/1997 of 9 October 1997, to align European rules with those of the Convention. This Regulation broadens the extent and scope of Montreal Convention provisions on carriage of passengers, baggage and cargo. After the adoption of Regulation (EC) No. 889/2002, the most important piece of legislation relating to the INC was modified. Section II of the INC sets out rules entirely dedicated to aviation matters, while

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<sup>6</sup> Article 37, Paragraph 2, letter (h) of Law Decree No. 201/2011.

Section I concerns matters related to maritime law. With Law Decrees No. 96/2005 and No. 151/2006, several amendments were introduced to the INC's provisions governing the aviation sector with the aim of creating national rules in line with international and Community standards and, in particular, with regard to the transport of passengers and the consequent carrier's liability and protection of passengers' rights.

By means of the above-mentioned amendments, Italy has extended the enforceability of the Montreal Convention to every area of commercial aviation, which includes the ferrying of air passengers and baggage, as well as areas left out by the extension brought about by Regulation (EC) No. 2027/1997, as amended by Regulation (EC) No. 889/2002. The excluded areas concern transport services carried out by non-Community air carriers (in Italy, these services are governed by the above-mentioned ENAC Regulation of 21 December 2015), as well as services performed by unlicensed carriers (at present, pursuant to the Chicago Convention provision on cabotage rights, non-Community air carriers are not permitted). Unlicensed operators include, for example, carriers operating with light aircraft, as well as those involved in transport services with points of departure and arrival at the same airport.

Article 941 of the INC, concerning air carriage of passengers and baggage, and Article 951 on the transport of goods, extend the applicability of the Convention to the entire air transport sector, to which the domestic laws – Law Decrees No. 96/2005 and No. 151/2006 – become applicable.

Article 941, Paragraph 1 of the INC has extended the applicability of the Convention to personal injury caused to passengers. Although, according to the prevailing interpretation, the Convention applies only to bodily injury and not psychological injury, under national law the notion of personal injury includes psychological damage.

However, it is important to note that this extension is not applicable to areas of transport to which the Convention applies in its own right, or as a result of European rules.

Article 949 *ter* of the INC states that the two-year limitation period laid down by the Montreal Convention shall apply to any passengers' claims brought before Italian courts. With regard to carrier liability, the INC provides for a compulsory insurance system.<sup>7</sup> Since Regulation (EC) No. 785/2004 on insurance requirements for air carriers and aircraft operators does not establish a complete regulatory framework on insurance, the civil liability insurance rules laid down in the Italian Civil Code apply, as well as the provision contained in Article 942, Paragraph 2 of the INC, which provides that the passenger has the right to bring a direct action against the carrier's insurer for any damage suffered or incurred. As for the transport of passengers and goods by air, the Italian legislature found in 2006 that the regulation on liability for damage caused to third parties on the surface was adequate and comparable to the international regulations in force. Indeed, Article 965 of the INC extends the rules of the Rome Convention 1952 to damage caused on Italian territory by aircraft registered in Italy, as well as damage caused by state aircraft.

There have been some changes in Italian law to the rules on liability for collisions between aircraft. These are in line with the regulation of liability of the operator for damage caused to third parties on the surface's amendments. Article 972 of the INC states that all rules governing the limitation of compensation and its implementation in the event of liability for damage caused to third parties on the surface (Rome Convention) shall also apply to liability for damage caused by collisions between two aircraft in flight, or between an aircraft in flight and a moving ship (where responsibility for damage falls on the aircraft). Article 971

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7 Article 942.

of the INC modifies the extent of the limits laid down in the Rome Convention (which vary according to the weight of the aircraft<sup>8</sup>) and fixes it in accordance with the minimum amount of insurance required pursuant to Article 7 of Regulation (EC) No. 785/2004. The minimum coverage is determined by the maximum take-off mass of the aircraft and ranges from 750,000 to 700 million special drawing rights (SDRs).

### **i International carriage**

As mentioned above, an air carrier's liability for cargo loss, damage or delay in international transport is governed by the Montreal Convention. Article 951, Paragraph 1 of the INC establishes that the air transport of goods is regulated by the rules contained in the Convention. The Montreal Convention does not apply to damage in the event of a carrier's outright non-performance of passenger carriage and, in fact, Article 952 of the INC reiterates the limitation of liability foreseen in the Montreal Convention for the carriage of goods but not for the carriage of passengers or baggage.<sup>9</sup>

### **ii National carriage**

Article 951 of the INC makes the liability rules set out in the Montreal Convention applicable to all air transportation of goods. In particular, the gaps in the Montreal Convention rules in relation to the carriage of goods have been filled by the INC both by referring to and extending the INC rules governing maritime transport and by introducing the provision regarding the non-performance of transport services set out in Article 952 of the INC; in fact, this Article corresponds to the liability regime established by the Convention in respect of delay.

### **iii General aviation regulation**

The law governing the liability of the operator in general aviation activities is established by the INC and other domestic laws (see President of the Republic's Decree No. 133 of 9 July 2010).

Article 743, Paragraph 1 of the INC sets out a broad definition of aircraft, describing them as machines used for the transport of passengers and goods by air. Consequently, the activities performed by aircraft are subject to the rules of the INC.

With regard to aircraft used for leisure and microlight aircraft, a special regulation for insurance obligations has been introduced through Decree No. 133/2010. However, this special regulation refers to both the Community guidelines on insurance obligations and the principles established by the INC for such obligations. Decree No. 133/2010 introduces specific insurance requirements for single and double microlights without motor (two-seaters weighing up to 100 kilograms) for powered aircraft (weight not exceeding 330 kilograms for fixed-wing aircraft used for leisure flights, and not more than 450 kilograms for helicopters) and for two-seater powered aircraft (weighing not more than 450 kilograms, and not more than 495 kilograms on devices with fixed wings used for recreational flying and helicopters). This Decree has amended Law No. 106 of 25 March 1985 in light of developments in technology and the safety needs of leisure aviation.

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8 Article 11 of the Convention.

9 Article 949 *bis* of the INC.

Article 20 of Decree No. 133/2010 establishes a compulsory insurance for civil liability of the operator for damage caused to third parties on the surface as a result of impact or collision in flight.

Article 21 introduces the requirement for insurance coverage and requires that the insurance contract must be concluded in compliance with Regulation (EC) No. 785/2004, and it foresees the extension of insurance coverage to damage caused by gross negligence. It also provides for the obligation of the insurer to directly indemnify the injured third party, within the limit of the maximum coverage. However, this does not preclude the possibility of recourse by the insurer against the insured, to the extent and circumstances provided for in the contract.

On 15 June 2021, the Senate started a legislative process to reform Presidential Decree No. 133/2010 through draft law No. 2053 of 2021. The amendments will include two innovations: (1) the option for advanced sport flight aircraft to carry out take-off, landing and storage operations on the runways of ENAC-certified airports in Italy; and (2) the qualifying conditions for foreign sport flight aircraft to be able to fly in Italian airspace and take off or land in the designated areas.

#### **iv Passenger rights**

ENAC has issued the Passenger's Charter, which contains the rights conferred on passengers pursuant to Regulation (EC) No. 261/2004.

The Passenger's Charter is a practical guide in which ENAC has summarised useful information for people travelling by air. It was drawn up for the first time in 2001 and distributed in all Italian airports. A new version (the fifth) was introduced in 2005, together with new rules governing delay and cancellation of flights, with the aim of reporting, in particular, the increase in the amount of compensation payable by carriers in the event of denied boarding owing to overbooking, introduction of forms of compensation and assistance in the event of flight cancellations or long delays, as well as the extension of protection of this kind to passengers on charter flights.

In November 2009, ENAC issued the sixth edition of the Passenger's Charter, including information on the provisions issued by the European Union on the rights of persons with disabilities or reduced mobility, the rules on airport security checks and the surveillance of foreign operators. In this edition of the Charter, ENAC has also incorporated the principles established in the judgment of the European Court of Justice dated November 2009 regarding passengers' compensation in the event of a long delay. The judgment upheld the rights of passengers to be compensated in the event of reaching their destinations over three hours later than the scheduled time of arrival.

In addition, the Italian legislature introduced into the INC certain provisions aimed at ensuring special protection for passenger rights. Special mention should be made of Article 943, which imposes a specific obligation to provide information. If transport is to be carried out by an air carrier other than the carrier indicated on the ticket, the passenger must be adequately informed of this prior to the issuance of the ticket and, in the case of ticket reservations, the information must be given at the time of booking. In the absence of such information, a passenger may request the termination of the contract, reimbursement of the ticket fare and payment of damages. Article 943 also establishes that carriers cannot operate from the Italian territory if they do not fulfil their obligations to provide the information referred to in

Article 6 of Regulation (EC) No. 2027/1997.<sup>10</sup> In addition, Article 948 introduced rules for passengers' waiting lists. Carriers are obliged to communicate to passengers their respective waiting list numbers when putting up a waiting list for a certain flight. Moreover, the list must be posted in a location accessible and visible to the public. Passengers whose names have been entered on the waiting list have the right to access transport according to the assigned waiting list number.

Article 783 of the INC requires air carriers to carry out an annual check on the quality of services offered to passengers, according to indications given by ENAC, which checks compliance with promised quality and, in the event of non-compliance, enforces measures laid down in its rules, including ultimately the option to withdraw the operator's licence.<sup>11</sup>

With the issuance of Legislative Decree No. 53/2018, the Italian legislature implemented the EU Passenger Name Record Directive on the use of passenger name record data for the prevention,<sup>12</sup> detection, investigation and prosecution of terrorist offences and serious crime. According to this Directive, airlines must transfer the data collected to the competent authority (i.e., passenger information unit) in the relevant Member State.

Moreover, in judgment No. 1584 of 23 January 2018, the Supreme Court clearly stated that in the case of flight cancellation or delayed arrival, the burden of proof lies with the air carrier. Therefore, in a claim for compensation under Regulation (EC) No. 261/2004, passengers have only to prove their title (i.e., the flight title) while the air carriers must provide evidence of the proper fulfilment of the flight obligation.

Finally, on account of the covid-19 outbreak, ENAC press release No. 12/2020 of 29 February 2020 informed passengers whose flights were cancelled and passengers who were subject to restrictions imposed by third countries that they had the right to reimbursement of their ticket price but did not have the right to compensation provided for in Article 5(3) of Regulation No. 261/2004, because, in these circumstances, the cancellation of a flight, or the impossibility of flying, was considered to depend upon the carrier. Subsequently, Article 88 *bis*, Paragraphs 11 and 12 of Law No. 27 of 24 April 2020 established that instead of reimbursement of the ticket price air carriers could offer a voucher, to be valid for one year from the date of issuance. Hence, the issuance of the voucher fulfilled the reimbursement obligation and did not require any form of acceptance by the passenger. In this regard, ENAC in a press release issued on 18 June 2020 established that, because the covid-19 restrictions had been lifted, cancellations made after 3 June 2020 were not attributable to the pandemic except in specific cases. Hence, air carriers must reimburse the ticket price to passengers whose flights have been cancelled.

The European Commission has addressed the matter too and on 18 March 2020 it issued interpretative guidelines aimed at clarifying how certain provisions of the EU passenger rights legislation apply in the context of the covid-19 outbreak.<sup>13</sup> The Commission Guidelines established that the measures taken to contain covid-19 should be regarded as 'extraordinary circumstances' precluding the right of passengers to claim compensation pursuant to Article 5(3) of Regulation 261/2004. Subsequently, in March 2021, the European Court of Auditors published a document referring to the EU measures adopted in

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10 As amended by Regulation (EC) No. 889/2002.

11 Article 783 of the INC.

12 Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016.

13 Commission Notice – Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with covid-19, 18.3.2020 C(2020) 1830 final.



relation to air passenger rights,<sup>14</sup> to give air passengers a more comprehensive review of the rules governing their rights and to help them in facing claims that have occurred since the beginning of the covid-19 crisis. In December 2021, 16 leading EU airlines committed to improving the compensation rights for those passengers whose flights were cancelled because of the pandemic and to adopt several measures:<sup>15</sup>

- a* for passengers who had yet to receive any refund, the airlines committed to settling the remaining claims within seven days, as required by EU legislation;
- b* airlines will inform passengers of their rights in the event of flight cancellation, in a clearer, more intuitive and more direct way, by including the information on their corporate websites, in corporate emails and in other communications to passengers;
- c* airlines will communicate to passengers all the options at their disposal in the event of flight cancellation, including rerouting, cash reimbursement or reimbursement by means of a voucher (only if offered by the airline);
- d* airlines will not give priority to one solution over the others, nor can the other options be omitted;
- e* above all, passengers cannot be pressured to accept one of the above-mentioned solutions rather than others and shall always be free to express their preference, and should receive vouchers instead of reimbursement of the flight price only if they expressly choose that solution; and
- f* most airlines have agreed to refund in cash all unused vouchers that passengers had to accept in the absence of the option of a refund during the peak of the pandemic.

Airlines have also undertaken to distinguish and to communicate clearly to passengers not only the rights provided for in Regulation (EU) No. 261/2004 but also all contractual rights deriving from the terms and conditions of carriage. In 2022, the Consumer Protection Cooperation network will monitor whether the airlines' commitments have been implemented and it will also investigate the airlines' intermediaries to assess whether they are informing passengers properly about conditions and fares for air services.

### III LICENSING OF OPERATIONS

#### **i Licensed activities**

Within the European Union, international and domestic air services are governed by Regulation (EC) No. 1008/2008 (and subsequent amendments), which provides market access to all carriers who have obtained an operating licence, as well as an air operator's certificate. This principle was also adopted by the Italian legislature in 2005 and 2006 as it modified the rules of the INC, stipulating services that are allowed to be performed by air carriers. These include air transport services to passengers and carrying of mail and cargo on scheduled and non-scheduled flights on intra-Community routes by carriers who have obtained an operating licence, and previously an Air Operator Certificate (AOC), according to the provisions of the INC and EU legislation.

ENAC is the entity responsible for the issuance of AOCs, which prove that the operator has the professional ability and the organisation necessary to ensure the exercise of its aircraft

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14 European Court of Auditors, Air passenger rights during the covid-19 crisis, March 2021.

15 The airlines included Air France, Alitalia, British Airways, EasyJet, Iberia, KLM, Lufthansa, Ryanair and Vueling.

in a safe condition for the specified aviation activities.<sup>16</sup> ENAC establishes, through its own internal rules, the content, limitations and procedures for the issuance, renewal and changes, if any, to the AOC. The Regulation governing ENAC's issuance of a national AOC for air transport undertakings is also applicable to air carriers performing helicopter operations.

ENAC grants air carrier licences to undertakings established in Italy according to Regulation (EC) No. 1008/2008. The conditions for the issuance, formalities and validity of the licence are subject to the possession of a valid AOC specifying the activities covered by this licence.

For the issuance of the licence, ENAC requires the operator to submit evidence of the administrative, financial and insurance requirements referred to in Regulation (EC) No. 1008/2008 and Regulation (EC) No. 785/2004, and proof of availability of one or more aircraft on the basis of a property deed or under a contract for the use of the aircraft previously approved by ENAC.

In accordance with Article 779 of the INC, within one year of the issuance of the licence, and every two years thereafter, ENAC must recheck all the requirements regarding ownership, control, financial support, guarantees, etc.

ENAC may, at any time, suspend the licence if the carrier is unable to ensure compliance with the licensing requirements and ENAC has the authority to revoke the licence if it appears that the carrier is no longer able to meet its commitments. The procedures carried out by ENAC to verify the licensing requirements established by Chapter II of Regulation (EC) No. 1008/2008 are laid down in ENAC Circular of 23 December 2015.<sup>17</sup>

Furthermore, on 17 November 2017 ENAC issued a regulation regarding firefighting air operations in Italy. This Regulation sets out the rules applicable to the release, maintenance, limitations and revocation of the Firefighting Air Operator Certificate (COAN). The COAN is a mandatory requirement for the performance of this type of flight operation, which ENAC defines as 'air operations devoted to firefighting, including flights for observation and finding of fires, spread of extinguishing and retardant products, transport of specialised personnel and flight training'.

To obtain the COAN, the applicant must comply with several requirements regarding the place of business, citizenship and professional ethics of the legal representative and the board members, nationality of the operator, operator's financial means, registration of the aircraft, aircraft's property, airworthiness certificate and insurance coverage.

Finally, also of particular note in relation to the drones sector are Regulation (EU) No. 1139/2018 (the Basic Regulation),<sup>18</sup> which laid down new requirements to ensure the free circulation of drones in the European Common Aviation Area, and the third edition of the ENAC regulation on remotely piloted aerial vehicle operations falling within its competence.<sup>19</sup> However, after Regulation (EU) 2019/947 entered into force on 1 January 2021, introducing several innovations regarding the certification, airworthiness and insurance of unmanned

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16 Article 777 of the INC.

17 ENAC Circular, Air Transport Operating Licence, EAL, 23 December 2015.

18 Regulation (EU) No. 1139/2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency (repealing Regulation (EC) No. 216/2008).

19 ENAC Regulation on Remotely Piloted Aerial Vehicles, third edition, 11 November 2019.

aircraft systems (UAS), ENAC updated the national legislation to comply with the new EU Regulation and issued the new ENAC UAS-IT Regulation, which entered into force on 4 January 2021.

## **ii Ownership rules**

ENAC issues the air carrier's licence according to Regulation (EC) No. 1008/2008<sup>20</sup> and the EC interpretative guidelines (2017/C 191/01) dated 16 June 2017. The licence is granted to undertakings established in Italy whose effective control, through a shareholding majority, is owned directly or through majority ownership by a Member State or nationals of EU Member States and whose main activity is air transport in isolation or in combination with any other commercial operations of aircraft or the repair or maintenance of aircraft. Moreover, air carriers must own a valid certificate of airworthiness issued by ENAC for one or more aircraft being its property or leased as provided by Paragraph 4 (c) of ENAC Circular No. EAL-16 of 23 December 2015. In addition, air carriers must provide satisfactory evidence of administrative, financial and insurance requirements, as provided by Regulation No. 1008/2008.

Finally, in its Work Programme 2020, among the new initiatives to be taken to realise the aviation services package's policy objective, the European Commission highlighted the need to revise ownership and control rules to help air carriers mitigate the economic impact of the crisis on the air transport sector.

## **iii Foreign carriers**

Access to European routes is ensured to all air carriers (Italian and European) in possession of the AOC and the operating licence granted by ENAC.<sup>21</sup>

The services of scheduled air transport of passengers, mail or cargo conducted, in whole or in part, outside the European Union are governed by bilateral agreements.

Regarding non-EU scheduled air transport services, Article 784 of the INC provides that it is an essential condition that the civil aviation authorities of the states party to the agreement have a regulatory system for certification and surveillance of air transport services; this is to ensure a level of safety as provided by the Chicago Convention standards. For Italy's part, air transport services are performed by designated air carriers established on national territory with a valid operating licence granted by ENAC or by a Member State of the European Union and with financial and technical capacity and insurance sufficient to ensure the smooth running of air services in conditions of safety and to safeguard the right to mobility of citizens.<sup>22</sup>

With regard to the operation of extra-EU scheduled services, in December 2014 ENAC issued Circular EAL-14B encompassing guidelines on the authorisation and designation procedure for both Italian and Italian-based EU carriers in accordance with international air transport agreements. The Circular aims to improve the regulatory framework and to assist the industry by broadening business opportunities. Once an EU airline has been recognised by ENAC as an established carrier, it must comply with all national laws and regulations

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20 Article 778 of the INC.

21 Article 776 of the INC.

22 Article 784 of the INC.

applicable to its specific business in Italy (including any relevant fiscal and employment laws).<sup>23</sup> ENAC has also outlined the criteria in selecting carriers applying for traffic rights to and from extra-EU airports.

In 2016, ENAC issued Circular EAL-23, which determines the implementation procedures of the second edition of the ENAC Regulation on Non-scheduled Air Services between EU and Third Countries, approved in December 2015 (implementing Article 787 of the INC). The Circular aims to simplify the procedures concerning traffic rights permissions in favour of non-EU carriers operating non-scheduled services in Italy. In particular, it revises the accreditation process for non-EU operators performing services in Italy, according to the third-country operator authorisation provided for in Regulation (EU) No. 452/2014 and subsequent amendments. The Circular establishes two different authorisation procedures respectively for aircraft having a maximum operational passenger seating configuration of no fewer than 20 seats, and for taxi flights (performed with aircraft having a configuration of a maximum number of passenger seats fewer than 20). The choice of carriers shall be made by ENAC according to criteria established in advance and made public and through transparent and non-discriminatory procedures. Designated carriers cannot assign this hired service to other air carriers without prior written consent from ENAC, under penalty of exclusion from the hired service.<sup>24</sup>

On 20 May 2019, China and the European Union signed an agreement on civil aviation safety and a horizontal aviation agreement to strengthen their aviation cooperation. Prior to this agreement, only airlines owned and controlled by a specific Member State or its nationals could fly between that Member State and China, whereas the new horizontal aviation agreement will allow all EU airlines to fly to China from any EU Member State through a bilateral air services agreement with China under which many previously unused traffic rights have now been made available. In addition, on 7 March 2019, the United States and the European Union agreed to amend Annex 1 to the Agreement on cooperation in the regulation of civil aviation safety and, in June 2020, the European Commission signed bilateral aviation agreements with Japan and South Korea respectively.

#### **iv The national airport plan**

In accordance with Article 698 of the INC, in 2015 the Ministry of Transport published the latest version of the national airport plan, which was formally approved in Presidential Decree No. 201/2015.<sup>25</sup> The plan sought to ensure the balanced development of Italian airports, offering a new governance system, identifying structural priorities and optimising the global transport offer. The plan aimed to prevent competition conflicts between airports located in the same region, favouring the creation of a common airport system with a single governing body. The Italian airport plan was drafted according to EU principles included in the 2014 EU Commission Guidelines on state aid to airports and airlines, and identified 10 traffic zones, each with one strategic airport, with the sole exception of the centre–north zone, where both Bologna and Pisa–Florence operate. Provided that the Pisa and Florence airports become totally integrated, the 10 strategic airports are: Milan Malpensa (north-west), Venice (north-east), Bologna and Pisa–Florence (centre–north), Rome Fiumicino (centre), Naples

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23 A minimum wage for air transport personnel has been established by Article 203 of Law Decree No. 34/2020.

24 Article 785 of the INC.

25 Decree No. 201 of the President of the Republic of 17 September 2015.

(Campania), Bari (Mediterranean–Adriatic), Lamezia (Calabria), Catania (east Sicily), Palermo (west Sicily) and Cagliari (Sardinia). Other airports of national interest could be identified in the plan provided that they can actually play an effective role in one zone and can achieve at least a break-even point in their annual accounts. The plan also envisaged the strengthening of airport infrastructure, the development of intermodality, the creation of a cargo network and the facilitation of general aviation.

Since the publication of Decree No. 201/2015, the volumes and components of Italian airport traffic have grown significantly, the travel habits of EU and global passengers have changed and the covid-19 pandemic has challenged the resilience of the Italian airport network. These factors prompted the MIMS to request ENAC to update the national airport plan. Specifically, on the basis of Presidential Decree No. 201/2015 and after having established suitable guidelines, the MIMS directed and mandated ENAC to proceed with a critical revision and update of the 2015 plan. On 10 February 2021, ENAC issued a public call for tenders for the update and on 22 December 2021 it concluded the public procedure to select the consultants who will support it both in reviewing and updating the plan to provide for the years until 2035, and in carrying out the strategic environmental assessment procedure for the plan.

On 31 March 2022, the company ENAC Servizi was created to manage Pantelleria airport directly, along with 17 other general aviation airports. ENAC Servizi's mission is to provide flexible management tools to carry out various activities, including direct management of Pantelleria airport, technical and economic management of 17 minor state-owned general aviation airports, international activities of a non-institutional nature, management of real estate at ENAC's disposal and the promotion of aeronautical culture in Italy. ENAC Servizi will give particular attention to enhancing and developing Pantelleria and the minor airports that develop important general aviation-related traffic, flight-school activities, sport flying and aerial work, ensuring more effective control of the country's airport infrastructure.

#### IV SAFETY

Safety in the aviation field is guaranteed by the maintenance of the airworthiness of aircraft, parts and spares. Safety requires the certification of management organisations and products, as well as the qualification of technical and operating staff working in the field. Safety technical regulation is established and implemented by ENAC, which issues airworthiness certificates and air operator certificates, and approves maintenance programmes in accordance with the international and European rules issued by the International Civil Aviation Organization (ICAO) and by the European Aviation Safety Agency (EASA) pursuant to the Basic Regulation.<sup>26</sup>

As the principal applicable ordinance, the Basic Regulation restates the role covered by EASA and expands it to include drones and urban air mobility. The Basic Regulation gives EASA a coordinating role in aviation cybersecurity and widespread scope for research and development, international cooperation and environmental protection matters.

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26 The main objective of the Basic Regulation is 'to establish and maintain a high uniform level of civil aviation safety in the Union'.

The Italian implementation process is supervised by ENAC, which issued Guidelines No. 2017/003-APT<sup>27</sup> incorporating interpretative and procedural information on aspects relating to both airport certification and conversion of certificates issued by ENAC pursuant to applicable national legislation. The Guidelines are intended to provide operators with a comprehensive framework of the criteria for the application of the requirements of the Basic Regulation and the related implementing rules.

Civil aviation safety is also ensured through the issuance of the state safety programme (SSP),<sup>28</sup> as provided for in ICAO Annex 19, which entered into force in November 2019 and which is governed in Italy by a special committee including ENAC, ANSV, the Ministry of Infrastructure and Transport, the Air Force, ENAV (the Italian air navigation service provider) and Aero Club d'Italia. The SSP aims to determine an acceptable safety standard for the country's entire civil aviation system and then identify the activities that the state will have to undertake to achieve or maintain this level of safety. To this end, the SSP provides that each state is to establish specific indicators (safety performance indicators) to assess the degree of safety achieved in the aviation sector in its national territory.

Notably, ENAC was the first aviation authority to adopt this system of safety performance indicators and to subsequently issue, in 2019, the basic edition of the SSP document. This edition of the SSP encompassed the requirements provided for in the Basic Regulation and introduced the principles of a 'just culture', as required by Regulation (EU) No. 376/2014. The fourth edition of the SSP fully complies with the standards defined by the second edition of ICAO Annex 19, thus completing the implementation of the safety principles in the management of Italian civil aviation.

In Italy, the accident reporting system is guaranteed by the pilot in command of the aircraft, who has the duty to record the accident or incident in the flight book immediately after landing and sending a report to ENAC. Articles 826 to 832 of the INC regulate air accidents, establishing several duties for airport management, the Italian air navigation services provider and for the ANSV. Pursuant to Article 826 of the INC, the technical investigation of air accidents and incidents is conducted by the ANSV.

Regarding safety, the Basic Regulation confers the power on the European Commission, with support from EASA, to establish the technical characteristics and requirements that drones must meet to fly safely.

In May 2021, ENAC issued the state plan for aviation safety 2021–2025 (SPAS) in compliance with the requirement of Article 8 of the Basic Regulation to describe the safety activities that, in accordance with the objectives set out in the state safety programme – Italy, are put in place to ensure the highest levels of safety in the Italian aviation sector. The SPAS has the same validity period (five years) as the corresponding edition of the European plan for aviation safety (EPAS). With the publication of the SPAS, ENAC has set out the objectives to implement the strategic decisions adopted in the state safety programme – Italy to satisfy the requirement of Article 8 of the Basic Regulation; the safety actions attributed to the EU Member States by EASA through the EPAS; the safety actions identified at the national level on the basis of the safety data collected by ENAC; and the mitigation actions of the safety risks identified at the European and national level.

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27 ENAC Guidelines No. 2017/003 – APT ed. No. 2 of 10 October 2019: Process for the certification or conversion of airport certificates pursuant to Regulation (EU) 139/2014.

28 State Safety Programme, fourth edition, 3 February 2020.

On 17 January 2022, EASA published the 11th edition of the European Plan for Aviation Safety (EPAS 2022–2026). EPAS 2022–2026 sets out the strategic priorities and main risks affecting the European aviation system, and defines the actions necessary to mitigate these risks, with the primary objective of further improving aviation safety. EPAS 2022–2026 is the regional aviation safety plan (RASP) for EASA Member States. It supports safety management at state level and constitutes the main input to the RASP for the ICAO EUR region.<sup>29</sup>

On 11 April 2022, the EU Commission updated the EU Air Safety List, a list of airlines subject to an operating ban or operational restrictions within the European Union because they do not meet international safety standards. Following the update, 21 airlines certified in Russia have been included on the Safety List. This reflects serious safety concerns arising from Russia's forced re-registration of foreign-owned aircraft, knowingly allowing their operation without valid certificates of airworthiness. As regards the Italian market, on 27 February 2022, Italy closed its airspace to Russia flights, joining other European countries in stepping up sanctions against Moscow over its invasion of Ukraine.

## V INSURANCE

The amendments to the INC made in 2005 and 2006 (by Decree No. 96 of 9 May 2005 and Decree No. 151 of 15 March 2006), which adapted its provisions to the international and Community standards in force in Italy, have also had a significant impact on aviation insurance regulation.

The previous regulations on compulsory insurance for air carriers and aircraft operators have been replaced by the current obligations to insure civil liability for damage caused to passengers, baggage, cargo and third parties established at European level. The current rules oblige air carriers and aircraft operators to insure their liability for damage caused to passengers, baggage and cargo in accordance with EU legislation.<sup>30</sup> In this way, Italy applies the same EU regulations, with one specific provision established in favour of passengers. Indeed, Article 942 of the INC allows passengers to exercise direct action against the insurer for compensation for damage caused by the air carrier; this action is not envisaged by Regulation No. 785/2004.

As a result of this provision, an injured person may claim compensation directly from the air carrier's insurer. With regard to legal action against the insurer, Article 1020 of the INC provides for a limitation period of one year. However, under Article 35 of the Montreal Convention, the passenger has a period of two years to bring an action against the air carrier; therefore, it is generally believed that if the same passenger intends to act directly against the insurer, he or she would have the two-year term provided under the Montreal Convention for bringing action against the insurer.

## VI COMPETITION

The Italian system does not provide specific regulation for the aviation sector. Therefore, Law No. 287 of 10 October 1990, which introduced to the Italian legal system general rules on competition, is also applicable to the aviation sector.

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29 ICAO region Europe (55 states).

30 Regulation No. 785/2004.

An interesting point regarding the Italian aviation sector concerns the opportunity to implement public investments in small and regional airports with the aim of giving them a central role in their economic growth and regional development without distorting competition.

In this regard, on 14 June 2017, the EU Commission adopted Regulation (EU) No. 2017/1084, which amended the General Block Exemption Regulation (GBER)<sup>31</sup> and extended its scope to ports and airports. The amended GBER rules exempt support measures for ports and airports from prior Commission scrutiny, thus simplifying the procedure for public investments in ports and airports. The aim of the GBER is to facilitate public investments that can create jobs and growth.

The aforementioned Regulation is specifically designed for regional airports, which are defined as ‘airports with average annual passenger traffic of up to 3 million passengers’, and seeks to reduce the regulatory burden and costs for public authorities and other stakeholders in the European Union.

Prior to the issuance of the GBER, the Italian authorities presented their position concerning its first draft. Following a public consultation on the draft, the authorities considered that a real and effective simplification of the administrative burden could be realised provided that operating aid to airports would be exempted from the notification procedure. In addition, they underlined the need to clearly define the instances of small airports, which are exempt from the application of state rules.

On this matter, the Italian authorities consider that airports for general aviation and those with scant economic traffic should not be considered to be in competition with other airports because of their small size. Therefore, any public financing given to them should not be considered as having an effect on competition or trade relations between Member States.

In addition, the Italian Ministry of Infrastructure and Transport guidelines and the ART intervention on the subject may be revised, in accordance with the approved GBER amending Regulation (EC) No. 651/2014 for regional airports, as it represents an important support instrument for regional airports, which are a substantial part of the airport structure in Italy.

The 2021 Budget Law<sup>32</sup> provided for the establishment of a specific fund of €500 million to compensate for losses and damage suffered as a result of the pandemic, namely: (1) the damage suffered by airport operators (€450 million); and (2) damage suffered by airport ground assistance service providers (€50 million). The resources allocated were then increased by €300 million by Law Decree No. 73 of 2021 and distributed as follows: a further €285 million compensation for airport operators and €15 million compensation for airport ground handling service providers, making the total budget €735 million for airport operators and €65 million for ground handling services.

With regard to the European rules on competition, the European Council adopted Regulation (EU) 712/2019 to safeguard the competitiveness of EU air carriers against unfair competition and other practices implemented by non-EU airlines. The new legislation entered into force in May 2019 and goes beyond the former Regulation (EC) No. 868/2004, which had proved to be ineffective. Under the new Regulation, if the European Commission finds that an actual injury has been caused to EU air carriers by a practice adopted by a third country or a third-country entity that distorts competition, the Commission may impose

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31 Commission Regulation (EU) No. 651/2014 of 17 June 2014 and subsequent amendments.

32 Article 1, Paragraphs 715–719.



measures to offset and redress that injury. These measures shall take the form of ‘financial duties or any operational measure of equivalent or lesser value, such as the suspension of concessions, of services owed or of other rights of the third-country air carrier’<sup>33</sup> but shall at the same time respect the principle of proportionality. To this end, the measures must be proportionate, limited to a specific geographical area and not exceed what is necessary to remedy the injury to the EU air carriers concerned, and must never result in the suspension or limitation of traffic rights granted by a Member State to a third country.

For completeness, also of note is the introduction into Italian law of the new Business Crisis and Insolvency Code,<sup>34</sup> which, inter alia, has modified the regulation of bankruptcy procedures available to airlines in precarious financial situations to facilitate their financial recovery. Because of the covid-19 pandemic, and following a number of different legislative measures, the original date for the entry into force of the Code (August 2020) has been postponed several times and the current date of entry is 15 July 2022, although further postponements cannot be ruled out.<sup>35</sup>

In any case, the applicability of the extraordinary administration of large companies contained in Decree No. 347/2003, and further amended by Decree No. 134/2008, remains unchanged provided that the air carrier meets the necessary requirements for access.

In addition, on 28 January 2020, ENAC adopted a three-year plan for the prevention of corruption and transparency precisely aimed at defining a strategy to prevent the commission of acts of corruption in public administrations that could potentially be detrimental to free competition among air carriers.<sup>36</sup>

## VII WRONGFUL DEATH

Italian law allows for the recovery of actual damages as pecuniary damages (economic loss, out-of-pocket expenses and loss of profit) and non-pecuniary damages – those resulting from wrongful death, personal injury, the loss of physical or mental integrity (or both), or pain and suffering. The Italian legal system recognises non-pecuniary damages for wrongful death suffered by the ‘secondary victim’ (known as the *danno riflesso*). Despite there being no statutory definition of a secondary victim, the notion generally encompasses the victim’s family members. However, when assessing the gravity of life disruption arising from the accident and the quantum of non-pecuniary damages, Italian courts make a distinction between secondary claimants who live in the same house with the primary victim (such as a spouse or dependent children) and secondary claimants who are closely related to the primary victim but live separate and independent lives. Secondary claimants have to demonstrate the blood relationship and the existing close and loving bond with the primary victim. This close bond may also be presumed for the spouse or young children living with the victim (although such a presumption does not exonerate the secondary claimant from the burden to prove the strength of the relationship).

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33 Article 14.4.

34 Legislative Decree No. 14/2019.

35 The main part of the new Code will modify bankruptcy procedures; however, some provisions of the reform have already entered into force, in particular those related to the amendments to the Civil Code, and others will come into force later, in particular those related to ‘warning tools’ and assistance elements of the crisis.

36 ENAC’s Board of Directors’ resolution No. 6/2020.

For the assessment and liquidation of non-pecuniary damages for secondary victims, Italian courts rely on parameters set out in the tables elaborated and regularly updated by the Court of Milan (the latest edition of the Milan tables was adopted in 2018). These tables contain a section for the calculation of damages secondary victims are entitled to claim for pain and suffering in the event of death or severe injury of the primary victim.

The system is based on a chart containing the various hypotheses of family relationship. These tables essentially sum up compensation for either biological or psychological damage, considering the specific circumstances and features of the case. The Milan tables have become the reference throughout Italy, following the indications given by the Supreme Court. As a general rule, the compensation must be tailor-made. While applying the Milan tables, the judge must consider all the relevant factors (such as the severity of the injury and the age of the victim) and find a figure within limits set by the chart fitting best with the circumstances of the case. These tables, in essence, contain two sections: one for the calculation of the non-pecuniary damage suffered by the primary victim, as well as the secondary victim if he or she is physically or mentally affected by the event, to compensate temporary and permanent invalidity arising from the accident, and another for the calculation of non-pecuniary damages for secondary victims, in the event of loss or disruption of the family relationship arising from the death or a severe permanent inability of the primary victim. A secondary victim's non-pecuniary damages must be duly proven; courts require the claimants to confirm that the event has caused a substantial disruption in the standard and ordinary habits such as to impose a choice of life that is radically different. Furthermore, the Supreme Court has repeatedly held that the secondary victims must prove the intensity and strength of the family bond and the sharing of life and habits.

Moreover, under Italian law, a sudden death (i.e., a death immediately following an event) does not give rise to a right to a claim transferred to heirs, on the assumption that as soon as a person dies, he or she is no longer a legal person and loses the capacity to suffer damage caused by death.

The principle was confirmed in 2015 by a pronouncement of the Joint Chambers of the Supreme Court,<sup>37</sup> resolving a conflict that had emerged in case law over the years.

The successors of the primary victim are entitled to claim non-pecuniary damages for the harm suffered by the primary victim before dying, to the extent that an appreciable amount time elapsed between the event and the death,<sup>38</sup> and may also claim 'catastrophe damages', as compensation for the primary victim's affliction deriving from the awareness of imminent death.<sup>39</sup>

## VIII ESTABLISHING LIABILITY AND SETTLEMENT

### i Procedure

Liability is allocated between defendants according to the extent that their individual negligence contributed to causing the accident.

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37 Judgment No. 15350/2015 issued by the Joint Chambers of the Supreme Court.

38 Among many others, see judgment No. 32372/2018 issued by the Supreme Court.

39 Among many others, see judgment No. 29492/2019 issued by the Supreme Court.

**ii Carriers' liability towards passengers and third parties**

See Section II for a discussion of the legal framework for liability.

**iii Product liability**

There are no specific rules governing manufacturers' liability; therefore, the Italian regulations on product liability and the Italian Consumer Code<sup>40</sup> apply.

**iv Compensation**

There are no sector-specific rules; therefore, the Italian regulations on product liability apply.

**IX DRONES**

Drones are remotely piloted aircraft systems considered for all intents and purposes to be aircraft by Article 743 of the INC. The use of drones is regulated by national laws, EU regulations, ENAC regulations and, for military drones, by decrees of the Ministry of Defence. The rapid evolution of the remotely piloted aircraft systems sector has led to the need to innovate the relevant legislation contained in Regulation (EC) No. 216/2008. For this reason, the European Union recently adopted the Basic Regulation, which is in the process of being implemented by the European Commission with the support of EASA aimed at establishing common rules on the use of drones to allow their free circulation in the European common aviation area. As previously said, on 12 March 2019 the European Commission adopted Delegated Regulation (EU) 2019/945<sup>41</sup> establishing common rules setting technical requirements for drones, and on 24 May 2019 it adopted Implementing Regulation (EU) 2019/947 on the rules and procedures for the operation of unmanned aircraft. The legislation introduces common rules for operators, whether professional or recreational, enabling them to operate across borders. Once drone operators have received the authorisation in the state of registration, they are allowed to freely circulate in the European Union. The new rules include technical and operational requirements for drones defining the capabilities to be flown safely. For instance, new drones will have to be individually identifiable, allowing the authorities to trace a specific drone, if necessary. The Regulation provides rules covering each operation type, from those not requiring prior authorisation to those involving certified aircraft and operators, as well as minimum remote pilot training requirements. It is worth highlighting that on 12 December 2019, EASA published the Easy Access Rules for the Basic Regulation to provide stakeholders with an updated and easy-to-read publication.

Regarding safety matters, the approach taken by the European Commission and EASA is to apply the highest safety standards achieved in manned aviation to drones to prevent the occurrence of any type of accident.

Beyond the European Union institutions, in 2019 ENAC adopted the third edition of the Regulation<sup>42</sup> on Remotely Piloted Aerial Vehicles laying down the necessary requirements that shall be met to ensure the safety levels for the different types of RPAS operations, the

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40 Legislative Decree No. 206 of 6 September 2005.

41 Commission Delegated Regulation (EU) 2019/945 of 12 March 2019 on unmanned aircraft systems and on third-country operators of unmanned aircraft systems.

42 ENAC Regulation on Remotely Piloted Aerial Vehicles, third edition, 11 November 2019.

provisions for operating RPAS and those regarding air navigation in national airspace and common provisions applying to RPAS. The ENAC Regulation also lays down provisions and limitations that must be complied with for the operation of model aircraft in national airspace. ENAC has also contributed to the development of the international UAS regulation for categories A (open), B (specific) and C (certified) under the joint authorities for rule-making on unmanned systems context. In particular, ENAC, in coordination with the ICAO Remotely Piloted Aircraft Systems Panel, made a considerable contribution to define the emission criteria of the Type Certificate and the Airworthiness Certificate for C Category UAS. On this occasion, preliminary discussions about the concepts and problems of UAS autonomous flights have also started.

Following the entry into force of new EU legislation on drones, ENAC adopted the ENAC UAS-IT Regulation in January 2021. The new national Regulation establishes that it is not permissible to conduct drone operations in the absence of valid third-party liability insurance coverage.<sup>43</sup> The provision specifies that, in addition to being adequate for the purpose, the drone insurance must provide for insurance limits no lower than the minimum parameters indicated in the table of Article 7 of EC Regulation 2004/785 regarding the insurance requirements applicable to air carriers and aircraft operators operating from, to or in the territory of a Member State. In particular, the table establishes that for an aircraft with a maximum take-off weight of less than 500kg, the minimum insurance limit is equal to 750,000 SDRs, corresponding to around €900,000. Finally, in compliance with Article 743 of the INC, Article 27 of the new ENAC UAS-IT Regulation prescribes that the provisions of Article 1015 of the Civil Code shall also apply to unmanned aircraft, extending the regime of direct action by injured third parties against the insurer to include cases of damage caused by the use of drones.

## **X VOLUNTARY REPORTING**

Regulation (EU) No. 376/2014 establishes rules related to the reporting, analysis and follow-up of occurrences in civil aviation. Article 3(2) of this Regulation was amended by the Basic Regulation. For the purpose of Regulation No. 376/2014, occurrence means any safety-related event that endangers or that, if not corrected or addressed, could endanger an aircraft, its occupants or any other person and includes in particular accidents or serious incidents. This Regulation aims to improve aviation safety by ensuring that relevant safety information relating to civil aviation is reported, collected, stored, protected, exchanged, disseminated and analysed. It provides a reporting system that is both mandatory (mandatory occurrence reporting (MOR) and voluntary (voluntary occurrence reporting).

Regarding the Italian system, companies in the aviation sector are required to set up a voluntary reporting system to facilitate the collection of details of occurrences that may not be captured by the mandatory reporting system and of other safety-related information that is perceived by the reporter as an actual or potential hazard to aviation safety. Any significant information shall be analysed and notified to ENAC by means of the 'eEMOR' system.

However, it is also possible to address the voluntary reports directly to the competent authority; in this case, the reporting process works without using the internal company reporting system. The competent authority is the National Agency for Flight Safety (ANSV). Once voluntary reports have been sent directly to, and analysed properly by, the ANSV,

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43 Article 27.

they enter into the national events database administered by ENAC, which ensures the appropriate confidentiality and protection of the collected details of occurrences. The ANSV is also concerned with the investigation of aircraft accidents in cooperation with ENAC.

The sole objective of occurrence reporting is the prevention of accidents and incidents, and not the attribution of blame or liability. The absence of punitive purposes (in accordance with a no-penalty policy or a just culture) and the fact that those contributing the information remain anonymous are intended to allay fears and remove resistance to communicating, and also to engender more complete occurrence reporting. Voluntary occurrence reporting – and also reporting of confidential information – could make an important contribution to operational safety in aviation. In particular, these reports may include premonitory or near-miss occurrences that could lead to real incidents if not duly communicated.

## **XI THE YEAR IN REVIEW**

### **i Key facts**

The covid-19 emergency required the adoption of Law Decree No. 18 of 17 March 2020,<sup>44</sup> which laid down new provisions for the companies Alitalia SpA and Alitalia Cityliner SpA. Article 79, Paragraphs 3 to 8 of this Law Decree authorised the renationalisation of Alitalia by the establishment of a new public company entirely controlled by the Ministry of Economy and Finance, or by a company with a prevalent direct or indirect public participation. On 9 October 2020, the Ministry of Economy and Finance, the Ministry of Infrastructure and Transport, the Ministry of Economic Development and the Ministry of Labour and Social Policies signed the decree for the incorporation of new company Italia Trasporto Aereo SpA (ITA), which replaced Alitalia and is based in Rome. On 25 May 2021, the government and the European Commission entered into an agreement on the divestment of Alitalia and making ITA fully operative. In particular, the Commission and the government reached a common understanding on the key parameters deemed necessary to ensure complete economic discontinuity between ITA and Alitalia. This meant that, on the one hand, ITA had to buy back, through public tenders, the management of all Alitalia's services, such as maintenance, branding and handling services, but, on the other hand, by forming a separate and independent entity, it did not inherit Alitalia's huge debts and financial problems. As a consequence of the fleet reorganisation, ITA has not taken over all the slots and flight rights previously held by Alitalia, assuming instead only those commensurate with its new flight capacity, and functional, against payment of a market price; specifically, ITA uses 85 per cent of the former Alitalia slots at Milan Linate and 43 per cent of those at Rome Fiumicino. ITA started its flight operations on 15 October 2021, with the company's first flight going from Milan Linate to Bari Palese and, on 4 November 2021, the first intercontinental flight went from Rome Fiumicino to New York JFK. By means of the Decree by the Presidency of the Council of Ministers dated 11 February 2022, procedures were defined for the disposal of the Ministry of Economy and Finance's equity investment in ITA. At the beginning of April 2022, the government set a deadline for expressions of interest from private companies to take over the majority of the airline shares. On Thursday 7 April, ITA's privatisation process began. Subsequently, on 18 April 2022, the deadline for submissions of expressions of interest expired. Three bids were submitted to the Ministry of Economy (ITA's sole shareholder): the

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44      Converted into law and amended by Law No. 27 of 24 April 2020.

from MSC and Lufthansa, from US private equity fund Indigo Partners (which invests in several low-cost carriers, including Wizz Air), and from private equity fund Certares (which proposed a commercial partnership with Air France–KLM and Delta Air Lines).

With regard to public service obligations (PSOs), on 27 January 2022, an information notice was published in the Official Journal of the European Union concerning the imposition of PSOs on scheduled air services on several routes to and from Sardinia Alghero to Rome Fiumicino, Alghero to Milan Linate, Cagliari to Rome Fiumicino, Cagliari to Milan Linate, Olbia to Rome Fiumicino and Olbia to Milan Linate. Decree No. 466/2021 imposing PSOs on the same routes as of 15 May 2022 was supplemented by Decree No. 18 of 25 January 2022 of the MIMS. Pursuant to this amendment, EU air carriers may now submit transitional acceptance of one or more of the above routes, without any rights of exclusivity and without any financial compensation. The transitional acceptance will lapse in the event of acceptance, at any time, by another air carrier for a period of at least 12 months (in accordance with Article 4). The provisional starting date for new exclusive licences for scheduled air services on the routes concerned has been set for 1 October 2022; therefore, transitional acceptance of the PSOs on these routes would cover the period between 15 May and 30 September 2022.

## ii The covid-19 pandemic and the Ukrainian crisis

Almost all the measures taken in 2020 and 2021 were due to the fact that no industry has been as badly affected by the covid-19 pandemic as the air transport and tourism industries. Moreover, the International Air Transport Association (IATA) added a covid-19 variant scenario in its outlook for 2021,<sup>45</sup> estimating that the revenue passenger kilometres (RPK) for 2021 might only reach 38 per cent of the 2019 RPK figures. This reflects the general decline foreseen by IATA in its previous financial outlook, confirming that the deep losses in the air transport sector recorded in 2020 would continue in 2021, with passenger yields declining each year between 2012 and 2020. In contrast, the air passenger business contributed US\$227 billion to industry revenues in 2021 and this rose to US\$378 billion in 2022, with 2021 yields expected to grow by 2 per cent and further growth of 10 per cent in 2022.

Moreover, according to the latest Eurocontrol data, in April 2022, the Russian invasion of Ukraine has led to significant changes in flight patterns. In a recent snapshot, Eurocontrol determined that, for some countries in Eastern Europe, the Ukrainian crisis has affected long-haul flights to Asia. In particular, the closure of Ukrainian airspace and the flight ban imposed on Russian and Belarus airlines has resulted in a significant increase in flight times to and from four major European cities, Amsterdam, Copenhagen, Frankfurt and Helsinki, and their Asian counterparts, namely Singapore, Tokyo, Bangkok, Shanghai, etc. The extra flight time has led some airlines to cancel these routes and connections.

As regards Italy, in mid-April 2022, air traffic data for both commercial and general aviation from the first six months of 2021 became available, showing that between January and June 2021, approximately 277,000 movements, 16.5 million passengers and 508 tonnes of cargo were recorded at domestic airports open to commercial traffic.

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45 See IATA, Covid-19: weak year-end for air travel and outlook is deteriorating, 3 February 2021.

In light of the impact of covid-19 on passenger traffic, the EU decided, in recent months, to implement broad measures regarding air cargo operations, slot allocation and state aid.

### ***Air cargo operations***

In light of the strategic importance of air cargo, the European Commission, through the issuance of Guidelines,<sup>46</sup> has requested that Member States implement appropriate operational measures to facilitate air cargo transport and reduce additional costs.

The measures listed in the Commission Guidelines include the following:

- a* for transport coming from outside the European Union, granting without delay all necessary authorisations and permits, including, where legally possible, temporary traffic rights for additional air cargo operations, even when conducted by passenger aircraft;
- b* temporarily removing or applying flexible night curfews or slot restrictions at airports for essential air cargo operations;
- c* facilitating the use of passenger aircraft for cargo-only operations; and
- d* ensuring that air cargo crew, as well as handling and maintenance personnel, are qualified as critical staff in the event of lockdown or curfew, and exempting from travel restrictions asymptomatic transport personnel, including aircrew, engaged in the transport of goods.

The use of passenger cabins for cargo, known as cargo-in-the-cabin flights, has been in operation since 2020, after EASA issued authorisations and exemptions for the carriage of cargo in passenger cabins. These authorisations were time-limited and although EASA extended the rules in August 2021, the Agency confirmed in a decision on 11 April 2022 that it will not extend the time frame again.

### ***Slot allocation***

On 27 January 2021 the European Union announced its intention to issue new temporary rules to help air carriers cope with the drastic decline in air traffic caused by the covid-19 crisis and avoid the operation of empty flights by an agreement with Member States' ambassadors on a negotiating mandate for granting airlines relief from airport slot use requirements for the summer of 2021, while taking initial measures to start relaunching the industry and encouraging competition. The new rules aimed to provide flexibility to adapt to different scenarios and allow for measures to be taken up to the summer 2022 scheduling period.<sup>47</sup>

On 17 December 2021, the European Commission prolonged airport slot relief rules over summer 2022, with effect from 28 March 2022 until 29 October 2022. Consequently, the airlines will be able to use 64 per cent of allocated slot series to retain their rights in those slots during the covid-19 pandemic, instead of the normal requirement of 80 per cent. This new usage rate is expected to facilitate the efficient use of airport capacity while providing benefits to passengers.

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46 Communication from the Commission, European Commission Guidelines: Facilitating Air Cargo Operations during covid-19 outbreak, 2020/C 100 I/01, of 27 March 2020.

47 Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EEC) No. 95/93 as regards temporary relief from the slot utilisation rules at Community airports due to the covid-19 pandemic – Council mandate, 22 January 2021.

### **State aid**

On the basis of Article 107(3)(b) of the Treaty on the Functioning of the EU (TFEU),<sup>48</sup> the Commission adopted a temporary framework for state aid measures<sup>49</sup> to support companies during the covid-19 outbreak.

The temporary framework allows Member States to set up schemes to direct grants, selective tax advantages and advance payments of up to €800,000. Furthermore, it allows Member States to provide state guarantees on bank loans, subsidised public loans to companies and safeguards for banks that channel state aid to the real economy, and to grant short-term credit insurance. Based on the exception provided for in Article 107(2)(b) of the TFEU, the Commission enables Member States to compensate companies for the damage directly caused by exceptional occurrences even if they have received rescue aid in the past 10 years.

In 2020, several European airlines (for example, Lufthansa group, EasyJet, Virgin Atlantic and Air France–KLM) requested state aid from their respective governments. From December 2020 to May 2021, the European Commission approved state aid measures in favour of several airlines and airport operators in Portugal, Italy and Ireland. Moreover, on 13 May 2020, the European Commission issued guidelines laying down general principles applicable to all transport services and specific recommendations designed to address the characteristics of each mode of transport. These guidelines aim to provide a common framework to support authorities, stakeholders, social partners and businesses operating in the transport sector during the gradual re-establishment of connectivity and free movement while protecting the health of transport workers and passengers.<sup>50</sup> On 12 May 2021, in addition to the aid granted previously, the Commission approved more than €12 million for the Italian aid measure to compensate Alitalia for further losses suffered because of the covid-19 outbreak.<sup>51</sup>

In December 2021, the European Commission decided to extend until 30 June 2022 the validity of the State Aid Temporary Framework, previously set to expire by the end of 2021. To further accelerate recovery from the pandemic, the Commission has also decided to introduce two new measures to create direct incentives for forward-looking private investment and solvency support measures, for an additional limited period. The extension will allow Member States to widen their support schemes and ensure that businesses still affected by the crisis will not be cut off suddenly from necessary support. At the same time, the Commission will continue to monitor closely developments regarding the covid-19 pandemic and other risks to the economic recovery.

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48 Article 107(3)(b) of the Treaty on the Functioning of the EU (TFEU) provides for an exception in cases of aid to remedy a serious disturbance in the economy of a Member State.

49 Communication from the Commission Temporary Framework for State aid measures to support the economy in the current covid-19 outbreak (C/2020/1863 final), 19 March 2020.

50 Communication from the Commission, Covid-19: Guidelines on the progressive restoration of transport services and connectivity, 13 May 2020, C(2020) 3139.

51 European Commission, Coronavirus Outbreak – List of Member State Measures approved under Articles 107(2)(b), 107(3)(b) and 107(3)(c) of the TFEU and under the State Aid Temporary Framework, updated to 12 May 2021, [https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/State\\_aid\\_decisions\\_TF\\_and\\_107\\_2b\\_107\\_3b\\_107\\_3c.pdf](https://ec.europa.eu/competition/state_aid/what_is_new/State_aid_decisions_TF_and_107_2b_107_3b_107_3c.pdf).



## **XII OUTLOOK**

At the end of 2020, the European Commission issued its Sustainable and Smart Mobility Strategy,<sup>52</sup> a policy document setting out the actions required to ensure that each mode of transport can contribute to the achievement of the objectives set by the European Green Deal: reducing greenhouse gas emissions by 55 per cent by 2030 and making Europe the first climate-neutral region in the world by 2050. With regard to civil aviation, the Strategy sets the ambitious goal of making zero-emission aircraft available to the European market by 2035. In particular, according to the Commission, a more efficient management of air traffic, for example through the Single European Sky, can contribute to reducing the climate impacts associated with emissions of gases other than CO<sub>2</sub> in the air transport sector. The main measures proposed in this regard are carbon pricing and the simultaneous reduction of emission allowances allocated free of charge to airlines under the European Emissions Trading System (ETS) through the revision of the ETS Directive. On 20 April 2022, the European Parliament's Energy and Industry Committee (ITRE), which is jointly responsible with the EU Parliament's Environment Committee for the key issue of the free emissions allowances, voted on its ETS report. In the next step, the Environment Committee will vote on the ETS revision proposals, including a vote on the topic of free allowances, on 16 and 17 May 2022. The plenary vote is expected by the end of June 2022.

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52 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Sustainable and Smart Mobility Strategy – putting European transport on track for the future, COM(2020) 789, 9 December 2020.

Appendix 1  
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Anna Masutti is the chairperson of Rete Ferroviaria Italiana, the Italian railway infrastructure company. She is a tenured professor of air and space law at the University of Bologna and a partner at RP Legal & Tax law firm. She represents clients in both ordinary and administrative courts, as well as in arbitration and mediation forums with regard to legal issues arising from airlines' liability, aircraft finance and leasing, employment and corporate issues. She advises her clients in relation to a wide variety of regulatory matters, including representation before governmental agencies such as antitrust authorities and civil aviation authorities.

She provides assistance and advice in the drafting of aviation contracts, in particular for the purchase, sale and lease of aircraft and related financial and guarantee transactions. She also assists air carriers in obtaining the air operator's certificate and related licences. Anna advises public bodies in relation to financing procedures for air services in accordance with the Community guidelines on state aid and in relation to the preparation of calls for tender for the allocation of routes subject to public service obligations.

Anna regularly works with the European Commission on European programmes concerning the regulation of UAVs (drones) and the development of new aerospace technologies (EGNOS and Galileo GNSS programmes).

Anna Masutti is member of the board committee of the European Air Law Association, the membership officer of the Aviation Law Committee of the International Bar Association and a member of the Italian Association of Navigation and Transport Law (AIDINAT) and of the scientific technical committee of Insurance Skill Jam.

She is the author of several monographs in the field of aviation law, transport and public services. She is the editor of *The Aviation & Space Journal*, published in cooperation with the University of Bologna, and a member of the scientific committee of the journal *Transport Law* and of the journal *Marine Aviation & Transport* published by the Italian Association of Insurance Companies (ANIA).

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