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**COMMISSION STAFF WORKING DOCUMENT**

**EVALUATION**

**of the Regulation (EC) No 1008/2008 on common rules for the operation of air services  
in the Community**

{SWD(2019) 296 final}

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## GLOSSARY

<i>Term or acronym</i>	<i>Meaning or definition</i>
Air Services Agreements (ASA)	<p>Agreements regulating air transport services between contracting States.</p> <p>In aviation, most international air transport is governed by ASAs. They can impose detailed requirements (e.g. how many and which air carriers can provide services to which destinations at which frequency) or leave these questions up to the air carriers which wish to provide the service.</p>
<a href="#">Airport Charges Directive</a> <sup>1</sup>	This Directive, adopted in 2009, applies to all EU airports handling more than five million passengers per year and to the largest airport in each Member State. It aims to provide for a transparent system of airport charges setting.
Aviation packages	The aviation packages have established and organised the EU internal aviation market since the beginning of the liberalisation and gradual market opening in 1987. There were three aviation packages: the <b>first aviation package</b> was adopted in 1987, the <b>second aviation liberalisation package</b> in 1990 and the <b>third aviation liberalisation package</b> in 1992.
<a href="#">Aviation Strategy 2015</a>	This comprehensive strategy published in 2015 proposed an ambitious EU external aviation policy, tackling limits to growth both in the air and on the ground, and maintaining high EU standards and innovation, investments and digital technologies. <sup>2</sup>
Codeshare agreements	Codeshare agreements, also known as codeshare, are commercial agreements under which the airline operating a flight (the "operating airline") allows one or more other airlines (the "marketing airlines") to market and issue tickets for the flight as if the marketing airlines were operating the flight themselves. Flights covered by a codeshare agreement are displayed on the code-sharing airlines' websites and on computerised reservation systems (CRS, see definition below) with more than one IATA airline designator or "code", namely that of the operating airline and that of the marketing airline(s).
Cost-shared flights	A cost shared flight is defined in EASA (EU Aviation Safety Agency) Air OPS Regulation <sup>3</sup> as a flight with no more than six

<sup>1</sup> Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges.

<sup>2</sup> [https://ec.europa.eu/transport/modes/air/aviation-strategy\\_en#package\\_detail](https://ec.europa.eu/transport/modes/air/aviation-strategy_en#package_detail)

<sup>3</sup> Commission Regulation (EU) No 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations, in Article 6, paragraph 4

	private individuals whose direct costs are shared between all the occupants of the aircraft, including the pilot.
<a href="#">Connectivity</a>	The Aviation Strategy 2015 defined connectivity as the "number, frequency and quality of air transport services". In this way, connectivity may include direct, indirect and hub activities of airports as well as links to other transport modes. In a broader sense, connectivity may also include the possible linkage between two or more regions or the population living in the given territories. This evaluation understands the second, broader approach when it refers to connectivity.
CRS (computerised reservation systems)	Computerised Reservation Systems ("CRS") <sup>4</sup> are also known as Global Distribution Systems ("GDS"). Economically speaking, they are technical intermediaries which connect airlines (and other travel service providers, such as rail operators) on one side of the market, with travel agents, both online and bricks-and-mortar, on the other side. Airlines give the CRS information on their fares, schedules and seat availability and get from the CRSs access to thousands of travel agents, plus the technical capability for the agents to make bookings. Travel agents get from the CRSs an interface which allows them to compare, reserve and book tickets from hundreds of airlines and other travel service providers worldwide.
<a href="#">CRS Regulation</a> <sup>5</sup>	Regulation 80/2009 on a Code of Conduct for computerised reservation systems ensures that air services by all participating airlines are displayed in a non-discriminatory way on the travel agencies' computer screens. It maintains safeguards that protect against potential competitive abuses by airlines owning or controlling a CRS (parent carriers). It also introduced enhanced rules for the protection of passenger/personal data.
EASA	European Union Aviation Safety Agency
EEA	The European Economic Area comprises the 28 Member States of the EU (Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and UK) as well as Iceland, Lichtenstein and Norway.

<sup>4</sup> This is defined in article 2(4) of Regulation 80/2009 as a "...computerised system containing information about, inter alias, schedules, availability and fares, of more than one air carrier, with or without facilities to make reservations or issue tickets, to the extent that some or all of these services are made available to subscribers."

<sup>5</sup> Regulation (EC) No 80/2009 of the European Parliament and of the Council of 14 January 2009 on a Code of Conduct for computerised reservation systems.

EEA 18	Ireland, Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Italy, Luxembourg, Malta, Netherlands, Spain, Sweden, UK, as well as Iceland, Liechtenstein and Norway
EQ	Evaluation question
EU 13	Estonia, Lithuania, Latvia, Poland, Czech Republic, Slovakia, Hungary, Romania, Slovenia, Bulgaria, Croatia, Malta, Cyprus
EU 15	Ireland, United Kingdom, Sweden, Finland, Denmark, Germany, Austria, France, the Netherlands, Belgium, Spain, Portugal, Italy, Luxembourg, Greece
Freedoms of the air	<p>The <b>freedoms of the air</b> are a set of commercial aviation rights granting a country's airlines the privilege to enter and land in another country's airspace and represent the fundamental building blocks of the international commercial aviation route network.</p> <p>The first freedom allows an air carrier to fly over a foreign country without landing</p> <p>The second freedom allows an air carrier to refuel or carry out maintenance in a foreign country without embarking or disembarking passengers or cargo</p> <p>The third freedom allows an air carrier to fly from its own country to another country</p> <p>The fourth freedom allows an air carrier to fly from another country to its own</p> <p>The fifth freedom allows an airline to carry revenue traffic between foreign countries as a part of services connecting the airline's own country. It is the right to carry passengers from one's own country to a second country, and from that country to a third country (and so on).</p> <p>The sixth freedom is the right to carry passengers or cargo from a second country to a third country by stopping in one's own country.</p> <p>The seventh freedom is the right to carry passengers or cargo between two foreign countries without any continuing service to one's own country.</p> <p>The eighth freedom is the right to carry passengers or cargo between two or more points in one foreign country and continuing to one's own country.</p> <p>The ninth freedom (also known as standalone cabotage) is the right to carry passengers or cargo within a foreign country without continuing service to or from one's own country.</p>

Home-base	<p>According to the Flight time limitation Regulation<sup>6</sup> “home base” is the location, assigned by the operator to the crew member, from where the crew member normally starts and ends a duty period or a series of duty periods and where, under normal circumstances, the operator is not responsible for the accommodation of the crew member concerned.</p> <p>“Home base” also refers to the place where social security contributions must be paid.<sup>7</sup></p>
ICAO	International Civil Aviation Organisation
Operational base	An operational base is the airport at which an air carrier bases its aircraft - and in principle also crew - and from where it operates routes. Both fleet - and in principle also crew - return to the operational base after accomplishing a return flight or a series of flights.
Principal place of business (PPoB)	The Air Services Regulation defines it as the head office, or registered office, of a Community air carrier in the Member State within which the principal financial functions and operational control, including continued airworthiness management, of the Community air carrier are exercised.
<a href="#">Rome I</a> and <a href="#">Brussels I</a> Regulations <sup>8</sup>	The Rome I Regulation and the Brussels I Regulation (recast) deal respectively with the applicable law and competent jurisdictions in civil and commercial matters. They contain special provisions with regards to employment contracts with the aim to protect the employee as the weakest party to the contract. While parties to an employment contract are free to choose the applicable law for the purpose of their contract, such choice should not deprive the employee from the protection of the mandatory rules of the law of the country that would apply in the absence of such choice, and which corresponds as a main rule to the law of the place where, or from where, the worker habitually carries out his work. Parties to employment contract can also choose a competent court, but such a choice of jurisdiction is only valid under strict conditions.

<sup>6</sup> Commission Regulation (EU) No 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council - OJ L 296, 25.10.2012, p. 1–148

<sup>7</sup> Regulation 883/2004 on the coordination of social security, as amended by Regulation 465/2012

<sup>8</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I); Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I recast).

<a href="#">Slot Regulation</a> <sup>9</sup>	This Regulation introduced common rules for the allocation of slots at EU airports. The aim is to ensure that airlines have access to the busiest EU airports on the basis of principles of neutrality, transparency and non-discrimination.
Social fact funding study	Study on employment and working conditions of aircrews in the EU internal aviation market by Ricardo AEA (2019) <sup>10</sup> , providing insights particularly on key alternative forms of employment of aircrew, including so called "pay-to-fly" schemes and false self-employment.
<a href="#">Unfair Commercial Practices Directive (UCPD)</a> <sup>11</sup>	This Directive constitutes the overarching (horizontal) piece of EU legislation regulating unfair commercial practices in business-to-consumer transactions. It applies to all commercial practices that occur before (i.e. during advertising or marketing), during and after a business-to-consumer transaction has taken place.

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<sup>9</sup> Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports.

<sup>10</sup> <https://publications.europa.eu/en/publication-detail/-/publication/97abb7bb-54f3-11e9-a8ed-01aa75ed71a1>

<sup>11</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (Unfair Commercial Practices Directive)

## 1 INTRODUCTION

### 1.1 Purpose of the evaluation

In line with the commitments made in the 2015 Aviation Strategy, the Commission is evaluating several pieces of aviation legislation to have a comprehensive view of the aviation market, take into account the interactions between the different pieces of legislations, and determine whether there are overlaps and synergies for possible future proposals.<sup>12</sup> However, these exercises do not aim at assessing the overall functioning of the aviation market.

The evaluation of Regulation No 1008/2008 (hereafter "the Air Services Regulation") aims to assess the various intended and unintended economic and social effects of the Air Services Regulation, to analyse if the framework is consistent with internal market objectives and international obligations, and to determine if it is still fit for purpose. The evaluation also seeks to identify areas of concern or shortcomings in the application of the Air Services Regulation in light of the current market reality. The evaluation takes into account the results of the 2013 Fitness Check on Internal Aviation Market (hereafter "the Fitness Check"). The evidence gathered during the evaluation and the resulting recommendations will inform the Commission's decision on a possible legislative intervention to amend the Regulation.<sup>13</sup>

The 2013 Fitness Check assessed the contributions brought by the Air Services Regulation in revising the existing rules on the EU internal aviation market and concluded that the objectives to consolidate the existing liberalisation legislation and to provide some clarifications were achieved. Issues that were identified as problematic were either outside of the scope of the Regulation (e.g. access of non-scheduled services to extra-EU markets), either could be further clarified by a technical guidance (leasing, restriction of traffic rights), either necessitated better dissemination of best practices among enforcement bodies (e.g. PSOs, price transparency, passenger protection in case of insolvency) or merely required continuing monitoring and enforcement. However, since then a number of market and policy developments described in this report took place that warrant another look at the Regulation and different measures to address concerns.

### 1.2. Scope of the evaluation

The Air Services Regulation is the "successor" of the various packages of measures, which have established and organised the EU internal aviation market since 1987.

#### *Evolution of the EU internal aviation market*

Until 1987, EU aviation was governed by bilateral agreements between Member States and national rules prescribing which air carriers could fly on which routes and the capacity they could provide as well as at which fares. Most carriers were State owned and, in general, aviation was seen as a national strategic and economic asset.

Against this background, an internal aviation market progressively emerged i.e. through

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<sup>12</sup> The evaluations of the Airport Charges Directive and of the Regulation on Code of Conduct for computerised reservations systems are carried out currently and are to be completed in the course of 2019. The Commission may also conduct a study to determine whether the text of the [Slot Regulation](#) proposal of 2011 is still relevant in the current market context. A report on social issues in aviation was published on 1 March 2019, and an evaluation of the Ground handling Directive will be launched in the first half of 2019. An Inception Impact Assessment was published in March 2018 [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-1022254\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-1022254_en)  
An Inception Impact Assessment was published in March 2018 [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-1022254\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-1022254_en)



liberalisation and gradual market opening through the adoption of various so-called aviation packages. The **First Package** (1987) essentially left the bilateral framework in place while also relaxing some so far usual restrictions, such as those consisting in the ‘single designation’<sup>14</sup> or the fact that some national airlines were traditionally given a 50% share of the market. The **Second Package** (1990) introduced an element of ‘double disapproval’ for fares under which a fare set by an airline for a route between Member States would be permitted unless both States disapproved it. It also opened up routes between almost all European Community airports; relaxed restrictions on fifth freedom services<sup>15</sup> routes; and eased restrictions on multiple designation of airlines on particular routes. The final step in the process, establishing the liberalised EU aviation market as we know it today, was reached through the **Third Aviation Package** adopted in 1992.

The **revision of the Third Package in 2008** did not bring any major changes to the existing framework but rather consolidated three existing legal texts into one and fine-tuned specific aspects.<sup>16</sup> The changes contributed to the existing objectives without however modifying them. These changes are presented in Section 5 under Effectiveness.

Given the progressive liberalisation of the aviation market, **the scope of this evaluation goes beyond the specific changes introduced in 2008 to assess the overall effects of the provisions adopted since the previous reform of 1992** (the Third package) and the relevance of the current framework in light of changes in the market, policy and technological environment. This allows capturing the effect of important provisions for EU aviation, which would otherwise be excluded.<sup>17</sup> A fully-fledged evaluation of the legal framework has never been carried out. The 2013 Fitness Check focussed only partially on the Air Services Regulation since it covered also computerised reservation systems, insurance requirements and assistance to passengers affected by airline insolvency. Its objective was merely to identify potential overlaps, gaps, inconsistencies or obsolete measures of several legal acts. When it addressed the Air Services Regulation, it considered only leasing, access to routes, public service obligations, traffic distribution, environmental and emergency measures and price transparency, and only the changes introduced in 2008. It left out important areas concerning for example operating licences and in particular issues related to the principal place of business and ownership and control. It did not consider in the first place the scope of

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<sup>14</sup> Only one airline of each country is permitted to operate

<sup>15</sup> The "**freedoms of the air**" are a set of commercial aviation rights granting a country's airlines the privilege to enter and land in another country's airspace and represent the fundamental building blocks of the international commercial aviation route network. The **fifth freedom** allows an airline to carry revenue traffic between foreign countries as a part of services connecting the airline's own country. It is the right to carry passengers from one's own country to a second country, and from that country to a third country (and so on).

<sup>16</sup> The accompanying impact assessment (2006) did not identify the need for any major overhaul of the legal framework. It confirmed the 1992 approach to build on liberalisation of the market and to provide the aviation industry with the market conditions that allow it to best exercise their business and operations on the assumption that this would provide the best quality of service to passengers. At the same time, the initial approach to counterbalance the possible negative effects of liberalisation with measures ensuring the protection of citizens in particular in matters of safety and consumer protection was validated. For more details, see Section 2.1 and in Annex 4.

<sup>17</sup> For example, in 2008 a remaining obstacle to the freedom to provide services was reduced by prohibiting certain restrictions on code sharing and pricing. Some Member States still granted national carriers price leadership for routes from their territory to third countries and/or banned EU carriers from other Member States to combine flight numbers with third-country carriers. This led to distortions of competition and discrimination between EEA carriers based on nationality. Limiting the assessment to this aspect would ignore the wider effects the freedom to provide air services had on the EEA aviation market.

the Regulation in light of services such as drones and cost-shared flights. Regarding social implications, it mentioned issues like working time. On the other hand, it pointed out the increase in transnational employment meaning mobility of the aircrews without however reflecting on possible related challenges.<sup>18</sup>

The evaluation covers the [European Economic Area](#) (hereafter EEA). The assessment is based on the evidence available mainly for the period of 2008 to 2017 following the 2008 revision brought by the Air Services Regulation, with some references to earlier developments.

**It covers the seven main policy areas comprised in the Regulation** and the interrelations between them, namely: (1) Freedom to provide intra-EU air services; (2) Operating licence including principal place of business; (3) Leasing (which was included following the feedback received to the Evaluation Roadmap); (4) Transparency concerning air carriers' pricing; (5) Ownership and Control of EU air carriers; (6) Public Service Obligations and (7) Traffic Distribution Rules. These issues are considered in light of five evaluation criteria (Section 5.1. through 5.5 of the document structured around questions). All the policy areas are assessed according to the 5 evaluation criteria but not under all evaluation questions (see table 5.1 in Annex 5 for more detail).

In addition, although the provisions of the Air Services Regulation (as the “successor” of the various liberalising Aviation Packages) do not specifically cover social aspects, some of its provisions have an indirect impact on workers in the aviation sector. A Recital refers to the fact that it is for Member States to ensure the proper application of EU and national social legislation.<sup>19</sup> Thus, the evaluation sets a particular focus on the **social issues** in the context of provisions on principal place of business and on leasing.<sup>20</sup> In order to have a wider assessment of these issues, a study on social aspects in the aviation sector has been carried out and a Commission Report on maintaining and promoting high social standards for aircrew has been published at the beginning of 2019.<sup>21</sup>

**Some specific areas covered by the Air Services Regulation were not included into the scope of this exercise.** In particular, the evaluation does not address the insurance provisions<sup>22</sup> that were not identified as problematic by the stakeholders in the 2013 Fitness Check. The evaluation also does not explicitly include the emergency and environmental measures as such, since, to the knowledge of the Commission (confirmed by the feedback to

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<sup>18</sup> Since then changes in EU safety rules may have made some provisions of OL and leasing redundant (having the PPoB and AOC in the same Member State, prior approval of intra-EU dry or wet-leasing). In light of increasing congestion at airports MS may wish to adopt TDRs that have discriminatory effects, and financial consequences for carriers given the value of airport slots at those airports. Air carriers and airports in other parts of the world have become an increasing competition for EU carriers warranting the assessment as to whether the risk of granting access to foreign capital still outweighs the benefits of maintaining EU O&C restrictions. While for this purpose maintaining the EU identity of air carriers is important, it may not be the most effective way to ensure this through the citizenship of the carriers' final beneficial owners.

<sup>19</sup> According to recital 9 of the Regulation “*With respect to employees of a Community air carrier operating air services from an operational base outside the territory of the Member State where that Community air carrier has its principal place of business, Member States should ensure the proper application of Community and national social legislation*”.

<sup>20</sup> This was also flagged during the feedback provided by stakeholders to the Evaluation Roadmap [http://ec.europa.eu/smart-regulation/roadmaps/docs/plan\\_2016\\_45\\_air\\_services\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/plan_2016_45_air_services_en.pdf)

<sup>21</sup> Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Aviation Strategy for Europe: Maintaining and promoting high social standards, COM(2019) 120 final

<sup>22</sup> The Regulation only obliges as to insurance of transport of mail and refers to Regulation (EC) No 785/2004 which covers insurance matters of all other types of commercial services.

the Evaluation Roadmap), no problem has been identified and the measures have only been applied by one Member State prior to the Regulation.<sup>23</sup> These provisions will be assessed in the context of the provisions on traffic distribution and exercise of traffic rights. Moreover, with an increase in frequencies of air services and number of market players, the provisions of the Air Services Regulation have an indirect impact on the environment. This will be considered under unintended effects (see section 5.1 regarding effectiveness).

The freight market is not systematically singled out in this evaluation, as generally issues that are relevant for passenger air transport services are equally relevant for freight. In addition, the conduct of the freight services is often done within the same operation of passenger services.

## 2 BACKGROUND TO THE REGULATION

### 2.1 Description of the Air Services Regulation's main objectives, provisions and their evolution in time

The **Air Services Regulation** lays down common rules for the operation of air transport services in the EU. It establishes who can benefit from the internal market (i.e. EU licensed air carriers), who delivers the carriers' operating licence and how, the link between the licence with the safety oversight of the airline, the EU ownership and control requirements of an air carrier in order to receive a licence. It establishes that EU air carriers are free to provide air services anywhere in the EU but also contains exceptions to the freedom: public service obligations, environmental and emergency measures, and traffic distribution between airports serving the same conurbation. It states that carriers are free to set the price provided they respect price transparency provisions. It also contains provisions on code-sharing, as well as on wet and dry leasing.

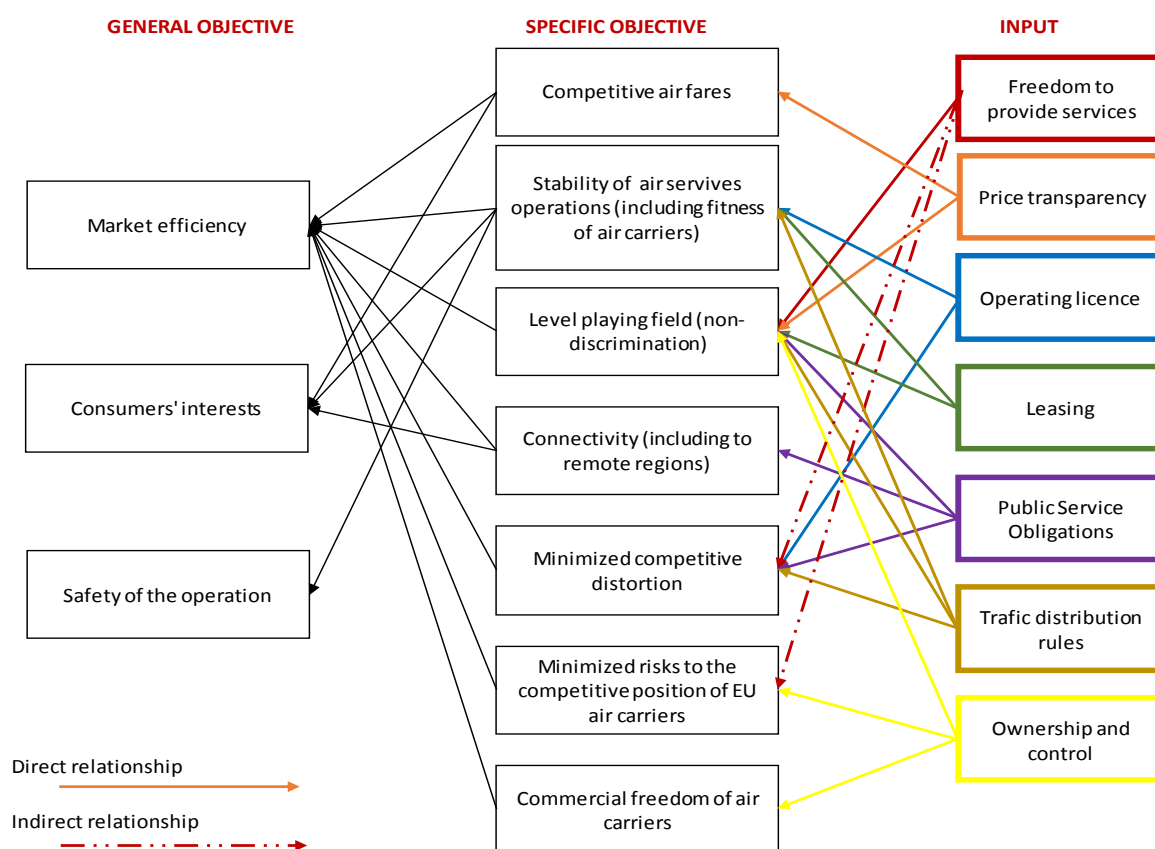
The Regulation's main objectives are to reduce competition distortions and increase market efficiency,<sup>24</sup> improve the safety of air services and contribute to consumer interests. These objectives stem from the Third Package and were confirmed by the 2008 revision. The achievement of these general objectives is supported by a set of specific and operational objectives, building on the measures from the seven main policy areas covered by the Air Service Regulation. An introduction to these areas is provided below. More explanations regarding the specific objectives pursued by each of these areas and an assessment of their achievement can be found in section 5.1, when discussing the effectiveness, and in Annex 4.

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<sup>23</sup> One Commission Decision was issued in a case where Germany adopted measures for environmental reasons (noise) that had an impact on the take-off and landing of aircraft at Zurich airport in Switzerland. However, the case was mainly governed by the German-Swiss bilateral ATA applicable at the time: Commission Decision of 5 December 2003 on a procedure relating to the application of Article 18(2), first sentence, of the Agreement between the European Community and the Swiss Confederation on air transport and Council Regulation (EEC) No 2408/92 (Case TREN/AMA/11/03 — German measures relating to the approaches to Zurich airport) (notified under document number C(2003) 4472) OJ L 4, 8.1.2004, p. 13–24

<sup>24</sup> Market efficiency is a measure of the availability (to all participants in a market) of the information that provides maximum opportunities to buyers and sellers to effect transactions with minimum transaction costs (Business Dictionary). Adapted to the aviation internal market, it can be defined as the capacity of all competitors to take up business opportunities allowed by it. According to ICAO, this can be understood as a combination of traffic growth and increased competition, which stimulates efficiency gains as a result of air carriers' ability to optimise their network and reduce prices.

**Figure 2-1: General intervention logic for Air Services Regulation**



Source: European Commission

### 1. Freedom to provide services

The Air Services Regulation is established around the fundamental EU principle of the freedom to provide services within the EU that sets as its main objective to ensure a **level playing field** for all market players (by preventing discrimination between EU air carriers and competitive distortions). The level playing field is therefore an overarching objective for all policy areas in order to ensure market efficiency and contribute to consumer interests.

### 2. Operating licence

The operating licence is an authorisation granted by the competent licensing authority to an undertaking, permitting it to provide air services. Conditions to obtain an operating license include notably the possession of a valid air operator certificate (AOC) certifying that the carrier complies with safety standards, having the principal place of business (PPOB) in the Member State granting the licence, being majority owned and effectively controlled by EU shareholders and compliance with certain financial conditions. The operating license provisions require competent licensing authorities to monitor compliance with the applicable requirements, including air carriers' financial situation. Once an EU carrier can no longer meet its actual or potential obligations for a 12-month period, the national licensing authority shall suspend or revoke the license. It may grant a temporary license for a duration not exceeding 12 months to the carrier, provided safety is not at risk and there is a realistic prospect of financial reconstruction within that time period.

EU rules on how to grant and monitor licenses were held necessary to ensure a **level playing field**. By imposing financial requirements on air carriers and monitoring requirements on

competent licensing authorities the objective was to ensure the continuous **stability of the air services operations**<sup>25</sup>, thus contributing to market efficiency, safety and consumer interests.

The PPOB is defined as the head office, or registered office, of an EU air carrier in the Member State within which the principal financial functions and operational control, including continued airworthiness management, of the carrier are exercised. The notion was introduced to ensure that the competent licensing authority had sufficient information available in its Member State to properly exercise its monitoring functions.

### 3. Leasing

Leasing is a widespread method used by air carriers to obtain flying equipment or increase their fleet capacity. A leased aircraft is an aircraft used under a contractual leasing agreement between the owner of the aircraft (the "lessor") and the air carrier that will use it (the "lessee").

The Regulation distinguishes between dry- and wet-leasing: under a '**dry lease agreement**' the aircraft is operated under the AOC of the lessee. Under a '**wet lease agreement**' the aircraft is operated under the AOC of the lessor. This distinction therefore affects the State responsible for the safety and operational oversight of the aircraft, if the lessor and lessee are not from the same Member State. At a practical level wet-lease arrangements usually include aircraft with crew while a dry-lease arrangement includes the aircraft only<sup>26</sup>. Another practice has emerged referred to as "**damp lease**" which is an arrangement where the lessor provides the aircraft and flight crew but the lessee provides the cabin crew.<sup>27</sup>

The leasing provisions contribute to the objective of ensuring the **stability of the air services operations** by allowing air carriers the necessary operational flexibility to respond to seasonal, operational or financial needs. This objective is counterbalanced by the objective of **minimizing safety risks** to ensure that the leased aircraft comply with EU safety standards. Therefore, prior approval is required for both dry- and wet-leasing and wet-leasing operations are limited. This feeds into the objectives of market efficiency, safety and consumer interests.

### 4. Pricing

The provisions on pricing target two groups of stakeholders, i.e. air carriers and consumers. Air carriers are free to set the prices (and compete with each other based on prices) for their services but must comply with certain obligations on how to display the price to consumers: the final price<sup>28</sup> must be indicated at all times and include all unavoidable and foreseeable price elements, the price must be broken down in air fares/rates, taxes and airport charges and other charges/ surcharges/fees, and any optional price elements must be indicated in a clear, transparent and unambiguous way at the start of any booking process and offered on an 'opt-in' basis. This allows consumers to effectively compare prices. The provisions contribute to

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<sup>25</sup> Ensuring stability of air services means avoiding a high number of sudden bankruptcies that would leave passengers stranded and workers unemployed. See the 2006 Commission Impact Assessment.

<sup>26</sup> While this is not specified in the English version of the Regulation as the intention was to align it to EU safety regulation, it is widely understood that one arrangement includes crew while the other does not. Other language versions of the Regulation do refer to the use or absence of crew («contrat de location avec équipage» in French).

<sup>27</sup> "Damp leasing" is not defined under the Air Service Regulation but falls within the Regulation's definition of "wet-leasing" since the operation takes place under the AOC of the lessor.

<sup>28</sup> The final price is the amount that includes all price elements that are foreseeable and unavoidable at the time of publication of the offer. This means that it does not necessarily equal to the amount paid by the consumers which may include optional price supplements.

the specific objective of **competitive air fares** which feeds into the general objectives of market efficiency and consumer interests.

#### *5. Ownership and Control*

The ownership and control rules require that an air carrier with an EU operating licence is majority owned and effectively controlled by EU shareholders. The reason is that most international air transport is governed by air service agreements (ASAs) which usually specify that air carriers must be owned and controlled by the contracting state or its nationals to ensure that the rights exchanged under the ASA are exploited by the contracting parties and their nationals only.

The contribution of ownership and control provisions in the Air Services Regulation to the market efficiency objective is twofold: firstly it intended to facilitate maintenance of traffic rights<sup>29</sup> and of the competitive position of air carriers in light of the nationality requirements in bilateral ASAs (between an EU Member State and a third country). However, it should be noted that in practice traffic rights to third countries are maintained only if the third-country decides to accept the “EU designation” which is within the discretion of the third country. Secondly it intended to allow EU air carriers to freely establish operations in other EU Member States by removing different measures on ownership and control between Member States thus to facilitate cross border establishment within the EU. There is an intended trade-off in setting these two specific objectives, which counterbalance two different interests: on the one hand, to provide as much commercial freedom as possible to EU air carriers by liberalising restrictions internally (i.e. within the EU), while also intending to facilitate that ASAs with third countries are complied with to maintain traffic rights. Air carriers may themselves ensure that they fulfil the requirements of any ASA. However, the EU ownership and control rules are meant as a reference point vis-à-vis non-EU countries, and their application creates the basis for mutual recognition.

#### *6. Public Service Obligations*

In order to set up or maintain appropriate scheduled air services on routes that serve a peripheral or development region or a thin route, and which are vital for the economic and social development of the region they serve, Member States may impose public service obligations (PSO) on these routes. PSOs constitute an exception to the freedom to provide intra-EU air services. The provisions provide a framework procedure to establish PSO routes to ensure transparency and non-discrimination between EU air carriers.

The specific objective to **ensure connectivity to remote regions** is thus counterbalanced by another specific objective of **minimizing competitive distortions**, to assure that effective competition is not distorted through protectionism on the market. This feeds into the general objectives of market efficiency and consumer interests.

#### *7. Traffic distribution rules*

Another exception to the freedom to operate are the provisions on traffic distribution rules, which allow Member States to regulate the distribution of air traffic between airports that are close enough. The specific objective allowing Member States to **manage airport capacity strains** is counterbalanced by the objective of **minimizing the competition distortions** and discrimination between air carriers. Thus, any traffic distribution rules must notably comply

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<sup>29</sup> Explanatory memorandum of the Commission Proposal for a Council Regulation (EEC) for the licensing of air carriers, COM (91) 275 final.

with conditions of transparency, proportionality and non-discrimination. This supports the objective of market efficiency.

## **2.2 Baseline and points of comparison**

As explained above the Air Services Regulation consolidates earlier legal instruments and brings only limited changes by itself compared to the Third Package. As such, in order to determine the effects of the framework as it stands today, two baselines are used. One covers the period between 1992 and 2017 and describes how the market and the identified issues would have evolved without the Third Package until today (“Third Package baseline”). The second covers the period between 2008 and 2017 describes how the market would have evolved without the 2008 Revision (“2008 Revision baseline”). This allows to better measure the effects of the current framework (by comparing them to the Third Package baseline), and the effects of the specific changes introduced in 2008 (by comparing them to the 2008 Revision baseline).

### ***2.2.1. Third Package baseline period between 1992 and 2017***

As explained previously the aviation market in the EU was liberalised gradually through a number of aviation packages. The situation during the period before the entry into force of the last such package, the [Third Package](#) (1990 – 1993) was characterised by low numbers of effective competitors at the route level (ITF, 2015). Intra-EU routes were largely monopolised by EU flag carriers operating under bilateral [ASAs](#). As a result, such carriers were limited in the choice of their operations, while also being protected by respective governments.

As an illustration, the study on social aspects in aviation by Ricardo AEA (2018) found that the number of daily flights in 1992 was less than 10,000 serving under 2,700 routes. Data gathered by the Commission from OAG, shows that in 1992 the share of all intra-EU routes operated by a single carrier was 72.2 % and the share of intra-EU routes operated by 3 carriers or more was only 5.5% (see figure 3-4 in Section 3.1).

This situation was linked to the legal framework in place (at the time the Second Package) that was an intermediate step towards liberalisation but still maintained a number of restrictions.

Changes, however were occurring. For instance, while air carriers were traditionally State owned, (considered as possessing strategic importance), a new trend began in the EEA with the privatisation of British Airways in 1987 (Button, 2010). Moreover, there was a move towards better route access, designation of multiple air carriers on certain routes, and greater flexibility in the setting of fares (based on the double disapproval system<sup>30</sup>).

Nevertheless, while it could be expected that the started liberalisation process would have continued, it would have likely progressed at an uneven pace, with the coexistence of bilateral or even multilateral agreements among certain Member States, while other national markets would have remained more restricted. Analysis done in the support study (Ricardo AEA (2018)) and in literature (Cranfield University (1997)) shows that in the absence of the adoption of the [Third Package](#), the liberalisation of the aviation market would have been expected to remain incomplete, with restrictions in terms of access to routes and pricing. Further, the licensing regime would have remained inconsistent across the EU with national authorities imposing their own criteria and procedures resulting in lack of regulatory level playing field and thereby risk of competition distortions.

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<sup>30</sup> Fares set by air carriers are only rejected if both governments (of the State of departure and of the State of arrival) disapprove.

The projections of the AERO-MS model (please see Annex 3 for details) by Ricardo AEA (2018) shows that in the absence of the Third Package, the total [passenger-km](#) would have grown on average 3.2% per annum. According to the model, the real average GDP growth of 2.1% in the EEA18 during the 1993-2016 period, would have contributed to a growth in passenger air transport demand of around 2.2% per year (as it is considered by Ricardo AEA (2018) as a powerful driver of air transport demand). The remaining of the baseline growth would have been due to changes in airline operating costs (mainly fuel costs).

### **2.2.2. 2008 revision baseline period between 2008 and 2017**

Only general developments will be described here, while the developments under the individual policy areas will be described under evaluation question 1.

As regards market structure, the period following the adoption of the Third Package has been characterised by growth of hub-and-spoke systems by the (former) flag full-service carriers during the second half of the 1990s (Eurocontrol (2017) and DLR (2008)). In addition, and as a result of air carriers being free to establish themselves and operate anywhere in the EU, the low-cost carrier segment taking advantage of the newly acquired opportunities quickly grew while the flag full-service carrier share declined.<sup>31</sup>

Moreover, new carriers took advantage of market liberalisation to enter the market, and competition has increased at route level. According to the data gathered by the Commission from OAG, in 2006 the share of all intra-EU routes operated by a single carrier was 70% and more than 2 carriers in size 11.4 % (in terms of seats 29.2% and 45.1% respectively).

Competition on international air services markets has created incentives for building strategic [air carrier alliances \(e.g. Oneworld; Star Alliance; SkyTeam\)](#) in order to achieve economies of scale and to respond to consumer demand for global networks. This was a trend that started to develop in the 1990s after the adoption of the Third Package, first with increasing level of code-sharing among pairs of carriers, and then with the formation of more integrated (frequent flyer programs reciprocity, extensive use of code-sharing, coordinated marketing, etc.) strategic alliances like the ones we have today (European Commission, (1999)).

These trends were likely to continue under the 2008 revision baseline, as the revision did not change major elements linked to the freedom to provide services or operating licence.

The projections of the AERO-MS model by Ricardo AEA (2018) estimates that in the period between 2008 and 2017 and in the absence of the Air Services Regulation, the main air transport indicators such as passenger km<sup>32</sup> and number of flights would have been increasing at a smaller pace as compared to the earlier period. The significant decline in air transport demand identified in 2009 is most likely essentially driven by the strong decline in demand following the economic crisis of 2008. Demand for air transport only picked up after 2013 as a result of economic recovery.

## **3 IMPLEMENTATION / STATE OF PLAY**

### **3.1 General market context and development**

#### *Growth of the EEA aviation market*

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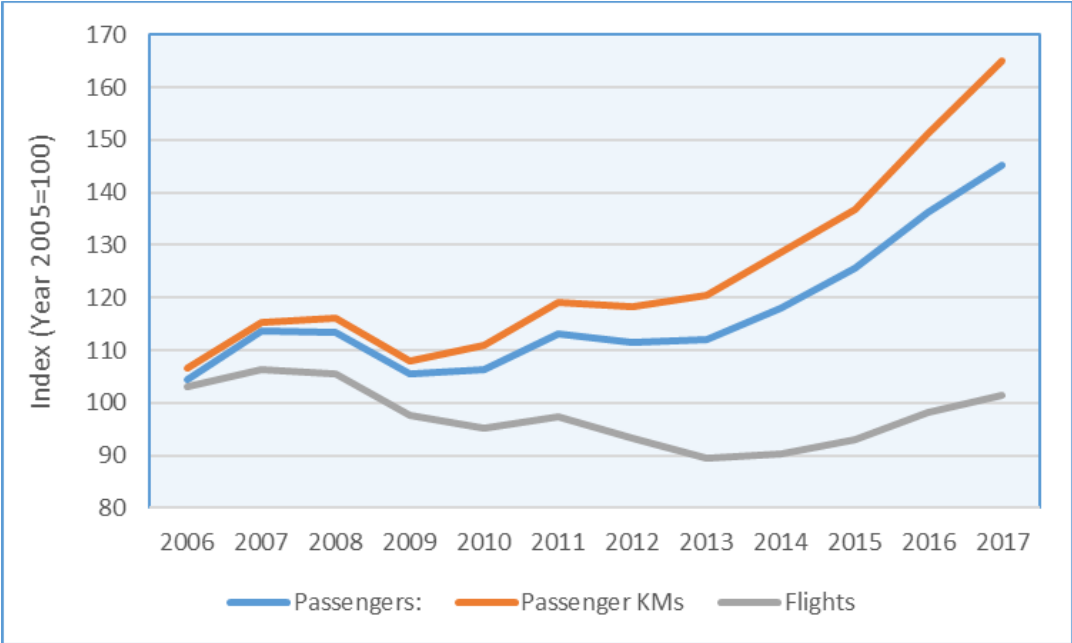
<sup>31</sup> The share of intra-European seat capacity provided by low-cost carriers in Western Europe grew from 9% in 2002, to around 30% in 2010 (ITF study 2015). Traditional scheduled operators however have still carried twice the passenger-km number on intra-EEA31 routes compared to low cost carriers in 2006.

<sup>32</sup> A unit of measurement representing the transport of one passenger by a defined mode of transport (in this case, air) over one kilometre.



Eurocontrol data analysed by Ricardo AEA (2018) shows that the main growth indicators have increased. Passenger-km<sup>33</sup> has grown on the intra EU28 market from 441 billion in 2005 to 728 billion in 2017. The figure 3-1 below further shows the evolution of indicators such as flights, and passenger numbers from 2005 to 2017.

**Figure 3-1: Air transport indicators for intra EU28 routes (year 2005 = 100).**



Source: Eurocontrol/Eurostat

Opening national markets spurred competition and provided more routes and more destinations to places in the EU and beyond. There has been strong growth in air travel, with the number of daily flights more than doubling (from less than 10,000 in 1992 to around 25,000 in 2017<sup>34</sup>) and the much greater number of routes offered (from under 2,700 in 1992 to more than 8,400 in 2017<sup>35</sup>).

As an example, the number of intra-EU routes at Dublin Airport went from 36 in 1992 to 127 in 2016. International intra-EEA routes (meaning flights between EEA countries as opposed flights within the same country) have increased by over 37% (from 3,173 in 2006 to 4,364 in 2017). Between 2004 and 2014, connectivity increased between all categories of airports, with the highest growth of total connectivity out of small and regional airports (+46%), but also strong growth of total connectivity out of largest European airports (+34%). (Aviation Strategy, 2015). However, the CESE study<sup>36</sup> refer to a clear connectivity gap between Western and Eastern Europe in the periods respectively 2004-2014 and 2004-2013.<sup>37</sup>

<sup>33</sup> Passenger-km is unit of measurement representing the transport of one passenger by a defined mode of transport (in this case, air) over one kilometre

<sup>34</sup> Eurocontrol

<sup>35</sup> OAG

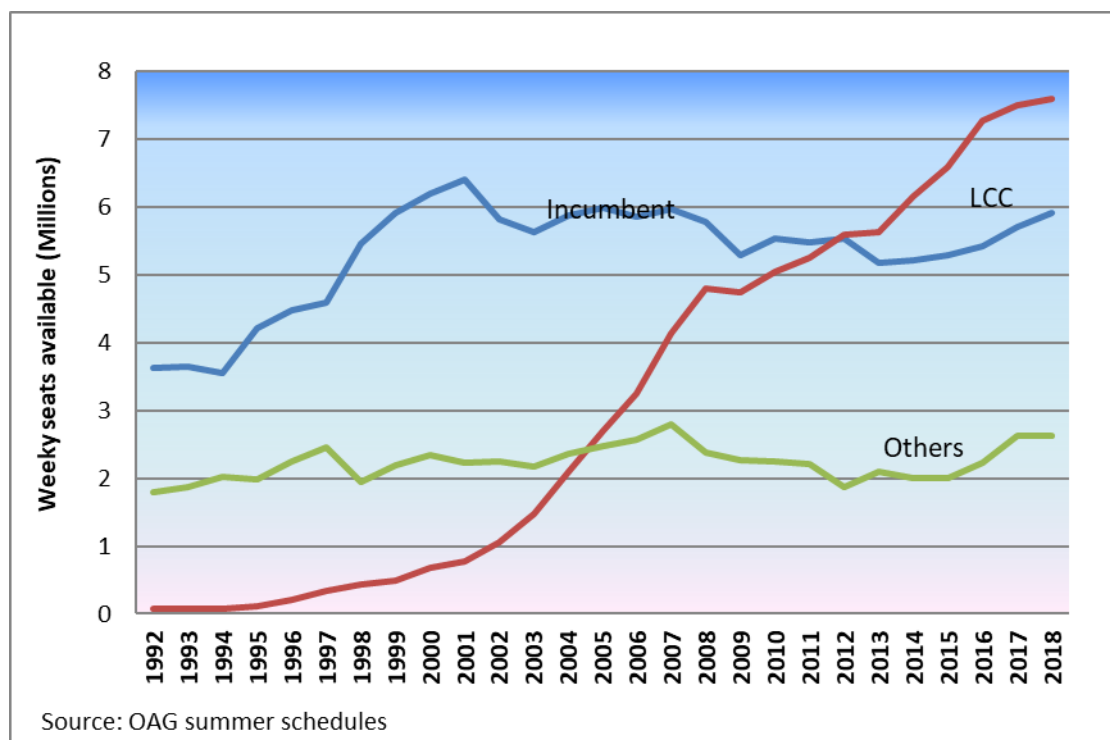
<sup>36</sup> The CESE study on air connectivity in Central, Eastern and South-East Europe (CESE) was commissioned by the Commission and developed by PwC in 2014.

<sup>37</sup> The CESE study (PWC, 2014) developed a methodology to calculate connectivity and rank countries. Two indexes were established, one for business connectivity and another for leisure connectivity. Both indexes show that there exists a significant connectivity gap between Member States. The business connectivity on average level per country was found 7.5 times higher in the EU15 than in the EU13 Member States.

### Evolution of the aviation market structure

The number and share of intra EEA flights operated by low-cost carriers (LCCs) has increased significantly in the period 2006-2017 (+1.3 million; +88%), whereas the number of flights operated by traditional scheduled operators has declined over the same period (-1.2 million; -27%). Furthermore, LCCs have significantly increased their share in terms of seat supply. While in 2005, traditional scheduled operators have still offered over twice the available seats on intra-EU28 routes compared to LCCs (6 versus 2.8 million), the situation has now reversed. In 2017, LCCs offered over 30% more seats in the intra-EU than traditional scheduled operators.

**Figure 3-2: Weekly seats available by market segment**



*Figure 3-2: Passenger km on Intra EEA31 routes by market segment*

### Air carrier privatisation and new behaviour

Another important development has been the trend for air carrier privatisation and consolidation.

Since the privatisation of British Airways in 1987, many EEA governments have fully or partially sold their stakes in their national carriers: while in 1992 41 EEA carriers had at least 50% governmental ownership, this number has declined to 28 in 2008 and 25 in 2016 (ICAO, 2016b).

In addition, there are now air carrier groups (e.g. Lufthansa Group, Air France-KLM, International Airline Group<sup>38</sup>, Thomas Cook<sup>39</sup> or TUI Airlines<sup>40</sup>) that hold multiple operating

Similarly, the leisure connectivity shows more than nine times higher values for EU15 countries than for the EU13 Member States.

<sup>38</sup> Bringing together Aer Lingus, British Airways, Iberia and Vueling.

<sup>39</sup> Thomas Cook is a tour operator with four air carriers: Thomas Cook Airlines (UK) Limited, Thomas Cook Airlines Scandinavia (DK), Condor (DE) and Thomas Cook Airlines Balearics (ES).

licenses and a different principal place of business and AOC attached to each operating license. The emergence of such consolidated groups has been motivated by the need to create greater efficiencies by centralising certain functions<sup>41</sup>, while maintaining different Member States' nationalities in order to benefit from traffic rights under bilateral ASAs.<sup>42</sup> Keeping brand image is also an asset vis-à-vis consumers because it is associated with a country or a business model (full service vs LCCs). Moreover, multiple operating licences' holders (for example air carrier groups with subsidiaries in different Member States) may indeed have an interest in using the same services providing for exercising certain functions – such as airworthiness management – and therefore ensure a uniform approach across the operating licences and economies of scale. However, air carrier groups with multiple AOCs seem to face challenges in the sense that they have aligned practices across the group, yet need to deal with different Member States' authorities based on where their respective OLs and AOCs were issued as will be discussed in EQ1.

Another important development is the practice of dry and wet-leasing. The growth in leasing has been significantly impacted by the emergence of different market players: where previously commercial banks have been the main source of aircraft financing, now other types of leasing companies have entered the market. Ireland assumes a prominent role, especially on dry-leasing, with around half of aircrafts leased worldwide on its registry. Fourteen out of the world's 15 biggest lessors have a presence in the country (Market Research Future, (2017)).

Finally, the phenomenon of multiplication of operational bases<sup>43</sup> outside of the principal place of business became widespread. The decision of having an operational base in a country different from its principal place of business depends on various factors including for example a service model of an air carrier (i.e. hub-and-spoke vs. point-to-point), historical reasons (e.g. mergers), geographical localisation, languages used or accepted by the national licencing authority, procedures for the oversight of the carrier and registering aircraft etc. Since LCCs almost exclusively follow the point-to-point service model, the use of multiple operational bases has been a major feature of their business. For example, for the 10 LCCs that Ricardo AEA (2018) looked at, operational bases have increased from 92 in 1993 to 228 in 2017.<sup>44</sup> The operators based in the departure or arrival country still ensure the largest share of flights between EEA countries. However, over time a larger proportion of air transport market for flights between EEA countries has been served by operators based in an EEA country other

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<sup>40</sup> TUI Airlines is part of the TUI Group, a tour operator which owns 6 subsidiary air carriers: TUI Airways (UK), TUI fly Belgium, TUI fly Deutschland, TUI fly Netherlands, TUI fly Nordic (SE), Corsair International (FR).

<sup>41</sup> For example, centralising purchasing and finance operations: - one procurement organisation, leveraging scale on all contracts Purchasing & Finance - one procurement organisation, leveraging scale on all contracts • Maintenance, having a single engineering and maintenance procedure, ensuring interoperability among fleet and crew

<sup>42</sup> This is due to the fact that some third countries do not recognise the EU designation principle despite continued efforts by the Commission to generate support for this principle. For example, the air carrier Iberia retains its Spanish nationality despite merging with British Airways, in order to continue benefitting from traffic rights under the ASA between Spain and Argentina.

<sup>43</sup> An operational base is the airport at which an air carrier bases its aircraft - and in principle also crew - and from where it operates routes. Both fleet - and in principle also crew - return to the operational base after accomplishing a return flight or a series of flights.

<sup>44</sup> See Ricardo AEA (2018), Table 2-19: "Number of operational bases (2008 and 2017) for selected EEA air carriers": of the ten LCCs listed on the table, the number of bases that they operate increased from 92 when the Regulation was enacted, to 228 in 2017".

than of departure or arrival: these have increased from 12% of passenger-km on international Intra EEA flights in 2006 to 31% in 2017.

The outsourcing of air carrier functions is generally a noteworthy development. Depending on the degree of outsourcing and functions outsourced, this may impact a national licencing authority's ability to properly monitor the carrier's operations.

As of 2017, cargo flights represent 3% of European flights (Eurocontrol, (2017a)). Like for passenger traffic, demand for all-cargo flights is also correlated with business cycles, and the economic downturn in 2008-2012 led to a reduction in the number of all cargo flights of 15% and 20% as compared to 2009 and 2012, respectively. While the years 2012 and 2016 have known 11% growth, that growth was still insufficient to compensate the effects of the 2008-2012 economic downturn. Still, that decline did not translate into less transported cargo, since air carriers have used fuller aircraft and moved cargo from all cargo flights to passenger flights using wide-bodied aircrafts, in an attempt to increase yields (Eurocontrol, (2017a)).

New business models have emerged in civil aviation since 2008. Some were not foreseen when the Regulation was adopted, such as [cost-shared flights](#) advertised through online platforms. In 2017 the number of flights conducted under existing cost sharing platforms was estimated to amount to less than 1% of the total flights conducted in General Aviation in the EU (EASA, (2017b)). Recently, eight well known online platforms have signed a charter to promote safety of non-commercial General Aviation flights with light aircraft<sup>45</sup>. Other platforms matching pilots with interested individuals probably exist.

#### *Competition in the aviation market*

Competition on international air services markets has continued to develop. According to (ICAO, 2013c), in 2013 the three major airline alliances (Star Alliance, SkyTeam and Oneworld) represented more than 60% of the global market share: competition takes place not just between individual airlines but increasingly between alliances. In 2013, 32% of intra-EU passenger traffic and 39% of extra-EU traffic has been carried by one of these alliances. In 2008 market shares were 27% and 37% respectively.

Consolidation can also be seen in the evolution of number of EEA air carriers, which has dropped. Over the period 2000 to 2017 the number of aircraft operators providing scheduled services on intra EEA<sup>31</sup> routes declined from 274 to 191 (30% decrease). The reduction in the total number refers both to traditional (network) carriers as well as LCCs, pointing to consolidation in the sector. During 2009-2017, 524 OLs have been granted (this number is higher than the number of currently active OLs because it includes OLs that have since been revoked or suspended). In terms of the distribution of licences among Member States (i.e. the authorities that are responsible for these licences), Ricardo AEA (2018) analysis shows that Germany, France and the UK have the highest numbers (together representing 36% of the total). At the same time, Malta has been particularly active since 2009 with 32 issued licences. During 2017, three significant players have gone bankrupt or into insolvency process: Air Berlin (including NIKI and LGW), Monarch, Alitalia and most recently WOW. The results have differed since national legislations apply and regulate bankruptcy procedures.

Regarding consolidation in the EU market, although a high level of concentration of market share in the hands of only a few market players may be detrimental for consumers when the market players can independently reduce choice of services and quality or increase prices, the

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<sup>45</sup> COAVMI, FlyBook, Flyt.club, Flightshare, Fly Boy, Rotorpool, TAKEOFF Air Tourism and Wingly. The charter is available at <https://www.easa.europa.eu/charter-promote-safety-non-commercial-general-aviation>

broad picture in the EU market has not attained this level. By comparison, in the EU the six top carriers account for 42.4% of the market share, while in the US the top four air carriers already account for 81.1% of the market (as shown in table 3-1 below).

**Table 3-1: Market share of biggest carriers in Europe and the US, measured by the number of seats offered (2017)**

Share of number of seats							
<b>Europe</b>	Ryanair	EasyJet	Turkish	Lufthansa	SAS	British Airways	Total for top six
	12.4%	9.3%	6.4%	6.1%	4.2%	4.0%	42.4%
<b>US</b>	American	Southwest	Delta	United	Alaska	JetBlue	Total for top six
	22.8%	21.5%	21.0%	15.8%	4.6%	4.0%	89.7%

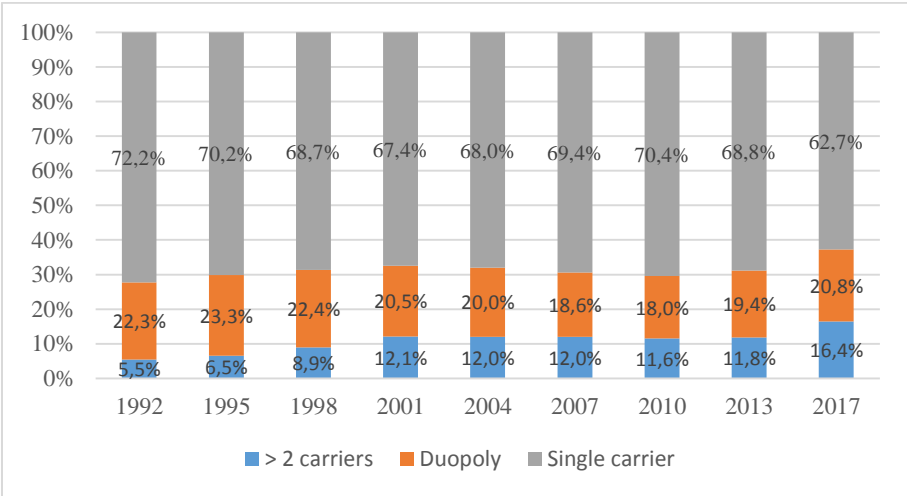
Source: Ricardo AEA (2018)

In addition, competition has continued and there are signs that fares have gone down, in the sense that the range of advertised fares has increased.

This evidence is corroborated by data, which shows that between 2006 and 2017, the number of airport-pairs with three or more carriers servicing that route remained stable at 20% (see Figure 3-4). This has been driven by a withdrawal of traditional carriers from a number of routes (their share decreased from 47% in 2006 to 25% in 2017) while low cost carriers have mainly used secondary airports, and have only recently started using also some primary airports. One would expect that an analysis at the city-pair level (i.e. flights between two different cities/regions, for example between London and Paris, regardless of the airports served) would show an increase in the share of city-pairs served by 3 or more operators since low low-cost carriers still often use secondary airports to serve a given city or region, effectively competing for the traffic in and out of that city, even if different airports are served. However, the analysis of the available data from Eurocontrol shows a similar picture as above, with the share of city pairs served by more than three carriers rather stable at around 24% of the total.

Data gathered by the Commission from OAG does show an increase in the number of routes operated by equal or more than two carriers and a decrease in the market share operated by a single carrier.

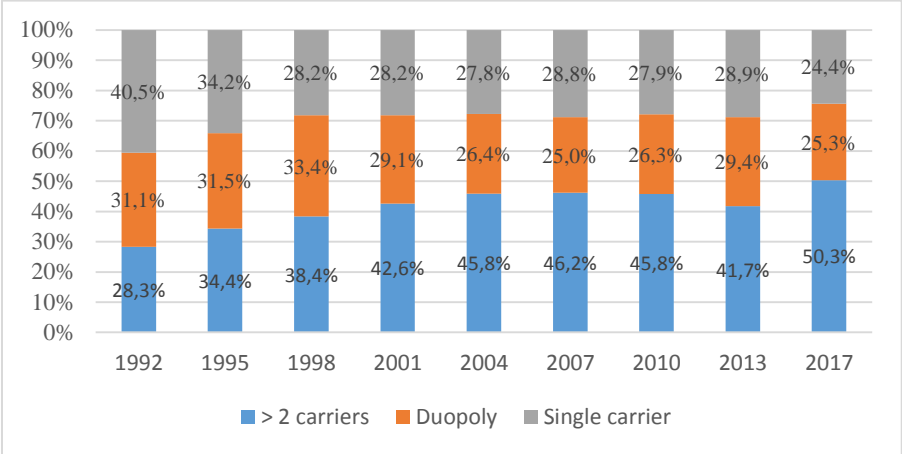
**Figure 3-3 Evolution in number of air carriers operating a flight on a route**



Source: OAG

The difference is even clearer when looking at the number of seats offered on routes.

**Figure 3-4 Evolution in number of operating air carriers offering seat capacity on a route**



Source: OAG

*Evolution of air fares*

The meaningful price comparison over time requires to compare fares in 1992 and full fares (i.e. some of the most common ancillary services such as transport of checked-in baggage included) of today. The combined reading of the literature (Intervistas 2012 or ITF 2015) and Eurostat data on the Harmonised Index<sup>46</sup> of consumer prices for passenger transport on the matter is inconclusive: the literature suggests that on liberalized routes fares go down, while Eurostat data suggest an increase in the average fares over time. However, such assessment does not account for all new travel opportunities allowed by cheaper fares based on offering fewer services within basic fare, something which may be observed as a fundamental market development largely created by the development of LCCs following the internal market liberalisation. The practice of reducing the services covered by the basic fare had been launched by LCCs and is now applied by all airlines. This has subtracted significant elements from the basic fare. For most of the air carriers (and primarily for low-cost carriers) the price structure of the air ticket today does not include many elements in the basic fare (e.g. transport of checked-in luggage or in some cases even hand luggage beyond a smaller size bag<sup>47</sup>). Thus the range of advertised fares has increased and with that the share of low fares accessible to consumers has increased. The increase of market share of LLCs mentioned above also supports this.

In addition, although there is no systematic data collection on fares at EU-level, the Commission, for example purposes, analysed the evolution of ticket fares on 8 routes between 1997 and 2012. This partial analysis while not representative gives some indication of a trend of decreasing fares as can be seen in the table below.<sup>48</sup>

<sup>46</sup> The index covers also Extra-EU fares and is based on relatively small samples in each Member State, which implies sizeable uncertainty when it comes to analysing how structural changes in the industry impact on air fares.

<sup>47</sup> On this point, cf. footnote 133 below.

<sup>48</sup> The databases used for the above table exclude LCCs. It could be assumed that the general decrease in fares is due to the emergence of LCCs in the market, driving down fares due to their business model. One route in the table above, (Helsinki – Brussels) has never been served by LCCs, nevertheless the fare price has decreased. This could point to the benefits of liberalisation on the level of airfares or the fact that LCCs’ influence on prices can go beyond the particular routes they operate on.

**Table 3-2: Evolution of the air fares between 1992 and 2017 Roundtrip in EUR**

		1992	2002		2011		2017	
		Price*	Price	% change to 1992	Price	% change to 1992	Price	% change to 1992
ROM	MIL	190	223	17.4%	101	-46.8%	96	-49.8%
PAR	MAD	538	451	-16.2%	59	-89.0%	111	-79.4%
LON	STO	420	329	-21.7%	125	-70.2%	106	-74.8%
LON	WAW	694	513	-26.1%	124	-82.1%	149	-78.6%
BER	AMS	401	276	-31.2%	64	-84.0%	116	-71.2%
FRA	BER	245	209	-14.7%	65	-73.5%	80	-67.3%
MUC	BCN	434	480	10.6%	83	-80.9%	94	-78.3%
HEL	BRU	634	719	13.4%	185	-70.8%	177	-72.1%

\* indicated price is inflation adjusted

Source: European Commission based on Sabre data for 2011 and 2017 prices (Market Intelligence Sep-2011 & Sep-2017 OD-traffic - Average base fare, non-directional, discount coach), OAG (Jun-92 lowest published fares) for 1992 and Amex (Amex fare index – lowest economy) for 2002

### *International air services agreements and ownership and control*

In parallel with greater liberalisation within the EU, the EU and its Member States have developed their international aviation relations with third countries with the goal of, among other things, opening access to cross-border markets. This development, which dates from the European Court of Justice Open Skies ruling of 2002<sup>49</sup>, should be seen together with Member States' own bilateral air services agreements with third countries. As an example, the EU-US Open Skies Agreement signed in 2007 allowed any EU or US airline to fly between any point in the EU and the US.

These agreements have also attempted to liberalise ownership and control restrictions, however the clauses have not yet been triggered in all cases. In the case of the US, for example, this is due to the US holding back on liberalising its own Ownership & Control (O&C) restrictions.

The EU, in liberalising O&C restrictions within the internal aviation market, was faced with the risk that third countries would no longer recognise EU carrier's traffic rights under their bilateral ASAs. Therefore, the Commission started to negotiate with non-EU countries to accept the so-called "EU designation" (i.e. to treat all EU carriers equally for the purpose of any given agreement with third countries). Many third countries have accepted the renegotiation of the existing agreements to recognise the EU designation of an EU air carrier for the purposes of using traffic rights granted under the ASA. Currently there are more than 110 third countries which accept that an EU air carrier may be controlled by any EU national or Member State. There remain however third countries which do not recognise the EU designation. The number of such countries is slowly declining, but some important 'hold-outs' remain, such as Russia and South Africa.

### *Employment*

<sup>49</sup> Judgments in cases C-466/98 *Commission v United Kingdom* C-467/98 *Commission v Denmark*, C-468/98 *Commission v Sweden*, C-469/98 *Commission v Finland*, C-471/98 *Commission v Belgium*, C-472/98 *Commission v Luxembourg*, C-475/98 *Commission v Austria* and C-476/98 *Commission v Germany*.

While increasing mobility for European citizens and contributing to the development of the single aviation market, such market developments as have been described in this section have also given rise to allegations of "rule shopping"<sup>50</sup> by air crew unions.<sup>51</sup> Moreover, the latter have raised concerns over a number of developments that are perceived by some stakeholders as leading to a deterioration of working conditions.<sup>52</sup> These include lack of predictability of habitual place of work which implies difficulties in establishing the competent court and applicable law to the labour contract, together with so-called atypical forms of employment (such as bogus self-employment, triangular relationships, pay-to-fly).<sup>53</sup>

Despite the significant increase in the total level of flight activity across the EU, the overall level of employment in the aviation sector has decreased, because of significant productivity improvements. In its more recent report, (Steer Davies Gleave, 2015) concluded that direct employment in the air transport sector at EU 28 level decreased over the 2000-2013 period at a compound average rate of -1.2% p.a. (from 501,000 persons employed to 426,000). The significant increase in the level of competition and productivity improvements in the sector have been linked (by workers' unions) with the increasing use of outsourcing and alternative employment arrangements (such as temporary agency work and self-employed), as an alternative to the traditional open-ended employment contract.

### 3.2. General policy developments

A number of relevant policy developments related to aspects of the aviation market and topics covered in this evaluation have taken place since the adoption of the Air Services Regulation in 2008. These include:

#### Commission Official Documents

- A 2013 Commission [Communication on passenger protection in the event of airline insolvency](#) which lists best practices followed by Member States to reduce the impact on affected passengers.
- The Commission Guidelines for State aid for Airports and Airlines of 2014<sup>54</sup>
- A 2015 Commission [Communication setting out an Aviation Strategy for Europe](#)
- A 2019 Commission Report [Aviation Strategy for Europe: Maintaining and promoting high social standards](#)
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<sup>50</sup> This expression refers here to the practice consisting in "shopping around" between different countries' rules, in order to benefit from differences in the rules and/or their implementation in the Member States and choose the more favourable regime. However, it should be noted in this context that In the EU internal market undertakings benefit from the freedom to establish and to provide services, and that taking advantage of these freedoms is not unlawful in itself.

<sup>51</sup> 2014 - Joint declaration against EU-based flags of convenience in aviation, available at [https://www.etf-europe.org/files/extranet/-75/43220/Joint-Social-Partners-Press-Release\\_Joint-declaration-FoC\\_110714.pdf](https://www.etf-europe.org/files/extranet/-75/43220/Joint-Social-Partners-Press-Release_Joint-declaration-FoC_110714.pdf)

<sup>52</sup> Joint Declaration against EU-based Flags of Convenience in Aviation as endorsed by the Air Crew Working Group of the Sectoral Social Dialogue Committee, 5 June 2014.

<sup>53</sup> More information on these practices can be found in the Ricardo Study on the employment and working conditions of aircrews in the EU internal aviation market, and Commission Report "Maintaining and promoting high social standards".

<sup>54</sup> Their aim is to provide guidelines on how Member States can support airports and airlines in line with EU state aid rules, ensuring good connections between regions and the mobility of European citizens, while minimising distortions of competition in the Single Market.



## EU Legislation

- The “[new EASA Basic Regulation](#)” of 4 July 2018, making some amendments to the Air Services Regulation regarding the operating license and leasing provisions (see Annex 7 for the amendments).
- [Regulation \(EU\) 2019/2](#) of 11 December 2018 amending the Air Services Regulation in relation to wet-leasing.
- [Regulation \(EU\) 2019/452](#) of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.
- Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement for consumer protection laws (hereafter “[CPC Regulation](#)”) which becomes applicable as of 17 January 2020 and provides for cooperation mechanisms between enforcement authorities covering EU consumer protection are applicable for the Air Services Regulation.

## Studies

- The Eurocontrol Challenges of Growth 2013 and 2018 Studies on airport congestion.<sup>55</sup>
- The [European Aviation Environmental Report 2019 issued by Eurocontrol](#), EASA and the European Environment Agency

## Other

- A [Practice Guide](#) has been published by the Commission on jurisdiction and applicable law in international disputes between the employee and the employer. It has been a step towards more clarity for mobile workers including aircrews.
- Court of Justice of the EU (CJEU) case-law<sup>56</sup> further clarifying the concept of "the place where the employee habitually carries out his work" under the so-called [Brussels I Regulation \(recast\)](#) in the context of a dispute involving former aircrews and their employers and the relevance for the purposes of determining that place of the concept of "home base" under safety legislation.

The relevance of these developments for the Air Services Regulation will be discussed in more detail under the effectiveness and coherence sections. The **implementation** of the provisions will be discussed together with the questions on the effectiveness criterion.

## **4. EVALUATION METHODOLOGY**

### **4.1 Short description of methodology**

The evaluation of the Air Services Regulation started in November 2016 with the publication of the roadmap and was overseen by an Inter-Service Steering Group who monitored the progress of the exercise. This evaluation builds on the evidence of the external support study by Ricardo AEA (2018)<sup>57</sup> and relies on series of techniques and methods for the evidence collection and data analysis.

#### **Evidence collection:**

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<sup>55</sup> <https://www.eurocontrol.int/articles/challenges-growth>

<sup>56</sup> Joined Cases C-168/16 and C-169/16 Sandra Nogueira and Others v Crewlink Ltd and Miguel José Moreno Oscar v Ryanair.

<sup>57</sup> Support study for the ex-post evaluation of Regulation 1008/2008 on common rules for the operation of air services in the Community, by Ricardo AEA (2018)

*Desk research:* The methodology used for the gathering of data consisted of collecting information from published sources at EU and Member State level, including Eurostat, national statistical authorities, and relevant associations in the field. The existing evidence provided in published literature played an important role in supporting the evaluation in a number of thematic areas.

*Targeted tailor-made survey* was aimed at six stakeholder categories: national authorities responsible for aviation – licencing authorities; national authorities responsible for price transparency and non-discrimination issues; ministries of employment responsible for employment/social legislation; air carriers; airports; Computer Reservation System/Global Distribution System (CRS/GDS)). The objective was to collect data and views on a number of topics. The survey was open for six weeks. Responses were received from 16 licensing authorities, (including 16 MS, two responses from two different organisations in ES), 14 national authorities responsible for price transparency and non-discrimination issues (including 13 Member States, two responses from two different organisations in IT), 8 ministries of Employment (including 6 MS, two responses from two different organisations in CZ and SE), 22 air carriers, 7 airports, 4 ticket distribution services.

*Targeted structured interviews* were aimed at a) following up the findings of the survey (i.e. national authorities responsible for aviation, individual airlines, individual airports, CRS/GDS company), b) reaching stakeholders not targeted by any of the surveys (i.e. airport association, EU workers organisations, air service providers representatives, ground handling, logistic companies, tour operators, European Consumer Centres) and c) providing input for the case studies.

*Direct information requests* – a secondary source of information used to cover data gaps which were identified in the course of the analysis phase. In particular, the direct information requests aimed at increase the level of input from regional airlines, filling in data gaps in terms of the approval rate of applications for operating licences and following up with respondents to surveys.

*Workshop* organised by the European travel agents' and tour operators' associations (ECTAA) and Amadeus where the industry views on the interactions between the Regulation and the CRS Regulation were discussed.

*Open public consultation (OPC)* carried out from 22/03/2018 until 7/06/2018 with a view to provide an opportunity mainly to passengers, crew members and citizens in general to express their opinions on the main topics. The questionnaire was available in all official languages. In total 106 answers were received (respectively 72, 6 and 28 answers from citizens, aircrew members and associations or organisation)<sup>58</sup>. Answers were received from respondents residing in, or organisations based in 19 EU Member States (AT, BE, HR, CY, DK, EE, FR, DE, HU, IE, IT, NL, PL, PT, ES, SE, and UK) whilst five responses were also received from Switzerland (three), the United States, and Malaysia. The largest number of responses was from Italy, with 57 responses (54%), with a high share from Sardinia and Sicily. The statistical value of these responses is therefore very limited.

*Five targeted case studies* were developed to analyse specific topics in greater depth. They cover the following topics: Ownership and control, Use of PSOs, the application of the

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<sup>58</sup> Provided limited contributions from associations and organisation (28 in total with further more marrow breakdown) their answers were not used for the statistical purposes and were assessed only qualitatively. For the large part of the questions (with exception to the question on the working conditions of the crew members), the replies of citizens and crewmembers were treated together.

principal place of business, Costs for newly established air carriers, and Traffic Distribution Rule (TDR) application.

### **Evidence analysis:**

*Modelling:* Ricardo AEA (2018) used the AERO-MS model to produce forecasts of the expected evolution of air transport demand and supply indicators for the period since the adoption of the [Third Package](#). It reflects how intra EEA air transport would have developed in the absence of the Regulation for the 2008 revision baseline, and in the absence of the [Third Package](#) for the Third Package baseline.

*Analysis of the data provided by Eurocontrol* In order to develop an overview of the actual development of intra EEA air transport the recorded air traffic data provided by Eurocontrol were used. The Eurocontrol data sets including information on the flights for the following years: 2000, 2003, 2006, 2009, 2012, 2015, 2016 and 2017. Data for the period 1992-2000 were not made available by Eurocontrol. The data provided refer to six representative weeks within each of the years identified and cover: airport of departure; airport of arrival; aircraft operator; aircraft type; and air service market segment (traditional scheduled, low-cost carriers, charter, all cargo, business, other). These data were processed by Ricardo AEA (2018) to develop the relevant indicators.

*Analysis of costs:* Ricardo AEA (2018) processed the analysis of costs borne by air carriers, airport and national authorities.<sup>59</sup> The calculations were based on the data received from the relevant stakeholder surveys and cover period of 2008 to 2017.

## **4.2 Limitations and robustness of findings - what are the limitations and consequences for the results**

The *historical developments of the intervention* itself (i.e. adoption of the main provisions within the [Third Package](#) and then consecutive changes following the revision of 2008) brought an important challenge and methodological limitations to the design of the evaluation. As explained above the overall effects of the intervention could not be assessed in comparison to the 2008 revision baseline (2008 – 2017) as the main building blocks of the Regulation were already introduced by the [Third Package](#). It was attempted to address this gap through the introduction of the Third Package baseline (1992 – 2017). Nevertheless, it remains impossible to assess the cumulative effects of the Regulation in relation to the cumulative baseline. This limitation is always clearly spelled out in the assessment of the effectiveness question.

An important limitation of the *data collection* were incomplete time series to be able to track trends over the relevant period, as well as a lack of data on the most relevant indicators. In these cases, it was attempted to fill the gaps through the surveys and data requests, and also using proxy indicators where possible. Where proxy data were not available, a qualitative analysis is performed.

The most concerning general limitations in terms of the evidence collection are low response rates and incomplete answers. In particular for air carriers, no inputs were received to the survey from regional airlines –a shorter survey targeted specifically at these stakeholders was prepared; however, still no responses were received. A representative of the regional airlines was interviewed (ERA), so their views are represented to some extent. There was also a low response rate from ministries of employment responsible for employment/social legislation and labour inspectorates. Particular difficulties were encountered by stakeholders when

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<sup>59</sup> Cost for licencing authorities and authorities responsible for the price transparency were processed separately.

answering questions on certain topics, where a large number of “don’t know” responses were received. These are highlighted in the relevant evaluation questions, but tended to affect topics that were indirect impacts (such as social impacts), or where quantitative data were requested (such as costs). In these cases, it was attempted to fill the gaps through the follow-up interviews and data requests. Where information is still not available, the limitation is highlighted in the text.

As regards the *data analysis and the modelling*, the AERO-MS model uses both GDP growth data and fuel prices as exogenous variables. It is assumed therefore that these are not affected by the changes to the Regulation. According to Ricardo AEA (2018), although there may be a feedback loop in terms of aviation demand impacting GDP, this effect is limited relative to the overall growth in GDP (which is impacted by all sectors of the economy). Hence, any impact on aviation demand due to the EU legislation will only have a limited effect on GDP. In terms of fuel prices, kerosene prices are driven by development in the global oil market that are not affected by the EU aviation legislation.

## **5. ANALYSIS AND ANSWERS TO THE EVALUATION QUESTIONS<sup>60</sup>**

### **5.1 Effectiveness:**

This section will first examine the effectiveness of the Air Services Regulation’s provisions to achieve the intended objectives stemming from the 2008 revision or, where no changes were made in 2008, from the Third Package. In this context various unintended impacts stemming from the Regulation are also described. Lastly, an overall view of the effectiveness of the Air Services Regulation is given based on the foregoing analysis.

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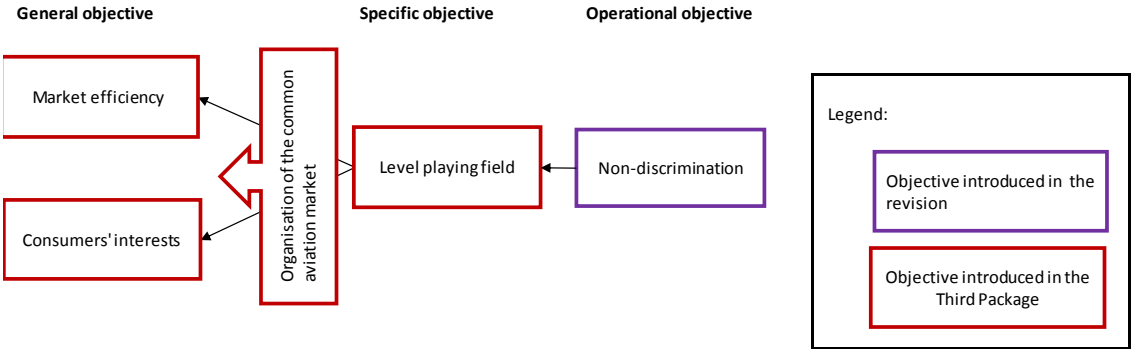
<sup>60</sup> The seven main areas are assessed according to the 5 evaluation criteria but not under all evaluation questions (see Annex 11).

**EQ1. To what extent has the Air Services Regulation been effective and contributed to the achievement of the objectives<sup>61</sup>? Which factors have influenced the achievements observed? Which unexpected or unintended effects have occurred as a result of the intervention and what factors have influenced those achievements? What are their consequences on different stakeholders?**

*The **Third Package** extended the principle of freedom to provide air services to the aviation market and removed market access restrictions for EU air carriers on the EU internal market. The 2006 Impact Assessment identified that certain provisions from bilateral ASAs between Member States regarding pricing and code-sharing led to distortions of competition and discrimination between EU carriers based on nationality.*

*The **revision in 2008** removed remaining restrictions on code-sharing between EU air carriers to non-EU countries. The objectives are to create a level playing field (1992) and ensure non-discrimination for air carriers (2008).*

**Figure 5-1: Intervention logic for Freedom to provide services**



*Source: European Commission*

**2008 revision baseline:** *It was expected that without the revision remaining provisions from old bilateral ASAs between Member States would create hurdles by divergent practices between Member States, especially with regard to code-sharing with third country carriers and price setting on 6th freedom routes. This would continue limiting the air carrier freedom to provide services and therefore economic benefits that citizens could reap from the liberalisation of external relations as the price and the choice of connections with third countries will depend on their place of departure in the European Union.*

a) Freedom to provide intra-EU air services

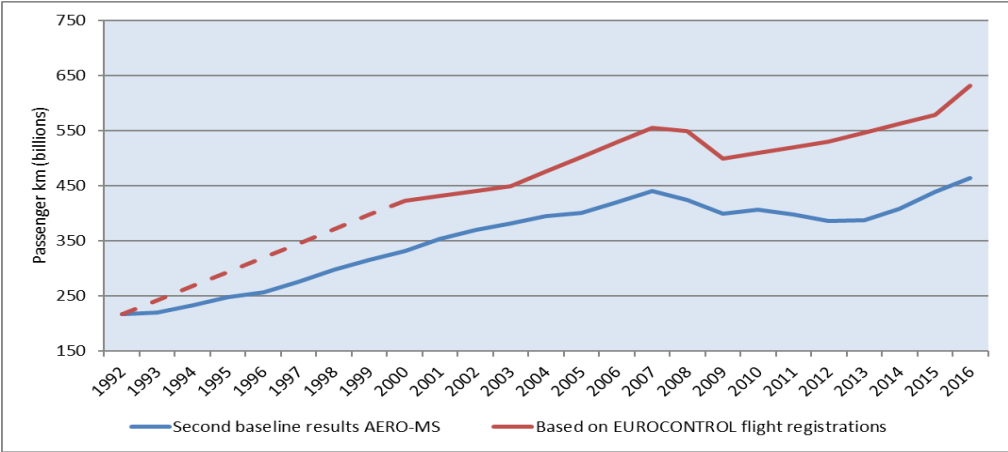
The Air Services Regulation had a significant positive impact on the **level playing field and non-discrimination** for air carriers, which resulted in the intensification of competition and

<sup>61</sup> The main policy objectives in the context of the evaluation are the objectives combining the original objectives of the Third Aviation Package as modified by the revision of 2008.

better quality of the air services in terms of choice of routes and frequencies and range of advertised fares.

The effects in comparison to the 2008 revision baseline might seem less significant than they are in reality, as the revision of 2008 aimed to correct very specific elements to contribute to the effectiveness of the measures already established in 1992. Comparing the Third Package baseline data modelled through the AERO-MS with the actual Eurocontrol data for the period 1992-2016, it is possible to see that traffic exceeded the forecast over the whole period. This suggests a positive impact of the legal framework which enabled growth.

**Figure 5-2: Evolution of passenger km in comparison to the Third Package baseline**



Source: Ricardo AEA elaboration using AERO-MS model and © Eurocontrol (2018)

Eurocontrol data shows that the intra EEA18 air transport market increased at a higher rate than was projected under the baseline. Moreover, the data on the market developments presented in Section 3 and baseline developments in Section 2.2 provide evidence of the overall positive role of the relevant provisions in terms of increasing the number of routes and, in most cases, the level of competition in most domestic and intra-EEA routes. Particularly since 2000, low-cost carriers with point-to-point services have emerged and gained significant market shares while maximising the use of cabotage rights.<sup>62</sup> The analysis of Eurocontrol data shows that the share of intra-EEA point-to-point operations – mainly provided by low-cost carriers – increased from around 12% of passenger-km in 2006, to around 31% in 2017. The number of city pairs served thanks to the opening of new routes has also strongly grown. In combination with the increasing demand resulting from economic growth and declining fuel prices, flag carriers in Europe operating hub-and-spoke networks made use of the new freedom rights and increased their operations.<sup>63</sup>

The practice of establishing multiple operational bases in different Member States allowed for a market structure where air carriers can adapt their operations according to real-time growth, more quickly than before shift capacity on the market and provide sufficient choice of services to the consumer at better prices. The analysis of the Eurocontrol data has indicated relatively small changes to the level of competition compared to the baseline along specific routes (the share of airport-pairs with three or more carriers servicing a specific route remained stable at 20%) although the actual number of routes served by more than one carrier has increased significantly (see section 3.1).

<sup>62</sup> ITF (2015) In fact, the removal of restrictions on cabotage has represented an important factor in the emergence and growth of low-cost carriers since cabotage fits their point-to-point model better (ITF (2015)).

<sup>63</sup> ITF (2015).

Stakeholders replying to the consultation confirmed the findings above. Among authorities that contributed, 13 (MT, IE, CZ, DE, DK, EE, FI, FR, SE, PL, PT, UK) consider that the freedom to provide air services had a positive or very positive impact in terms of the level of competition in the domestic market as well as the EEA market. Only two authorities (AT, BE) consider that it had a negative impact. The Austrian authorities pointed to the fact that recent consolidation (takeover of Austrian by Lufthansa) in the market has resulted in some domestic routes and connections with Eastern Europe countries being unserved. The Belgian authorities did not further explain their answer. Among air carriers that contributed to the study, all carriers involved in passenger air services consider that the provisions on freedom to provide air services had a positive impact on competition both at the domestic and intra-EEA level.<sup>64</sup> Reflecting on the impacts of the liberalisation on the EU aviation market, one representative of a low cost carrier said “the liberalisation was part of the growth and the basis on which we grew as an air carrier and low cost [travel] grew within Europe”.<sup>65</sup>

The case-law of the Court of Justice of the European Union has highlighted the role of the Regulation in ensuring the freedom of providing services, and has helped ensuring a more consistent enforcement of the rules. It can be argued that these rulings helped to clarify what practices could be considered as introducing possible discrimination, and helped remove any remaining restrictions on the provisions of air services.<sup>66</sup>

It should be noted that during the consultation, one low-cost carrier has expressed the view that in some Member States (DE, PL, CY, and EL) the conditions imposed to demonstrate an establishment are too burdensome. Consequently the air carrier cannot benefit from bilateral ASAs between those Member States and third countries. However, according to CJEU case-law, in particular the Open Skies judgments based on the Third Package, an EU carrier established in a Member State other than the one of its principal establishment is entitled to non-discriminatory market access under ASAs between the Member State of (secondary) establishment and third countries. Therefore, the requirements that Member States impose on airlines seeking establishment need to avoid any overt or covert discrimination on grounds of nationality, and those requirements must remain proportionate. The issue was not mentioned by any other air carrier.

When it comes to *removing the restrictions* (notably on code sharing to non-EU countries) *that remained in old bilateral ASAs* between Member States, the effects of the 2008 revision on level playing field and non-discrimination have been positive. The quasi-totality of air carriers participating in the survey for this evaluation (20 out of 21) are not aware of any intra-EEA service that they would not be entitled to operate<sup>67</sup>. Moreover, as further explained

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<sup>64</sup> Six indicated some positive impact and 10 significant positive impact for both aspects. The only carrier that indicated no impact was a cargo carrier. This is expected since cargo air services were not affected by the Third Aviation Package. They had already been liberalised as part of the Air Cargo Regulation 294/91 (Cranfield University, 1997).

<sup>65</sup> Butcher, 2018 citing UK Country Director at EasyJet

<sup>66</sup> C-70/99, Commission v. Portugal, C-92/01 *Stylianakis* holding that authorities may not impose requirements amounting to discrimination in the provision of services on the basis of nationality (e.g. higher taxation of intra-EU air services than domestic air services). C-628/11, *International Jet Management GmbH*, which concerned non-discrimination between EU air carriers on routes to/from third countries. With reference to Article 18 of the TFEU on non-discrimination, the Court held that the requirement imposed by the German authorities asking for notification and approval to enter the German air space for a carrier holding a licence issued by another Member State (Austria) was contrary to the provisions of the Treaty.

<sup>67</sup> The only restriction reported concerned restrictions arising from slot allocation restrictions and traffic distribution constraints in the case of the Milan airport. However, as will be explained in the coherence section TDRs are an express derogation from the freedom to provide services. Therefore, it is obvious that it

in Annex 4, almost all Member States that replied to the survey removed restrictions on code-sharing (13 of 16 authorities). Only three Member States (PL, FR, AT) maintain them in the context of bilateral ASAs with third-countries where the third country in question does not reciprocate the EU's approach and imposes restrictions. However, these Member States indicated limited capacity to effectively monitor or enforce code-sharing restrictions suggesting that in practice the effect of the restrictions is low.

Consequently, 10 out of 12 air carriers that responded to the survey, have not experienced restrictions to the provision of any code-sharing services with third countries or restrictions on marketing of code-shares (11 out of 13). Compared to the 2008 Revision baseline, air carriers enjoy an enhanced equal treatment when providing air services operations in the EEA. It can be concluded that the provisions of the Regulation have been effective in contributing to preserving the overall integrity of the internal market and ensuring an equal opportunity for EU air carriers to provide intra-EU air services

**In summary:**

- The freedom to provide services has allowed EU carriers to conduct their operations between any points in the EU. This has brought benefits to the market and consumers, via an intensification of the competition leading to more choices and cheaper prices, and better quality of the air services.
- The provisions were effective in contributing to create a level playing field for EU carriers, ensuring non-discrimination and removing any restrictions on code sharing stemming from old bilateral ASAs between Member States.

b) Operating license and principal place of business

*The **Third Package** established common rules on operating licenses for all EU air carriers in order to ensure a level playing field and equal treatment. The provisions required, among other things, financial monitoring of air carriers, recognising that financial fitness is linked to safety and stable operations of air carriers.*

*The **2006 Impact Assessment** identified substantial differences across Member States in the implementation of the provisions. As a result the level playing field was not always ensured. Further, the continued operation of financially unsound airlines might create safety risks, and expose consumers more than necessary to the financial risk of being left with worthless tickets in case of an airline's bankruptcy.*

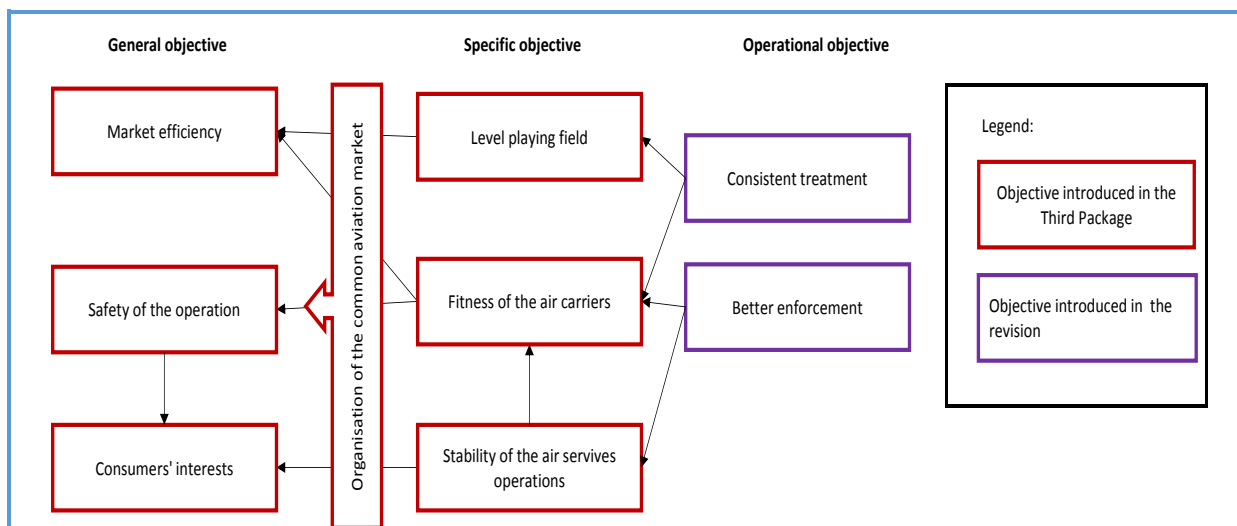
*The **revision in 2008** carried over these objectives of the Third Package and strengthened the financial fitness requirements as well as the clarity of the provisions. This aimed to achieve a more homogeneous enforcement across Member States and reduce the risk of newly established air carriers going quickly bankrupt, which would leave passengers stranded. The revision also introduced a definition for the principal place of business.*

**Figure 5-3: Intervention logic for the Operating licence**

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would restrict carrier's freedom to provide services. Moreover, the TDR was accepted by Commission decision.





Source: European Commission

**2008 revision baseline:** without a more stringent and homogeneous application of procedures for granting and revoking operating licences, a high failure rate among newly established carriers was expected to continue with increasing risks to leave their passengers stranded. The precarious financial situation of these air carriers would also mean that employment in the airline sector would remain unstable, and therefore less attractive. Persistent inconsistencies in applying the rules would have worsened competitive distortions.

The Air Services Regulation appears to have been partially effective in achieving the objective of **ensuring the financial soundness** of air carriers and **stability of services** in comparison to the 2008 revision baseline. Air carriers and authorities are sceptical of the role that financial and operational supervision can play in avoiding bankruptcies.<sup>68</sup> However, it is clear that the provisions had a positive effect, at least on newly established carriers. Compared to the situation before the adoption of the Regulation, national authorities have now a greater role to play in the case of newly created carriers by ensuring that only companies with viable business plans obtain and maintain operating licences.<sup>69</sup> Evidence shows that the **bankruptcy rate of air carriers** in their first four years of operations has gone down (particularly within their first year of operation). There has been a decrease of 70% for air carriers going bankrupt in their first year and a 41% decrease of air carriers going bankrupt within their first four years compared to the situation before the 2008 revision, despite the economic downturn that characterised this period.<sup>70</sup> Factors external to the regulation play an important role in air carriers' financial health, such as external shocks like the economic crisis or fuel price variations.<sup>71</sup> However, stricter monitoring has contributed to the financial stability of

<sup>68</sup> Ten out of 19 indicated no or a very limited role of the operational supervision and 11 out of 19 in relation to financial supervision. Similarly, authorities interviewed (UK, IE) did not see the role of the financial monitoring to avoid bankruptcies.

<sup>69</sup> Ricardo AEA (2018)

<sup>70</sup> Between 2000 and 2008, 41 air carriers that ceased operations were up to one year old, and 51 up to four years old. In comparison, between 2009 and 2017, 12 air carriers that ceased operations were up to one year old and 30 were up to four years old.

<sup>71</sup> Wald et al, 2017 and SDG, 2011

particularly newly established air carriers.<sup>72</sup> The application of air carriers for an operating license that would have previously been allowed to establish without sufficient financial capacity, are no longer allowed, reducing the risk that these carriers would go quickly bankrupt resulting in uncertainty for passengers and workers. A reduced risk, however, does not mean that the Regulation can prevent bankruptcies in all cases nor does it mean that this was its ultimate objective.

For bankruptcies of air carriers older than 4 years the link between financial monitoring and eventual bankruptcies is weak. Although a decrease in the bankruptcy rate can be generally detected for air carriers older than 4 years, (a relatively moderate decrease of 26% compared to the pre-revision situation), there are indications<sup>73</sup> that this decrease is more likely linked to the external factors described above, while the authorities' ability to prevent an air carrier's eventual bankruptcy is limited. The existing evidence shows that even if the operating licence provisions were also meant to allow authorities to address an air carrier's bankruptcy, the authorities have only a limited role to impact the financial conditions of an operating air carrier. In these cases, the provisions serve a better purpose in keeping licencing authorities aware of air carriers' situation and providing them opportunity to take measures to soften the impact of bankruptcies on consumers. For example, the UK increases monitoring and dialogue with the air carrier in these circumstances, which may enable the carrier to restructure financially or time the bankruptcy to take place in the off-peak season. In 2013 the Commission issued a Communication on airline insolvencies<sup>74</sup> describing the effects of air carrier insolvencies on passengers. It concluded that passengers holding only tickets (as opposed to those that purchased a package travel, which are covered under the Package Travel Directive) were not well protected in case of an airline insolvency. Some measures identified that could mitigate the impact included more frequent monitoring by licensing authorities of air carriers and a collaborative approach among Member States and the industry (air carriers and airports) to make contingency preparations. The Commission undertook to assess whether a legislative initiative is needed to guarantee the protection of passengers in the case of airline insolvency. A report should have been issued within a two-year period by the Commission. Nevertheless it did not happen as there were no major cases to be reported in the 2013 – 2015 period. Recent bankruptcies of Monarch, Air Berlin (including NIKI and LGW), and WOW (between 2017 and 2019) indeed show that increased monitoring and dialogue could be used more effectively, by increasing contacts and cooperation with the air carrier when financial ratios decrease below a certain threshold. In these cases the Commission was also in touch with IATA and competent authorities to see whether rescue fares have been activated and passengers were treated fairly, among other things. A study is being carried out on the current level of protection of air passenger rights in the EU, which is expected to be finalised by autumn 2019.

**Temporary operating licences** have been effective as an instrument to allow air carriers in financial difficulties to keep operating while undergoing financial restructuring, since under the Regulation the operating license would have otherwise been revoked and the carrier would have to cease operations immediately. Further the temporary license allows air carriers to be

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<sup>72</sup> For example, when asked to indicate the main reasons for rejecting operating licence applications, three Member States (DE, HU, IT) indicated the inability to prove financial health as a common or very common reason.

<sup>73</sup> Literature review (SDG (2011)) and analysis of market changes by Ricardo AEA (2018)

<sup>74</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Passenger Protection in the Event of an Airline Insolvency, COM/2013/0129 final

exempt from certain obligations on slot usage requirements of the Slot Regulation, which is important to preserve the carrier's value and network.<sup>75</sup> However, the Commission noted the reluctance of national authorities dealing with recent bankruptcy cases (Air Berlin (including NIKI and LGW), Monarch) in granting temporary licenses. Four Member States replying to the consultation (DE, UK, AT and IE) have found that granting temporary licences exacerbates the financial situation of air carriers because the market is officially alerted to their difficulties.<sup>76</sup> In their opinion more frequent monitoring and dialogue with the air carrier (as the UK tends to engage in) is more productive. Although the temporary license gives the licensing authority and the air carrier some leeway in choosing the moment to fully stop operations and thus soften the impact on stranded passengers, this should be balanced against the arguments provided by the authorities, which have recently dealt with bankruptcies: they consider that under its present form it further negatively impacts the air carrier's financial condition. Whether the adequate balance could be achieved with a different kind of intervention may need to be explored.

Further, the impact on the carriers' financial conditions comes at a critical moment where the carrier may be trying to secure financing or protect the value of its operations for sale or take-over. Against this background, the link with the Slot Regulation is crucial. The coherence between the Air Services Regulation and Slot Regulation will be explored under EQ 8. Given the impacts on stranded passengers, workers, and competitors in trying to gain access to valuable airport infrastructure, licensing authorities and slot allocators are under high pressure and scrutiny. The lack of clear provisions and a clear procedure may also lead to competitive distortions.

During recent cases, in which air carriers were in financial difficulties the Commission liaised with the national licensing authorities and clarified the need to grant a temporary license and the link with the Slot Regulation. This could mean that a wider clarification effort of the provisions could address the problem. However, the Commission through discussion with the authorities also noted that the objectives pursued by the instruments could be achieved in a different way (e.g. a more structured dialogue meaning increased monitoring but also increased communication and planning activities between air carriers and authorities).

The Air Services Regulation has been partially effective in contributing **to a level playing field** compared to the 2008 revision baseline. While reducing uncertainty around the procedures and requirements for obtaining an operating licence and reducing discriminatory practices, part of the inconsistencies still remain.<sup>77</sup> For example, Member States have adopted various approaches to monitoring and various types of preventive measures in case air carriers develop financial difficulties (e.g. regular monitoring of financial capacity, contingency plans, organised winding-down of airline activities but also different national insolvency proceedings). Thus, the rules leave some room for certain inconsistent application by the national authorities. Air carriers also report differences among authorities as regards the monitoring requirements as further described in Annex 4.<sup>78</sup> Available evidence does not

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<sup>75</sup> Under article 8 of the Slot Regulation air carriers are required to use 80% of a series of slots allocated to them. Under article 10(4)(c) of the same Regulation, air carriers that have been granted a temporary license must not fulfil this obligation.

<sup>76</sup> 11 out of 15 Member States did not have a problem with temporary license provisions. However, the four that did, are singled out since they include the authorities that most recently dealt with large scale bankruptcies.

<sup>77</sup> See Ricardo AEA (2018), section 2.3.1.

<sup>78</sup> 9 out of 18 considered that problems exist, mainly due to Member States following different approaches of the assessment and monitoring.

suggest that this leads to severe competitive distortions, however it does lead to regulatory burden for EU air carriers with multiple subsidiaries (and therefore multiple AOCs and operating licenses) across Member States that could be reduced.<sup>79</sup> This will be also discussed in the context of leasing.

According to the Air Services Regulation, the Member State in which an EU air carrier has its principle place of business is responsible for the monitoring of the operating licence. The same Member State would usually also issue the AOC and perform the safety oversight.<sup>80</sup> The introduction of the definition of **principal place of business (PPoB)** in 2008 has brought more clarity to determine the Member State where an air carrier may apply for an operating licence and thus which competent authorities are responsible for monitoring it.<sup>81</sup>

However, Section 3.1 described market developments regarding the multiplication of operational bases outside the PPoB, multiple AOCs' and operating licences' holders, and generally outsourcing activities to cut costs. In light of the resulting dispersion of activities, some authorities have expressed concerns regarding the contribution of the PPoB definition to the effective and consistent enforcement in light of this.<sup>82</sup> For example, the present definition gives rise to the question how to determine the principal place of business of an airline that, while being registered in Member State A, belongs to a parent company registered in Member State B or in a third country, which handles the financial issues of the former.<sup>83</sup> In addition, financial monitoring may be more difficult where an air carrier has its license in Member State A but carries out most of its operations in Member State B or C.<sup>84</sup> In the case of safety oversight, the Impact Assessment for the new EASA Basic Regulation has shown that authorities may be subject to resource limitations and difficulties when they need to supervise operators in remote locations.<sup>85</sup>

The assessment of the problem shows that due to the multiplication of operational bases national aviation authorities face challenges to perform the safety oversight of operations of an air carrier, which mainly operates in another Member State. The [new EASA Basic Regulation](#) has therefore introduced, among other things, the possibility of having the safety certification, oversight and enforcement carried out by EASA or a Member State other than the one where the air carrier's principle place of business is located. This benefits air carrier groups because it reduces the differences in procedures the group has to deal with.

### **Unintended indirect impacts on employment and working conditions**

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<sup>79</sup> One cargo carrier claims that Member States may have different interpretations of the same rules by the authorities (e.g. when interchanging aircraft and crew between carriers of the same group that have aligned operations manuals).

<sup>80</sup> This was an obligation but the requirement has been modified in the new EASA Basic regulation that entered into force in 2018

<sup>81</sup> Ricardo AEA (2018) It is confirmed by 13 authorities out of 16 (AT, BE, CZ, DE, FR, IT, SE, IE, ES, EL, FI, PT, UK) as well as 11 out of 19 air carriers.

<sup>82</sup> (AT, EE, EL, PT, ES, and PL)

<sup>83</sup> Richard Venables, "Implications of the new EU Airline Licensing Regulation: how much has changed?", 16 March 2009. See also case-study conducted by Ricardo AEA (2018) on Principal place of business.

<sup>84</sup> Ryanair which, despite having an Irish license and being registered in Ireland, has significantly more operational bases in other Member States, such as Italy, Spain, the UK or Germany.

<sup>85</sup> In one case the outsourcing of activities and lack of cooperation between authorities led to a severe accident. The Cork accident, Manx2 Flight 7100, where six people died. The UK accident investigation body found that the virtual airline had no control over the operations and this made monitoring and supervising both financial and operating aspects particularly challenging.

Some stakeholders, typically traditional air carriers but also trade unions and five authorities (BE, DE, DK, EE, FR), argue that the choice of PPOB and operational bases might be dependent also on the differences in legal regimes applicable within the EEA, including in the areas of tax and employment. Some Member States receive more operating licence applications than others, for example Malta and Ireland. In cases where the PPOB has been set up in a territory where the airline performs none or a few flight operations, this gave rise to allegations of **rule shopping**<sup>86</sup>. There are indications that some level of rule shopping to avoid higher labour costs might take place<sup>87</sup>, even if there are different views as to the extent to which this would be problematic. When asked to indicate how common this practice is, six out of the 12 Member States respondents<sup>88</sup> indicated that it is relatively common with the remaining indicating that they do not know.<sup>89</sup> Among the 16 air carriers that responded to the question, 12 indicated it is common.<sup>90</sup> Three examples of such cases were mentioned: Norwegian Air Shuttle, Primera Air in Latvia and AVIES in Sweden<sup>91</sup>. It should be noted that “rule shopping” is in principle covered by the freedom of establishment. The Court has variously confirmed that the quest for favourable conditions is in principle protected by that freedom and cannot as such be considered abusive.<sup>92</sup> At the same time this does not exclude harmonisation of conditions under one or the other applicable legal basis, subject to the conditions set out therein, notably to improve the functioning of the internal market.

Besides the allegation that some air carriers chose their PPOB to unduly benefit from more flexible labour law rules, the **use of multiple operational bases outside the PPOB** among air carriers, as observed in the market since its liberalisation through the Aviation Packages and the Air Services Regulation as its “successor”, raises questions as to which labour law is in fact applicable. At the EU level, the harmonised rules on the law applicable to individual employment contracts are provided by the Rome I Regulation, which, as indicated earlier, provides for a limited autonomy of the parties to choose the law applicable to their employment contract, with the aim to protect the employee, as a weaker party.

According to the social fact-finding study, a large majority of survey respondents indicated that the law applicable to their contracts is the law of the country where they are based (88%

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<sup>86</sup> SSDC, Joint declaration against EU-based flags of convenience in aviation (2014)

<sup>87</sup> Input from the field research performed by Ricardo AEA (2018) on the prevalence of the phenomenon

<sup>88</sup> (BE, CZ, DE, EE, FR, MT)

<sup>89</sup> Five out of the 13 national authorities indicated they are aware of air carriers that have selected to obtain their OL in a specific Member State in order to benefit from a more favourable regulatory regime concerning employment and working conditions (BE, DE, DK, EE, FR) with one referring to a specific example (Norwegian). Four others (CZ, FI, MT, IE) indicated that they are not aware of such a practice and four more that they do not know (IT, PL, PT, ES).

<sup>90</sup> Four indicated that it is extremely common, six more that it is very common and two that it is relatively common while four had a different view, suggesting that it is very uncommon.

<sup>91</sup> According to some stakeholders Norwegian Air Shuttle allegedly chose Ireland for obtaining an AOC for its subsidiary Norwegian Air International (NAI) to operate its long-haul flights to avoid the more stringent Norwegian labour and social security laws as well as Norwegian immigration laws. Other examples provided were those of Primera Air in Latvia or AVIES in Sweden (ECA, 2015). According to ECA, Primera Air was a Danish air carrier that moved its AOC (and the OL) to Latvia under a new subsidiary “Primera Air Nordic”, which manages remotely its operations, only very few of which will ever touch Latvian territory. Similarly, AVIES has most of its operations in Sweden while having an Estonian AOC. According to ECA the objectives of benefiting from more relaxed social legislation were explicitly stated by the Chief Executive of Primera according to which “the carrier needs to have an AOC outside the Nordic countries to have “more flexibility” especially in regard to labour regulations and unionisation”.

<sup>92</sup> Cf. Centros, C- 212/97, paragraph 27.

of cabin crew and 82% of pilots), meaning that air carriers, in general, do apply local labour law to employment contracts, with some slight deviations within the business models. It is common that some specific air carriers which have developed a low-cost business model with multiple operational bases outside their PPOB are more likely to apply the labour law corresponding to the country where they have their PPOB, regardless of where their workers are home based<sup>93</sup>. 96% of the pilots surveyed who declared working for a traditional scheduled airline considered the country's labour law applicable to them to be the same as that of their home base, while 62,5% of those working for low-cost carriers indicated that this was the case.<sup>94</sup> In the case of air carriers with no operational base outside their PPOB – as is the case for most traditional carriers – there is no issue linked to the determination of the applicable labour law and the competent court in case of disputes over individual employment contract, since the PPOB and the home base are located in the same Member State, and, pursuant to the CJEU ruling in joined cases C-168/16 and C-169/16, ‘home base’ constitutes a significant indicium for the purposes of determining the ‘place where the employee habitually carries out his work’ under the Brussels I Regulation (recast) (see below).<sup>95</sup>

The multiplication of operational bases in different Member States increases the level of complexity and may create confusion as to the applicable legal framework for aircrew in the particular case where the law applicable to their contract is different from their home base. Under EU law, private parties to an individual employment contract can in principle chose which law is applicable and which is the competent jurisdiction in case of a dispute between the parties. However, the Brussels I (recast) and Rome I Regulations contain special provisions with regard to individual employment contracts which aim to protect the employee as the weaker party to the contract. A choice of applicable law should not deprive the employee from the protection of the mandatory rules of the law of the country that would apply in the absence of such choice. As a main rule, the competent jurisdiction and the applicable law are determined by the place where or from which the employees habitually carry out their work (the habitual place of work)<sup>96</sup>. A choice of competent court by the parties to the employment contract under the Brussels I Regulation (recast) is effective only if such a choice of court agreement has been made after the dispute has arisen or, if concluded beforehand, it does not limit possibility for the employee to sue the employer at the courts available under the Regulation.

As regards social security, Regulation (EU) No 465/2012 amending Regulation (EC) No 883/2004 on the coordination of social security systems established the “home base rule” whereby aircrew are covered and pay social security contributions to the Member State of their home base<sup>97</sup>, that is, the place where the individual usually starts and finishes work.

### **Member States seem to have different approaches when it comes to enforcing their labour legislation on aircrew who are based in their country but are working for an air**

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<sup>93</sup> According to the findings of Ricardo AEA (2018) in the Social fact finding study. Ricardo however indicates that further evidence including an analysis of contracts from a wider range of low-cost carriers would be needed to verify this finding.

<sup>94</sup> These statements should be treated with caution since a lot of interviewees indicated difficulty to determine which labour, tax and social security laws apply to them.

<sup>95</sup> The majority of traditional scheduled air carriers which were surveyed have one or two operational bases within the EEA (14 out of 18), while the two main low-cost carriers surveyed have many more operational bases (up to 87 in the case of Ryanair).

<sup>96</sup> If the action is brought by the employer against the employee, the competent court is the court of the employee’s domicile (Art. 22 of the Brussels I Regulation recast).

<sup>97</sup> As defined in in Annex III to Regulation (EEC) No 3922/91

**carrier with a PPOB in another Member State**<sup>98</sup>. For example, six national labour inspectorates out of the 13 surveyed said they apply their labour legislation (ES, IT, CZ, HU, EE<sup>99</sup> and DK<sup>100</sup>), while four (AT, LU, NL, DK) said they did not. This is also confirmed by the interviews of trade unions (EuRECCA, ECA, ETF). In this context, **some Member States, trade unions and legacy air carriers**<sup>101</sup> **are of the opinion that it is difficult for Member States to enforce the proper application the relevant labour and social legislation.** Indeed, the new business models and multi-jurisdiction activities pose challenges for authorities to identify and to enforce the appropriate legislation in the appropriate location.

A recent CJEU ruling on court jurisdiction<sup>102</sup> brings further clarity on how to determine a court's jurisdiction in disputes relating to individual employment contracts. In this ruling the Court clarified the concept of "place where the employee habitually carries out his work" ("habitual place of work"), which is used in the Brussels I Regulation (recast) but also in the Rome I Regulation<sup>103</sup>. According to the Court the "home base" of aircrews (within the meaning of EU air safety rules<sup>104</sup>) is a *significant indicator* among the relevant indicia when it comes to determining the "habitual place of work". This CJEU ruling complements a number of other rulings by the Court on the concept of the "habitual place of work". It should be noted that from their side, three low-cost carriers that contributed to the Ricardo AEA study – as well as the UK and Irish authorities - do not consider that the use of multiple operational bases should be linked with the employment conditions of the staff. They indicate that there is no connection between the use of the operational bases and compliance with the applicable employment and broader social legislation.

On the one hand, it should be noted that whereas rules on air transport services have been largely harmonised to guarantee equal access to the market for air carriers and allow businesses to choose where they wish to carry out their activities within the EU internal market, many aspects of social law are not harmonised at Union level. Moreover, the existing *acquis* is primarily composed of directives setting up minimum standards, which leave to Member State a margin of discretion on how to regulate the employment and working conditions which apply under their jurisdiction and on how to ensure that the rules concerned are properly enforced. It should thus be noted that the social impacts described above may not be directly attributed to the Air Services Regulation as such (which aims to organise the internal aviation market), but are a general feature of the EU internal market in which tax and labour laws are not fully harmonised. They may result from the fact that a number of rules, which may impact competition in the market, are enacted at national level and may therefore diverge from one Member State to another. Recital 9 of the Regulation implies that there is a link between the multiplication of operational bases outside the PPOB and social conditions. In this case, Recital 9 clearly provides that it is for the Member States to ensure the proper

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<sup>98</sup> According to the findings of the Social fact finding study by Ricardo AEA (2018).

<sup>99</sup> The law of the home country is applied only if the contract is concluded under the national law.

<sup>100</sup> In DK the national legislation cannot be enforced outside the territory of the country. However Danish representatives point that the trade unions can enforce the Danish collective agreements on crew with Danish home base and principle place of business in another country.

<sup>101</sup> Nine Member States (CZ, DE, FR, MT, DK, EE, PT, BE, FR), six legacy air carriers, air carriers representatives (ERA) and all 7 trade unions that contributed to the Social study by Ricardo AEA (2018).

<sup>102</sup> Cases C-168/16 and C/169/16

<sup>103</sup> Habitual place of work is the main determinant for identifying the applicable law and competent jurisdiction for the disputes relating to individual employment contracts by Rome I and Brussels I (recast) Regulations. Under the latter Regulation, the employee can also sue the employer at the courts of the latter's domicile.

<sup>104</sup> Within the meaning of Annex III to Council Regulation No 3922/91.

application of EU and national law. This, together with evidence pointing to possible competition distortions, warrants an assessment of whether the Regulation should take up an objective related to this topic, as explored further in EQ 6.

On the other hand, practices when it comes to applying and/or enforcing the applicable law are clearly divergent despite the harmonised regime on the law applicable to individual employment contract put in place by the Rome I Regulation, which means that different rules may apply to air carriers even where they operate and compete in the same Member State and market. The effects can be particularly felt in the aviation market where the main nature of the services provided are across borders, and aircrew are highly mobile. Inadequate enforcement of EU and national rules may add to competition distortions already resulting from divergent tax and labour legislation.

These issues have also been highlighted in the Commission Report on maintaining and promoting high social standards in aviation.<sup>105</sup>

**In summary:**

- The objectives of the provisions on operating licence have been partially achieved. The Air Services Regulation has likely had a larger impact on ensuring newly established carriers are financially sound, and less impact on the bankruptcy rate of carriers in general.
- Recent market exits in the case of Monarch, Air Berlin (including NIKI and LGW) and WOW have shown a need to reflect on a better approach to the wind up of carriers including the temporary license and the interplay with the Slot Regulation.
- The PPOB notion is increasingly reaching its limits to cover all the different types of business models in the market when it comes to overseeing air carriers with multiple operational bases, AOCs and/or different control of financial and operational centres.
- Multiple operational bases outside the PPOB add a level of complexity to identify the applicable labour law and competent jurisdiction for mobile aircrew in some specific cases, though the rules are harmonised at the EU level and have been clarified in the CJEU rulings in terms of applicable criteria.

c) Leasing

*The **Third Package** in 1992 allowed the possibility to EU air carriers to dry and wet-lease EU as well as non-EU aircraft, since leasing is an important practice for carriers to be able to address short-term capacity problems by either leasing out aircraft that they cannot use in low seasons or leasing in aircraft when facing high demand. It introduced common rules and required prior approval by the competent licensing authorities of leasing agreements to ensure that the aircraft complied with EU safety standards. In addition, wet-leasing of non-EU aircraft was limited to short term or exceptional circumstances to reduce the risk safety concerns. The 2006 Impact Assessment identified that inconsistent application of the rules led to safety concerns. The Commission also recognised the possible impact on aircrew from the inconsistent application of the rules regarding wet-leasing from third country operators.*

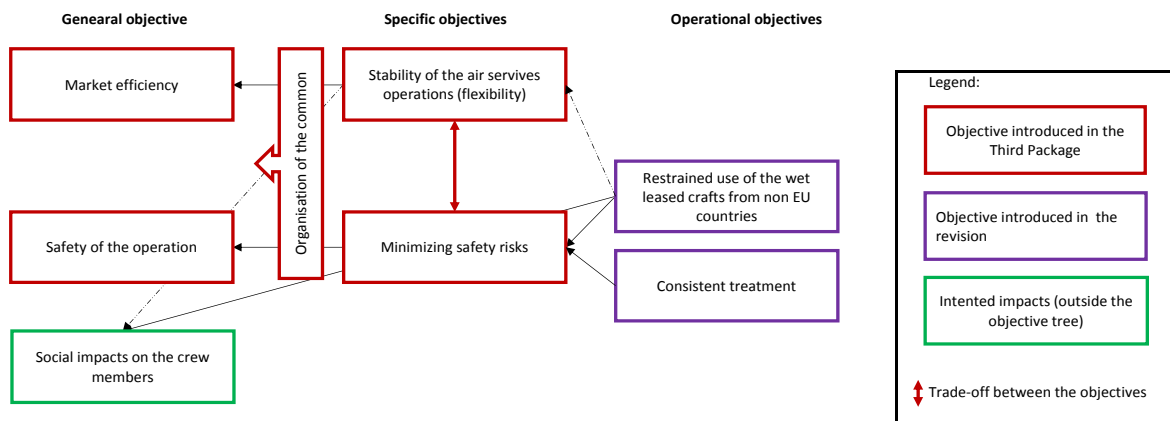
*The **revision of 2008** carried over objectives of the Third Package. To strengthen them the*

<sup>105</sup> Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Aviation Strategy for Europe: Maintaining and promoting high social standards, COM(2019) 120 final



rules were further clarified and simplified to ensure homogeneous application across Member States and the restrictions on wet-leasing of non-EU aircraft were further specified.

Figure 5-4: Intervention logic for the Leasing provisions



Source: European Commission

**2008 revision baseline:** It could be expected that use of wet-leasing agreements of third country aircraft would have increased, while the safety supervision in these instances would not be fully assured leading to higher risks to the safety and negatively affect consumer interests. Opportunities to avoid the social security and labour costs through widespread wet-leasing of third-country registered aircraft would have furthermore created competitive distortions in the internal market and undermined working conditions of aircrew.

Overall, the Regulation has been effective in **allowing flexibility to air carriers** to widely make use of this commercial and organisational practice. Leasing accounted for less than 15% of the global aircraft fleet in 1990. It grew considerably compared to the Third Package baseline 1992 -2017 and achieved 53% of the total fleet in Europe in 2005. This high share remained stable in recent years after the 2008 revision compared to the 2008 Revision baseline 2008-2017. The current level of leasing for the EU is estimated at 52% by ICF (2017) and has not been largely affected by the measures introduced which could have had a negative effect on the overall level of leasing in the EU. Leasing has made air carriers less capital intensive and better capable of responding to market fluctuations, whether up or down, thus reducing risk.<sup>106</sup>

While dry or wet-leasing is an important tool for air carriers allowing the stability of their operations, the introduced restrictions aimed at **enhancing safety and minimizing the risk of adverse social consequences** by ensuring consistent application of the stricter requirements across Member States and limiting possible excessive recourse to wet-leasing from third countries.

The requirement for prior approval was likely effective in contributing to enhancing safety. Given the absence of statistics about accidents with leased aircraft, it is difficult to quantify the effects of the leasing restrictions as to the reduction of safety risks. Moreover, the restrictions imposed are part of the overall EU air safety framework, which as discussed under EQ2 results in overall high safety standards in general. Importantly, at the moment the leasing restrictions were imposed in 2008, these safety standards were already high comparing to other world regions. No quantitative or qualitative evidence exists as to the extent to which

<sup>106</sup> EBOC Aviation, (2016)

restricting leasing could improve safety, nor is this topic discussed in the literature beyond recognising that safety risks are of the utmost concern and need to be carefully considered in the case of any leasing agreements.<sup>107</sup> For this reason the EU safety rules, in particular the [new EASA Basic Regulation](#), effectively deals with safety risks of third country aircraft, potentially making the restrictions in the Regulation redundant from a safety perspective. This is also addressed under EQ5.

Regarding the *consistent application of the stricter requirements* across Member States, the provisions have not been fully effective, however stakeholder opinions vary.

The dry or wet-leasing requirements have been implemented according to the provisions in the Regulation without additional conditions in most Member States<sup>108</sup>. Moreover, there is no apparent correlation between Member States' adoption of additional requirements and differences in approval rates of lease agreements, as reported by the air carriers. According to Member States, the leasing provisions have contributed to consistent application. Nine out of 14 authorities agreed that application of the leasing rules has contributed to a level playing field in the provision of air services<sup>109</sup> and between 9 and 14 respondents out of 14 indicated no problems in applying the rules regarding different aspects of the rules.

Five authorities (CZ, DE, MT, IE, Spanish Aviation Safety and Security Agency) identified problems with the need to demonstrate that aircraft registered in the EU (EEA<sup>110</sup>) cannot be reasonably leased. This condition is required when wet-leasing is used to cover seasonal needs or to overcome operational difficulties and the comments from Member States indicated that the demonstration test of such a need was not clear (CZ, MT), and providing evidence in last-minute situations was difficult (IE). One Member State (DE) reported an issue with assessing exceptional needs, which arises in specific cases that could last longer than the current maximum of 14 months.

Although airlines reported that rejections of leasing requests is rather low<sup>111</sup>, the air carriers did indicate that differences across Member States in the application of the rules exists: 11 air carriers out of 17 surveyed agreed or strongly agreed with this statement.<sup>112</sup> Two air carriers from the same group (as well as a cargo carrier in a group) elaborated their answer by pointing to problems due to improper enforcement and varying standards among Member States. Indeed, air carrier groups deal with authorities of different Member States and are therefore in a position to compare first-hand whether the application and enforcement of the rules across Member States is consistent. Regarding wet-leasing in particular two cargo companies and the European Regions Airline Association (ERA), highlighted the need to better define "exceptional needs" to provide further clarity to carriers. One cargo carrier reported a lack of transparency as to how different Member States apply wet-leasing provisions.

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<sup>107</sup> Jimenez (2017); EASA (2017d) and ICAO, (2003)

<sup>108</sup> According to Ricardo AEA (2018). In terms of leasing requests and approvals, 7 of the 16 surveyed Member States have adopted specific methods for verifying compliance with EU and national legislation. Cases where *additional* requirements are introduced relate to additional requirements for insurance, specific auditing of non-EEA carriers and provision of operational details.

<sup>109</sup> AT, CZ, FR, SE, PL, IE, ES, IT, PT. Three authorities disagreed or strongly disagreed (BE, DE, FI).

<sup>110</sup> The Air Services Regulation is incorporated into the EEA Agreement.

<sup>111</sup> Among eight of the responding Member States, the percentage of leases approved between 2015 and 2017 varied between 75% and 100% according to Ricardo AEA (2018).

<sup>112</sup> The remaining air carrier respondents answered that they did not know.

Responses to the surveys indicated<sup>113</sup> only two Member States, which stand out for very low approval rates: Poland with 36% (26 out of 73 requests) and Portugal with 13% (45 out of 347).<sup>114</sup> More investigation into what types of agreements are accepted/rejected and for which types of operations is necessary, however this strong difference in approval rates could indicate some inconsistency of application of the rules.

Taking into account Member States' views the leasing provisions were effective to contribute to consistent application when compared to the 2008 revision baseline. Nevertheless, although quantitative data on Member States' leasing approvals can be considered inconclusive without further investigation, the responses from air carriers (especially those which are part of an air carrier group) and provisions open to interpretation such as the need to demonstrate no EEA registered aircraft is available or "exceptional needs" suggests that inconsistencies remain that may impact the level playing field between EU air carriers, although there is no evidence showing that this impacts safety.

Regarding *limiting possible excessive recourse to wet-leasing from third-countries*, the provisions of the Regulation have been effective. A direct indicator of the achievement of this objective is whether the share of wet leases from third countries has remained low or decreased compared to the 2008 revision baseline following the introduction of this restriction in the Air Services Regulation. The share of intra-EU wet-leasing appears to have significantly increased since the 2008 revision, having overtaken dry-leasing<sup>115</sup>. Conversely, the use of wet-leasing from third countries remains very limited (generally around 1% of the fleet) at least for those countries that reported data. While this does not cover the whole EEA, it provides some indication that the share remains small overall. Seven out of nine authorities pointed out that since the 2008 revision, the figures remained the same or decreased. Given expectations that such activity would have increased in the 2008 revision baseline – it seems likely that the Regulation has contributed to this outcome. The Flightglobal data presented in Annex 4 (figure 4.4) supports this conclusion. As regards its link with the improved safety records, as discussed above, it is difficult to qualify the effects of the leasing restrictions to the safety of operations based on the European data. However, a low level of leasing from non-EEA aircraft limits the use of aircraft which are overseen by third countries for safety purposes. This is mitigated by strong safety oversight of third country carriers since the introduction of Third Country Operator approvals by EASA in 2017.

As to the objective of **minimizing the risk of adverse social consequences**, the data described above show that there has been an overall low use of wet-leasing from third countries. Hence, it points to the conclusion that risks to worsening of the existing social conditions have not materialised on any significant scale. This conclusion is not supported by all stakeholders. Only half of the responding Member States agreed that adverse social consequences were avoided<sup>116</sup>. There was also some disagreement from air carriers (8 respondents out of 17 disagreeing that the wet-leasing provisions contributed to avoiding adverse social consequences). Conversely, representatives of workers (EurECAA, ECA) and ERA support the role of the restrictions contained in the leasing provisions, with ECA

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<sup>113</sup> It should be noted however that available evidence does not allow completing the assessment for the whole EU, as Ricardo AEA (2018) could complete the assessment only for 10 Member States out of 28.

<sup>114</sup> The reasons for rejecting leasing requests given by the Member States were, that carriers did not meet the adequate safety standards (PT, PL), submit incomplete documentation (PL), propose inappropriate agreements (sub-lease instead of lease) (PL), or are unable to show that aircraft registered in EEA countries are not available (PT).

<sup>115</sup> According to Ricardo AEA (2018)

<sup>116</sup> BE, DE, DK, FR, MT, SE, and ES; whereas only one (FI) strongly disagreed.

commenting that wet leasing leads to less stable employment and increased risk that working conditions suffer.

More generally, to the extent that lessors operate under the law of a third country, there is a risk of disturbing the level playing field and competition conditions in the internal market. The provisions on wet-leasing have thus on the one hand been effective in limiting the adverse social consequences, on the other there may be a need to address them even further.

### **Unintended impacts on employment and working conditions**

Seven out of 15 Member States<sup>117</sup> consider that the limited use of wet-leasing from third-country operators has helped avoid negative impacts on employment and working conditions. On the other hand, seven out of 17 air carriers<sup>118</sup> disagreed that leasing provisions contributed to avoiding adverse social consequences. Most stakeholders representing workers consulted in the context of the Social fact finding study by Ricardo AEA (2018) consider that the utilisation of wet-leasing can undermine notably the trade union negotiation position and the right to strike, as well as reduce the minimum workers' rights.

The field research performed by Ricardo AEA (2018) points to the concerns of workers' representatives (ETF and ECA) about the possible use of wet-leasing arrangements to overcome strikes, which was done in one case, through wet leasing of aircraft by British Airways<sup>119</sup>. The trade unions (and ECA in particular) consider that the use of wet-leasing to replace workers on strike should not be considered as covered by the "exceptional needs" that justify wet-leasing with third-countries. However, this issue is not related to the question of "exceptional needs" as wet-leasing from EU carriers can be done in the same circumstances without any "needs" test. The UK licensing authority stated that previously British Airways had wet-leased from EU operators to cover strike periods. They also note that "exceptional needs" are not defined in the Regulation, and there is no case law relating to what this term means. The issue at hand therefore relates to the rules governing collective action in Member States. Other stakeholders did not comment on this.

In assessing the impact of the application of the Air Services Regulation on the right to strike, it is important to note that wet-leasing third countries' aircraft is an operation that is limited in time and proportionate to address exceptional or seasonal needs or operational difficulties. The Regulation does not regulate or deal with the origin of the exceptional needs or operational constraints but seeks to address the disruptive consequences of certain events on the operations and negative impacts on consumers while avoiding excessive recourse to wet-leasing with third countries. The provisions on wet-leasing concern operational matters only and does not exempt operators from complying with their other obligations outside the scope of the Regulation. It is in particular without prejudice to the application of social legislation as well as collective agreements, meaning that a particular wet-leasing operation could be assessed by Member States in light of the national social legislation concerned and their international obligations. It should be recalled in particular that the supervisory system of the International Labour Organization has concluded that the hiring of workers to break a strike in

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<sup>117</sup> 7 out of 15: BE, DE, DK, FR, MT, SE, ES; 5 others (AT, CZ, IT, PT, IE) did not know what contribution has been made.

<sup>118</sup> Six traditional carriers and one low cost.

<sup>119</sup> The UK Government allowed the wet lease of nine Qatar-registered aircraft during strikes to British Airways cabin crew in 2017 to cover British Airways "exceptional needs". The UK CAA reported that in occasions prior to July 2017, BA wet-leased aircraft solely from within the EU to cover strike periods, which during the incident in question was not a possibility due notably to the lack of aircraft capacity in the EU during the summer period.

a sector which cannot be regarded as an essential sector in the strict sense of the term constitutes a serious violation of freedom of association. Replacing workers at strike by temporary workers had also been considered by the multinational enterprises follow-up system of the Organization for Economic Cooperation and Development as contrary to the OECD Guiding Principles for Multinational Enterprises.

**In summary:**

- The objectives have been partially achieved. EU air carriers are allowed to lease aircraft to address operational needs while the risk of adverse social consequences are minimized and safety is enhanced.
- Inconsistencies between Member States, seem to remain to a certain extent. Although there has been no concrete evidence that this hampers the safety of operations it may increase the risk of distorting competition.
- While wet-leasing of third-country aircraft has remained limited to date, concerns about social conditions arise in this context because of the lack of definition of “exceptional needs”, and the uncertainty about the legal regime applicable to non-EU crew on these aircraft operating in the EU.
- Some stakeholders have expressed concerns about the possible use of wet-leasing air carriers from non-EU countries to break up strikes. The provisions on wet-leasing concern operational matters only and does not exempt operators and Member States from complying with their other obligations outside the scope of the Regulation, such as Member State national laws or international obligations.

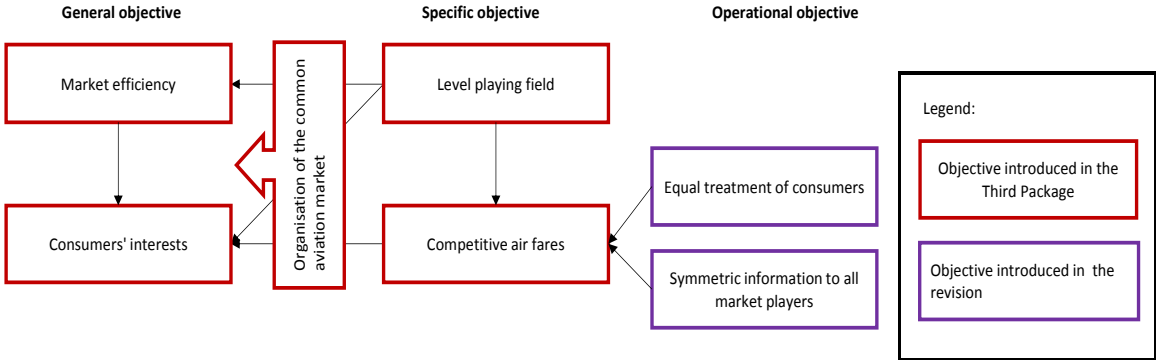
d) Pricing freedom and price transparency

*The **Third Package** established that air carriers could freely set their airfares in order to achieve competitive airfares. The Third Package still allowed Member States to intervene in the setting of air fares when they were deemed to be too high or too low.*

*The 2006 Impact Assessment identified that consumers were being misled by seemingly interesting fare offers and were only told the full fare at the moment of payment. Moreover, carriers charged different fares depending on the place of residence of the consumer.*

*The **revision of 2008** carried over the objective of competitive pricing from the Third Package but also introduced the objective of price transparency and of ensuring non-discriminatory fares for passengers.*

**Figure 5-5: Intervention logic for the Pricing provisions**



Source: European Commission

**2008 revision baseline:** *Without the changes introduced in 2008, the level of passengers' awareness of prices was expected to further deteriorate given the confusion with respect to "all-inclusive" fares, fares "exclusive of taxes and charges" and the differences in national legislation concerning fare publication. Without the current Regulation, Member States would have the possibility to control the prices, however it is fair to say that under current market conditions such price control would not be exercised. Nevertheless, certain elements of price transparency that exist today (e.g. level of details of the final ticket price, possibility of effective price comparison of final prices, inclusive of all taxes, charges and fees) and non-discrimination in the application of air fares would not be present, which could be detrimental to consumers. Although the Regulation is a *lex specialis*, horizontal consumer legislation applies as a safety net. The current horizontal and aviation specific rules complement each other which is beneficial to consumers.*

In comparison to the 2008 revision baseline, overall, the Regulation had a positive impact on the **competitive pricing** objective and its underlying operational objectives of *price transparency* and *equal treatment of passengers*, which aim to give consumers the information necessary to effectively compare prices.

Studies show that because of the carriers' obligation to display the final price and also the break-down of taxes, fares and charges, consumers are able to make more informed purchasing decisions, which should in principle, lead them to make more optimal and rational purchases based on the information provided<sup>120</sup>. Whereas, if much of the required information to make a flight purchase decision was drip fed<sup>121</sup> throughout the purchase process as was prevalent before 2008, consumers would make suboptimal purchasing decisions.

Stakeholders have similar assumptions: 9 out of 14 air carriers and consumer groups<sup>122</sup> agreed that the price transparency rules introduced in 2008 have increased the comparability of airfares. In addition, ECTAA shared the view that without price transparency rules and non-discriminatory access to fares, the benefits of air transport liberalisation for consumers would be limited. Member States authorities also agreed that the provisions had contributed to the comparability of prices but placed greater importance on other legal acts than the Air Services Regulation for the outcome of increased price competition<sup>123</sup>. While other EU consumer protection legislation no doubt contributed to ensuring consumers' interests are safeguarded when it comes to air carriers' unfair practices, it is likely that the Regulation played an important role in air carriers changing their price display practice and increasing price transparency in cases of previous non-compliance.<sup>124</sup>

<sup>120</sup> See for instance Sanata et al, 2017

<sup>121</sup> Drip feeding or drip pricing is a technique by which a headline price is advertised at the beginning of the purchase process and additional, unavoidable price elements are added (dripped) resulting in a different price from the one advertised at the start of the purchase. Drip pricing should not be mixed up with dynamic pricing. This latter means (also referred to as surge pricing, demand pricing, or time-based pricing) is a pricing strategy in which businesses set flexible prices for products or service based on current market demands.

<sup>122</sup> BEUC, Friendly Flying, and a national consumer protection body.

<sup>123</sup> DK, EL, FI, NO, DE, UK and the two responding Italian authorities out of 14 responding agree that pricing provisions increased price comparability. Only 4 out of 13 authorities agreed that the provisions increased price competition: BG, DK, EL and IT. Six authorities stated that they did not know/had no opinion.

<sup>124</sup> 9 out of 16 air carriers changed their approach to the presentation of taxes and airport charges, 8 changed the presentation of other surcharges or fees, 7 changed the presentation of ancillary services. It should be noted

The objective of **price transparency** is implemented by obliging carriers to display the final price (including unavoidable and foreseeable elements) at all times, break down the price elements in fares, taxes and charges, and offer optional price element on an opt-in basis. Against this background, the following problems have been reported.

Regarding the display of **final price** Steer Davies Gleave (2012) reported that in 2012 70% of surveyed air carrier and travel agent sites correctly provided the final price inclusive of unavoidable and foreseeable taxes fees and charges. The 2013 sweep exercise carried out by the Commission screened 552 air travel and accommodation sites and found 112 problems with prices not inclusive of unavoidable costs<sup>125</sup>. Most identified problems were with travel intermediary sites (95 problems). This suggests a fairly high rate of compliance by air carriers. Only a small number of authorities consulted reported complaints from passengers or professional bodies (5 out of 14 and 2 out of 13 respectively) while both BEUC and Friendly Flying also mentioned some complaints on surcharges and whether they should be included in the final price. Some key surcharges that were problematic are currency conversion fees and credit card fees. As regards the latter, the 2016 mystery shopping exercise by the network of European Consumer Centres (ECC-Net) found that credit card fees (a surcharge) was one of the key reasons the final price did not match the initial price shown. However, due to legislative changes – Payment Services Directive<sup>126</sup> to be applied by Member States since 2018 -, the issues related to credit card fee are expected to be solved shortly.

The complaints suggest difficulties in interpretation of what is “unavoidable” and should be included in the final price. Moreover, complaints addressed to enforcement authorities also made it evident that in some cases there is a thin demarcation between mandatory and **optional price elements** to be offered on an **opt-in** basis and it may be hard for consumers to compare the prices if optional price elements – at least the most typical ones, checked-in luggage, seating, etc. – are excluded from the final price. 40% of national authorities surveyed for a study in 2012 signalled receiving double-digit number of complaints a year regarding optional price supplements. There have been national and EU court cases<sup>127</sup>, and investigations<sup>128</sup> testing the effectiveness of the provisions and ensuring adequate price transparency and comparability. The lack of clarity in what should be included in the final price and what is an optional charge effectively leads back to the possibility of drip pricing<sup>129</sup>.

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that this may not give the overall picture on compliance as the other carriers may already have complied with the provisions.

<sup>125</sup> One site could have multiple problems reported.

<sup>126</sup> See for instance Sanata et al, 2017

<sup>127</sup> For example the ruling C-478/12 Vueling resulted in an investigation in Hungary because Wizzair continued charging for hand baggage after the decision of the court and the Hungarian enforcement authority obliged the air carrier to cease the collection of such charge. In another ruling, C-573/13 Air Berlin v Bundesverband der Verbraucherzentralen und Verbraucherverbände, the CJEU ruled that, in the context of a computerised booking system such as the system at issue here, the final price to be paid must be indicated whenever the prices of air services are shown, including when they are shown for the first time. This applies not only to the air service specifically selected by the customer, but also to each air service in respect of which the fare is shown.

<sup>128</sup> As an example, the Italian Competition Authority (AGCM) carried out an investigation on the luggage policies of Ryanair and Wizzair in 2018-2019. While the authority found the given policies unlawful, the decisions have been appealed and the case is in front of the Italian national court at the time of writing. <http://www.agcm.it/media/comunicati-stampa/2018/10/PS11237-PS11272>

<sup>129</sup> Drip pricing is a technique by which a seller advertise a headline price at the beginning of the purchase process but additional fees, taxes or charges are then incrementally disclosed or "dripped" – even if these additional price elements are unavoidable and foreseeable at the beginning of the purchase process. This

However, Member States interviewed, and "sweep exercises" showed that it is much less common to face "opt-out" optional price elements than before the adoption of the Regulation or some years afterwards suggesting improvements compared to the 2008 baseline.

Regarding the correct *break-down of taxes fees and charges* (TFC) mislabelling of price elements has been reported by some stakeholders<sup>130</sup>. A study<sup>131</sup> found that only 22% of sites analysed in eight countries provided a full and correct split of the TFCs applicable to bookings. The study found compliance on travel agent sites to be particularly problematic, with no travel agent sites providing the appropriate breakdown. In particular, some air carriers were found deliberately displaying prices in aggregated form (i.e. adding up taxes and charges and displaying only the sum under 'taxation' or 'charges' or mismatching what should be under the different price elements). One particular case was even argued in front of the Court of Justice of the European Union (C-290/16 Air Berlin). This judgment said that air carriers when publishing their air fares, must specify separately the amounts payable by customers in respect of taxes fees and charges and may not, as a consequence include those items, even partially, in the air fare.

Another factor potentially hindering effectiveness of the rules is that the *enforcement* of the rules remains inconsistent.<sup>132</sup> Interpretation of the above mentioned terms may differ, as well as the action taken in response to claims and penalties.<sup>133</sup> Although difficult to quantify the harm, this likely has a negative impact on consumers.

The Air Services Regulation has contributed to the **equal treatment of passengers** compared to the 2008 revision baseline. The 2013 Fitness Check found that 74% of websites tested did not discriminate by place of residence. Most cases of non-compliance were found to be due to service fees specific to countries and payment fees that some Member State residents could not avoid. Yet this issue is basically solved in the meantime, mainly due to the Consumer Rights Directive and the Payment Services 2 Directive. 6 out of 13 authorities<sup>134</sup> found that the Air Services Regulation contributed towards reaching no discrimination of access to fares while other responding authorities were either neutral or did not know. Even if six authorities agreed that the rules had been effective in ensuring equal treatment, only one (Estonia) reported taking action to monitor non-discrimination. Furthermore, only the UK authority reported problems enforcing the non-discrimination provisions, and only to say to that it has been difficult to do so and that they do not monitor this aspect of the Air Services Regulation. For this reason, the lower level of agreement among Member State authorities may be due to a lack of enforcement on their part. Especially because the analysis undertaken by Ricardo-AEA showed uneven enforcement actions for price discrimination rules across Member States still exist: only two (out of 14 respondents) reported having taken actions to monitor non-compliance with price discrimination rules. Furthermore, five respondents (out of 13) reported having introduced or made changes to penalties for infringement.

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way a consumer's interest is caught by a misleadingly low headline price without the true final price being disclosed until the consumer has invested time and effort in the purchase process.

<sup>130</sup> CRS companies, ECTAA and consumer organisations during the interviews and survey conducted by Ricardo-AEA

<sup>131</sup> SDG (2012)

<sup>132</sup> The 2013 sweep exercise and the Ricardo-AEA.

<sup>133</sup> 10 out of 14 Member State authorities responsible for price transparency gave details on enforcement action taken in response to complaints, out of which seven reported having taken enforcement actions. These range from the provision of information to legal proceedings undertaken by Member States.

<sup>134</sup> BG DE, DK, EE, EL and NO



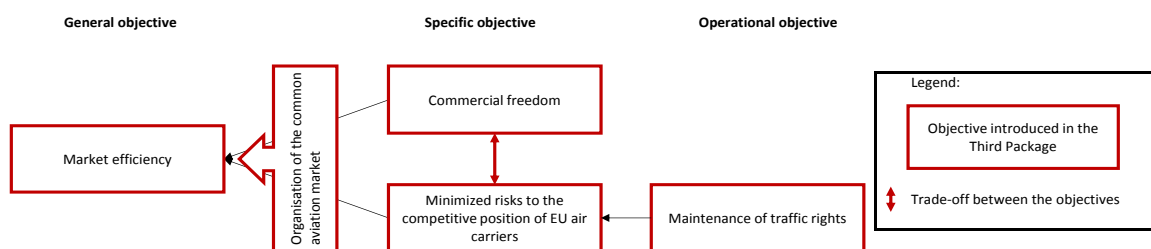
### In summary:

- Compared to the 2008 revision baseline the provisions increased price transparency by allowing passengers to receive the necessary information and effectively compare prices, and reducing discrimination based on residence. Unfair practices have been reduced to an extent, but other legal instruments, in particular consumer protection rules, have contributed to this as well.
- Problems remain in the way air carriers break-down taxes fares and charges on websites, and in comparing the final price in light of different range of services offered in a price by different air carriers.
- Inconsistencies remain between Member States in addressing complaints.
- Current price transparency rules do not seem to enable an effective price comparability for passengers in light of the increasing use of optional price supplements.

### e) Ownership and control

*The international legal aviation framework is based on Treaties between States (bilateral Air Services Agreements - ASAs) that determine the rights of airlines when flying into the other State's territory. These Treaties usually contain clauses limiting the amount of foreign ownership in an air carrier from a State to be able to make use of the rights granted. The **Third Package** aimed to liberalise the EU internal market and thus any EU national or Member State could own any EU air carrier. At the same time it was recognised that due to the international legal framework preserving the EU nationality of air carriers was necessary and the limit on non-EU ownership and control intended to facilitate the compliance with ASAs. The 2006 Impact assessment did not include O&C in its scope. The **revision in 2008** carried over the objectives of the Third Package.*

**Figure 5-6: Intervention logic for the Ownership and Control requirements**



Source: European Commission

Compared to the Third Package baseline, the Ownership and Control provisions have contributed to a **greater commercial freedom** for EU air carriers in their ability to develop their businesses according to shifts in the market. An indirect indicator of this could be the **number of mergers** of EU/EEA air carriers, which previously would not have been allowed to take place. Since 1992 for example, Air France has been able to merge with KLM; Lufthansa has taken over Swiss International Air Lines, Austrian Airlines and Brussels Airlines; and British Airways merged with Iberia and acquired Vueling and Aer Lingus under the holding company International Airlines Group. It can be argued that this has led to

increased market efficiency and has likely contributed to overall increased development of networks, choice of routes and decrease in fares.<sup>135</sup> The effects exceed the ones under the Third Package baseline, where air carriers would have continued being locked into rigid national structures and markets. However, it is difficult to disentangle how much of the benefits are attributable to the freedom to provide air services and how much to the liberalisation of ownership and control restrictions within the internal market. Both aspects are important.

The provisions also facilitated cross-border establishment within the EU, i.e. establishment of air carriers that are owned and/or controlled by nationals of one Member State to establish themselves in another Member State, thus giving carriers broader access to investment and moving from a system where most air carriers were functioning as national carriers to one where air carriers are European, independently of their ownership or control from any specific Member State.

However, as anticipated in the preparatory work for the Third Aviation Package<sup>136</sup>, the provisions have prevented mergers with non-EU carriers (and possible gains for market efficiency) because of the 49% limit on non-EU ownership and the requirement of effective control. Some literature shows that potential mergers might have not happened because of fears of losing traffic rights.<sup>137</sup> This assessment was supported by stakeholders. In particular, 13 out of 19 air carriers and 9 out of 16 Member States<sup>138</sup> find that the O&C rules have a negative impact on the merger and acquisition opportunities coming from outside the EU.

Thus the objective to grant greater commercial freedom objective is not translated in full, given the other objective pursued at the same time of **minimizing risks to the competitive position of EU air carriers** and, at the operational level, of **facilitating the maintenance of traffic rights**.

The objective of *maintenance of traffic rights* has been partially achieved. As it was not possible to quantify the share of air carriers that have maintained or lost their traffic rights following the adoption of the rules, the evaluation also relies upon literature and the views of stakeholders. One study argues that no EU airlines lost their traffic rights after a merger<sup>139</sup>. The majority of the responsible authorities who answered the survey question overall think that O&C provisions have contributed to the objective of the maintenance of traffic rights. 7 out of 15 national authorities<sup>140</sup> said they were responsible to a large extent. However, some authorities argue that the rules are not the most important factor contributing to the achievement of the objective. In particular, the Spanish Directorate General of Civil Aviation

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<sup>135</sup> Economic theory recognizes the value of mergers in creating more efficient capacity utilisation through economies of scale which leads to reductions in costs, while merging with air carriers established in different Member States can increase the network of destinations by benefiting from traffic rights to third-countries.

<sup>136</sup> Due to basic characteristics of the international aviation system, requirements on Community ownership, control and location are required. An air carrier must be owned and effectively controlled by a majority of Community nationals and the majority of the board must consist of such nationals. It is, however, clear that the ownership limitations may hinder a normal business development in the interests of Community air carriers. It is, therefore, desirable to introduce a possibility to conclude more liberal agreements with third countries on a mutually beneficial basis, without prejudice to international commitments.

<sup>137</sup> Lykotrafiti, (2015) and Humphreys (2003) , ITF (2015)

<sup>138</sup> BE, CZ, DE, FI, Spanish Aviation Safety and Security Agency, FR, IT, PL, PT

<sup>139</sup> ITF (2015b)

<sup>140</sup> BE, DE, EL, FR, PL, PT and the Spanish Aviation Safety and Security Agency, and 4 partially or to a limit extent (against 1 which believes that they did not contribute at all).

argued that O&C requirements have actually called those traffic rights into question.<sup>141</sup> According to them, traffic rights being maintained is due to horizontal and comprehensive agreements. It is the case that the EU designation of an air carrier has not been universally accepted among third countries regarding the permission to use the traffic rights granted under bilateral ASAs with individual Member States but as described elsewhere, the EU has made considerable progress in having third countries accept EU designation, through horizontal agreements and asking Member States to change bilateral ASAs with third-countries. It is clear that coordinated action at international level (for example the draft O&C waiver convention under discussion at ICAO) would also be key to achieving the objective of maintaining traffic rights.

The effect of O&C on the **competitive position of the air carrier** should further be seen in the context of the overall picture of O&C requirements globally (see Section 3), where the great majority of third countries have their own nationality requirements and major competitors (such as the US) have more restrictive thresholds. Therefore, compared to more restrictive global regions, the Regulation has comparatively helped the competitiveness of EU air carriers. By the same argument, compared to less restrictive regions, the Regulation has comparatively harmed the competitiveness of EU air carriers by limiting their access to financing from third countries. The stakeholders have mixed opinions about the effects of the O&C restrictions on this objective, with Member States being more positive and air carriers being more negative. Their assessment however is affected by some unintended effects (e.g. limiting access to foreign capital) of the Regulation, which will be further assessed below.

Another reason for O&C provisions is to protect the internal market and only extend the benefits of the internal aviation market on a reciprocal basis or when this is specifically allowed in a bilateral ASA. In this respect cf. the Commission's [Sabena/Swissair Decision concerning the envisaged bilateral air service agreement between Switzerland and the EU \(at the time "Community"\)](#).

The full achievement of this objective is hindered by **inconsistent enforcement of the rules**. Stakeholders revealed that requirements on Ownership and Control are inconsistently enforced within the EEA.<sup>142</sup> Ten out of 17 air carriers that participated in the survey considered that this was a problem; with some countries being very lenient and others even forcing changes in the air carrier business model to comply with the requirements. ECA joined the majority of air carriers in saying that enforcement is not consistent. Authorities have also indicated that harmonization on the application of the rules, mainly as regards the assessment of the effective control, has not been fully achieved. One of the issues identified that could lead to inconsistencies is in particular the **complexity of the cases and structures the authorities have faced**<sup>143</sup>. According to some studies, Ownership and Control provisions were actually the driver in increasing the complexity of ownership structures of EEA air carriers<sup>144</sup>. Some stakeholders<sup>145</sup> consider that the use of complex ownership structures makes

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<sup>141</sup> As mentioned in the section on market developments, Iberia maintained a national ownership structure after merging with British Airways in order to continue to benefit from traffic rights to e.g. Argentina.

<sup>142</sup> Out of the 16 Member States that responded, 9 have introduced specific criteria to assess O&C requirements. It is apparent from Member States that have made these public, that the assessment is not always uniform across Member States.

<sup>143</sup> According to 7 of the authorities that replied (DE, DK, EE, ES, FI, IE, PL).

<sup>144</sup> CAPA Daily, (2017) suggests that IAG and Air France-KLM structures were in part created to ensure that O&C rules are formally respected. Additionally, Lykotrafiti, (2015) suggests a role of Ownership and Control restrictions in the creation of complex joint ventures and alliances between air carriers wanting to

it possible for non-EU nationals to exercise effective control of EU air carriers despite the provisions, or simply by obtaining EU citizenship from certain Member States in which it is comparatively easy to obtain.<sup>146</sup>

Complex ownership structures are difficult to assess as they involve multiple layers of companies with EU and third country ownerships that makes the identification of the nationality of the final owner very difficult. This creates a risk for competition distortions. Further, a study by Oxera (2006) found that complex structures lead to inefficient financing structures and increase the cost of capital.

The enforcement of the O&C provisions is first and foremost the role of national licensing authorities. The Commission does not have to grant a prior approval, but in case of doubts or where it receives complaints, the Commission may ask the competent national licensing authority for its assessment and all documents reviewed from the air carrier. Such requests by the Commission were made in 15 cases and in the context of contingency planning for the withdrawal of the UK from the EU. Assessments are made on a case by case basis, taking into account the specific circumstances of each case. There are instances in which the Commission expressed doubts on the initial documents or assessment submitted and changes were subsequently made to the ownership or articles of association or shareholder agreements (see further Annex 4). However, since the O&C provisions are not detailed, they do not provide clear lines on when a control or ownership structure go beyond what is allowed. Thus divergent interpretations arise (indeed some Member States have issued guidance documents with different ways to assess cases). The Commission attempted to mitigate this issue by adopting Interpretative Guidelines in 2016, however these could not go beyond the provisions of the Regulation and describe the Commission's interpretation, without prejudice to the interpretation of the Court of Justice (for more information see Annex 4).

As mentioned above, the O&C provisions have had unintended impacts:

### **Unintended economic impacts**

The O&C restrictions on foreign capital raise concerns among some stakeholders on *limited access to capital*, which *may increase the risk of bankruptcies* with a possible further negative effect on the *competitive position of the European air carriers*.

Both airlines and national authorities<sup>147</sup> indicate negative impacts from the O&C provisions on the access to foreign capital. While elaborating their answers, some authorities pointed to concrete examples where as they believe O&C restrictions did indeed lead to bankruptcies<sup>148</sup>. 8 out of 16 authorities agree that O&C rules limit opportunities to avoid bankruptcies<sup>149</sup>. The air carriers consulted do not support these views<sup>150</sup>, with only 1 carrier indicating a negative

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work closely together, such as Delta investment in Virgin Atlantic. The study suggests that some of these would probably have been mergers and acquisitions if Ownership and Control restrictions were not in place.

<sup>145</sup> Authorities (DE, FR, UK, ES) and two air carriers.

<sup>146</sup> This issue is currently being explored in an EU pilot. Therefore, the SWD does not present its further details.

<sup>147</sup> 12 out of 19 airlines and 8 out of 16 national authorities (BE, DE, FI, FR, IT, PL, PT and Spanish Aviation Safety and Security Agency).

<sup>148</sup> The French authority mentioned an unnamed air carrier that was having difficulties and whose only proposal to inject capital came from third countries; the airline no longer exists. The UK mentioned a similar case of Silverjet, which could not accept an offer from outside the EU and keep its license, which was withdrawn due to the financial difficulties.

<sup>149</sup> BE, DE, FI, FR, IT, PL, PT, ES.

<sup>150</sup> To be noted that this is the only question about the O&C impacts where views of authorities and airlines do not follow the same trend.

impact. This assessment by air carriers could be linked with their fears of the distortion of air carriers' competitive position, which was discussed above. In particular, five air carriers argued that some third country investors invest in struggling EU airlines, not because it makes business sense, but because they want to get a foothold on the EU market – these five airlines also argued that airlines with good business prospects have no problem in attracting capital. One EU workers' union suggested that if EU airlines are taken over by third country airlines, these airlines would divert long haul traffic to their own hubs outside the EU, with the European airlines only serving as feeders to those hubs. However, in relation to the general ease in obtaining access to capital (as opposed to the specific purpose of avoiding bankruptcies) five air carriers reported being affected to a very limited extent, while five air carriers felt they had been affected to a significant extent.<sup>151</sup> Regarding **access to foreign equity capital**, air carriers were slightly more affected, with five affected to a very limited extent, one to some extent, five to a significant extent, and one to a full extent.<sup>152</sup> Seven out of 19 air carriers also felt that the limits had affected their competitive position in comparison to non-EEA air carriers to a significant extent. Six out of 19 air carriers felt that merger and acquisition opportunities had been affected to some extent, with a further five being affected to a significant extent.

The literature has also delved into this topic extensively, assessing the need of foreign investors' support, mainly basing the estimates of the impact of O&C provisions on economic theory, as well as drawing parallels with other sectors and other regions. Thus, Lelieur (2003) refers to the example of US air carriers TWA or Pan Am, which without effective support by foreign capital had decreased their chance of long-term success. More recently, CAPA Daily (2017) pointed to the example of European carriers which collapsed (Air Berlin) or entered into special administration (Alitalia) after foreign investor Etihad removed financial support in 2017. It should be noted that there is no evidence to determine the cause of this removal (i.e. if Ownership and Control restrictions were a cause of Etihad's removal of financial support). It is neither possible to determine if that hypothetical support would have been enough to keep those airlines from collapsing<sup>153</sup>. However, analysis in the case study by Ricardo AEA (2018) on Ownership and Control worldwide showed that liberalisation of O&C in the Australian and Chilean domestic air transport markets may have contributed to greater foreign investment. A study by Oxera has also found that the restrictions on Ownership and Control can also limit the transfer of valuable international best business practices by limiting the pool of owners.

The literature also assesses the link between the restriction to the capital and competitive position of the EU carriers. In particular, World Economic Forum (2016) and ICAO (2013) point out that by denying airlines access to scarce capital resources, the Ownership and Control restrictions can increase the cost of capital for airlines and therefore prevent the development of more competitive carriers and increase the risk of bankruptcy. The conclusions of the study go in line with the view of certain stakeholders. Certain airlines and national authorities negatively assess the impact of the Ownership and Control rules on the competitiveness of EEA air carriers (13 out of 19 air carriers and 5 out of 16 Member States

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<sup>151</sup> Six out of 19 air carriers felt that the limits on the level of foreign ownership had not affected their access to equity capital at all,

<sup>152</sup> only three indicating no affect at all

<sup>153</sup> Etihad at the time was having financial problems of their own – probably exacerbated by the problems at Air Berlin and Alitalia – and it is not clear that they would have kept financial support regardless.

(BE, DE, FI, PL, PT,)<sup>154</sup>. Finally, CAPA Centre for Aviation (2017) noted that a downturn in the aviation industry might lead the industry to more vigorously support the removal of Ownership and Control requirements in order for consolidation to happen at a greater scale. It should be noted that the full relaxation of Ownership and Control restrictions within the EU have had also a positive impact on the competitiveness of EU air carriers, as discussed in EQ2. Therefore, this points to a link between Ownership and Control restrictions and access to capital, and more generally the competitiveness of air carriers. While a clear-cut statement about the detrimental impact of O&C restrictions on EU air carriers' financial health and competitiveness is not possible, the evidence does point to the fact that an effort to further liberalise O&C rules (preferably on a global level) would have important benefits for EU aviation (as further addressed under EQ 5).

### **Unintended consequences on employment and working conditions**

The workers' representatives suggested that O&C requirements have *positively impacted working conditions in the EU aviation sector*. For example, ETF considers that ownership and control restrictions protect the jobs, particularly those on the ground, i.e., not pilots or cabin crew. ETF argues that as the O&C restrictions preserve the traffic rights for EU nationals, they also ensure that air carriers keep long haul traffic to the hubs inside the EU. Another union also agreed that O&C restrictions protect EU jobs and ensure that EU air carriers operate European flights with the crews based inside of the EU. The crewmembers therefore enjoy the EU standards for working conditions. Conversely, however, O&C restrictions can also have a negative social impact if they limit an air carrier's access to sources of financing to an extent that impacts its competitiveness and its ability to maintain or increase its workforce through fresh investments.

#### **In summary:**

- Liberalising Ownership and Control restrictions within the EU has been effective in allowing air carriers commercial freedom, however in respect of Member States enforcing the Ownership and Control provision in case of non-EU investment there are inconsistencies that may hamper the level playing field for EU air carriers.
- Removing Ownership and Control limitations within the EU has been part of the success of the internal aviation market.
- Regarding the intent to help maintain traffic rights, the provisions seem to have been effective although it had to be accompanied by negotiations with non-EU countries to accept the EU carrier designation.
- Ownership and control restrictions limited EU carriers' access to foreign investment beyond 49%. A number of stakeholders and desk research indicate that limiting EU air carrier's access to foreign capital affects their competitive position and limits the pool of investment and know-how, risking a loss of competitiveness and know-how.
- Nevertheless, the evidence overall remains inconclusive whether greater access to capital would have invigorated EU airlines and whether certain airlines (e.g. Air Berlin, Alitalia) could have been rescued from collapse in the absence of the ownership and control restrictions.
- Some stakeholders argue that O&C restrictions prevent foreign airlines from taking control over EU airlines with the aim to channel their passengers through their own hubs and hence away from the EU hubs, with possible negative impacts for EU

<sup>154</sup> The result remains the same if stakeholders are asked about the Competitive position against non-EEA carriers: 13 out of 19 air carriers and 6 out of 16 authorities 6 out of 16 (BE, DE, ES, FI, PL, PT)

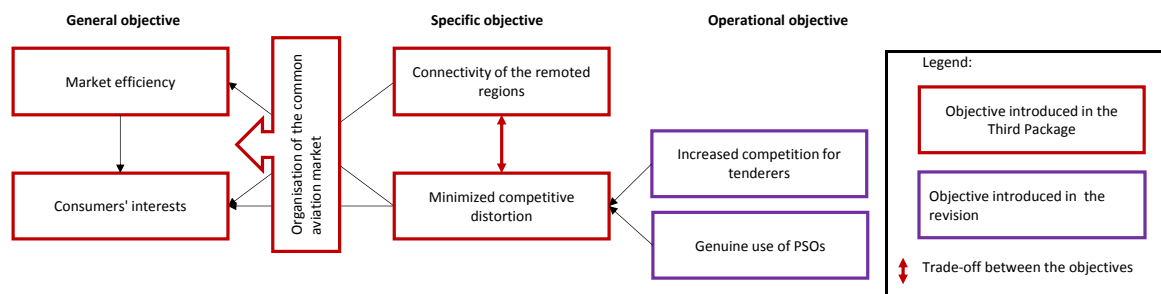
activity and jobs, thus contributing to protect jobs in the EU. Securing high working standards is an important aspect to take into account when moving forward with the debate on O&C restrictions. At the same time, to enable protecting jobs in the EU, it is also important to allow EU air carriers to secure fresh investments to remain competitive and maintain the workforce.

- The existing evidence from the literature suggests that the evolving complexity of EU carriers' ownership structures in light of Ownership and Control restrictions make homogeneous enforcement of the rules more difficult. It also likely increases the cost of capital.

#### f) Public Service Obligations

The **Third Package** allowed Member States to impose Public Service Obligations on certain routes namely in respect of services to an airport serving a peripheral or development region in its territory or on a thin route to any regional airport in its territory. The aim was in particular to allow the promotion of the development of and connectivity to remote regions and islands. At the same time it was recognised that imposing Public Service Obligations could lead to distortions of competition and protectionism of national carriers. These objectives of development and connectivity were carried over in the **2008 revision**, and further measures were introduced on one hand, to make the tendering process more attractive so that more air carriers would apply, and on the other hand, to ensure genuine use of Public Service Obligations.

**Figure 5-7: Intervention logic for the Public Service Obligations**



Source: European Commission

**2008 revision baseline:** The revision aimed for the Commission to be in a better position to monitor the correct application of legislation in this area and to limit excessive recourse to PSOs given the increased access to information on imposed PSOs – in particular, their justification and economic context –. The clarification of PSO rules and the avoidance of misuse were expected to promote competition on domestic routes where most PSOs are located. This should have resulted in lower fares and higher mobility levels for consumers. Air carriers were to benefit from the reduction of the competition distortions that exist when recourse to PSO would be used in a situation where a PSO was not strictly necessary. Subsidy levels for justified PSO would also be reduced and more efficiently applied. The proposal would also lead to an administrative simplification for national and European authorities as only a very short notice is published in the EU Official Journal.

The overall effects of Public Service Obligations provisions and their contribution to the general objectives should be considered in light of the aim to achieve a balance and trade-off

between two objectives (i.e. **increasing connectivity** and **minimizing competitive distortions**). These two objectives are meant to adjust the adverse effects of each other.

Regarding the first objective (i.e. **increasing connectivity**), since the 2008 revision focussed on the objective of minimizing competitive distortions, the effects of the Air Services Regulation on the objective of increasing connectivity and assisting Member States in their effort to promote the economic and social development of remote regions and islands, as compared to the 2008 revision baseline are limited. For example, when comparing the 2006 Impact Assessment data with the most recent figures one can see that the number of Public Service Obligations routes in the EU remained to a certain extent within the same range (234 PSO routes in 2005 against 178 routes in 2017). These figures need to be assessed with care, as they do not explain Public Service Obligations overall effects on connectivity and/or on the regional development. Other factors, like increased and improved offer by other transport modes or general economic circumstances (e.g. the recession of 2008) may also have had an important effect on these aspects. Nevertheless, the figures can also point to the limited effects of the 2008 revision to this objective.

Any impact on connectivity and/or on the regional development should also be considered in light of the overall changes to the air services market due to the Air Services Regulation allowing for more choice in terms of destinations and the service providers. These changes likely had an indirect positive effect on the need for Public Service Obligations.<sup>155</sup>

The literature<sup>156</sup> shows that **Public Service Obligations are vital for remote EU regions and islands**: a 10% increase of connectivity, as measured in those studies, stimulates the GDP (per capita) by an additional 0.5%, the GDP growth rate by 1% and leads to an overall increase of labour productivity.<sup>157</sup> Public Service Obligations that carriers operate receiving compensation by the Member State ensure connections that are not commercially viable and they are often the only tool to ensure regular air services in order to break the geographical and economic isolation of these regions and islands and their inhabitants.

Looking into the geography of Public Service Obligation routes in the EU in 2017, one can observe that around 46% and 26% of all PSO routes are imposed to connect respectively with islands and outermost regions and 28% the domestic mainland (with France and Sweden counting for more than half of these routes). Moreover, in almost all cases Member States justify the imposition of a PSO by means of peripheral and development justifications.<sup>158</sup> Due to limited historical data a comparison with the situation before the 2008 revision and its possible development does not allow assessing the genuineness of these justifications and their impact on the competition (discussed further below). Nevertheless, these figures show that the current structure of the Public Service Obligation routes does consider the needs of remote regions. Moreover, Ricardo AEA's (2018) analysis of Eurocontrol data points to a choice of destination options for remote regions (particularly observed in Estonia, Sweden, the UK and Ireland) by providing connections to larger airports with higher levels of

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<sup>155</sup> As an indirect indicator of such a link, one can consider two trends, both started after 1995. An increase in the number of PSO routes (from below 25 in 1994 to 225 in 2002 after it stabilized) largely coincides with the changes to the market structure. The number of the increased PSO routes may not prove the increased connectivity, however it points to the possible increased choice for the inhabitants of remote regions.

<sup>156</sup> InterVISTAS, 2015; PwC, 2013, IATA, 2007b

<sup>157</sup> Literature analysis also shows that PSOs have been generally effective at ensuring greater connectivity (in terms of flight frequencies) in the case of connections to islands in Spain and Italy. Assessment in case of Spain is done in Calzada & Fageda, 2012 and Calzada & Fageda, 2014; in case of Sardinia Francesco & Pagliari, 2012 and Calzada & Fageda, 2014.

<sup>158</sup> All Member States that have PSOs, except Sweden, invoke other justifications as well.



connectivity. Also, most authorities and air carriers<sup>159</sup> agreed that PSOs help to serve the mobility needs of remote regions and islands. Therefore, we can conclude that the Public Service Obligation imposition has had some positive effect on the connectivity and development of remote regions and islands and on consumers' wellbeing.

Impact on prices may be another indicator of the impact of PSOs on the consumers' wellbeing. The effects of the Public Service Obligation are different from country to country. The study by Calzada and Fageda (2012) conclude that intra-island Public Service Obligations (with price caps) in place in Spain between 2001 and 2009 have led to lower prices in relation to unprotected routes with similar characteristics. In addition, Francesco & Pagliari (2012) found that ending the PSO programme that connects Sardinia to mainland Italy would result in higher and more variable airfares that would disproportionately affect Sardinian residents. However, in their assessment of air routes connecting the mainland with the islands in Italy, France, Greece, Portugal and Spain, Fageda et al (2017) explain that PSOs do not lead necessarily to lower airfare prices when compared to routes where no subsidies are provided. The study shows that the price cap established by the PSO does not appear to be lower than the price that would be achieved in a free market context. Indeed, the PSOs tend to limit operations to one air carrier - usually a regional air carrier - which is not always able to operate with lower costs than other potential carriers, especially when these routes are longer. The decision over the price cap falls under the discretion of each Member State. If the price cap is set low, then a Member State should pay more in compensation. For many Member States the objective is to guarantee reasonable prices at all times and flight availability with such prices at short notice. For example, Italy has proposed one-way resident prices of EUR 40 and 49 from Sardinia to Rome and Milan, respectively.

Regarding the second objective (i.e. **minimizing competitive distortions**), the Regulation has been only partially effective. The literature concludes that the level of minimum services and the subsidy level had a negative effect on competition in the tendering process and found a general deterioration of Public Service Obligation services in the end of the contracts that could be linked to the low level of competition in the tendering process.<sup>160</sup>

Comparison with the 2008 revision baseline indicates only a limited positive effect to the level of competition by the changes introduced. It should be noted that the stakeholders have different opinions about the PSO impact on competition, although a slight majority seems to think that PSOs do not entirely harm competition.<sup>161</sup>

The Commission has developed a questionnaire that it asks the Member States to fill in when presenting their plans for Public Service Obligation and it strives to discuss potential issues informally with Member States in advance before the publication. During this process, it often asks Member States to provide further information and justifications for the need to impose a

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<sup>159</sup> Ten of 11 authorities (CZ, EE, EL, IT, SE, PL, IE, ES, PT, FR). Out of these 11 Member States only Poland does not have PSO. 10 out 12 air carriers.

<sup>160</sup> Williams & Pagliari (2004) and Merkert & Williams (2013)

<sup>161</sup> In particular, three of 11 authorities using PSOs (EE, EL, IE) suggested that the PSO rules have harmed competition, whereas three (FR, PT, ES) do not agree. 6 out of 15 national authorities (whether or not they have PSOs) agree at least to some extent that PSOs under current rules have not harmed competition. Three of 7 airports agreed to a large or full extent that PSOs do not have any negative impact on level of the competition against two that agreed only partly or to a limited extent. Six of 16 air carriers agree to a limited extent that PSOs do not have a negative impact on the level of competition, compared to two air carriers that do not agree at all and four that agree only partly or to a large extent. 8 out of 22 carriers agree at least to some extent with the statement that Member States use PSOs to protect their national carriers. 2 did not agree, 6 gave no answer, 6 did not know.

Public Service Obligation. In some occasions, this has prompted Member States to change their plan. A very recent example is the case of Sardinian PSOs. The Commission had doubts about the proportionality of the Public Service Obligation project and on its compatibility with the Regulation. As a first result, the publication has been delayed by several months and subsequently the Member State withdrew four of the six published PSOs.<sup>162</sup>

When it comes to the supporting operational objectives, it appears that the Air Services Regulation has only partially achieved the objective of *ensuring genuine use of PSOs* in EU Member States. The quantitative data presented in Annex 4 suggests important differences between the Member States in terms of the Public Service Obligation implemented. While these differences themselves might not indicate the excessive use of Public Service Obligation (as the Public Service Obligation could have been set for genuine reason), they are to be assessed in light of specific needs of a Member State or region and the rules' application and enforcement.

The literature<sup>163</sup> shows that some of the differences in application and enforcement of Public Service Obligation are driven by geographical conditions, which influences the Member States' use of this mechanism. Nevertheless, some other sources of differences also exist. Some studies<sup>164</sup> point to Member States having different objectives and being subject to pressures that influence their decisions. In addition, certain terms are open to interpretation such as the concept of '*adequacy*' of the air service in question or '*thin routes*' which Member States interpret differently and dependent on policy objectives.<sup>165</sup> One airport responding to the survey also commented that determining the *thinness of a route* is left to the discretion of the Member State.

The issue of *different interpretation of terms* that are not further defined in the Regulation has to be analysed in light of the analysis of the density of Public Service Obligation routes. The monitoring data suggest that passenger figures in different Member States vary from less than 100 to more than one million a year. According to the Public Service Obligation database, 18.9 % of the routes (32 out of the 169 for which information is available) have more than 100,000 passengers a year, while 48.5 % (82 routes) has less than 20,000 passengers.

Seasonality is evident on routes that serve many tourists, this includes in particular popular holiday destinations (FR, IT, EL) in the Mediterranean.<sup>166</sup> Such Member States argue that imposing the Public Service Obligation for the whole season allowing air carriers to benefit from e.g. exclusivity, may reduce the compensation the Member State has to pay because in the high season the carrier may economically benefit from operating the route. However, this might lead to an excessive limitation of competition on the routes concerned.

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<sup>162</sup> Regarding the other two routes, they will in principle stay as imposed but will be operated without exclusivity and compensation.

<sup>163</sup> Merkert & O'Fee (2012) and Merkert & Williams (2013)

<sup>164</sup> Merkert & O'Fee, (2012), Merkert & Williams (2013), Fageda, et al., (2018)

<sup>165</sup> Merkert & O'Fee (2012) and Merkert & Williams (2013) or Suárez-Alemán, Serebrisky, & Fioravanti (2018).

<sup>166</sup> For example, on the routes from Sardinia to mainland, the smallest number of passengers in 2017 was in February (319 611) and the highest in August (812 203) and 56 % of passenger travel between May and September.

Regarding the changes introduced by the Air Services Regulation on the use of the emergency procedure, these procedures seem to be unclear to some of the stakeholders.<sup>167</sup> In 2017, the Commission issued the [Interpretative Guidelines](#) to clarify the rules applicable to Public Service Obligations. The effects of the guidelines is still difficult to assess, although the majority of stakeholders consulted<sup>168</sup> felt that the guidelines on PSOs were helpful.

The operational objective of *increasing competition in tendering* and thus reducing subsidy levels has not been fully achieved. According to the monitoring data, the number of tenderers remains very low, between one (often only the incumbent) and three, with no difference between Member States. Moreover, for the 127 routes currently awarded to a single carrier after tender, more than 60% were awarded after a tendering procedure with only one bid lodged. In 23 % of cases 2 bids and in 17 % of the cases 3 bids were lodged. According to the survey of national authorities, five out of the 15 consulted indicated that following the revision in 2008 the number of individual air carriers tendering for restricted Public Service Obligations remained the same (FR, SE, PL<sup>169</sup>, IE, ES), whilst three authorities indicated that it increased (CZ, EL, PT). According to some, Public Service Obligations might have actually served as deterrence to competition and new entrants and for market protectionism.<sup>170</sup>

A change in number of air carriers from another Member State operating open Public Service Obligations participating in tenders is another indirect indicator of the level of the competition (i.e. openness of the market). There are some signs of more Member States selecting air carriers from other Member States in tenders. The rules as revised in 2008 require Member States to deliver more information to the Commission concerning the tender selection results and the Commission also has the right to request Member States to communicate all relevant documents relating to the selection. While Member States selection criteria could sometimes put a lot emphasis on the experience of the Public Service Obligation markets and language skills of the crew, there are also other factors – like cost from setting up new base – affecting the willingness of air carriers to compete for PSO routes in other Member States. Available data, however, do not paint a clear picture and rather points to limited effects of the Regulation.

The monitoring data and Ricardo AEA (2018) surveys show that 4<sup>171</sup> out of the 5 Member States (EL, PT, IE, ES) believing that the level of competition has remained the same since the changes introduced had only national carriers operating Public Service Obligation routes in 2017. The other four authorities believe it has increased (CZ, EE, FR, and SE). They are from countries where non-national carriers also provide the PSO air service in 2017.<sup>172</sup> In total in 2014 non-national carriers were operating Public Service Obligation routes in seven

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<sup>167</sup> The Welsh Audit Office (2014) noted that it is not clearly defined what constitutes an emergency and the legal advice of the Welsh Government was sought when such a case arose for the Public Service Obligation route between Anglesey Airport (RAF Valley) and Cardiff Airport.

<sup>168</sup> Ten out of 15 air carriers and 11 of the 12 authorities for which the guidelines were relevant – CZ, DK, EL, FR, IT, MT, SE, PL, PT, IE, ES).

<sup>169</sup> PL does not have any PSO routes.

<sup>170</sup> Merkert & O'Fee (2016) found in their paper that seven out of the 14 PSO operators they surveyed and eight out of the ten non-PSO operators surveyed believe that PSOs prevent competition and can be a form of market protectionism.

<sup>171</sup> PL answered positively, but it has not imposed any PSO schemes.

<sup>172</sup> Including the routes in Czech Republic for which there is no 2017 data available on the nationality of the operator: two of the three routes are not being operated due to no interest expressed by air carriers; for the third route, Brno – Munich, it is operated by BMI Limited (from the UK) under PSO contract from March 2018.

Member States (EE, ES, FI, IE, IT, FR, SE), while in 2018 this number has increased to eight (CY, CZ, EE, FI, IT, FR, PT, SE). In five Member States (EL, ES, HR, IE, UK) Public Service Obligations are operated only by domestic carriers.<sup>173</sup>

Therefore, according to the data available from the monitoring and the survey of national authorities, the level of subsidisation has remained roughly the same as before the revision. According to the survey, the average level of compensation per Public Service Obligations has remained largely the same for two authorities responding (FR, IE)<sup>174</sup>; for two other two authorities it increased (EE, SE) and for the remaining two it has decreased (EL, ES).<sup>175</sup> However, the decrease of subsidised routes has helped to avoid potential competition distortions overall, despite the fact that certain air carriers operating given PSO routes alone may receive levels of subsidy that are higher than necessary or indeed public financing on routes where a PSO was not strictly necessary.

As underlying factors, which were supposed to contribute to higher tender participation were changes to the transparency of tendering and changes to the duration of a Public Service Obligation contract. The simplification for the tendering in case of small routes introduced by the 2008 revision could potentially have had an adverse effect on the number of tenderers. Before 2008, the Commission published notices containing much more information and the simplification consisted in only publishing very short notices indicating the route and address from where additional information could be obtained. In case of routes where the number of passengers expected to use the air service is less than 10 000 per annum (i.e. about 1/3 of all routes), the information notice on Public Service Obligation can be published either in the Official Journal of the EU or in the national official journal of the Member State concerned, but this possibility has been used only in very few cases, so the practice has not really changed. Moreover, the monitoring data confirms that at least 6 Member States out of 11 having Public Service Obligation (FI, IE, ES, IT, PT, UK) keep publishing the information in both sources. If the option of only national publication would have been used on a larger scale, it could have led to an adverse effect of reduction of the number of carriers submitting offers for Public Service Obligation routes. When questioned as to whether the rules governing the imposition of Public Service Obligations are transparent, relevant stakeholders (air carriers, authorities<sup>176</sup>) have largely agreed with this view: 11 of the 16 air carriers consulted and 9 of the 12 authorities having Public Service Obligation schemes in place<sup>177</sup> (EL, FR, IT, PT, IE, ES, CZ, EE, SE). Some factors external to the Regulation have also contributed to greater transparency. Five authorities consulted (EE, PL, PT, IE, ES) point to

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<sup>173</sup> Until very recently this was also the case for Italy and Portugal, but now six of 14 routes for Italy and one of 20 routes for Portugal are operated by a carrier from another Member State. Air Berlin operated PSO routes in the Balearic islands, but after its bankruptcy only Spanish carriers operate PSO routes in Spain. Also Ireland has in the past had one of its three routes operated by an UK carrier.

<sup>174</sup> PL also answered that compensation for PSO had remained the same but PL has not made use of PSO schemes.

<sup>175</sup> 8 authorities did not know, or it was not relevant to their organisation.

<sup>176</sup> Airports were also consulted, but since half of respondents (three out of six) indicated the question was not relevant to them and the remaining three gave different answers, we cannot draw general conclusions from their answers.

<sup>177</sup> In total 15 authorities contributed to this question. 10 (including Poland that has never used PSOs agreed). One did not know and for 4 the question was not relevant.

the national law on procurement (including transpositions of Union rules on public procurement<sup>178</sup>) and national aviation laws.

As regards the increase of the duration of the contract, it can be noted that this possibility has been used widely by the Member States, as currently about 76 % contracts are concluded for more than three years that was the previous maximum length. However, given the remaining low number of tenderers, its expected effect of making Public Service Obligation contracts more interesting for air carriers (for example by providing longer write-off periods for the equipment) has been limited.

The literature and Ricardo AEA (2018) field research do point also to other factors. In particular, Merkert & O'Fee (2016) found that European regional air carriers felt that the current tenders and Public Service Obligation contracts are complex for the type of operators interested and those who are able to bid for these contracts. As to the reasons for not being interested in PSO routes, the air carriers surveyed<sup>179</sup> by Ricardo AEA (2018) indicate: continuity obligations/contract length being too restrictive (1 reply), lack of suitable aircraft (3 replies), and expected profits too low (3 replies).

**In summary:**

- The existing evidence indicates that Public Service Obligations have had some positive effect on the connectivity and development of remote regions and islands and on consumers' wellbeing, compared to the Third Package baseline. This seems confirmed by the positive impact the Air Services Regulation has had on the connectivity of remote regions and islands in terms of links provided.
- The provisions have only partially achieved the objective of ensuring genuine PSOs. Although the overall number of PSOs has decreased since 2008, the number of Member States that have PSOs in place has remained stable (currently thirteen, with France and Greece with the highest numbers). This points to remaining differences in needs between Member States while differences in application and enforcement are based on geographical needs but also on different interpretations of unclear terms such as 'peripheral or development region', 'thin route', 'vital character for economic and social development' and 'air service adequacy', as well as 'emergency procedure'.
- The provisions have likely had only a limited positive effect to the level of competition by the changes introduced. Participation in the tendering process still remains low.

g) Traffic Distribution Rules

*The **Third Package** recognised the need for Member States to introduce traffic distribution rules notably to address strains on airport capacity. Traffic distribution rules must be non-discriminatory. It established a system whereby Member States, subject to the Commission's approval could establish "airport systems" (airports serving the same city or conurbation) within which they could distribute traffic. Only after the Member States implemented the rule,*

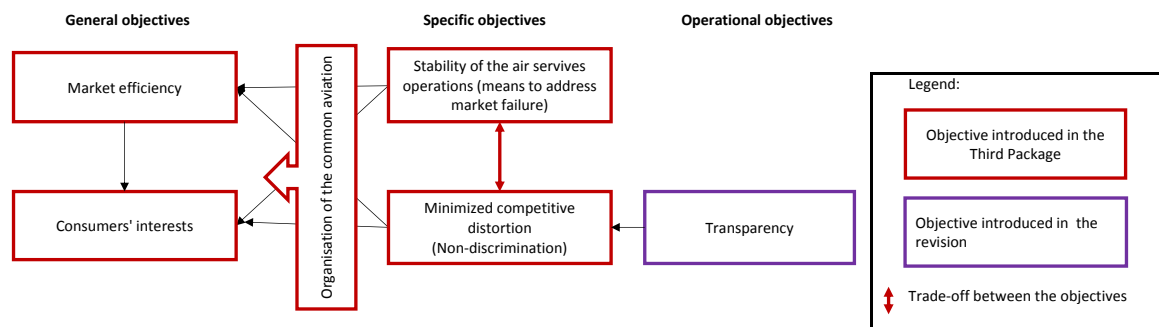
<sup>178</sup> On the relationship between the PSO rules contained in Regulation (EC) No 1008/2008 and general procurement rules, see paragraphs 113 and 114 of the [Interpretative Guidelines](#) on Public Service Obligations (PSO).

<sup>179</sup> No answer from 16 air carriers, 5 of those are already providing the PSO services.

the Commission decided in case of complaints, whether the rules were non-discriminatory. The 2006 impact assessment concluded that the rules were not transparent and risked being applied in a non-homogeneous way and based on arbitrary criteria.

Thus, in the **2008 revision** the objective of allowing Member States to address certain issues, notably strains on airport capacity while ensuring competition and non-discrimination was maintained. The latter objective was enhanced by requiring Member States to consult interested parties and notify the rules to the Commission for review before being able to apply them.

**Figure 5-7: Intervention logic for the Traffic distribution rules**



Source: European Commission

**2008 baseline:** The use of TDRs was not widespread. Under the Third Package 9 airport systems were listed in its Annex. However, since the adoption of the Third Package only two Member States have imposed TDRs, France, and Italy. Still, the unclear provisions of the two-step procedure of the third package for Member States adopting TDRs could lead to Member States discriminate in favour of their national legacy carrier leading to competition distortions.

There are currently three Traffic distribution systems introduced in the EU. Paris and Milano traffic distribution systems were both introduced firstly under the [Third Package](#) and then both *modified* after the 2008 revision. The UK traffic distributions were introduced before the adoption of the [Third Package](#). The limited data sample therefore is insufficiently representative to identify robust trends. The assessment is mainly based on the extensive field research. The overall effects of Traffic distribution rules and their contribution to the general objectives should be considered in light of the dichotomy between two main objectives: the objective of minimising competition distortion was introduced to adjust to the possible adversary effects of the objective of allowing Member States to manage air traffic between their airports.

The direct effects of the objective of **allowing Member States to better manage traffic between airports** to address possible market failures and strains on airport capacity in comparison only to the 2008 revision baseline could not be assessed, as the changes brought by the 2008 revision did not target this objective directly. However, some indirect effects on its effectiveness result from the changes to the consultation process aiming at strengthening the second objective (as discussed below). While acknowledging these possible spill-over effects and their possible impacts, the effectiveness is mainly considered in comparison to the Third Package baseline.

The objective should be assessed in light of the provisions of the freedom to provide air services, which prohibited the imposition of any restrictions. It could be argued therefore that the possibility for Member States to introduce provisions on Traffic distribution is positive

compared to the both baselines, as their adoption gave authorities the opportunity – if and when justified – to use this instrument to manage traffic between airports, for example to address strains on airport capacity. However, as described below, in practice the disrupting effects on air carriers affected may outweigh or largely limit the benefit for Member States to manage traffic.

The use of the Traffic distribution rules is quite limited in the EU. Only three Member States (UK, FR, IT) have made use of them, while the airport congestion has been increasing since the adoption of rules in 1992. The literature (Eurocontrol, 2018b) has forecast that by 2040 within the plans reported by airports, 1.5 million flights will not be accommodated which is the equivalent of an estimated 160 million passengers unable to travel. Further, 8 airport systems had been registered in the Annex to the Third Package. Five of those have not imposed Traffic distribution rules.<sup>180</sup>

Among stakeholders there are no consistent views about the effectiveness of traffic distribution rules. Both the French and Italian authorities that have applied these rules expressed positive views on their role in managing traffic between airports (to a significant extent), although only the Italian authorities considered that the application of the rules actually helped address strains on airport capacity. The French authorities considered that, at least in the case of the Paris airports, co-ordination processes in place are more important than Traffic distribution rules when it comes to addressing airport capacity. Furthermore, while air carriers were not directly asked about the supportive role of the general provisions (introduced under the Third Package), responses concerning the success of the changes introduced in 2008 in relation to the airport capacity show their negative views concerning the overall contribution of the Traffic distribution rules since 1992. In total, ten out of 17 air carriers provided a negative assessment on the contribution of the rules to the reduction of strains to airport capacity and 11 in terms of better management of traffic distribution.

The views of air carriers are supported by the case study of Ricardo AEA (2018) and the literature review. In particular, SEO Economic Research, (2015) concludes that TDRs supposed to correct perceived market failures presents risks of undue effects given their static nature and their imposition on a fast-changing market situation. The case study concludes that TDRs were not successful in alleviating capacity strains on Linate and turning Malpensa into an international hub. In fact, forcing Alitalia to adopt split operations, as well as the low performance of Malpensa may be one of the reasons, which led the air carrier to abandon its hub in Milan. Overall, it resulted in a decrease of the traffic to the Milan airport system and increase in prices. In addition, referring to the TDR put in place by the UK authorities even before the adoption of the Third Package and therefore not subject to a Commission's decision, the London transport authority (Transport for London) concluded that the use of the rules has failed to lead to the creation of a secondary hub at Gatwick airport as was intended (Transport for London, 2013). On the other hand, the case of TDRs imposed for the Paris airport system shows that the rules has been effective in limiting smaller aircraft from using Orly.

However, both the French and Italian authorities argue that other initiatives can have a greater impact on traffic distribution, such as slot-allocation rules, or air traffic movement caps. In total, 10 out of 17 carriers provided a negative assessment on the contribution of the rules to the reduction of strains to airport capacity and 11 in terms of managing traffic distribution.

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<sup>180</sup> On the other hand 4 main cities served by more than one airport under common ownership: Berlin, Milan, Paris and Rome. Airports under common ownership on a confined geographic area are less likely to compete and may divert traffic between the airports without the need for a TDR.

Out of these, six air carriers, – including 5 traditional carriers and one low-cost carrier also referred to slot allocation rules as a much more effective tool when it comes to addressing airport capacity issues. This will be further reviewed under the Relevance section.

As discussed above the overall effectiveness of the objective of a better traffic management is restrained by the second specific objective of the Air Services Regulation's rules on Traffic distribution (i.e. **minimizing competitive distortions**) and its underlying operational objective (*transparency of the consultation process* introduced in the 2008 revision). The effectiveness of the provisions serving these objectives are considered as limited in the view of the main parties involved. Both the French and Italian authorities stated that there was a limited effect on ensuring fair competition (i.e. no discriminatory effects); while the airport representatives (ACI Europe) consider that the rules discriminate against new entrants. Most air carriers (11 out of 13) considered that the rules do not ensure non-discrimination when Traffic distribution rules are applied, five of them pointing to the case of the Milan Traffic distribution rules.

This negative assessment of the Traffic distribution provisions also follows from the stakeholders' views about the changed consultation process introduced under the 2008 revision.

Despite the perceived ineffectiveness of the consultation process (as discussed below) the introduced changes have brought some positive effects compared to the baseline. In particular, the approval process for Traffic distribution by the Commission contributes to better transparency and prevention of discrimination. In particular, the Commission initially rejected in 2015 the proposed TDR of the Milan airport on the basis that interested parties had not been consulted. Following subsequent consultation with associations (three meetings between November 2015 and January 2016), the Italian authorities re-submitted the rules, which were eventually approved by the Commission. Better involvement of the interested stakeholders has also had a positive effect in the case of the modified TDR for Paris, where due to the consultation process changes were introduced to the rules. The Dutch authorities have also modified their proposed TDRs for Amsterdam airports following comments from interested parties. The case is currently being assessed by the Commission. However, 10 out of the 17 air carriers consider that there are problems in the process of identification of interested parties with no respondent providing a positive assessment, a view also shared by the Italian authorities. Elaborating on the specific problems, a network carrier involved in the Malpensa airport system suggested that it is currently not clear whether the concept of "interested parties" refers to all air carriers and airports or only to the ones directly involved in the airport system. From its side, the Italian authority (ENAC) stated that it was not clear as to whether air carriers that did not own slots in any of the airports covered- but with commercial agreements with those who have slots - should be considered as interested parties. Either way, it can be argued that the absence of clear rules for identifying the operators to be consulted and what should be the approach to follow in the instance of one or two opposing views appeared to create uncertainty. As a result, the consultation process itself was considered by most carriers (11 out of 17) as a not transparent and clear, a view largely shared by the Italian authority. Only the French authorities and one airport considered that the definition of the consultation process was fully transparent and clear.

Asked about the conditions for determining between which airports traffic may be distributed, the small number of responses suggests that different stakeholder groups view these conditions at different levels of importance. Moreover, there is a wide dispersion of views even within stakeholder groups. Among the four requirements set out in Article 19(2), second



subparagraph, of the Air Services Regulation, the 90-minute rule<sup>181</sup> has the least support from stakeholders. Many stakeholders see the reason of their imposition as being unclear, in particular in comparison with the provision to serve the same city or conurbation and the presence of transport links. ACI has stated that there are not a lot of airports in such proximity serving the same city. The Commission, in its assessment of TDR cases, found that air carriers may not regard airports that are 90 minutes away as adequate to serve the same city or conurbation, especially when one airport is reachable from the city centre a lot faster and with more frequent public transportation than the other is.

**In summary:**

- Despite forecasts of airport congestion, little use has been made of traffic distribution rules by Member States.
- Among stakeholders there are no consistent views about the effectiveness of traffic distribution rules in addressing strains on airport capacity or managing traffic between airports. Other initiatives may have a greater impact such as slot-allocation rules or air traffic movement caps.
- The approval process for Traffic distribution by the Commission contributes to better transparency and prevention of discrimination. However, concerns about improving the transparency and ensuring non-discrimination in the consultation process of interested parties remain.

**EQ2. To what extent has the Air Services Regulation contributed to the achievement of the objectives to increase the market efficiency, to improve the safety of air services and to increase consumer protection? Which different (external) factors have influenced the achievements observed?**

The main positive impacts on **market efficiency** can be observed by comparing the market today to the Third Package baseline. As pointed out in the intervention logic, the [Third Package](#) brought about the main changes in the legal framework, which later have led to behavioural changes of the main industry stakeholders and improvements to the structure of the aviation market. Since the 2008 revision has mainly introduced small adjustments to enhance these already realized effects and objectives (with exception to the provisions on price transparency), its impacts are lower and comparing them to the 2008 revision baseline would not show the effects of the whole framework in place today.

All main elements of the Air Services Regulation have had an impact on the objective of [market efficiency](#) through various specific objectives and unintended impacts (see intervention logic figure 2-1 and EQ1).

By ensuring a level playing field and the stability of air services operations, the provisions for the freedom to provide services, operating licence, leasing and, to some extent, ownership and control (liberalising limits on investment within the EEA) have allowed air carriers to optimise their networks and ensured better market efficiency. As further analysed in EQ1, Ricardo AEA (2018) modelling results suggest a substantial change stemming from the [Third Package](#) and the Regulation on traffic growth, while also taking into account the effects of exogenous factors (GDP, fuel prices). The contribution of Public Service Obligations and traffic distribution rules to the market efficiency objective through minimizing the risk of the

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<sup>181</sup> The requirement reads as follows: “the airports are served by adequate transport infrastructure providing, to the extent possible, a direct connection making it possible to arrive at the airport within 90 minutes including, where necessary, on a cross-border basis”.

competitive distortion has been positive but more limited, as these objectives are not fully attained due to their “balancing” role vis à vis the objective of ensuring that regional connectivity and efficient use of airport capacity do not lead to protectionism.

The main impacts on market efficiency since the adoption of the Regulation can be assessed through the evolution of the number of aircraft operators providing scheduled services, the evolution of different market segments, and the evolution of market shares by operational base of aircraft operator described in Section 3.

The exact extent to which such developments can be attributed to the legislation is not possible to determine quantitatively, however it is widely recognised in the literature<sup>182</sup> that the EU single aviation market’s liberalisation had positive impacts on indicators of market efficiency (e.g. passenger volumes, choice of services, lower prices, and more competition). The intra EEA18 air transport market has grown in [passenger-km](#) from 216 billion in 1992 to 549 billion in 2008. This is an average growth of 6% per year, which is higher than the 4.3% average growth under the Third Package baseline forecast. This provides an indication of the possible impact from the adoption of the Third Package in 1992.

Generally speaking two key contributors of the Air Services Regulation to **consumer protection**, i.e. stability of the air service operation (meaning that passengers do not face a high risk of unexpected air carrier bankruptcies) leading to a better consumer choice, and price competition (through greater price transparency allowing consumer to better compare fares) have seen improvement.

The citizens that replied to the open public consultation are divided on whether the offer within the EEA had improved, with 35 out of 78 noting an improvement to some extent, but 33 indicating a deterioration to some extent. They have also been divided on whether competition between air carriers had improved, with 32 respondents noting an improvement to some extent, and 38 noting a deterioration to some extent.

However, as described in Section 3, today almost eight times more routes than in 1992 are operated, allowing more choice to consumers and ensuring that more places are regularly connected. In addition, qualitative statements in the literature<sup>183</sup> strongly link the impact of the [Third Package](#) with increases in connectivity, consumer choice and more competitive prices.

Regarding price competition, some practices affecting price transparency come at the expense of consumers and are still ongoing. According to Ricardo AEA (2018), quantitative and qualitative literatures point to a positive role of the [Third Package](#) and the Regulation in improving consumer choice, thereby improving price competition and reducing air fares. Evidence<sup>184</sup> from other markets around the globe consistently finds that liberalisation leads to airfare reductions of between 7% and 40%. Even if due to the differentiation of products offered by air carriers today, consumers benefit from a much wider range of products and travel opportunities, a direct comparison of prices before and after the adoption of the [Third Package](#) and the 2008 revision is not possible. However, these findings are in line with the Commission analysis of fare evolution on 8 intra-EU routes presented in Section 3.1 (see table 3.2) which gives some indication of a trend of decreasing fares. Equally, Ricardo AEA (2018) has found that pricing provisions boosted competition which resulted in decreasing prices.

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<sup>182</sup> For example Christidis, (2015) and Oum et al (2009)

<sup>183</sup> (ICAO, 2016), (UK CAA, 2006); (Christidis, 2015); (Oum et al, 2009)

<sup>184</sup> (Intervistas, 2012); (NERA, 2008); (Iches, 2010)

The analysis performed for the 2015 Aviation Strategy shows that the liberalisation of the European aviation market in the 1990s has also led to a very significant increase in the total number of route connections operated within the EU (both domestic and intra-EU), from approx. 1,700 routes in 1992 to more than 4,300 in 2014 (+155%). Simultaneously the number of cross-border routes within the EU increased even more (+285%).

More routes and more connectivity also gave a boost to the economy. The fact that air transport is linked with economic and social development is today widely accepted. The following figures attempt to quantify these benefits, although it should be kept in mind that they are provided by the industry. In 2014 for example, aviation supported 8.8 million jobs in the EU, and contributed over EUR 621 billion to EU GDP<sup>185</sup>. Aviation is also important for the success of SMEs and tourism. The number and quality of air connections can play a decisive role in the location choice of large firms' headquarters within and outside the EU.

Regarding the stability of the air service operation, the analysis in EQ1 shows a reduction in the number of air carrier bankruptcies. While in general there are other more important factors linked to carriers' bankruptcies, in the case of newly established carriers the stricter financial requirements imposed may have played a role.

Finally, benefits to consumer interests have increased due to deeper price transparency, price comparability and non-discrimination. Yet issues concerning pricing are still prevalent as mentioned in Section 5.1.d. For example the Network of European Consumer Centres still receive a high number of complaints with regards to price indication. However, it is not always clear whether the issues derive from non-compliance of air carriers and intermediaries with the applicable rules, insufficient information of consumers on the actual rules in this domain or the inadequacy of those rules. Other provisions that have had a positive impact on consumer protection are PSOs that ensure air transport links to otherwise underserved regions.

Regarding the objective of **safety of air services**, the the Air Services Regulation did not directly aim to improve safety, but rather ensure that the provisions on market liberalisation would not compromise safety. As discussed under the sections on operating licence and leasing in EQ1, the Air Services Regulation has had a positive impact in this regard through the introduction of higher operational standards both for EEA carriers and by restraining the use of non-EU carriers in the context of wet-leasing aircraft from third-countries, where an extra level of safety approval is warranted to ensure the aircraft complies with EU safety standards. Ricardo AEA (2018) shows that European air carriers have an excellent safety record. It has been consistently strong, with the number of accidents remaining below five per million departures over the whole 2006-2016 period, which is significantly below the average worldwide rates (EASA (2017a)). During the same period, the number of fatal accidents remained below 0.2 per million departures, also consistently below the worldwide average. While the Regulation provisions are not directly responsible for the EU's safety record, they support the EU safety culture and do not undermine the results of the common air safety framework.

### **Unintended impacts on the environment**

With the global economic growth and the liberalisation of the aviation market, air traffic in EU28 has grown from less than 10,000 daily flights in 1992 to around 26,000 in 2018 (+160% increase).<sup>186</sup> This sustained growth has produced significant economic and social benefits but has also had unintended negative impact on the environment. Associated environmental

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<sup>185</sup> Air Transport Action Group (ATAG) 2016

<sup>186</sup> Eurocontrol

externalities such as CO<sub>2</sub> emissions also followed a growing trend, however at a slower rate. In particular, whereas technological improvements, fleet renewal and increased operational efficiency have been able to partially counterbalance the impact of recent growth, there has still been an increase in overall noise and emissions since 2014. In 2016, aviation was accountable for 3.6% of the total EU28 greenhouse gas emissions and for 13.4% of the emissions from transport. The “European Aviation Environmental Report 2019” published in February 2019 provides an updated assessment of the environmental performance of the aviation sector.<sup>187</sup>

The main environmental impacts of the Air Services Regulation are those of increased pollutant emissions and noise as well as those of increased pollutant emissions from land transport accessing airports.

The global aviation industry remains a small producer of greenhouse gases (around 2% of all human-induced CO<sub>2</sub> emissions). However, its growth rate is significantly higher than for other sectors (with a doubling of CO<sub>2</sub> emissions from international aviation in the EU between 1990 and 2013<sup>188</sup>); its contribution to overall CO<sub>2</sub> emissions is therefore projected to significantly increase in the future. In particular, greenhouse gas emissions represent an increasing challenge for aviation sector, with an expected increase by 40% over the 2005 to 2040 period.

With the use of the AERO-MS model, the Ricardo AEA (2018) estimated the CO<sub>2</sub> emissions would have grown under the Third Package baseline by around 33% for the period 1992 to 2016 (1.8% per year). However, the model estimated that CO<sub>2</sub> emissions would have decreased by around 10.5% in the period from 2008-2017 under the 2008 revision baseline (-1.4% per year). It should also be acknowledged that although air traffic growth and CO<sub>2</sub> emissions from aviation have both increased by about 80% from 1990 to 2005, CO<sub>2</sub> emissions have increased more slowly (+5%) than passenger-kilometres (+32%) between 2005 and 2014. In particular, flying further in larger aircraft, an increase in load factors and the use of lighter and slimmer seats have all resulted in a reduction in fuel burn per passenger-kilometre flown (-19% fuel burn per passenger-kilometre from 2005 to 2014). As to noise, the average noise level of the twin-aisle aircraft category in the European fleet has significantly reduced since 2008 due to the introduction of the Airbus A350 and Boeing 787.

In the years up to 2035, although CO<sub>2</sub> emissions are expected to keep growing, this growth is expected to be slower than the growth of air traffic. This is due to a basket of measures taken at national, European and global level, which are contributing to mitigate the effect of aviation on the environment. Additional measures at global level (Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), CO<sub>2</sub> standards) are expected to enter into force in the coming years, and will further contribute to reducing the environmental footprint of aviation. These will be further described in the Coherence section.

Aircraft noise exposure is typically assessed by looking at the area of noise contours around airports, as well as the number of people within these contours. Noise exposure has stabilised over the past ten years. The total population inside these contours (thus very exposed areas) decreased by only 2% between 2005 and 2014, from 2.52 to 1.18 million people in 2014. This overall noise reduction is due to technological improvements, fleet renewal, increased ATM efficiency and the 2008 economic downturn. As an example, fleet renewal has led to a 12%

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<sup>187</sup> [https://ec.europa.eu/transport/modes/air/news/2019-01-24-aviation-environmental-report\\_en](https://ec.europa.eu/transport/modes/air/news/2019-01-24-aviation-environmental-report_en)

<sup>188</sup> In 2016, aviation was accountable for 3.6% of the total EU28 greenhouse gas emissions and for 13.4% of the emissions from transport (European Aviation Environmental Report 2019).

reduction in the average noise energy per operation between 2005 and 2014. The [Airport Noise Regulation](#) introduced noise-related operating restrictions at Union airports within a Balanced Approach.

**In summary:**

- Without the liberalisation of the EU aviation market the positive impacts on indicators of market efficiency (e.g. passenger volumes, choice of services, lower prices and more intensified competition) would not have materialised.
- There are indications that the market efficiency resulted in benefit to the consumers from a much wider range of products and travel opportunities, and there is some indication that prices decreased. Other elements contributing to consumer interests (stability of air services and competitive prices) also have seen improvement.
- European air carriers have an excellent safety record and while the Air Services Regulation did not aim to directly improve safety, there are indications that it contributed to the positive results of the common air safety framework.
- The increase in air traffic levels brought by the global economic growth and liberalisation has had effects on the environment in terms of air and noise pollution. Evidence shows that air transport is much more environmentally efficient than before the Air Services Regulation but that the rapid growth to the sector has overtaken efficiency gains per flight. The demand for and growth of air transport have increased at a faster pace than the technological improvement and what mitigating actions can address. There are many initiatives ongoing in order to address these negative impacts ranging from a global standard for CO2 emissions (CORSIA), to regulation on noise at airports and research and development into quieter and less polluting aircraft.

**5.2 Efficiency:**

**EQ3. To what extent has the legislation been efficient? What are the regulatory costs and savings involved (i.e. substantial compliance costs/savings, enforcement costs/savings and administrative costs/savings of monitoring and reporting arrangements)? Were the costs proportionate to the benefits achieved? Has the regulation resulted in unnecessary regulatory burdens or inefficiencies? Is there a potential for the reduction of the regulatory costs for any of the stakeholders group?**

To quantify the *costs of implementing the revised Regulation at national level* and in view of assessing its cost effectiveness, data has been gathered on the costs incurred by Member States for administering, monitoring and setting up the required procedures and systems at the level of licensing and price transparency authorities. It should be noted that the Member States authorities have had a high degree of difficulty in assessing the costs to the Regulation and their relative change in comparison to the baseline. As regards the latter, only 9 licencing authorities out of 16 participating in the study could assess the changes in costs levels. Of the remaining responses, the majority (AT, CZ, EE, MT, and PT) indicated that no material change occurred in comparison to the baseline. Significant cost increases were identified in the case of SE (see assessment for the monitoring below) and ES (concerning ICT development and personnel).

**Table 4-1 Costs to Member States in EUR millions (inflation adjusted) for 2008-2017**

One-off	Ongoing	Total
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<b>Licensing authorities (total)</b>	<b>0.76</b>	<b>38.41</b>	<b>39.17</b>
<i>Monitoring</i>	-	19.65	19.65
<i>Substantive compliance</i>	0.76	16.55	17.31
<i>Pure enforcement</i>	-	2.22	2.22
<b>Price transparency authorities (total)</b>	<b>0.06</b>	<b>1.18</b>	<b>1.25</b>
<i>Monitoring</i>	-	-	-
<i>Substantive compliance</i>	0.06	-	0.06
<i>Pure enforcement</i>	-	1.18	1.18
<b>Totals</b>	<b>0.82</b>	<b>39.59</b>	<b>40.42</b>

Source: Ricardo AEA (2018)

The relatively low weight of the **one-off costs** in the distribution is in line with the answers of the authorities on the limited changes to their working methods introduced following the 2008 revision. The authorities have identified three most expensive costs categories (with a median value of EUR 5.5 thousands each) as: 1) training of staff involved in monitoring of air carriers' financial and operational performance, 2) setting/adapting PSOs tendering/ approval procedures according to the Regulation and 3) setting up the procedures for review/approval of leasing requests.

The magnitude of the **ongoing costs** is more substantial due to their recurrent nature for a total costs distribution. Moreover, their median estimates are overall higher than ones for one-off costs. Two cost categories what reached the highest median value of EUR 5.5 thousands yearly are 1) costs for monitoring/checking information required to ensure validity of an OL (Article 8) and 2) costs of maintaining the national register, which fall respectively under the monitoring and compliance costs.

While looking into the costs of the monitoring under Article 8, it should be noted that in comparison to other monitoring activities (e.g. reviewing the information to obtain the operation licence or checking information for the leasing) the monitoring is done for all air carriers with a valid operating license (and not only for the ones which applied). While cross-checking this figure on the basis of the EU Standard Cost Model this figure, the results turned to be within the same cost range. Moreover, as found out in the earlier SDG study (2011), the Member States apply the divergent practices for the monitoring. In most cases, regular checks tend to take place on an annual basis but become more frequent in the case that authorities identify problems (monthly or quarterly basis). This could partially explain its weight in the total costs categories. While being asked, none of the authorities consulted in the course of the study have indicated that these costs are disproportionate. The Irish authorities commented that the costs of monitoring were largely covered by relevant fees for air carriers. It should be noted however that the monitoring under Article 8 was the only cost category where SE authorities claimed significant increase in costs after the adoption of the Regulation marked as substantial costs. The relatively low levels of on-going costs for the price transparency authorities is also in line with their views received during the interviews.

As expected, compared to the costs for the national authorities, the costs for air carriers turned out to be more substantial. Similar to the costs distribution of the national authorities, the main share of the costs is for on-going costs. Provided that all three costs categories with the highest median value (EUR 5,500 per company) are ones linked to changes in procedures following the adoption of the Regulation, it can be argued that similarly to the national authorities, air carriers almost did not need to change their working practices.

**Table 4-2 Costs to air carriers in EUR millions (inflation adjusted) for 2008-2017**

	One-off	Ongoing	Total
<i>Direct substantive compliance</i>	9.94	43.35	53.29
<i>Administrative (reporting costs)</i>	-	65.03	65.03
<i>Enforcement</i>	-	-	-
<b>Air carriers (total)</b>	<b>9.94</b>	<b>108.38</b>	<b>118.32</b>

Source: Ricardo AEA (2018) based on the costs survey for the national authorities

The cost categories for the most significant median value of on-going costs (EUR 5,500 per company yearly) are linked with requirements for the OL checks and compliance, leasing requests and price transparency. As regards the differences in costs distribution according to type of air carriers, a detailed assessment was not possible due to the low number of responses received, which made further subdivision by Ricardo AEA (2018) invalid.

The assessment of carriers' views of provisions leading to the most significant cost increases and/or savings and literature review also points to the same costs categories as the most important for carriers. Although, the quantitative input on the level of changes in comparison to the baseline is very limited<sup>189</sup>, in their qualitative assessments the air carriers mainly refer to the price transparency provisions and burdensome procedures for prior approvals for intra-EEA leasing (and between air carriers with multiple AOCs). The SDG study (2011) estimates the cost to be EUR 630 per air carrier per year, attributable to tasks such as reviewing information and attending meetings. This is clearly far below the median figure from the survey (estimated at EUR 5,500 per air carrier per year), which demonstrates that the survey costs are likely to be an upper bound.

The costs of implementing the Air Services Regulation must be considered in relation to its benefits: market efficiency, safety of operations and consumer protections. The analysis provided under EQ3 shows overall positive effects of the legal framework in comparison to both baselines. The magnitude of these impacts in most cases might not be monetarized, making the overall conclusions impossible. Although the final cost estimate is highly uncertain, there was generally a reasonably high level of agreement between the stakeholders in the magnitude of estimates received, which supports the view that there were not excessive costs for any particular stakeholders. The summary assessment of the costs and benefits is presented in Annex 5.

**In summary**<sup>190</sup>:

- The estimated total cost to licensing authorities across the EU-28 over the period 2008 – 2017 is 39.17 EUR million.
- For price transparency authorities, it was concluded that all of the costs have been very low representing 1.18 EUR million.
- For air carriers, the best estimate of total costs is EUR 108.38 million.
- Although the final cost estimate is highly uncertain, there was generally a reasonably high level of agreement between the stakeholders in the magnitude of estimates received, which supports the view that there were not excessive costs for any

<sup>189</sup> Only three carriers could provide an answer to this question: 2 air carriers pointed to no change in costs and 3 air carriers claimed a small increase.

<sup>190</sup> The estimated costs are inflation adjusted

particular stakeholders. There is also a general view that the benefits brought by the Regulation have largely offset the costs it has generated.

### 5.3 Relevance:

This section will analyse first whether the *specific objectives* set for the 2008 revision, or where relevant for the Third Package are still relevant, considering market developments and unintended impacts. Next, the section will examine whether the *specific provisions* (corresponding to policy) areas are still relevant. Lastly, the section will examine whether the Regulation reflects the *social challenges* in light of market developments since the liberalisation.

#### **EQ 4. To what extent are the objectives which were identified at the time of adoption still adequate in the current context and how do they still correspond to the problems and needs of the mature internal aviation market?**

The general objectives themselves and the balance between them remain relevant in light of the changed market, political and technological context. Indeed, the objective of ensuring market efficiency remains needed for the establishment of an internal EU market where air carriers can freely provide services. At the same time, complete commercial freedom must be balanced against the interests of the society by maintaining the safety of operations and protecting consumers. However, as discussed in EQ1, the Regulation had unintended effects that brought new challenges to a stakeholders' group (i.e. the aircrews), which is now not explicitly targeted by the current text of the Regulation. The analysis in EQ7 will provide further assessment of the issue. The assessment below details the analysis of the relevance of the specific objectives. Whenever several topics contribute to the objective, the assessment is provided for all.

The existence of a mature EU internal aviation market drives economic growth, creates jobs, facilitates trade and allows people to travel. Today European aviation represents 26% of the world market, contributing EUR 510 billion annually to Europe's Gross Domestic Product, and supporting 9.3 million jobs in Europe. Open and connected aviation markets offer better value flights to a greater choice of travel destinations worldwide.

The existence of the common market can be ensured only by guaranteeing equal business opportunities to market players. The assessment of the effectiveness of this objective under EQ1 (in particular for the operating licence and principal place of business, leasing and Public Service Obligation) details the risk of negative consequences to the safety level, [market efficiency](#) and consumer protection which can arise in the absence of the level playing field. Therefore, the objective of **maintenance of a level playing field** is of utmost importance.

The objective of **ensuring stability of air services operations** is still relevant. As regards the element of fitness of air carriers under the operating licence provisions, the analysis presented in Section 3 shows that the liberalisation of the market has led to further intensification of competition combined with low profitability. Increased competition from low-cost carriers and third countries carriers has affected legacy carriers. Furthermore, while the number of bankruptcies decreased in the last years, mainly among new carriers, bankruptcies still occur with negative consequences to consumers and workers and the Regulation should ensure their mitigation. Further, in order for EU carriers to remain competitive, they must continue to be given operational flexibility as is provided by leasing agreements, both for the purpose of addressing operational and seasonal needs, but also as a financial tool, reducing aircraft capital expense and risk. The quantitative data presented in Section 3 and Annex 4 shows the high and increasing demand for leasing by EEA air carriers. Moreover, the literature review



(ICF (2018)) suggests that future strong travel demand, relatively low fuel prices, low inflation and manufacturer backlogs will ensure that leasing continues to be essential for air carrier competitiveness and [market efficiency](#). Thus, supporting the flexibility of operators through enabling access to leasing remains important for the efficiency of the air carrier industry.

As regards the objective of the **better management of traffic between airports**, forecasts for the 2018-2024 period by Eurocontrol suggests for a more than 20% increase in total traffic while total airport capacity is not expected to be able to serve this demand (Eurocontrol, 2018a). Furthermore, the increase in traffic and the use by low-cost carriers of secondary airports has probably led to an increase in the number of airports serving the same cities of regions. Therefore, it remains an important objective to ensure solutions to strains on airport capacity.

The relevance of the **price transparency objective** within the Regulation in addition to the EU's existing and newly proposed horizontal legislation have been questioned (discussed in EQ11). The Air Services Regulation acts as a *lex specialis* that seeks to address issues unique to the air services market, such as the role that taxes, fees, and charges play in consumer purchasing decisions. It goes beyond the general consumer protection rules. As further analysed in EQ8, the existing body of EU instruments on consumer protection regulated pricing issues in a horizontal way, which can be seen as complementary (but not replacing) the need for price transparency within the Regulation. Further supporting this continued need, updated guidance was published in May 2016 regarding [Unfair Commercial Practices Directive \(UCPD\)](#) that clarified that the sector-specific legislation takes priority, whereas the [UCPD](#) supports it and acts in case a *lex specialis* legislation provides no specific provision. The revised [CPC Regulation](#) (in force as from 17 January 2020) listed Regulation 1008/2008 in the Annex to the Regulation as an instrument which protects consumers' interests and hence cross-border cooperation of enforcement authorities is assured. This also shows that the pricing provisions are relevant for the market to keep it fair and unbiased and its cross-border facet needs even stronger enforcement. Indeed, the revised CPC Regulation opens the way to further administrative cooperation and exchange of best practices among the Member States' authorities, a new surveillance system and the European Commission's possibility to coordinate an action in case of an infringement with Union dimension. The consultation also confirmed (by authorities, air carriers and CRS companies) that the price transparency and non-discrimination rules are considered important, and relevant and were timely to have been introduced in 2008.

Moreover, the need of a possible even further adjustment of the Regulation to the specificities of the aviation market was mentioned by a large number of authorities during the consultation.<sup>191</sup>

The objective of **promoting connectivity, regional development** and securing regular air services for remote regions and islands is still relevant today where the market fails to provide adequate connections to remote and peripheral regions because there is not enough demand in the region alone for air carriers to establish profitable regular services (as explained in EQ1). The relevance of this objective is particularly high for islands where maritime links are much more sensitive to adverse weather conditions.

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<sup>191</sup> For example 11 of 13 authorities considered it a problem that the amount for refund is absent from the published elements.

The results of the open public consultation show a general agreement that Public Service Obligations should service primarily the transport needs of residents of remote regions and islands, with 47 out of 78 agreeing completely, and 11 agreeing to a large extent. Most respondents also agreed that Public Service Obligations have guaranteed mobility needs of remote regions and islands, with 21 completely agreeing, and 11 agreeing to a large extent. Respondents gave a mixed opinion on whether Public Service Obligation routes provide good value for the money spent by Member States, and a negative opinion on whether Public Service Obligations have contributed to the economic and social development of remote regions and islands (19 agreeing to a limited extent, and 15 not agreeing at all), and on whether conditions imposed by Public Service Obligations are appropriate to satisfy the transport needs (27 agreed to a limited extent, and 19 did not agree at all).

Ensuring the **competitiveness of EU air carriers through maintaining traffic rights** continues to be a relevant objective. EU air carriers must continue to comply with the language outlined in bilateral (and, more recently, horizontal) ASAs that restrict access to routes to third countries on the basis of compliance with Ownership and Control requirements. The EU Ownership and Control restrictions were aimed at facilitating EU air carriers' ability to maintain traffic rights to non-EU countries, although experience has shown that this also depends on the non-EU country's willingness to accept "EU designation".

Ensuring **commercial freedom** is fundamental for the internal aviation market. In this respect it continues to be relevant to preserve air carriers' freedom to provide intra-EU air services without restrictions and set up their operations according to market demands, for example by establishing multiple operational bases.

**In summary:**

- The general objectives of market efficiency, safety and consumer protection still correspond to the problems and needs of the mature internal aviation market.
- The specific objectives of ensuring a level playing field, non-discrimination, freedom to provide intra-EU air services and ensuring EU carrier's commercial freedom together form the cornerstone of the EU aviation market and remain relevant.
- Likewise, the "adjusting" objectives remain important, i.e. ensuring the stability of air services by establishing certain financial requirements and monitoring on airlines; addressing Member States' needs to address strains on airport capacity and connecting regions through Public Service Obligations despite this representing an intervention in the free market; ensuring EU air carriers can maintain traffic rights.
- Despite a general EU legal framework on consumer protection, the objective to ensure price transparency remains relevant to complement the general rules.

**EQ 5. Considering the technological, market, political and legal developments, to what extent is the existing range of provisions, requirements and conditions still relevant in the current context?**<sup>192</sup>

a) Provisions on operating license and principal place of business

### **Scope of the application in light of new technological (and business) developments**

The scope of the obligation to hold a valid operating licence is broad as it is compulsory for any undertaking carrying passengers, mail and cargo by air against remuneration, with only two exceptions.<sup>193</sup> "Undertaking" is defined as any natural or legal person, whether profit-making or not, or any official body whether having its own legal personality or not. Thus the obligation to hold an operating licence can potentially apply to individual persons or small-scale operations. The granting of the operating licence in its turn is based on a cumulative and exhaustive list of conditions harmonised at the EU level. They were designed for air carriers engaged in commercial activities and of which activities consist mainly in operating air services (as defined in Article 4(d) of the Regulation). The new technological and business developments discussed in Section 3 brought to the market new types of activities (e.g. drones and cost-sharing services advertised through online platforms) not existing or contemplated in 2008. While drones in general terms do fall under the scope of the application of the Regulation, in the case of cost-shared flights it is unclear whether they fall under the scope as well. They contain elements of remuneration even if the activity is not profit-seeking and the pilot contributes a share of the costs. To some extent the questions about cost-sharing platforms also apply to any cost-sharing flights (e.g. between friends or club-members) or contribution to costs e.g. in flying clubs, when performed outside the framework of such internet. Any possible revision of the rules would need to be careful so as to avoid the imposition of disproportionate or inadequate obligations on small scale activities.

While assessing the proportionality of the application in case of drones, different elements are to be considered. On the one hand, the use of drones for the commercial purposes has been growing in the past years and is expected to grow further. Literature (SESAR (2016) and de Miguel Molina & Segarra Oña (2018)) points out that they are being used for e-commerce and delivery services at a local level and are expected to be used more for cargo and eventually passenger transport after 2035. The current projections from Eurocontrol also suggest a long period of at least 10 years before drones will be used for long-distance cargo and passenger air services. Thus, in the long-run, these services will form a direct competition to manned air services. Therefore, (6 out of 19) surveyed air carriers commented that the presence of a pilot or not aboard the aircraft is not a decisive criterion. This view was also shared by the UK authorities during our interviews. However, 12 out of 14 surveyed authorities (from AT, BE, CZ, EL, FI, FR, IT, MT, SE, PT, IE, ES) consider that it is not appropriate to apply the Regulation in relation to the use of drones<sup>194</sup>. Indeed, there is a risk that the burdensome impact negatively the new business development opportunities in the market and therefore have a negative impact on consumer interests. As regards safety, the [new EASA Basic Regulation](#) intends to address it treating all types of drone operations, commercial and non-

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<sup>192</sup> The analysis of the evaluation question is based on the assessment of the previous questions (in particular of questions EQ1 – EQ3 (effectiveness) and EQ5 (Relevance) and it details the provisions of the Regulation which application was found not fully in line with the changed policy, technological and market context.

<sup>193</sup> Air services performed by non-power driven aircraft and/or ultralight power-driven aircraft, and local flights (Article 3(3)a)).

<sup>194</sup> Two authorities (EE, DE) suggested an alternative legislation would be needed to cover the specific characteristics of these drones and cost-sharing flights.

commercial, under the same legal framework, based on three different categories depending on the associated operational risk.

Regarding cost-shared flights, according to EASA (2017) assessment, the scale of these platforms is limited. There are 8 online platforms<sup>195</sup> which account for less than 1% of the total flights conducted. In a strict sense, the cost-sharing platforms do not directly compete with air carriers since they focus on a small niche market and, in some respects, do not represent commercial air services as the pilot is also contributing to the cost. Regarding the safety objective, the EASA Ops Regulation covers such type of operations. Seven out of the 17 air carriers that responded to the survey see the limited relevance of the current provisions on monitoring the financial standing of the online platforms that only operate as an intermediary and do not apply any effective financial and operational control to the pilot that owns the aircraft and is responsible for the flights. Ten out of 14 authorities believe that the Regulation is inappropriate tool in the case of cost sharing (AT, BE, DE, EL, FI, IT, MT, SE, PT, IE, CZ, EE, FR, ES)<sup>196</sup>. In fact, only FR (out of 14 authorities) indicated it applies the Regulation for cost-sharing.

### **Obligation on the OL in light of the policy developments**

The financial standing of air carriers is relevant under provisions on operating licence and AOC. This creates a risk of overlap of assessment and regulatory burden for carriers. However, the legal assessment by Ricardo AEA (2018) shows that the requirements for granting the AOC focus only on the capacity to ensure safe operations and the extent to which appropriate procedures and structures are in place to ensure airworthiness. They do not cover broader aspects of the financial operation of the air carrier or the viability of its business model, which are important, notably for newly created air carriers (as demonstrated in EQ2 to ensure the stability of the operations). As a result, the AOC monitoring on its own cannot provide a complete understanding of the financial status of operators. At the same time, general business law (namely, general rules for creating a business, or insolvency procedures) as applied in different countries are sufficient to complement them either as means to provide authorities with the necessary information, early warning and the tools needed to manage the risk associated with air carriers facing financial problems. The responses from stakeholders in the context of the external study overall – with a few exceptions- support maintaining the operating licence. 14 out of 17 carriers<sup>197</sup> and 12 out of 16 Member States (DE, FI, FR, IT, PT, ES, BE, CZ, EE, MT, SE, IE) support the relevance of the provisions. Three Member States (ES, UK, FR) highlighted that economic and operational oversight are complementary rather than overlapping and one Member State considers that the AOC requirements would not be sufficient.<sup>198</sup> Although being supportive of the relevance of the operating licence provisions in general, one union (EurECCA) considers it lacks the human dimension (i.e.: the working conditions and fitness of the aircrew).

### **Monitoring of the operating licences in light of the market developments**

As discussed in EQ2 and EQ3, the emerging trends in the market and in particular, the increased use by air carriers of multiple operational bases and outsourcing of key company

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<sup>195</sup> COAVMI, FlyBook, Flyt.club, Flightshare, Fly Boy, Rotorpool, TAKEOFF Air Tourism and Wingly

<sup>196</sup> Two authorities (EE, DE) suggested an alternative legislation would be needed to cover the specific characteristics of these drones and cost-sharing flights.

<sup>197</sup> Only two air carriers supported a possible change. One of them claim that air lines are normal commercial enterprises and this fact therefore challenges a need for the financial scrutiny by the State. It however recognised a need for supervision to minimize the risk of bankruptcy due to impact on passengers’.

<sup>198</sup> Only one authority (AT) indicated that there is no need for OL provisions.

functions pose challenges for authorities to monitor the AOC and operating licence in the same Member State. While the [new EASA Basic Regulation](#) through the amendment of the Regulation addressed the challenge in the respect to AOC<sup>199</sup>, the issue of the financial monitoring remains unsolved. Indeed, when an air carrier carries out most of its activities in a Member State different from its principal place of business, the licencing authorities of that Member State may be better placed to carry out the financial monitoring. While 6 authorities (from AT, EE, EL, PT, ES, PL) expressed concerns about the capacity of an authority to effectively monitor such air carriers in remote locations, it is interesting to note that stakeholders (including these 6 authorities) mostly agree with the current system. 13 authorities out of 16 (AT, BE, CZ, DE, FR, IT, SE, IE, ES, EL, FI, PT, UK) considered that the principal place of business criterion is appropriate in determining the location of where an air carrier applies for an operating licence. 11 out of 19 air carriers (against eight that were not) share this view. The definition is considered appropriate even in view of the subcontracting of functions and the establishment of multiple operational bases. (Respectively by 10 and 11 out of 15). 14 authorities out of 16 (AT, BE, CZ, DE, DK, FR, IT, SE, PL, ES, MT, PT, IE, UK) considered that the definition of the principal place of business ensures that the Operating licence is granted by the Member State, which is best placed to carry out financial and operational oversight and only 8 out of 19 air carriers (with the remaining considering that it is not).

**In summary:**

- It is unclear whether certain services fall within the scope of the Air Services Regulation such as drones or cost-shared flights. For some type of operations the current provisions on operating license may be disproportionately burdensome. In order not to stifle innovation the industry would benefit from clarity on the scope of application of the Regulation and adapted requirements.
- Some stakeholders have suggested that the requirements on operating licences and AOCs overlap and regulatory burden could be removed by having only one authority doing a comprehensive assessment of safety and financial fitness. However, the evidence suggests that both requirements complement each other, and the separate check of financial fitness provides authorities with the necessary information, early warning and the tools needed to manage the risk associated with air carriers facing financial problems.
- In light of the multiplication of operational bases, the ability of authorities from one Member State to carry out financial oversight of all operations may be questioned. The new EASA Basic Regulation has introduced the possibility for safety authorities from other Member States to carry over safety oversight and the same or a requirement for deeper cooperation between authorities may be warranted for the monitoring of financial fitness.

b) Leasing

**Prior approval in light of the policy and market developments (safety standards)**

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<sup>199</sup> The new EASA Basic Regulation in limited cases allows the supervision to be carried out by an authority in a different Member State alone, or jointly, or by EASA.

Some stakeholders<sup>200</sup> claim that given the increasing level of safety harmonisation through EASA, the prior leasing approvals for intra-EEA leasing agreements within the Regulation are redundant. In contrast to the situation before 2008, there is an important progress in the safety levels due to the safety standardisation work that is ongoing. Thus, while the provisions were likely relevant in the past, in future the situation changes.

The previous line of arguments about the relevance of intra-EEA approvals is also applicable to situations when a carrier holds multiple AOCs<sup>201</sup>, which is becoming a more common practice as described in Section 3 and EQ2. Since the AOCs will belong to one air carrier group the safety culture across the group in different Member States is likely already consistent, making the need for prior approval of leasing agreements redundant.

Regarding more particularly the conditions for wet-leasing, half of the 18 surveyed airlines felt that restrictions on time, demonstrating the need to overcome operational difficulties and/or seasonal capacity needs were "completely necessary". The condition that attracted the least support was the need to demonstrate the unavailability of EU registered aircraft.

**In summary:**

- In light of the increased level of safety oversight rules under the EASA, prior approval for intra-EEA dry- and wet-leasing are likely to be duplicating and not bringing added value in terms of safety.

c) Price Transparency

**General price transparency rules in light of divergent practices of air carriers**

The relevance of provisions requiring the breakdown of taxes, fees and charges has been questioned. Ricardo AEA (2018) argues that it is unclear whether providing a breakdown of TFCs in addition to the total price inclusive of TFCs actually helps consumers when comparing prices across different carrier offerings, routes, or over time. In fact, providing too much information that is irrelevant for choosing the best purchase option can instead lead to suboptimal decisions (Santana et al, 2017). On top of that, the inconsistent definitions air carriers have of the terms taxes, fees and charges further increases the difficulty of consumers to adequately compare prices. On the other hand, without such information identifying the parts of the ticket that are due to third parties is not easy, which can have a negative effect on the possible reimbursement of these price elements in case of voluntary cancellation by the passenger. Indeed, the surveyed national authorities considered that a remaining issue is the awareness (and possibility) of reimbursable price elements<sup>202</sup> in case the passenger does not show up at the flight or voluntarily cancels the flight<sup>203</sup>. While in France it has recently

<sup>200</sup> The views of the stakeholders were mixed on this point. Seven out of 13 air carriers responding to the survey, along with IATA, AIRE and ERA, a trade organisation, three interviewees in the leasing industry and 4 out of 14 authorities responding to the survey (AT, ES, FI, PT) argued for irrelevance of the priori-authorisation. Those who considered priori-authorisation being important included the majority of authorities responding to the survey (10 out of 14: CZ, DE, MT, SE, PL, IE, ES, FR, IT, PT), six out of 13 air carriers responding to the survey, as well as a representative of workers (ETF, ECA) and a company in the aircraft leasing industry.

<sup>201</sup> Other legislation such as the review in the context of the US ATA is not considered here, as it is part of a separate legislative proposal

<sup>202</sup> Those that are collected by air carriers from passengers at the time of booking but are due to third parties (typically government taxes and airport charges).

<sup>203</sup> BEUC joint action on no show: <https://www.beuc.eu/publications/consumer-groups-take-fight-against-unfair-%E2%80%98no-show%E2%80%99-clause-airline-tickets/html>

become an obligation under consumer law that air carriers reimburse such price elements if the passenger asks for them, there is no such obligation in European law. 11 of the 13 responding authorities<sup>204</sup> considered it as a problem that such possibility of reimbursement is not – at least – indicated during the booking process and signalled this could be considered as an improvement in the future<sup>205-206</sup>. Therefore, these provisions may be subject to further analysis in case a revision of the current rules are foreseen in the future.

The OPC show that the citizens participating in survey considers the amendment to clearly identify the reimbursable elements and amounts of the ticket at the time of purchase as the most important change, with 27 out of 78 scoring it highest. Other stakeholders (associations, organisations, etc.) scored the amendment that surcharges should be a reimbursable element the lowest.

Another aspect is that, as discussed in Section 3, since the adoption of the Regulation, carriers have increasingly rendered certain services optional, which in turn has made it more difficult to compare prices across air carriers. Air carriers are not consistent in which services, such as checked luggage, cabin luggage or seat reservation, are included in a certain offer and which ones are optional.

CRSs pointed to the problem that the fact that air carriers are not obliged to share all information on prices with the CRSs (but only the elements of the final price as per mentioned in the Air Services Regulation's provisions on price transparency) may impact price comparison.<sup>207</sup> It should be noted that, indeed the Regulation does not oblige air carriers *per se* to share such information with travel intermediaries (including CRSs). The regulation however obliges that the final price that includes all price elements that are foreseeable and unavoidable at the time of booking, together with the final price is indicated. Without information on final price the sales would not be possible. Thus, in practice the price elements of the final price is shared with intermediaries in order to fulfil the obligation of price transparency. Having said this, however, air carriers may freely choose – based on pricing freedom – what and how to sell through different sales channels. The decision for an air carrier to give access to booking of ancillary items in one sales channel (e.g. through own website or selected agents) and restrict such in other distribution methods (e.g. CRS) is not *per se* unlawful. Linked to the above observations, in course of the consultation to the evaluation, CRSs and online travel agents expressed their view that there is a growing tendency by airlines to split prices in separate services which may hinder transparency and possibilities for comparisons, thus enabling drip pricing techniques. Literature review (IATA (2018)) points out that the inclusion of many optional elements at a later stage in the booking may lead consumers to make suboptimal purchase decisions. There is separate EU law regulating CRSs<sup>208</sup> which is currently also being evaluated by the Commission.

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<sup>204</sup> BG, DK, EE, GR, FI, LT, NO, SE, SK and both from Italy.

<sup>205</sup> In particular, practices relating to the inflexibility of return terms or other inflexible terms, e.g. the no show clause, have been considered unfair according to the Unfair Contract Terms Directive.

<sup>206</sup> In this light, the EC has launched a website to increase awareness about the right for reimbursement : [https://europa.eu/youreurope/citizens/travel/passenger-rights/air/index\\_en.htm](https://europa.eu/youreurope/citizens/travel/passenger-rights/air/index_en.htm)

<sup>207</sup> Argued by ECTAA and four ETTSA members, which replied to the survey in the context of Ricardo AEA's support study.

<sup>208</sup> Regulation 80/2009 on a Code of Conduct for computerised reservation systems [https://ec.europa.eu/info/law/better-regulation/initiative/1138/publication/120003/attachment/090166e5b594463f\\_en](https://ec.europa.eu/info/law/better-regulation/initiative/1138/publication/120003/attachment/090166e5b594463f_en)

**In summary:**

- Certain practices may hinder effective price competition for consumers: i) consumers not being aware of reimbursable elements in case of voluntary cancellation, ii) tendency of air carriers to present certain services as optional rather than as included into the basic fare, making effective price comparison more difficult.

**d) Ownership and control**

Ownership and control provisions were intended to facilitate the maintenance of traffic rights of EU air carriers to third countries. In combination with the Commission's effort to encourage third countries to accept the EU air carrier designation, this has been achieved to a large extent. At the same time, however, ownership and control restrictions limit the access to foreign investments beyond 49%.

As demonstrated in EQ1, although mainly through literature and economic theory, limiting EU air carrier's access to foreign capital may undermine their competitiveness and limit opportunities.

A first question should be whether the air carrier industry needs the support of foreign investors. By denying air carriers access to scarce capital resources, Ownership and Control restrictions can increase the cost of capital for air carriers, which prevents the development of more competitive carriers and increases the risk of bankruptcy (World Economic Forum, 2016); (ICAO, 2013). Indeed some air carriers state that O&C restrictions limit their access to capital to some extent as well as their possibility to merge, as explained in EQ1 section e.

Another indication of the need for foreign capital is the increasing demand for more liberal interpretation of Ownership and Control provisions in bilateral agreements during periods of financial crisis in the industry (Lelieur, 2003). As noted above, a downturn in the aviation industry might lead to more vigorous support for the removal of Ownership and Control requirements (CAPA Centre for Aviation, 2017).

Even considering the global context where many bilateral or multilateral ASAs include O&C restrictions, some literature argues that the Ownership and Control restrictions are not relevant. For example, UK CAA (2006) notes that the aviation industry is an outlier among major industries operating on a commercial basis, as ownership restrictions have been lifted for the majority of those industries and multinational ownership is allowed in the EU in those cases. IATA (2007) discusses the concrete examples of retail banking, energy (gas and electricity), telecoms and media, which have seen waves of liberalisation even without reciprocity from third countries. Foreign direct investment is an important driver of Member States' economies, supports the creation of jobs, and provides capital and technology to foster European research, innovation and competition.<sup>209</sup>

Slaughter and May note that both the European Parliament and the European Council have called for enhanced reciprocity in global investment, an argument also made in the context of reform of O&C requirements (ICAO, 2013). These reports suggest that the Ownership and Control restrictions among Member States could be considered as restricting competition and not allowing the aviation industry to evolve. Developments since these reports were published show continued increases in cross-border investment in the sector within the EU, which

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<sup>209</sup> <http://ec.europa.eu/trade/policy/accessing-markets/investment/>



would not be possible if O&C restrictions among Member States were in place. The restrictions on establishment and investment for EU carriers should not remain in the Regulation simply because they are part of other international aviation agreements and it is necessary to continuously assess whether such restrictions are still justifiable. At least it should be assessed whether the same objective could be achieved through less restrictive means. The fact that some countries (e.g. Chile or Brazil) have fully liberalised O&C shows that this may be possible.

On the other hand, some stakeholders have shown support for the objective of maintaining EEA-carriers owned and controlled by EEA. For example, ERA argued that stopping carriers falling into third country control is an objective that is still relevant – another anonymous union agreed with that assessment. An air carrier made the same argument during an interview, and the German and Greek authorities also said that the objective was still relevant. In addition, the current Air Services Regulation already allows a relaxation of ownership and control rules via EU negotiated air transport agreements and some stakeholders consider that the EU rules should evolve based on reciprocity only.

However, one could consider that these comments may be, to a certain extent, due to the fear of increased competition enabled by investments originated from third countries. It should also be noted, that experience within the EU with liberalising ownership and control has shown that it is possible to mitigate problems arising from the bilateral air services agreements, either by the carriers adapting their ownership and control structure themselves, or by negotiation between States.

Overall, there is no full consensus on whether the Ownership and Control restrictions are still relevant in the current market. As discussed, on one hand they hinder EEA air carriers' position in the global market and from that perspective they are not relevant. On the other hand, as noted in the market development section and again in this question, Ownership and Control requirements are a common occurrence worldwide. Thus EEA carriers may not be considered as suffering disproportionately in that regard, and the relevance of the rules may not be put into question by the situation in the market.

The open public consultation showed mixed responses from the citizens participating in survey regarding the importance of limiting foreign investment in EU air carriers. 32 out of 78 participants felt that it is important to limit foreign investment, while 22 felt that it was not.

**In summary:**

- The Ownership and Control restrictions are considered by a number of stakeholders as not relevant anymore as they limit access of EU airlines to investment from third countries whereas other stakeholders consider they remain relevant as they secure EU control over EU air carriers and many third countries continue to apply such restrictions. The evaluation cannot draw any firm conclusion on this point.

e) **Public Service Obligations**

Overall, when asked whether the criteria for the establishment of a **Public Service Obligation** are still appropriate to determine on which routes Public Service Obligations should be applied, the authorities surveyed have mainly agreed. Both criteria “service to a peripheral or development region” and “route being vital for economic and social development” are still appropriate for all of the authorities responding with the exception of the Finnish and

Polish<sup>210</sup> authorities (who did not know). The views on the criterion “thin route” are not as clear-cut. The majority of authorities (nine of the 14 authorities responding and 6 out of 12 having Public Service Obligation routes: CZ, DE, DK, EL, FR, MT, SE, PT, IE) agree that it is still appropriate, however two authorities do not agree (EE, IT) and three do not know (FI, PL<sup>211</sup>, ES).<sup>212</sup>

The practice has shown that many difficult situations of interruption of traffic are not covered by the provisions concerning the so-called emergency procedure that according to the Regulation can only be applied in case of a sudden interruption of service by the air carrier selected in accordance with the Article 17. Such situations include in particular interruption of service on open routes, but also delays in the selection procedure caused for example by appeals lodged by the air carrier not selected. For example, when Swedish carrier Nextjet that operated several routes in Sweden went bankrupt in May 2018, this caused a traffic interruption on two open routes because the emergency procedure could only be applied in case of restricted routes. In France in 2017, an appeal by the losing tenderer that led to a cancellation of the selection procedure made the authorities to have recourse to the emergency procedure. Such appeals have also been witnessed recently in Greece and in Portugal delays in administrative procedures have led to conclusion of contracts by using so called negotiated procedures in cases that do not fulfil the conditions for applying the emergency procedure. This means that the situations currently not covered by the emergency procedure will lead either to an interruption in the connectivity or to arrangements incompatible with the scope of the Regulation. The requirements of State aid rules always need to be respected.

The current provisions require a route-by-route analysis of the Public Service Obligations to be imposed from one airport to another. This seems not to be the most appropriate solution in the case of some of the smallest regional airports in remote regions, where operational efficiencies would speak for declaring all the routes from such airports as Public Service Obligations. While operational efficiency is accepted as justification for grouping the routes at the tendering phase, no similar possibility exist for the imposition stage. One could argue that grouping of routes at the stage of the imposition would restrict excessively the access of the routes as only air carriers with regional bases are likely to be able to provide services on all those routes. At the same time, a grouped network of PSO routes could be preferable in case of justified reasons of operational efficiency (e.g. thin routes with operational complementarities or necessity of an operational base in a remote area).

**In summary:**

- The criteria to establish a Public Service Obligation seem to be still mostly relevant. However, they do not always ensure that services are guaranteed where necessary as shown by complaints received as to the necessity or proportionality of a PSO imposition on certain routes (e.g. Sardinia) and by Commission’s experience when discussing PSO impositions with Member States in advance before the publication. Also, the Regulation falls short, e.g. in the case of interruption of services or bundling the imposition of.

<sup>210</sup> PL, DE, DK and MT do not have PSO systems.

<sup>211</sup> PL does not have PSO systems.

<sup>212</sup> Italy considers thin route not to be a significant criterion; for Spain it is not sufficient alone, without service to peripheral or development region.

#### f) Traffic distribution rules

The open public consultation showed that the citizens participating in the survey (43 out of 78 participants) felt that the current level of intervention is insufficient, so the authorities should intervene more to move certain air services from very congested airports to less congested airports. However, 17 felt that the current level of intervention is sufficient, and 18 had no opinion on this topic. Among stakeholders (associations, organisations, etc.), 16 out of 28 felt that the current level of intervention is sufficient, and six had no opinion.

In addition, a number of stakeholders questioned the need of Traffic distribution rules in light of other possibly more effective ways to manage and distribute traffic between airports, such as slot-allocation rules, airport capacity caps or airport charges. The first two provide for other types of administrative allocation of airport capacity. Slot allocation is done under strict rules of non-discrimination by an independent party. Capacity caps do not discriminate between air carriers. Airport charges, set in compliance with the Airport Charges Directive (ideally in agreement between the airport managing body and the airport users), would naturally incentivize air carriers to move to a different airport. Moreover, the landscape of airport ownership and competition is changing. Where airports in close proximity to each other are becoming increasingly privatized and operated by different companies (as for example in London) they can compete to attract traffic through market mechanisms. It should be noted that even without TDRs the results of Member States imposing rules under article 20 (environmental measures) or article 21 (emergency measures) could have similar effects as distributing traffic between airports in some cases. Further article 19(1) limits the provision of services in the EU based on EU, national, regional and local operational rules relating to safety, security, the protection of the environment and the allocation of slots.

#### **In summary:**

- Whereas the increasing lack of capacity in Europe tends towards an increased relevance of Traffic distribution rules, the risks of discrimination stemming from the implementation of those rules are considered by many as disproportionate to the aim they intend to achieve. There are other measures that are liable to influence the distribution of traffic between airports such as slot-allocation rules, airport capacity caps or airport charges.

**EQ 6. Considering the market developments, including modern complex employment arrangements, to what extent do the scope and specific objectives of the regulation reflect the current social challenges of the aviation market?**

#### **Definition of the principal place of business in light of the market developments**

The Air Services Regulation does not contain provisions in relation to the social dimension of air services. Its Recital 9 explicitly stresses the fact that it is for Member States to ensure the proper application of EU and national social legislation. Since 2008, a number of market and policy developments have had an impact on employment and working conditions in aviation. In particular, one can refer to pressures to reduce costs (including labour costs) in a very competitive market, multiplication of operational bases outside the PPOB, difficulties for national authorities to enforce their national employment and social legislation due to the complexity of applying their legal framework to highly mobile aircrews whose contract is concluded under the law of another Member State, divergences in enforcing approaches across Member States, allegations of unfair competition in selecting a jurisdiction where setting up an airline is done on the basis of more favourable labour legislation (see EQ3).

Input from stakeholders on the above risks and whether the Air Services Regulation should address them varies significantly. As explained in EQ3, the significant challenges related to the employment and social conditions arise from the fact that a number of rules, which may impact competition in the market, are enacted at national level and may therefore diverge from one Member State to another. With the exception of trade unions, the level of support for changes to the objectives and the provisions of the Regulation however appear rather limited. A union, ETF pointed to the need to clarify in the context of the Regulation which national legislation should apply and also to set more clear conditions as to how Member States' authorities should monitor the implementation of the relevant legislation and how they should cooperate. ECA considers that the problem is that the freedom to provide air services within internal aviation market under the Regulation allows carriers to provide permanent services from operational bases outside their principal place of business without the need to be established and to apply the law of the host country.<sup>213</sup>

In contrast, some licensing authorities (UK, IE) do not consider it appropriate to aim to address social issues through the adoption of new provisions, especially not in the Air Services Regulation, which will, in their view, raise barriers to the market. Other authorities (FR, ES, and PL) were more sympathetic to the arguments raised by unions but appear sceptical of the feasibility of introducing specific provisions to address social aspects in the legislation without running the risk of further problems given that labour laws are still different among Member States. Nonetheless, among the authority survey respondents, eight out of 12 that responded to the specific question (BE, CZ, EE, FI, MT, PT, IE, ES) did not consider that there are specific provisions of the Regulation that create problems when it comes to ensuring that employment and working conditions are properly applied. Only two (FR, DK) considered it did and two (IT, PL) indicated that they do not know. It can therefore be argued that most Member States are not convinced that identified problems find their origin in flaws to be attributed to the Regulation.

The evidence and arguments put forward in EQ1 illustrate a complex situation where the relevant employment legal framework is interpreted and applied differently among both authorities and carriers giving room to differences in the working conditions of aircrew based in different Member States. Multiple operational bases appear to be particularly challenging when it comes to establishing the appropriate labour legislation to apply in the case of crew used in operational bases. They also represent a significant challenge in terms of the actual capacity to ensure effective application of the rules. Nine out of 14 authorities consider there is a link between certain practices (set up of subsidiaries and multiplication of operational bases) and the level of employment and working conditions. In the context of ongoing developments of business models and intensification of competition, these challenges could be expected to become more common.

Network carriers consider that the fact that principal place of business requires little if any activity in the country where the operating licence is obtained is a contributing factor to [rule shopping](#) and associated challenges. Trade unions refer to the need of written clarification and guidance on the definition of home base for the purpose of applicable social law and standards and the terms of employment. They also refer to the absence in the Regulation of a clear connection between compliance with the relevant social and employment legislation and the

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<sup>213</sup> ECA proposes to include the concept of "permanent establishment" in the Regulation as well as to require airlines to notify to the competent authority each operational base that they open in that country. ECA considers this would help avoid social dumping and clarify the legal framework applicable to operational bases for all matters related to establishment (labour law, social security, tax and consumer matters).

operating licence as the root of the problems. ECA also points out that the Regulation should contain provisions on the operation of airlines outside their principal place of business on a permanent basis through the opening of operational bases. Others (low-cost carriers, IE, UK authorities) clearly question the presence of any such connection between the provisions of the Regulation and social legislation issues.

Responding to the open public consultation, six aircrew members felt that there is a need to define the applicable laws more clearly. 22 out of 48 citizens felt that there is a need to more clearly define the applicable laws, and 25 had no opinion on this topic.

In the open text responses, three respondents noted that further definition is required to ensure that the Member State in which the aircrew has their home base is the national labour law applicable. Two respondents also noted that the definition in Article 8(2) of [Rome I Regulation](#) is suitable for this, but requires further enforcement. One citizen and one association noted that carriers are currently abusing the rules by hiring staff from countries with weaker social and employment laws. Another citizen contradicted most of the above, suggesting that disputes should be defined by the air carriers' principal place of business.

In an additional document submitted for the open public consultation, ECA noted that it is important to clearly establish that local laws and regulations must be respected for aircrew operating from bases established in a country other than that of the air carrier's registration.

### **Leasing arrangements in light of the market developments**

Leasing arrangements can make the legal situation more complex for aircrews and wet-leasing arrangements deserve special attention on the applicability of social legislation. For example, the difficulty in identifying the place of work of the aircrew is enhanced in the context of a leasing arrangement where the aircrew may temporarily be dislocated from their place of work to a different base for the purpose of operating the wet-leased aircraft.

The Social fact finding study by Ricardo AEA (2018) found that it is difficult to estimate the extent of practices whereby air carriers would use third country crews provided by local intermediary companies outside the EU as the evidence is mainly anecdotal. The data collected through interviews and surveys for that study confirmed the use of third country air crew (mainly for flights to/from third countries, less so for intra EU flights). However, it was not possible to tell how common this practice is, nor whether the third country crew's home base was located in a third country or in the EU. In this context, it is not clear how EU rules apply and interact with each other, notably regarding the posting of workers, visa and work permits (for third country aircrews), as well as national social legislation and collective agreements. Interviewed stakeholders representing workers (EurECCA, ETF, ECA), some airlines (ERA) and a few authorities (FR, Spanish Aviation Safety and Security Agency) agreed that the current restrictions on leasing are appropriate to reduce social consequences although representatives of workers (ETF, ECA, EurECCA) felt that the provisions do not go far enough in terms of ensuring social rights. IATA/AIRE noted that some of their members supported the leasing restrictions.

The extent to which this problem is still present in today's market depends on the extent to which labour and social standards still differ globally. A review of the current situation shows that social and labour standards differ significantly between countries (IFALPA, 2013); (Trafikstyrelsen, 2015). There is also a current environment of fierce competition in the market that incentivises air carriers to seek ways to cut costs – including labour costs - in order to remain competitive (EESC, 2015). The analysis on the Impact Assessment

accompanying the Commission's proposal on a Regulation on safeguarding competition in air transport<sup>214</sup> shows that, generally speaking, and given EU law and national law, the EU displays some of the highest labour standards in the world with regard to working conditions and social rights, which represent costs borne by the EU air sector – whereas many air carriers established in third countries do not bear equivalent costs. Such issues are not comprehensively addressed by other legislation or international agreements, as recognised in ongoing work and proposals to improve the competitive conditions for European air carriers.

Concluding on the above, the Regulation appears not to be the place to properly take into account evolving practices and employment and working conditions. It is assumed that enforcing labour and social protection legislation has to take place in the context of the existing EU and national employment and social protection legislation. However, the difficulties of enforcement in the changed market context seems to represent a challenge to the objective of ensuring a level playing field in the internal market.

**In summary:**

- The relevant employment legal framework is interpreted and applied differently among both authorities and carriers giving room to differences in the working conditions of aircrew who are based in different Member States outside the air carrier's PPOB.
- Despite a common EU framework on the applicable law, Member States seem to enforce the rules inconsistently.
- The provisions of the Air Services Regulation did not lead in themselves to the difficulties to determine the applicable labour law to some aircrew who are based in a country other than the PPOB. However, it remains that the aim to ensure that labour law is properly applied as stated in Recital 9 is not fully achieved. This has consequences on the aviation sector resulting in legal uncertainty and risks of distorting competition between air carriers.
- Wet-leasing of aircraft with crew from non-EU countries can make it challenging to determine the applicable social legislation as aircrew temporarily change their place of work. In addition, wet-leasing arrangements with non-EU operators on the EU aviation market may affect working conditions of EU air crew and competition, if the working conditions of the competing non-EU crew are much lower and/or if EU labour law does not apply<sup>215</sup>. Although this conclusion is mainly based on anecdotal evidence, the possibility of such occurrences is important to keep in mind as it may have the effect of undermining the level playing field.
- Further action may be warranted, but it may not necessarily be addressed through social provisions in the Regulation.<sup>216</sup>

<sup>214</sup> Brussels, 8.6.2017, SWD (2017) 182 final.

<sup>215</sup> If it can be established that a non-EU aircrew has his or her habitual place of work in a particular Member State, the non derogable rules of that Member State's law will apply to their employment contract and can be enforced before the Court in that Member State.

<sup>216</sup> For example, DG HOME carried out a Legal migration Fitness Check and adopted a corresponding report on 29/3. That report also covers the situation of highly mobile third country aircrews. Without prejudice to what is explained in the previous footnote, it shows, among other things, that these workers are not effectively covered by any specific EU rule legal migration or the visa *acquis*. The Commission Staff Working Document and the study carried out can be downloaded here: [https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/fitness-check\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/fitness-check_en)

## **5.4 Coherence:**

This section will look at the coherence between the Air Services Regulation and different legal instruments. First, it will analyse whether the Regulation's provisions are coherent with each other. Second, it will assess whether the Regulation is coherent with a number of other aviation related EU laws. Next, it will look specifically at the coherence between the Regulation and relevant provisions from the international aviation legal framework. Lastly, it will be assessed whether the Regulation is coherent with relevant wider EU policy, e.g. on competition, social issues, environment etc.

### **EQ 7. To what extent are the requirements and objectives set in the regulation coherent and consistent with one another? If not entirely, what would be the differences, overlaps or contradictions or inconsistencies?**

The Regulation presents an overall consistent legal framework built around its core part, which is the freedom to provide intra-EU air services. As explained above in section 2.1, the general objectives of market efficiency, safety, and consumer protection complement each other and result in certain trade-offs because of the need to balance certain interests (e.g. industry vs citizen).

At the level of specific objectives, the overarching objective of the freedom to provide services acts as a horizontal objective for all other topics. The objectives and the provisions of other topics are mainly supporting the ultimate goal of this freedom of the creation of the internal aviation market. The intervention logic shows that the specific objectives are generally complementing to each other in particular when they lead to the same general objective. However, again the aim is also to balance different societal (i.e. industry vs citizens) and political (external vs. internal aviation policy) interests. As shown in the intervention logics, these adjusting mechanisms were set for Public Service Obligations, Traffic distribution rules and Ownership and Control provisions. Moreover, as discussed under EQ1 and 2 these dualities in objectives can lead to overall reduced effectiveness when not well designed or calibrated.

Public Service Obligations and Traffic distribution rules are an express exception to the freedom to provide intra-EU air services. In the interest of Member States supporting the development of remote or peripheral regions or efficiently managing traffic between airports, the freedom of air carriers can be restricted if it does not go beyond what is necessary. In the Regulation this safeguard is built into the text, however in practice the balance may not always be ensured as explained in EQ2 and 6.

Ownership and control rules pursue two opposing objectives which are on the one hand fully liberalising Ownership and Control across the EU for EU air carriers, but at the same time maintaining some restrictions in order to safeguard traffic rights under ASAs with non-EU countries. The Commission has tried to gain international acceptance of the internal EU O&C liberalisation with success (although some countries still do not accept it). However, tensions between the two objectives remain, especially as the international debate on the topic evolves.

The underlying provisions of the Regulation are overall consistent and the main inconsistencies in their application (as discussed in EQ1 and 2) do usually stem from the differences in implementation in various Member States. This is the case of operating licence, leasing, Traffic distribution rules and price transparency provisions.

### **Operating license**

The provisions on operating licence reflect the trade-off in the general objectives to ensure market efficiency and safety as well as consumer protection. Thus there is a harmonised framework for granting operating licences to EU air carriers across Member States and at the same time air carriers' financial fitness is monitored in the interest of consumers and safety. The objectives and provisions are coherent with each other. However, the shortcomings identified in EQ1 on the notion of principal place of business in light of the multiplication indicate loopholes in the definition. In practice, the current definition of the principal place of business leaves room for interpretation. It could therefore potentially impact the level playing field between air carriers across Member States and also impact the ability of the national authorities to effectively perform the financial monitoring.

### **Leasing**

The provisions on leasing reflect the trade-off in the general objectives to ensure market efficiency and safety. The provisions allow air carriers to dry- and wet-lease, however in the interest of safety (and later some consideration of social conditions) a mechanism of prior approval and for wet-leasing from air carrier operators from third-countries some limitations are introduced. The objectives and provisions are coherent with each other, however Member State practice in applying the provisions may differ.

### **Pricing freedom and price transparency**

The provisions on pricing reflect the trade-off in the general objectives to ensure market efficiency and consumer protection. On the one side, the principle of pricing freedom laid down in Article 22 (supporting the principle of freedom to provide services) and, on the other side, the principles of information and non-discrimination, regulated in Article 23 (supporting the objective of consumer protection): Indeed, if for example provisions imposing information requirements are excessive or unjustified, the principle of pricing freedom could be unduly undermined. The existing jurisprudence of the Court of Justice of the European Union to date on the Regulation refers mainly to pricing provisions and suggests that there are still problematic areas. It appears however that interpretation issues referred to the CJEU by national courts are more related to new or dubious industry practices than to the lack of coherence of Articles 22 and 23 of the Regulation.

### **Ownership and Control**

The rules on ownership and control contained in the Regulation have been criticised by stakeholders for leaving room for interpretation which risks an uneven level playing field for EU air carriers. The Commission adopted in 2017 its Interpretative Guidelines on Ownership and Control however, as explained in EQ1 there are still stakeholders that allege that the rules are difficult to apply. The Commission acknowledges the difficulties, in particular in the case of certain ownership structures. However, including in the Air Services Regulation itself the criteria for interpretation contained could be a perilous exercise, as it seems difficult to cover in a regulation each and every scenario of public - private shareholding, nationality and contractual scenario that private operators could design.

While, the text of the provisions on ownership and control appears to be coherent, in practice the application of the rules points to loopholes that can impact the level playing field between EU air carriers.

### **Public Service Obligations**

The provisions on Public Service Obligations reflect the trade-off in the general objectives to ensure market efficiency and consumer interests. They also reflect the need to support the development of remote regions while not restricting EU carrier's freedom to provide services



beyond what is necessary. The provisions are thus designed to allow the imposition of Public Service Obligations while safeguarding free competition in the market. While the provisions themselves are coherent, the need for interpretation of certain terms resulting in divergences as between Member States do not always ensure that the intended result is actually achieved. The fact that the provisions lack clarity is also evident in the fact that guidelines were published on PSOs.

### **Traffic Distribution Rules**

The provisions on traffic distribution rules aimed to establish a process for traffic distribution where Member States could address strains on airport capacity through traffic distribution while avoiding/minimising market distortion beyond what is necessary.

The scope of traffic distribution rules that Member States can adopt is clearly defined. Also, procedural rules and steps to be followed by Member States and the Commission seem consistent. The text of the provisions is therefore coherent. However, similarly as under Public Service Obligations the lack of clarity of certain terms does not ensure a proper balance and coherence between the two objectives in practice.

As mentioned in EQ1, Member States issuing rules under two other provisions may have similar effects as Article 19 rules on the exercise of traffic rights [Article 19(1)] and, in some cases could have similar effects as traffic distribution rules [Article 19(2) and (3)]. These are environmental measures (Article 20) and emergency measures (Article 21). Although these were excluded from the scope of the evaluation, it is nevertheless worth to analyse their coherence with Article 19(1) in particular as they may tackle similar issues. Article 19(1) allows restrictions on traffic rights according to national, regional and local operational rules relating to safety, security, the protection of the environment and the allocation of slots. The environmental and emergency measures may be adopted as long as they are proportionate, non-discriminatory and transparency. Further, they must be limited in time and approved by the Commission.

The rare application of Articles 20 and 21 may indicate that it is not always clear whether certain traffic restrictions (e.g. restrictions on certain aircraft types) are operational rules under Article 19(1), environmental measures under Article 20, or emergency measures under Article 21. In addition, no time limitations are required under Article 19(1) and they are not subject to a prior Commission decision. The overlapping scope, however indicates that further clarification as to when the rules are applicable is necessary.

#### **In summary:**

- An analysis exercise of internal coherence of the regulation does not show fundamental concerns.
- Some policy areas require a balance to be struck between different objectives and interests. The analysis on the effectiveness of the provisions shows that the correct balance is not always ensured, mainly due to room for varying interpretations across Member States.
- The relationship between Article 19(1) and Articles 20 and 21 on environmental and emergency measures is not obvious and would deserve clarification.

**EQ 8. To what extent are the requirements set in the regulation coherent and consistent with other EU interventions under the air internal transport acquis? In particular, with [ground handling services](#) [airport slots](#), [airport charges](#); [new EASA Basic Regulation](#) as well as relevant legislation on safety, security, market access and air navigation services?**

**If not entirely, what would be the differences, overlaps or contradictions or inconsistencies?**

In order to assess whether the Air Services Regulation is coherent with other EU interventions under the internal air transport acquis, its high-level objectives have been compared to those of a number of relevant Regulations, or Directives. The analysis has also looked in more detail at selected provisions of the interventions, where a potential for inconsistencies existed.

The [Ground handling Directive](#) aims at improving the efficiency and quality of **ground handling services** provided to airport users by increasing competition and choice in the supply of ground handling services. The objective is coherent with the objectives of the Air Services Regulation. It is in line with the objective of market efficiency as the supply of ground handling services in line with these principles assists air carriers in their provision of air services.

Regulation on **civil aviation security** (hereafter the "[Security Regulation](#)") lays down security requirements for airports and air carriers. As to air navigation services, related the [Framework Regulations on the Single European Sky](#) and the [Service Provision Regulation](#) have the objective of offering more efficient services to airspace users, while improving the safety, capacity and environmental Key Performance Areas. The provisions of these Regulations may have an impact on EU air carriers' freedom to provide air services. However, Article 19(1) of the Air Services Regulation explicitly recognises that the exercise of this freedom may be subject to EU, national, regional and local operational rules relating to safety, security, the protection of the environment and the allocation of slots.

The [Airport Charges Directive](#) regulates the way airports can set their **airport charges**. It has been pointed out in EQ5 that different airport charges rates at airports between which air traffic may be distributed could be used by airports as an incentive to attract certain types of traffic instead of using Traffic distribution rules and Member State intervention. In this sense the use of both tools could to some extent overlap to achieve the Traffic distribution provisions' intended objective.

Common rules for the **allocation of slots** at EU airports were introduced in the EU in order to ensure that air carriers have access to the busiest EU airports on the basis of principles of neutrality, transparency and non-discrimination. A slot is the right to take-off or land at an airport. To the extent that the provisions on Traffic distribution rules also concern the efficient allocation of airport capacity the objectives are coherent. However, the practical application of both pieces of legislation may lead to incoherence. On the one hand, the [Slot Regulation](#) is supposed to give air carriers certainty over their operations, by granting them grandfather rights over slots they actually use. On the other hand air carriers may lose slots due to Traffic distribution rules. The practical reality at slot constrained airports is that those slots have a high value for the air carriers that own them and thus losing the slots is a sensitive issue for those air carriers concerned. Moreover, as mentioned in EQ5 slot coordination is possibly an equally effective way to manage and distribute traffic between airports.

Further, the Slot Regulation must be taken into account when applying the Public Service Obligation public tender procedures. Where the right to operate a route under Public Service Obligations is granted by a Member State following a public tender procedure under Air Services Regulation, the air carrier concerned needs to use the full range of airport infrastructure necessary to operate the route at stake. In coordinated airports, this fact is taken account of in accordance with Article 9 of the Slot Regulation by the "coordinator" (appointed by Member State). In the airlines survey one airport indicated that reservation of slots is a concern to it, while no airport considered that the unused Public Service Obligation slots negatively affect their capacity. However, in an interview with Ricardo, ACI-Europe

stated that PSOs can particularly affect regional airports as the rules do not take into account seasonality of airports. In their view, the rules should be more flexible by referring to city pairs (instead of airports) to avoid congestion in certain airports during high-demand periods.

The [Slot Regulation](#) also makes reference to provisions on operating licence. It states that air carriers which have been granted a temporary license are exempt from the requirement to use slots for 80% of a specific slot series.<sup>217</sup> This is to allow air carriers the time to restructure while not losing the certainty over slots which would significantly impact air carriers' financial viability as slots are essential for air carriers' operations. On the one hand slots are very valuable and important for air carriers from a financial perspective. On the other hand, at airports where capacity is scarce slots must be efficiently allocated to allow air carriers which can make the best use of them. A careful balance must be therefore struck between the interest of air carriers in financial difficulties to protect the value of their operations, and the interest of healthy competitors which wish to enter the market. In the Commission's experience the interplay between the two Regulations is not entirely clear and does not guarantee a desirable outcome. The recent bankruptcy of Monarch raises the question whether the balance is properly struck.<sup>218</sup>

The [new EASA Basic Regulation](#) establishes common rules for EU air carriers and civil aviation authorities in the area of **safety**. It has recently entered into force and amends the Air Services Regulation in the following ways: the amendments allow for the granting and monitoring of the AOC by a competent body that might be located in a different Member State than the one that issues the operating licence while providing for enhanced cooperation between the two authorities in such case.

Furthermore, it introduces an amendment to Article 12(1) of the Air Services Regulation in the sense that dry-leased third countries' aircraft may stay in a third country's register. This exception so far existed only with regards to wet-lease arrangements which are by nature temporary, but not dry-lease arrangements for which the Air Services Regulation does not impose time-limits. However, the safety legislation provides that dry-leasing third country registered aircraft is limited to seven months within 12 consecutive months.

Safety legislation and especially the implementing rules have exempted certain categories of operations (such as cost-shared flights) from holding an AOC. Inconsistencies may arise where these categories fall out of scope of the obligation to hold a valid AOC under the safety legislation, but fall within the wide scope of the obligation to hold a valid operating licence under the Air Services Regulation, which itself requires to hold a valid AOC. The Air Services Regulation applies in principle to all carriage by air of passengers, mail or cargo performed against remuneration, with only a few exceptions (local flights and operations performed by non-power-driven aircraft and/or ultralight power-driven aircraft). The scope of the Air Services Regulation may therefore need to be updated to take into account both the

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<sup>217</sup> 'Series of slots' shall mean at least five slots having been requested for the same time on the same day of the week regularly in the same scheduling period and allocated in that way or, if that is not possible, allocated at approximately the same time.

<sup>218</sup> In that case an air carrier had filed for insolvency but still requested slots from the UK slot coordinator. The slot coordinator refused to grant the slots which was contested in UK courts. A Court of Appeals decision held that Monarch, although not intending to operate anymore was still an "air carrier" within the definition of Regulation 1008/2008 and the Slot Regulation. Monarch had requested the slots for the sole purpose of exchanging them with remuneration against junk slots that it would then simply return to the pool. The UK that has an open secondary trading market for slots. In a Communication from 2008 the Commission stated that the Slot Regulation is silent on the issue of exchanging slots accompanied by remuneration, and that it would not open infringement procedures against Member States that allow such practice. .

developments in the safety legislation and in the aviation markets in terms of variety of operations, and avoid imposing disproportionate obligations on certain small scale categories of operations which have been identified by safety rules as not requiring the need for holding an AOC.

[Regulation \(EU\) 2019/2 of 11 December 2018](#) has amended Article 13(3)b of the Air Services Regulation to ensure legal consistency of this Regulation with an intended agreement with the United States of America on **wet-leasing**, complementing the existing air transport agreement. To this end, Article 13(3)b has been amended so as to preserve, as regards the restrictions contained in this particular provision<sup>219</sup>, any more liberal position under “an international agreement on wet-leasing signed by the Union which is based on an Air Transport Agreement to which the Union is a party and which was signed before 1 January 2008”. The other provisions of Article 13(3) (e.g. on safety standards and rights of the competent authority) have remained unchanged as conditions under which wet-lease arrangements are allowed. The intended wet-leasing agreement referred to above should provide precision to the relevant provisions of the ATA. As to possible unintended social impact, the said agreement should not bring any social tensions since the US are a Union like-minded country as to working conditions of aircrew.

Moreover, in March 2019 the EU [adopted a Regulation establishing a framework for the screening of foreign direct investments into the Union](#). The new framework creates a cooperation mechanism for Member States and Commission allowing the Commission to issue opinions where a foreign direct investment is likely to affect security or public order of more than one Member State or where a foreign direct investment is likely to affect a project or programme of Union interest such as Horizon 2020 or Galileo on grounds of security or public order. The objective is to ensure that foreign direct investment remains a source of growth in the EU while protecting the EU's essential interests. Concretely, the Commission may for example assess cases where foreign investors – especially but not only when they are state owned or controlled, including through financing or other means of direction – may seek to acquire control of or influence in European undertakings whose activities involve critical technologies, infrastructure, inputs or sensitive information. Such acquisitions may enable the use of these assets to the detriment of security and public order. This new instrument, currently in force, may interplay with the Regulation's Ownership and Control rules. Concrete experiences are missing so far.

**In summary:**

- The coherence between the objectives of the Air Services Regulation and the Slot Regulation, in particular as regards Traffic distribution rules, Public Service Obligations and air carriers in financial difficulties is not always ensured.
- The EASA Basic Regulation has introduced some changes to the Air Services Regulation to ensure consistency with its terms. There are other provisions in the Air Services Regulation that may require cross-references to safety rules to ensure coherence and consistency such as leasing and operations exempted from an AOC.
- The international debate on further liberalisation of Ownership and Control needs to take into account growing concerns about foreign direct investment posing risks to security or public order. The recently adopted EU framework for investment

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<sup>219</sup> The restrictive effect of Article 13(3)(b) is due fundamentally to the time limitation contained in point (i) thereof.

screening enhances abilities of the Union and its Member States to identify such risks without unduly limiting investment opportunities for the EU aviation sector.

**EQ 9. To what extent are the requirements set in the regulation coherent and consistent with the EU's external aviation policy, international (ICAO) rules and bilateral and multilateral air services agreements between the EU or its Member States and 3rd countries? If not entirely, what would be the differences, overlaps or contradictions or inconsistencies?**

**Air Transport Agreements (ATAs)** between Member States and third countries, and the newer external comprehensive agreements concluded at EU level (for example, those with [Canada](#), [Israel](#) and [Morocco](#)) are aligned with the Air Services Regulation. Although the bilateral ASAs and the Regulation sometimes refer to the same issues and/or legal categories, such as Ownership and Control, air traffic management or air safety, the fact is that they sometimes differ on scope and purpose. Therefore, it appears that there are no inconsistencies between the Air Services Regulation, on the one side, and agreements to which the Union is a party, on the other. However, to the extent that non-EU air carriers are given now access to intra-EEA operations, the question of ensuring an effective level playing field within the EEA became more important, as non-EU carriers operate largely under their home country's rules.

Special mention should be made of issues regarding ownership and control and leasing.

Regarding ownership and control, airline investment is liberalised vis-à-vis a number of third countries through agreements that incorporate the Union acquis, including the Air Services Regulation. This concerns Iceland, Lichtenstein and Norway, thanks to the European Economic Area Agreement; Switzerland, thanks to the Air Transport Agreement. The EU has also liberalised airline investment to a greater or lesser extent through comprehensive agreements with other third countries. Carriers do not lose their status as Union carriers simply because they are majority owned or are controlled by nationals of those states with which the EU has liberalised investment rules. This follows from Article 4 (f) of the Air Services Regulation.

Regarding leasing, the Air Transport Agreement (ATA) between the European Community and its Member States, of the one part, and the United States of America (US), of the other part ("**the EU-US Air Transport Agreement**")<sup>220</sup> raises a difficulty in its application insofar as wet-leasing is concerned. In order to bring clarity and certainty to the air carriers, in 2016, the Commission has recommended the Council to authorise it to negotiate a specific wet-lease agreement with the US, aiming at lifting the time restrictions. This authorisation has been granted on 21 December 2016, and the negotiations have been concluded by initialling the agreement on 8 March 2019.

The International Civil Aviation Organisation (**ICAO**), is a specialised agency of the United Nations. ICAO works with the Convention's 191 Member States, International Organisations as well as other global aviation organisations to develop international Standards and Recommended Practices (SARPs) which States reference when developing their legally-enforceable national civil aviation regulations. An in-depth analysis of all ICAO SARPs would exceed the scope of this report. However, as a general comment, (i) most ICAO Standards on aviation safety, security and air navigation are also covered by EU legislation

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<sup>220</sup> Signed on 25 and 30 April 2007 Council Decision of 25 April 2007 on the signature and provisional application of the EU-US Air Transport Agreement (2007/339/EC), OJ L 134, 25.5.2007, p.4. amended by a Protocol of 24 June 2010 OJ L 223, 25.8.2010, p.3.

and (ii) those Standards are connected to issues of a more technical nature (which are out of the scope of the Regulation) than to the material content of the Regulation. ICAO texts on economic issues are largely confined to (non-binding) manuals, policies and guidelines rather than SARPs. There is no incoherence between EU and ICAO rules.

**In summary:**

- Bilateral ASAs sometimes touch on the same issues as addressed in the Air Services Regulation, such as Ownership and Control. Although, the agreements sometimes differ on scope and purpose depending on the third-country, generally consistency between the agreement and the Regulation's application to the internal market is ensured. The same applies to discussions at ICAO.
- As regards wet-leasing, an agreement complementary to the Air Transport Agreements with the US is being developed, providing for rules more liberal than the general rules of the Regulation. In order to accommodate this more liberal regime to be agreed with the United States, the Regulation has been amended.

**EQ 10. To what extent are the requirements set in the regulation coherent and consistent with the other EU's principles and policies, notably principles of freedom of establishment and provision of services, with EU competition policy, EU social and employment policy (see inter alia the [Practice Guide](#)), EU consumer policy and relevant larger transport policy? If not entirely, what would be the differences, overlaps or contradictions or inconsistencies?**

Examining the interrelation between the text of the Air Services Regulation and **the principle of the freedom of establishment** allows to detect a close link between the provisions of the Regulation and the Treaty on the Functioning of the European Union and in particular its Article 49 prohibiting “restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State”. In practice, thanks to the common rules, in particular as regards ownership and control, the Regulation facilitates the creation of secondary establishments in Member States (other than the Member State of principal establishment).

It follows from Article 58 of the TFEU that the effective implementation of **the freedom to provide services** requires a corresponding intervention by the Union legislator. The Court of Justice clarified<sup>221</sup> that the provisions of the Third Package established freedom to provide services and needs to be interpreted in light of the Court's jurisprudence regarding Article 56 of the Treaty.

**EU competition law** is fully applicable to the aviation sector. The Commission has full powers to apply Articles of the Treaty on the Functioning of the European Union governing restrictive agreements and concerted practices, concerning abuse of dominance and on State aid rules, as well as the merger control provisions contained in the [Merger Regulation](#)<sup>222</sup>.

<sup>221</sup> Case C-70/99, Commission v Portugal; Case C-92/01, Stylianakis.

<sup>222</sup> Regulation No 487/2009 enables the Commission to grant in the air transport sector block exemptions to certain agreements and forms of cooperation normally restricted by Articles 101 and 102 TFEU. Block exemptions have been used in the past to exempt certain forms of revenue-sharing and capacity coordination, computer reservation systems and ground handling as well as the International Air Transport

State aid control is particularly relevant for State funding of Public Service Obligations. To qualify as State aid, a measure needs to cumulate four features:

- 1) an intervention by the State or through State resources which can take a variety of forms (e.g. grants, interest and tax reliefs, guarantees, government holdings of all or part of a company, or providing goods and services on preferential terms, etc.);
- 2) this intervention gives the recipient an advantage on a selective basis, for example to specific companies or industry sectors, or to companies located in specific regions;
- 3) competition has been or may be distorted;
- 4) the intervention is likely to affect trade between Member States.

The Court of Justice held in its judgment *Altmark*<sup>223</sup> that public service compensation does not constitute State aid within the meaning of Article 107 TFEU - and a notification is not needed - provided that four cumulative criteria are met i.e. a clearly defined PSO to discharge; objective and transparent parameters for calculating the compensation, set out in advance; compensation that does not exceed net cost and reasonable profit; organisation of a public tender procedure to ensure the least cost to the community (if not, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical well run undertaking would have incurred in discharging the PSO).

The provisions under the Air Services Regulation seem to be aligned with the above four criteria. Consequently, if the conditions of the Air Services Regulation are complied with, it can be considered that there will be no State aid<sup>224</sup>. However, in case it cannot be excluded that, in view of the criteria established in *Altmark*, there may be State aid - for example in case there is only one bid submitted in the tender procedure - the Member State concerned should ensure in another manner that the State aid rules are complied with. This case may also arise for example where, under the emergency procedure of Article 16(12) of the Regulation, the air carrier is selected without an open tender procedure, by mutual agreement between Member State authorities and the air carrier.

The definition of "effective control" under the Air Services Regulation is in very similar terms as the definition of control under Article 3(2) of the Merger Regulation. The notion of "joint control" raises the question as to how joint ventures are assessed under the Air Services Regulation. Joint control exists under the Merger Regulation where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking. Such "joint control" for the purposes of the Merger Regulation and "effective control" by EU shareholders within the meaning of the Air Services Regulation do not exclude each other. However, as explained in the [Swissair/Sabena decision](#) and in the above mentioned interpretative guidelines<sup>225</sup>, the Regulation requires an assessment of the position of Member States and/or their nationals in respect of whether, on balance, they have a decisive influence over the management of the undertaking concerned in a way that goes beyond the influence of the third country shareholders.

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Association (IATA) slot and tariff coordination conferences. However, these block exemptions have been gradually phased out and no aviation-specific block exemptions are currently in force. Consequently, the analysis of coherence between the Air Service Regulation and EU competition law will focus on non-sectorial rules. Council Regulation (EC) No 487/2009 of 25 May 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector (OJ L 148, 11.6.2009).

<sup>223</sup> Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*.

<sup>224</sup> See [Interpretative Guidelines](#) on Public Service Obligations (PSO).

<sup>225</sup> Point 47.

As to the link with **EU public procurement rules**, prima facie, it is useful to recall the relationship with [Directive 2012/34/EU on the award of concession contracts](#). Contracts awarded in application of Article 17 should normally be in the nature of concessions contracts, given the distribution of risks. However, Article 10(3) of the Directive states explicitly that it shall not apply to concessions for air transport services based on the granting of an operating licence within the meaning of the Air Services Regulation. This being said, both instruments are underpinned by the same main principles, namely of transparency and non-discrimination.

The **price transparency** provisions of the Air Services Regulation should be viewed as part of the European consumer protection legislation, and they are reinforced and complemented by the [horizontal consumer protection legislations](#), notably [Unfair Commercial Practices](#), [Unfair Contract Terms Directives](#) and [Consumer Rights Directive](#)<sup>226</sup>. This is underpinned by the investigations national authorities reported on during the consultation, since several national cases dovetailed [Unfair Contract Terms Directive](#) and [Unfair Commercial Practices Directive](#) with the Air Services Regulation. As regards the interplay of the Air Service Regulation and the EU horizontal consumer protection legislation, the [Guidance on the implementation/application of Unfair Commercial Practices Directive](#) also clarifies that "where travel service providers who market their services online breach the [Consumer Rights Directive](#) or the Air Services Regulation, aspects of the infringing practices that are not regulated by these sector-specific legal instruments could be considered unfair under the [Unfair Commercial Practices Directive](#) to the extent that they are likely to cause the average consumer to take a transactional decision he would not have taken otherwise. This must be assessed on a case-by-case basis."

As regards the relationship between general consumer law and the Air Services Regulation, some national enforcers argued during the consultation that several obligations announced by the developments of general consumer law encompass the sector-specific rules under the Regulation and point to room for simplification in the future.

Others pointed to the question whether airlines must inform travellers, as part of material information to be given prior to the purchase of a ticket, about a "development fee" that is charged by an airport (e.g. Ireland West Airport "Knock") to all departing passengers<sup>227</sup>. One of the points at stake in such a case is the relationship between the [Consumer Rights Directive](#), the [Unfair Commercial Practices Directive](#) and the Air Services Regulation.

The Air Services Regulation is listed in the annex to the revised [CPC regulation](#) which is applicable as of 17 January 2020. In concrete terms, the CPC authorities designated for the Air Services Regulation will enjoy a set of minimum investigation and enforcement powers which would potentially result into more efficient cooperation in the cross-border context to address widespread infringements.

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<sup>226</sup> On 11 April 2018 the Commission adopted the 'New Deal for Consumers', which proposes important changes to the existing consumer protection legislative framework. This 'package' is composed of two different proposals: 1) A proposal on better enforcement and modernisation of EU consumer protection rules, which mainly concern the Unfair Commercial Practices Directive and the Consumer Rights Directive and introduces amendments to the penalties systems of the Unfair Contract Terms Directive and the Price Indication Directive and 2) A proposal on representative actions for the protection of the collective interests of consumers. At the time of the draft SWD the proposals are not adopted by the co-legislators, however, for the proposal on better enforcement and modernisation of EU consumer legislation, the European Parliament and the Council reached a provisional agreement on 21 March: [http://europa.eu/rapid/press-release\\_IP-19-1755\\_en.htm](http://europa.eu/rapid/press-release_IP-19-1755_en.htm)

<sup>227</sup> See [https://irelandwestairport.com/development\\_fee](https://irelandwestairport.com/development_fee)



As to the coherence with the **EU social acquis**, Recital 9 of the Air Services Regulation states that, with respect to employees of a Union air carrier operating air services from an operational base outside the territory of the Member State where that Union air carrier has its principal place of business, Member States should ensure the proper application of Union and national social legislation. The Air Services Regulation does not contain any corresponding provision. It follows that:

- Subject to compliance with Union law, “national social legislation” as referred to in Recital 9 is established by each Member State. It will vary since many aspects of labour and social law are not harmonised at Union level. As regards the law applicable to the employment contract, this aspect is governed by the “[Rome I Regulation](#)”.
- National social legislation is applied by national Courts having jurisdiction to deal with the matter concerned. As regards civil and commercial disputes (having cross-border element) the territorial competence of courts is governed by the “[Brussels I Regulation \(recast\)](#)”.

Union social legislation referred to in Recital 9 and potentially applicable includes the Directive concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation as well as other instruments of a more general character, applicable to all workers including aircrews, such as in particular rules, on temporary agency work, social security coordination, information on employment conditions, part-time work, fixed-term work, health and safety, transfer of undertakings, collective redundancies and protection of employees in the event of the insolvency of their employer. Rules on free movement of workers apply also to aircrew.

The study supporting this report has pointed to a practice of what is perceived as [rule shopping](#), whereby certain air carriers would select specific Member States since legislation of these Member States is comparatively less protective.

However, the subject matter of the Air Services Regulation differs from the subject matter of EU social legislation: it mainly aims to deal with the conditions for market access of EU air carriers and the freedom to provide air services within the EU. However, EQ3 shows that different social conditions may have an impact on the broader objective (to which the Regulation equally contributes) of achieving a level playing field for air carriers. However, the Regulation is based on the relevant Treaty provision on transport policy and not meant as an instrument to deal with social issues. Therefore, the suggestion to add to the conditions established in Articles 4 to 7 of the Air Service Regulation additional requirements of a social nature has to be carefully examined, also taking into account the general level of harmonisation of social policy at the EU level, a situation which is relevant to a multitude of sectors. Another aspect to examine would be whether there is a need to ensure that the exercise of the freedom to provide air services does not affect negatively the correct application of the EU and national social legislation across the EU.

The TEN-T Guidelines and the CEF Regulation on funding inter alia promote **intermodal infrastructure development**, for example through the requirement for 38 European core airports to be connected to the rail network by 2050, and the corridor approach favouring intermodal options. For projects of common interest related to air transport infrastructure, the Guidelines identify certain specific priorities for development, namely (a) capacity enhancement (b) supporting the implementation of the Single European Sky and air traffic management systems – notably SESAR (c) improving multi-modal connections between the airport and other transport modes (d) improving sustainability and integrating the environmental impact from aviation. On this basis, a number of projects have been funded

under the CEF – especially in the field of multi-modal connections / connections between the airport and cities. In the latter respect, the integration of airports and cities plays an important role and TEN-T and urban mobility activities are closely interacting.

As explained in EQ2, the liberalisation of the internal aviation market as well as global economic growth have led to an increase of air traffic with negative consequences for the **environment**. There thus seems to be tension between the aim of allowing the aviation sector to grow and remain competitive and the EU’s commitment to environmental causes. To address the negative environmental effects a number of initiatives are ongoing at EU and international level<sup>228</sup>:

- **Improved aircraft technology and design.** European initiatives in the field of research and development are taken notably through the Clean Sky 2 Joint undertaking, whose budget is around EUR 4 billion, with a Union contribution of EUR 1 755 000 000. In particular, Clean Sky2 aims to reduce emissions by 20 to 30% compared to aircraft entering into service in 2014 i.e. potential global emission savings of 4 Bt CO<sub>2</sub> between 2025 and 2050. By 2040, further improvements are expected in average fuel burn per passenger kilometre (-12%) and noise energy per flight (-24%).
- **More sustainable aviation fuels:** The Renewable Energy Directive (2009/28/EC) and the recast Directive (EU) 2018/2001 that will be replacing it as from 1 July 2021 set a framework for the promotion of energy from renewable sources. They covers inter alia aviation fuels, with the aim of achieving significant emission reductions compared to conventional jet fuels. From 2014 to 2020, the European Union contributed with EUR 464 million to the budget to study advanced biofuels and other renewable sources, of which EUR 25 million were specifically earmarked for sustainable aviation fuels. In particular, although the uptake by the airlines is currently minimal and is likely to remain limited in the short term, there is interest in ‘electrofuels’, and six bio-based aviation fuels production pathways have been certified and several others are in the approval process. Depending significantly on the type of feedstock, biofuels can achieve significant emission savings compared to conventional fossil fuels.
- **Deployment of more efficient air traffic management operations.** More optimised flightpaths allow for significant fuel gains, thereby reducing the carbon footprint of aviation. The SESAR<sup>229</sup> Joint undertaking plays an important role in this respect. The European Union contributed with EUR 700 million to the SESAR 1 programme (2007-2016) and a further EUR 585 million to the SESAR 2020 programme (2014-2024). It is estimated that the deployment of SESAR technologies across the EU could achieve a fuel saving of 10% in 2025, compared to 2012 levels. Furthermore, the European Union also contributed so far with EUR 1.5 billion from the Connecting Europe Facility Programme to the deployment of these solutions by operational stakeholders such as airlines, airports or air navigation service providers.
- **Market based measures.** They are expected to play an important role in capping and reducing the amount of CO<sub>2</sub> emissions for which aviation is accountable. Between 2013 and 2020, the EU Emissions Trading Scheme (ETS) for aviation will have saved an estimated 193.4 Mt CO<sub>2</sub> (twice Belgian’s annual overall emissions). On a global scale, the first building blocks of the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) have been established at ICAO level in 2018. The

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<sup>228</sup> European Aviation Environmental Report 2019

<sup>229</sup> Single European Sky ATM Research

objective is to ensure that growth of aviation be carbon neutral compared to 2020 emissions levels. All European States have committed to implementing CORSIA from its initial phase.

**In summary:**

- Overall the requirements set in the Air Services Regulation are coherent and consistent with the other EU's principles and policies.
- When reviewing the ownership and control rules, and in addition to balancing the different interests, regard should be had to ease of application, bearing in mind inter alia the fact that in many cases, the EU Merger Regulation needs to be applied at the same time, often in circumstances of “joint control” within the meaning of the latter Regulation. Additional aligning efforts may be required in respect of an area lying outside the Air Services Regulation, namely by ensuring that the EU social acquis is effectively applied to highly mobile crew, and addressing environmental impact caused by growth in air traffic.

## 5.5 EU added-value

**EQ 11. What actual evidence can be found of the EU Regulation adding value, over and above what could reasonably have been expected from interventions of Member States or at international level? What would be the most likely consequences of stopping or withdrawing existing EU intervention?**

The analysis under EQ1 indicates the major contribution of the provisions of **the freedom to provide services** in comparison to the Third package and 2008 revision baselines. In light of the analysis of the market before the adoption of the respective provisions in 1992 and 2008, the EU added value of these effects appears to be significant. Indeed, Member States could potentially use multilateral and bilateral agreements to provide access to their markets, similar to the approach prior to the adoption of the Third Package. It could be expected that some degree of liberalisation would have been gradually achieved following the additional bilateral or multilateral agreements among Member States. However, the conditions would have been largely dependent on the conditions of the agreements and might not be the same for all Member States. The achievement of a level playing field and non-discrimination between all EU carriers across all Member States would be complex and lengthy to achieve on the basis of bilateral ASAs between individual Member States. Any positive impacts would have been expected to materialise later in time (the first impacts of the Third Package started to materialize already in 1994). Therefore, it could be argued that the main effects of the liberalisation of the aviation market as discussed in EQ1 and EQ2 can be attributed to the Regulation.

The EU added value of common provisions on **the operating license and principal place of business** is significant in light of the liberalization process of the aviation market<sup>230</sup>, as they have ensured the level playing field for the air carriers. Although the assessment under the EQ2 confirms that the objective of the level playing field is not fully achieved, it can be

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<sup>230</sup> As explained in the intervention logic and further pointed out in the assessment of EQ2, the freedom to provide services is the central part of the Air Services Regulation with all other provisions being set to support its delivery. Therefore, the EU added value of all other provisions other than the Freedom to provide services is assessed assuming the liberalisation of the EU aviation market is set.

argued that in the absence of the regulation the situation would be more difficult. Indeed, in light of the still existing inconsistencies, it is evident that the Member States alone would not have reached the same common level of requirements, in particular as regards the financial soundness of air carriers and the ensuing stability of air services. The situation prior to the adoption of the Third Package - where operating licences were granted on the basis of national rules - was characterised by differences among Member States and meant that air carriers faced uncertainty and discriminatory practices in accessing the markets of other Member States. In the absence of a common framework, certain Member States have applied their own rules for licensing, which would have made the process across the Union more inconsistent and led to greater discrimination and greater competitive distortions.

The same argument applies when assessing the EU value added of **the leasing provisions**. Given the difficulty of ensuring complete consistency even with Regulatory interventions (this is a process that has been ongoing since the 1992 Regulation), it seems unlikely that Member States acting individually would be able or motivated to achieve a comparable level of harmonisation. This in turn would have reduced the flexibility for operators to seamlessly lease aircraft between Union carriers. Thus, the value added of EU action has been to ensure more consistency in leasing provisions across Member States than would otherwise have been achieved. A consequence of this is a more level playing field, which reduces competitive distortions. Furthermore, the consistent legal framework added value in terms of reducing barriers to intra-Union leasing and thus affording operators additional flexibility over and above what could have been achieved with national level action. This common approach also ensured that Member States made sure that the proper safety rules were applied (and clarifying by which authority) to the carriers' operations. Limiting excessive recourse to wet-leasing of third countries' aircraft at EU level allowed to address the risk that safety and social conditions may have been compromised due to cost-reduction pressures attainable by wet-leasing from countries with lower safety and social standards.

Regarding **pricing rules**, the Regulation has added value by increasing the consistency of the rules that must be followed across the internal market, notably in the area of price transparency. . This is especially important as air travel is a cross-border activity that requires consistency within the internal market. Equally, non-discrimination on the basis of the place of residence can only be achieved via harmonised action across the internal market and the Regulation adds value by imposing a consistent rule. The Regulation also adds value relative to international interventions. ICAO published core principles on price transparency that recommends passengers should have clear information on the total price, as well as any applicable taxes, charges, surcharges, and fees (ICAO, 2013b). ICAO's recommendations are non-binding, therefore provisions under ICAO lead to inconsistent implementation. In contrast, an EU Regulation is directly applicable in all the Member States, whilst the Commission monitors that the Regulation is being applied correctly by the Member States. Further, there are no ICAO recommendations regarding non-discrimination by place of residence because this is specific to the EU's internal market objectives.

The main EU added value of a common **Public Service Obligations** framework is that it strikes a balance between the possibility for Member States to impose conditions for PSOs, as they are an important derogation from the freedom to provide air services, and the need. to minimize competitive distortion. While Member States are better placed to assess concrete needs for PSOs, only a common PSO framework can ensure fair competition in the context of the liberalized aviation market. Although, as analysed under EQ1, some degree of the competitive distortions still persist, the Public Service Obligation provisions have limited unjustifiable interventions and have contributed to ensuring that PSOs are imposed only where this is justifiable by genuine needs. Moreover, by ensuring the common tendering and

transparency standards the Regulation facilitated the access to PSO tendering of air carriers from other Member States.

The main EU added value of common **rules on Traffic distribution** is to provide a balance between the possibility for Member States to distribute traffic between airports and the need to avoid both disproportionate limitations and discrimination (cf. also EQ2). Indeed, Traffic distribution affects the freedom to provide services and is thus carefully framed by the Air Services Regulation. Therefore, despite their limited use, the added value of the provisions is significant. The presence of procedures and provisions set at EU level brings greater predictability of the process to be followed and conditions to meet and greater trust that the process will be applied in clear and transparent way with the Commission being able to intervene if and when needed. While probably not significant since Traffic distribution rules have not been often used, EU action has had some added value in terms of clarity, transparency and, possibly, efficiency of the process as well as preventing misuse of Traffic distribution rules in a way which would distort competition.

The EU value added of the **Ownership and Control rules** is twofold. Firstly, in light of the liberalisation process, the removal of Ownership and Control restrictions in the EU ensured a level playing field for EU air carriers aiming to shift their business to another Member States and give effect to the Treaty rules on free movement of capital and freedom of establishment. The stagnation at international level on the liberalisation of Ownership and Control despite there being a demonstrable need, indicates that this would not have happened if left to individual Member States. Secondly, while the Ownership and Control rules did not fully ensure the maintenance of traffic rights to third-countries (as it also depends on the third-country's willingness to accept this) they added value by giving all EU carriers the opportunity to obtain traffic rights between Member States (also other than the one in which they are licensed) and third-countries (which was not the case before). On the imposed restrictions for Ownership and Control vis-a-vis third countries the EU ensured compliance with the international legal framework.

**In summary:**

- Overall the Air Services Regulation adds value as it provides a common legal framework and harmonised rules that ensure a level playing field for EU air carriers. In the absence of the Regulation it can be presumed that liberalisation would have occurred at a much slower and asymmetric pace.
- In relation to PSO and Traffic distribution rules in particular the added value is that the Regulation gave Member States the opportunity to restrict the overall freedom to provide intra-EU air services in light of domestic needs, i.e. development of remote or peripheral regions and management of traffic between airports.

## 6. CONCLUSIONS

### Effectiveness and the EU added value

Air connectivity is relevant for the travelling public, for businesses and the economy at large as the better a city, region or country is connected by air to other destinations in Europe and other parts of the world, the more growth can be generated. Between 2004 and 2014, air connectivity in Europe increased between all categories of airports, with the highest growth of total connectivity out of small and regional European airports (+46%), but also strong growth

of total connectivity out of largest European airports (+34%).<sup>231</sup> Today, European aviation represents 26% of the world market, contributing €510 billion annually to Europe's Gross Domestic Product, and supporting 9.3 million jobs in Europe.<sup>232</sup>

These developments can be put to the credit of the substantial growth of demand in air transport within the EU and worldwide, and to market liberalisation through the Third Package and the Air Services Regulation. In particular, the Air Services Regulation has been very effective and has brought sizeable EU added value in creating the internal market by removing barriers to competition, such as restrictions on the routes, increasing the number of flights, allowing entry of new market operators, in particular in the low cost segment, and increasing the range of advertised fares. The **freedom to provide air services in the internal aviation market, intra-EU O&C liberalisation** and a **harmonised liberal legal framework** (notably regarding **operating licenses and leasing**) across Member States has allowed air carriers to organise their operations more efficiently. It has improved connectivity (by offering more routes and providing for a system where Member States can impose, under certain conditions, **PSOs** to support links to certain development or peripheral regions) to the benefit of businesses and consumers. The provisions on **traffic distribution rules** have brought some transparency to the process of Member States imposing them compared to the situation before 2008. The current market situation shows an increase in the overall level of air traffic and number of city-pairs connected significantly beyond what was expected compared to the baselines' values. The number of competitors per route has also increased and price levels have gone down. The rise of low cost carriers on the EU market has introduced new business practices and diversification of services offered (e.g. pricing policies whereby checked-in luggage or ability to select seats have become optional). Consumers have therefore benefited from new travel opportunities that have diversified airlines' offers including cheaper fares for less services. More competitive pricing is also a result of the **price transparency** provisions which, at the same time ensure consumers have access to transparent information on fares.

In addition, the excellent safety record of European aviation suggests that it is unlikely that improved monitoring of financial fitness of carriers has had an impact on safety that can be quantified. Overall, there are positive indications associated with improved financial monitoring and cooperation among the relevant authorities within each Member State. Regarding leasing, risks to safety have been minimized alongside with the minimisation of total wet-leases from third countries. Therefore, while the Regulation did not aim to directly improve safety, provisions on market liberalisation have not compromised safety. When it comes to scheduled commercial air transport operations, the EU/EFTA enjoys today one of the best safety records in the world, with the average fatal accident rate in the last ten years standing at 1.8 per ten million flights, which is significantly below the worldwide average.

While the sustained growth of air traffic brought by liberalization and global economic growth has produced significant economic and social benefits, it has also had unintended negative impact on the environment. Greenhouse gas emissions represent an increasing challenge for the sustainability of the aviation sector with the growth of aviation outpacing the reduction of emissions per passenger-kilometre flown. In order to tackle emissions in the decades to come, the EU has deployed a basket of measures including market-based measures, capping and reducing the CO<sub>2</sub> emissions for which aviation is accountable, EU-funded programmes like Clean Sky 2 program on fuel efficiency of aircraft, the entry into the

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<sup>231</sup> An Aviation Strategy for Europe, COM (2015) 598 final

<sup>232</sup> Aviation: open and connected Europe, COM (2017) 286 final

market of more sustainable fuels in the years to come as well as innovative and modernised air traffic management technologies.

The evidence collected also suggests that some of the specific and operational objectives of the Regulation have not been fully attained. Although these issues may look secondary as compared to the positive effects of the Regulation as a whole, they may disproportionately affect certain parts of the market and/or stakeholders. Therefore a detailed assessment of those is presented below within the section headed “Lessons learned and possible areas for improvement”.

### **Efficiency**

The magnitude of the positive impacts presented above are impossible to monetize, making it difficult to draw overall conclusions about the Air Services Regulation efficiency. The estimated total cost to licensing authorities across the EU-28 over the period 2008 – 2017 is 39.17 EUR million (inflation adjusted). For price transparency authorities, it was concluded that costs have been very low representing 1.25 EUR million (inflation adjusted). For air carriers, the best estimate of total compliance costs for all air carriers is EUR 118.32 million (inflation adjusted). Although the final cost estimate is highly uncertain, there was generally a reasonably high level of agreement between the stakeholders in the magnitude of estimates received, which supports the view that there were no excessive costs for any particular stakeholders. The general view is that the benefits brought by the Regulation have largely offset the costs it has generated.

### **Relevance**

The objectives of the Air Services Regulation and the balance between them remain highly relevant in light of the changed market, political and technological context. The objective of ensuring market efficiency remains needed for the maintenance of an internal EU market where air carriers have the opportunity to freely provide services in a system of effective competition. In this respect, it is important that the Regulation remains up to date taking into account practical experience and the evolving market and technological context. At the same time, complete commercial freedom must be balanced against the interests of the society by maintaining the safety of operations and protecting consumers and workers.

The evolution of the market, in particular the multiplication of operational bases outside the Member State of the PPoB, brought new challenges to aircrews and may have led, in some cases, to unintended indirect impacts on their working and employment conditions. The possibility of such occurrences is important to keep in mind as it may have the effect of undermining the level playing field.

### **Internal and external coherence of the Regulation**

In terms of internal coherence, there is no indication of major overlaps (subject only to the possible need to clarify the relationship between Article 19(1) and Articles 20 and 21 ) or inconsistencies between the different provisions or objectives of the Air Services Regulation. However certain objectives and measures counter-balance each other (e.g. freedom to provide services vs imposing Public Service Obligations to develop remote regions, or ensuring carriers’ commercial freedom within the EU vs maintaining restrictions on financing to maintain traffic rights).

In terms of coherence with other EU instruments, the evaluation has identified a need to clarify approaches as to some aspects involving, next to the Air Services Regulation, the Slot Regulation and the new EASA Basic Regulation.

Regarding the coherence with other EU policies, when reviewing the ownership and control rules, and in addition to balancing the different interests, regard should be had to ease of application, bearing in mind inter alia the fact that in many cases, the EU Merger Regulation needs to be applied at the same time, often in circumstances of “joint control” within the meaning of the latter Regulation..

The EU commitment towards environmental protection is not fully in line with the effects of the Air Services Regulation. The Regulation as well as GDP growth have led to more air traffic demand resulting in negative impacts for the environment. A number of initiatives at EU and international level aim at addressing such environmental concerns.

Lastly, one should mention a possible interplay between O&C provisions and the newly established EU framework for screening of foreign direct investment into the EU. Any future change to the Air Services Regulation must also take into account risks that foreign investment in critical infrastructure may pose to security and public order.

### **Lessons learned and possible areas for improvement**

The detailed analysis performed under the five evaluation criteria and under the seven policy areas has allowed detecting areas for improvement. The first three presented below are considered as a priority. To recall, there were important limitations in obtaining complete quantitative data allowing to comprehensively track trends over the relevant period. Where the data are not sufficiently conclusive, the conclusions are mostly based on qualitative information the Commission has gained and analysed through exchanges with and observation of stakeholder behaviour in its day-to-day activities.

#### **1. Operating licence provisions:**

Recent market exits in the case of Monarch, Air Berlin (including NIKI and LGW) and WOW have shown a need to reflect on a better approach to the wind up of air carriers including the temporary license and the interplay with the Slot Regulation. These bankruptcies of large air carriers have shown that they bring a considerable disruption to the market in terms of stranded passengers, job losses for workers and highly valuable airport infrastructure that becomes available as a result and should be used efficiently. Another lesson brought by these cases is that a bankruptcy situation brings high pressure to licensing authorities, slot coordinators and competing air carriers. Whether the situation is more adequately addressed in the context of the Air Services Regulation or the Slot Regulation will depend on further analysis falling into the context of the examination of the Air Services Regulation and the follow-up to the 2011 Commission’s Slot Proposal.

In light of developing business models that cover operations across many Member States the notion of PPOB raises questions. The need to ensure that the financial fitness is adequately monitored remains. At the same time, questions including which functions should be exercised in the Member State of the PPOB or which competent authority is best placed to ensure the monitoring deserve further analysis in light of increasing outsourcing of functions and multiplication of operational bases outside the Member State of the PPOB. In particular, pan-European airlines with operational bases in many Member States or subsidiaries based in different Member States, have become a successful business model. A number of air carriers hold multiple AOCs and operating licenses, which represent challenges. There appears to be no reason to stifle their development if adequate monitoring can be ensured in other ways. The topic could be further examined, including the question as to whether cooperation could be improved among national authorities. Further analysis would have to take account of the system adopted under the new EASA Basic Regulation for cooperative safety oversight.



The practice of establishing multiple operational bases outside the Member State of the PPOB also has consequences on the determination of the “home base” of aircrews. Multiple operational bases outside the Member State of the PPOB has added a level of complexity to identify the applicable labour law and competent jurisdiction for mobile aircrew in some specific cases, though the jurisdiction and applicable law (to employment contract) rules are harmonised by the Brussels I Regulation (recast) and the Rome I Regulation, and have been further clarified in the CJEU case law in terms of applicable criteria. Also, and more generally, the Practice Guide on jurisdiction and applicable law in international disputes between the employee and the employer, published by the European Commission, aims at informing about the operation of the applicable rules. The freedom of establishment and to provide services allows businesses to choose their place of incorporation anywhere in the EU. Further action regarding the rules concerning the applicable labour law and the enforcement of the applicable rules, may however be necessary to guarantee a level playing field.

Lastly, questions arise from the requirement to hold a valid operating licence in the case of certain small scale operations e.g. drones and of cost-shared flights advertised through online platforms. These types of operations are relatively new and the application of the current legal framework to them seems to give rise to legal uncertainty at least for cost-shared flights. Any possible revision of the rules would need to be careful so as to avoid the imposition of disproportionate or inadequate obligations on small scale activities. Moreover, today cases exist where an operating licence is required but and AOC is not, which constitutes an incoherence between the safety rules and the Air Services Regulation.

## **2. Ownership and Control rules:**

Several problems have emerged in the practical application of the O&C provisions. Feedback from airlines suggests that the difficulty in applying the rules in certain cases could lead some air carriers to adopt very complex financing structures in order to comply with O&C rules, especially when they are partially owned by third country investors. Airlines operating hubs from several Member States (e.g. Air France – KLM) may have to resort to complex corporate structures in order to satisfy the ownership and control restrictions in bilateral agreements between Member States and third countries (where the third country does not accept EU designation). Incidentally, it is noted that some foreign investors have taken advantage of Investor citizenship schemes offered by certain Member States, in order to obtain the nationality of one those Member States<sup>233</sup>. This issue is however not as such covered by the present review. Claims that Ownership and Control rules are too complex and not consistently enforced across the EU led the Commission to adopt in July 2017 interpretative guidelines to bring more clarity, facilitate foreign investment and avoid competition distortions. Nevertheless, Commission services’ experience is that rules remain difficult to monitor and enforce in practice in a fully consistent way in the absence of detailed rules or case law on complex financial structures. Whether the rules lead air carriers to adopt complex financial structures, or increase legal uncertainty around certain company structures (e.g. companies on the stock exchange where the nationality of final beneficial owners is difficult to determine), the impact is the same: air carriers may be led to adopt inefficient and costly structures in a capital intensive industry.

A more crucial issue is that Ownership and Control rules may render access to financing more difficult. EU air carriers have, as such, an interest in continued access to capital to the extent necessary to run profitable operations like in most other sectors of the economy. Stakeholders

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<sup>233</sup> Report from the Commission on “Investor Citizenship and Residence Schemes in the European Union” of 23 January 2019, COM/2019/12 final.

are divided on the subject. Some argue that existing restrictions on foreign investment limit opportunities of EU air carriers to receive financing and managerial acumen. Foreign direct investment has been found to be an important driver of Member States' economies, supporting the creation of jobs, and providing capital and technology to foster European research, innovation and competition.<sup>234</sup> While limited cross border investments are possible, the current restrictions prevent cross border mergers and acquisitions coming from third countries, which could lead to synergies and transfer of expertise and managerial acumen, as well as increased competition in the EU market. The fact that there is an appetite in the industry to do so can be seen by airline alliances entered into as a second best solution given the obstacles raised by ownership and control rules. To the same effect, one can refer to the fact that air carriers sometimes own limited cross-shareholdings in air carriers from other countries.

Nevertheless, the evidence remains inconclusive whether greater access to capital would have invigorated EU airlines and whether certain airlines (e.g. Air Berlin, Alitalia) could have been rescued from collapse in the absence of the ownership and control restrictions. Some stakeholders argue that the same restrictions prevent foreign airlines from taking control over EU airlines with the aim to channel their passengers through their own hubs and hence away from the EU hubs, with possible negative impacts for EU activity and jobs.

Ownership and Control restrictions are a common occurrence worldwide in air transport (with some exceptions) and hence EU airlines do not seem to suffer disproportionately in that regard. At the same time, such restrictions are not common in other economic sectors. The full relaxation of these restrictions within the EU has been a success allowing the creation of strong airline groups able to prosper and withstand competition from third country carriers.

The current Air Services Regulation already allows a relaxation of ownership and control rules via EU negotiated air transport agreements. Some stakeholders consider that the EU rules should evolve in this international context and seek relaxation of these rules through negotiations based on reciprocity rather than by a unilateral relaxation of EU restrictions. Many third countries have accepted EU designation and ICAO is examining means of facilitating the efforts of States to liberalise investment rules without endangering traffic rights with third countries.

The need to facilitate the maintenance of traffic rights with third countries seems to be the main justification for the restrictions. However, as mentioned previously, experience within the EU with liberalising ownership and control has shown that it is possible to mitigate problems arising from the bilateral air services agreements, either by the carriers adapting their ownership and control structure themselves, or by negotiation between States. The opportunity and the impact of any further relaxation of control and ownership rules on the EU aviation sector needs to be assessed carefully.

### **3. Traffic distribution between airports**

Member States have, until now, not made widespread use of traffic distribution rules. However, where they have been used they sparked great controversy due to their possibly discriminatory effects. Eurocontrol Challenges of Growth Studies show that airports become more congested in the EU and airport infrastructure becomes more valuable. A crucial issue is that traffic distribution rules can arguably lead to discrimination to the benefit of legacy carriers and their partners. Traffic distribution rules can "de facto" force air carriers to give up slots at well-connected airports, and to hand them over for free to competitors. Due to the

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<sup>234</sup> <http://ec.europa.eu/trade/policy/accessing-markets/investment/>

considerable value of slots at congested airports, the very possibility for Member States to provide for traffic distribution is strongly criticised by airlines, also given the possible impact on the application of the [Slot Regulation](#). The Commission may need to consider an amendment to the existing rules, so as to preserve opportunities of the air carriers to access the internal market freely, while also addressing strains on airport capacity.

#### **4. Leasing.**

Feedback from airlines suggests that the existing prior approval for intra-EEA dry- and wet-leasing hinders the efficiency of operations of air carriers unnecessarily, especially given that safety standards are fully harmonised in the EU. The requirement seems particularly burdensome, with little added value, for air carrier groups with multiple AOCs and operating licences that lease aircraft across the group and have to obtain prior approval from authorities in different Member States. In terms of difficulties in applying the leasing provisions, the most problematic area identified by air carriers and Regulators was the requirement to demonstrate that the carriers' need for leasing cannot be reasonably satisfied by aircraft registered in the EU. The Commission may need to rethink the process of leasing to ensure a clear and homogeneous application which would increase the efficiency of air carriers' operations and ability to respond to sudden changes in passenger demand.

Wet-leasing of third-country aircraft has remained limited to date, however there are arguments to facilitate it in respect of like-minded third-countries whose standards in terms of safety and of working-conditions and social protection are comparable to the standards applicable within the EU. This would allow air carriers more flexibility to address seasonal capacity changes. At the same time any future action must take into account concerns (voiced in particular by the trade Unions) about social conditions, which have arisen in the context of wet-leasing of third country aircraft, given the lack of a definition of "exceptional needs" and the potential uncertainty about the legal regime applicable to non-EU crew on these aircraft operating in the EU.

#### **5. Price transparency rules**

In the past years, general consumer law has created a safety net that would protect passengers from unfair and biased practices to some extent even without the Regulation. A number of national enforcers argued during the consultation that several obligations announced by the developments of general consumer law encompass the sector-specific rules under the Regulation and point to room for simplification in the future. More cooperation among the competent authorities by means of strengthened enforcement would help address infringements and reduce consumer detriment.

In addition, some problems remain in the way air carriers break-down taxes, fares and charges and present the prices of ancillary services. Further, Commission services' experience is that air carriers tend to split price elements and services. Also, there are divergent interpretations from national price transparency authorities in determining what constitutes mandatory elements which are part of the final price or optional elements. All this has negatively affected the ability of consumers to effectively compare prices and to know in advance which elements would be refunded if/when they cancel their flight.

#### **6. Public Service Obligations**

Literature suggests that important notions in the Air Services Regulation need clarification for better enforcement. A number of terms, including criteria for imposing PSOs, are very general in nature and are not further explained such as "peripheral or development region", "thin route" and "vital character for economic and social development". This can lead to inconsistent and even improper application of the rules on Public Service Obligations, therefore not ensuring the objective of minimising competition distortions. Although the overall number of PSOs has decreased since the adoption of the Regulation and the number of complaints as well, some PSOs have been legally contested by airlines as to their necessity or proportionality. Conversely, some regions may lack proper connectivity but the imposition of Public Service Obligations remains difficult (e.g. in the case of some of the smallest regional airports in remote regions, where operational efficiencies would speak for declaring all the routes from such airports as PSOs). Commission services' experience is that the rules on the emergency procedure have rarely been applied and that they may not accommodate all relevant situations.

Moreover, Regulators' feedback suggests that the objective of increasing competition in tendering and thus reducing subsidy levels has not been fully achieved as carriers consider expected profits too low and they do not have suitable aircrafts. They perceive the tenders and Public Service Obligation contracts as complex and time scales as too tight. The Commission may need to consider avenues to better target the use of Public Service Obligations to all those cases where genuine need exists while also improving the tendering processes to encourage wider participation of carriers.

**ANNEXES TO THE**  
**COMMISSION STAFF WORKING DOCUMENT**  
**EVALUATION**  
**of the**  
**Regulation (EC) No 1008/2008 on common rules for the operation of air services in the**  
**Community**

## ANNEX 1: PROCEDURAL INFORMATION

### 1. LEAD DG, DeCIDE PLANNING/CWP REFERENCES

- DG MOVE is the lead DG
- DECIDE Planning Reference: PLAN/2017/1425

### 2. ORGANISATION AND TIMING

The evaluation of the Regulation was coordinated by an Inter-Service Steering Group, which was established early in the evaluation process. Representatives from Secretariat General, Legal Service, DG Mobility and Transport (MOVE), DG Competition (COMP), DG Employment, Social Affairs and Inclusion (EMPL), DG Justice and Consumers (JUST), DG Internal Market, Industry, Entrepreneurship and SMEs (GROW), DG Economic and Financial Affairs (ECFIN), DG Regional and Urban Policy (REGIO), DG Trade (TRADE), DG Budget (BUDG) were appointed to the Steering Group.

The Inter-Service Steering Group met 7 times from September 2016 to September 2018.

### 3. EXCEPTIONS TO THE BETTER REGULATION GUIDELINES

The Better Regulation Guidelines and Toolbox were followed without any exceptions.

### 4. CONSULTATION OF THE RSB (IF APPLICABLE)

The evaluation has been selected for scrutiny by the RSB. The RSB received the draft version of the evaluation Staff Working Document on 26 September 2018. Following a hearing held on 24 October 2018, the RSB issued a negative opinion 26 October 2018. A revised version was sent for RSB scrutiny on 30 January 2019. The RSB issued a positive opinion on 15 February 2019. The RSB made several recommendations. Those were addressed in the revised evaluation SWD as follows:

1 <sup>st</sup> RSB Opinion - Recommendations	Modification of the Evaluation SWD
<b>Main considerations</b>	
<p>The scope of the evaluation is not clear. The report does not properly explain that it aims to evaluate the overall impact of the Regulation and not just the changes of 2008, as its title suggests. Due to the unclear scope, the two baselines are confusing. The wider context of the exercise is vague.</p>	<p>The revised evaluation SWD now explains that the evaluation goes beyond the limited changes introduced in the 2008 revision, and why. This is explained in Section 1 (Introduction) and when discussing the two different baselines.</p> <p>Regarding the baselines, the more detailed explanation of the scope and the explanation in Section 2.2 on the baselines clarify them. The text now focusses on key elements in the market under each of the baselines. The more detailed 2008 revision baseline for each policy area is discussed under the effectiveness evaluation question 1.</p> <p>The wider context of the evaluation is explained in the Introduction (Section 1) stating that different pieces of the aviation internal market legislation are being evaluated more or less in parallel in order to allow an overall view of the</p>

	market and determine whether there are possible synergies for possible future initiatives.
The evaluation does not draw conclusions from the available evidence. As such, it does not allow for an informed decision on the need for further action.	<p>The revised evaluation SWD now gives quantitative and where not available qualitative data together with stakeholder opinions in order to underpin the conclusions.</p> <p>Each evaluation question (or sub-section) concludes with a short summary explaining how the preceding stakeholder opinions and available evidence are interpreted to underpin the conclusions.</p>
The report does not provide for a comprehensive analysis of the unintended social and, in particular, environmental adverse impacts of the economic aviation rules at hand. It does not draw substantiated conclusion on these aspects.	The revised evaluation SWD now includes, where relevant, unintended social and environmental impacts under the effectiveness questions. The report also explains in parallel ongoing initiatives targeting the environment as well as the Report “Taking stock of the EU social agenda for air transport – towards achieving socially responsible air transport” to be adopted by the Commission early 2019.
The report is very dense and difficult to read and absorb. It requires expert-level knowledge and lacks guidance through its structure.	<p>The revised evaluation SWD is now structured more clearly, making it easier for non-expert readers to follow. Short introductions on the individual policy topics are provided in Section 2.1.</p> <p>Key terms used in the aviation industry are defined in the Glossary or in footnotes when the term is used in the text.</p> <p>Under each evaluation criterion, an introduction is given to describe what the evaluation questions aim to explain.</p> <p>The first evaluation question includes an introductory box for each policy area outlining the provisions of the Third Package, what was changed in the 2008 revision, the intervention logic and the 2008 revision baseline.</p> <p>Table in Annex 11 shows that the seven main areas are assessed according to the five evaluation criteria but not under all evaluation questions.</p>
<b>Further considerations and adjustment requirements</b>	
<b>Scope</b>	
The report should clarify from the beginning	The report now clarifies from the beginning that

<p>that it takes a holistic approach, i.e. that it evaluates the whole set of economic aviation rules (since the adoption of the Third Package in 1992) and not just the changes made in Regulation 1008/2008. To clarify this distinction, it should present the main changes introduced in 2008. Note that the title of the report is also misleading as it only refers to the 2008 changes.</p>	<p>it takes a holistic approach, and why. This is explained in Section 1 (Introduction). The overall changes introduced are presented under the effectiveness evaluation question 1 and Annex 9.</p>
<p>The report should not only explain the two different baselines but also clearly separate analyses depending to which baseline they refer.</p>	<p>The answers to the evaluation questions now clearly state when the comparison is made to the Third Package baseline or to the 2008 revision baseline.</p>
<p>It should also inform on the scope and the results of the fitness check carried out in 2013 and if (and why) some of its conclusions are no longer valid today.</p>	<p>The introduction states that a Fitness Check was carried out and that it had a different scope than the present evaluation. The market changes that happened since the Fitness Check that warrant re-evaluating its conclusions are briefly presented.</p>
<p>Furthermore, the report should explain the wider context to this evaluation, and in particular what to expect from parallel and related evaluations and nearly finalised studies. The report should, where relevant, build on the information already available out of these exercises.</p>	<p>Section 1 (Introduction) now presents the wider context i.e. the parallel evaluations and studies being carried out or finalised on a number of different pieces of the aviation internal market legislation. In particular, when discussing pricing, reference is made to the on-going evaluation of the Regulation on Code of Conduct for Computerized Reservation Systems, and when discussing social issues, reference is made to the fact-finding study supporting the Commission Report on “Taking stock of the EU social agenda for air transport – towards achieving socially responsible air transport”.</p>
<p><b>Conclusions</b></p>	
<p>The report should build on the extensive data and granular presentation of the stakeholder's opinions to combine this information into conclusions and lessons learned. It should indicate whether the available information allows concluding on the magnitude, the source of the problems and the need for further action. In particular, it should clarify to what extent the observed shortcomings find their source in the legislation itself or in its implementation. It should clearly indicate</p>	<p>The different available data, stakeholder opinions and conclusions drawn from them are now presented in a more granular way, in particular thanks to the summaries at the end of each evaluation question.</p> <p>The final conclusions recall, in the interest of transparency, the limitations in the data collection and the fact that conclusions in terms of lessons learned and areas for improvement are mostly based on qualitative analysis.</p>

uncertainties due to insufficient or unavailable information.	
The (intermediate and final) conclusions should be more granular and transparent.	The (intermediate and final) conclusions are presented in a more granular and transparent way.
The final conclusions could usefully provide for a prioritisation of the issues depending on their magnitude and urgency.	The final conclusions now provide for some prioritisation of the issues depending on their magnitude and urgency. In particular, four issues are now presented as areas requiring special attention according to the importance of the problems identified and the urgency of a possible action to be taken.
<b>Control and ownership</b>	
The report should clearly present to what degree control and ownership restrictions are still needed for maintaining traffic rights with third countries or to what extent observed shortcomings require a change in the rules.	The report now clearly states that ownership and control restrictions are necessary for maintaining traffic rights.
The report should provide more factual evidence that goes beyond the stakeholder contributions and acknowledge that research comes to divergent conclusions on this topic. The way in which the aviation market currently works is not sufficiently analysed to reach any meaningful conclusions on this issue.	The report provides factual data that could be collected in Section 3 (market background) as well as EQ1 – freedom to provide air services. The report presents stakeholder opinions (both agreeing and disagreeing), research or factual data thus showing when conclusions diverge.  Information on the working of the aviation market was added, for example on air carrier groups, and an annex on business models (Annex 8).
<b>Link with other EU policies</b>	
The report valuably addresses the unintended social impacts of the economic aviation rules from the Third Package (1992) and Regulation 1008/2008. The report should explain the wider context of this evaluation. It should include and explain the parallel stock taking exercise of the EU social agenda for air transport and the ongoing interinstitutional negotiations on the Commission proposal COM(2016)818 regarding further liberalisation of wet-leasing.	The parallel stock-taking exercises are explained. Proposals or relevant legislation adopted is mentioned and where relevant described (e.g. the proposal on foreign investment in the EU or, in Annex 7, amendments made by the EASA Basic Regulation and the Regulation on wet-leasing).
The intermediate and final conclusions of the report should reflect the findings concerning	Where relevant conclusions or impacts on social conditions are mentioned in the intermediate, as



the adverse impacts of the economic aviation rules on working conditions and collective labour rights. Overall, the report should better clarify the observed trade-offs between the economic aviation rules at hand and the EU social policy.	well as the final conclusions.
For the environmental aspects, the report does not sufficiently analyse the effects of economic aviation rules on the environment. The report should provide data on the impact of higher traffic growth rates on observed CO2 emissions. The report should elaborate on the effects of aviation growth on EU environmental and climate objectives.	The report provides data on CO2 emission and noise and addresses the effect of aviation growth under EQ1.  The measures undertaken to mitigate the unintended effects on the environment are presented under
The report should also analyse whether the economic aviation rules lead to interferences with fundamental rights and impacts on public health.	The unintended effects on the environment are presented under EQ2. The evaluation did not assess impacts on public health.  The concerns of stakeholders about the right to strike are presented under EQ1 – leasing.

<b>2<sup>nd</sup> RSB Opinion - Recommendations</b>	<b>Modification of the Evaluation SWD</b>
<b>Main considerations</b>	
The conclusions do not sufficiently stress the uncertainties due to insufficient information.	The conclusions now indicate where there is not sufficiently strong evidence to back clear-cut conclusions (e.g. O&C)
The evaluation is not transparent on the climate impact of aviation. The conclusions avoid highlighting the impact of traffic growth on greenhouse gas emissions. They do not clarify whether the existing measures to counter these effects are deemed sufficient.	The conclusions now clearly highlight the environmental impact on aviation with extracts from the European Aviation Environmental Report 2019 including regarding the likely impact of climate measures. An annex on CORSIA was added.
The evaluation does not build on the underlying study to provide conclusions on unintended social impacts.	The evaluation makes use of the findings of the underlying study, the social fact-finding study and refers to the Commission Report on maintaining and promoting high social standards. Trade-offs are highlighted under relevance, including in the conclusions and Regulation 2019/2 is described under coherence (including expected social impacts).

<p>When assessing issues with enforcement, the evaluation does not sufficiently analyse the role and actions of the national authorities and of the Commission.</p>	<p>The report describes better the role of the Commission in enforcement. It highlights for operating license the need for authorities to cooperate.</p>
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## 5. EVIDENCE, SOURCES AND QUALITY

The evidence findings of an external support study prepared by Ricardo AEA Ltd (Support study for the ex-post evaluation of Regulation 1008/2008 on common rules for the operation of air services in the Community) fed into the analysis of the evaluation SWD. The analysis of the SWD for the effectiveness, relevance and EU value criteria however largely deviated from the analysis performed for the support study. DG MOVE used the evidence collected and partially analysed by Ricardo AEA (2018) for its own analysis and synthesis. The main differences in the analysis stem from the revised Intervention Logic for the Regulation (see Section 2 and Annex 4), which now better reflects the set objectives and shows the interactions between various policy areas. Moreover, the presentation of several evaluation questions was simplified for the SWD in comparison to the support study to ensure a better readability and more transparent presentation. For further details, see Annex 6.

The evidence collection for the SWD is also based on the Commission's experience in monitoring and implementing the Regulation.

A social fact finding study was carried out in parallel and fed into the evaluation SWD on the following topics: Temporary work agencies/intermediary companies, Pay-to-fly and equal pay, Self-employment of pilots and aircrew, Posted workers, Gender equality and reconciliation between private and working life, Employment of EEA airlines' aircrews based in third countries and employment of third countries aircrews based on EEA territory.

## ANNEX 2: STAKEHOLDER CONSULTATION REPORT

### Methodology

The aim of the consultation on Regulation 1008/2008 was to collect views, evidence and opinions on the objectives of the Regulation, as well as, the Third Package and the implementation, relevance, efficiency and EU added value of the Regulation's provisions. Two main tools have been used to achieve the above-mentioned goals:

- The Open Public Consultation (OPC): it was designed by the Commission and included questions on the performance of the Regulation and options for the future. For the purpose of the evaluation only the questions regarding the performance of the Regulation in the past were used. The public stakeholder consultation for this evaluation was launched on 15 March 2018 and was open for responses until 7 June 2018 (12 weeks). A total of 78 responses were received from citizens and aircrew, and a further 28 responses from other stakeholders who represented organisations, associations, air carriers, airports, and national authorities. 21 additional documents were received, however six of these were letters from stakeholders noting that the European Cockpit Association (ECA) will contribute on behalf of their organisation. Where appropriate, the results have been presented below alongside the other stakeholder engagement activities.
- The targeted Consultation: it was designed by Ricardo AEA and included 5 targeted questionnaires, each designed to address specific stakeholders: national licensing authorities, national authorities responsible for price transparency issues, ministries of employment, air carriers, airports, a further questionnaire was designed by the Commission for fare comparison services.
  - 35 phone interviews with a selected number of stakeholders including national authorities, air service providers' representatives, air carriers, airports and their associations, ground handling providers, financiers and leasing companies, and workers organisations conducted by Ricardo AEA.
  - 10 direct information requests with stakeholders where very specific information beyond those addressed by the surveys and interviews was required by Ricardo AEA.
  - In addition, a workshop was also organised by European Travel Agents' and Tour Operators' Associations (ECTAA) and Amadeus where the industry views on both Regulation 1008/2008 and Regulation 80/2009 were discussed. An additional interview with a representative from a travel fare aggregator was conducted, since the company approached the study team expressing interest in providing input to the study.

More detailed information on stakeholders and the relevant limitations as well as response rates is shown in Annex 3 in the description of the methodology.

### Stakeholders' main views

#### ▪ *Operating licence and PPOB*

**Consistent application of operating licence provisions:** All Member States (BE, CZ, DE, EL, FI, IT, SE, ES, AT, EE, FR, MT, PL, PT, IE) participating in the survey felt that the application of rules for granting operating licences have been effective in ensuring non-discrimination to a significant or to the full extent. In interviews IE and UK did not raise major issues regarding consistency.

Most air carriers that responded to the survey felt that the Regulation has provided certainty to carriers concerning the exact requirements and process to obtain an OL (16 out of 19 air carriers and one to a very limited extent). Furthermore, 13 out of 19 air carriers participating in the survey felt that the Regulation ensured a level playing field in the provision of air services (that all air services providers follow the same rules) to some extent or more, four felt that this had only been achieved to a limited extent, and one felt that it had not been achieved at all. These divergences in views were also reflected in the additional comments provided to the surveys, particularly regarding different interpretation and application of the rules between Member States. There were no significant differences when the responses were split by carrier type. In its response to the OPC the representative of KLM-Air France repeated their view expressed in the survey that the rules on operating licences do not ensure non-discrimination among air carriers due to variation in requirements across Member States, and that authorities are sometimes reluctant to revoke licences when an air carrier breaches the conditions. They also felt that the Commission must have the power to conduct comprehensive audits to ensure consistent application and enforcement.

Interviews with two air carriers associations suggested that the Regulation provides a common framework for operators. However, the representative of regional air carriers (ERA) also noted that differences in the interpretations of the rules across Member States can exist.

**Effectiveness of operating licence provisions in the case of carriers in financial distress suspension/revoking of licences:** 13 out of 15 Member states had no problem with *suspension* of OL (AT, BE, CZ, DE, EE, EL, FI, IT, MT, SE, PL, PT, IE). FR stated that suspension should also be applied to problems with O&C, and ES noted a disconnect between the suspension procedure and national mercantile legislation which allows corrections of imbalances at a later date.

13 out of 15 Member States had no problem with *revocation* either (BE, CZ, DE, EE, EL, FI, FR, IT, MT, SE, PL, PT, IE). The Austrian authority felt Article 9 does not cover all of the possible reasons for revocation (such as the air carrier having no aircraft, or cessation of commercial operations, etc.), while the Spanish authority noted again the disconnect between the suspension procedure and national mercantile legislation.

11 out of 15 Member States had no problem with granting *temporary* licences (BE, CZ, EE, EL, FI, FR, MT, SE, PL, PT, IE), while four did (AT, DE, IT ES). The Austrian authority noted that there is no clear benefit for granting a temporary licence in Regulation 1008, while the German authority felt that a temporary licence can have a detrimental effect on the business model of most carriers, since they sell tickets in advance over a long period which may extend the validity of the operating licence. The Italian and Spanish authorities stated that the duration (12 months) in the case of insolvency proceedings aimed at rescuing companies in crisis is not appropriate.

The general public who responded to the OPC were rather negative about the impact of the financial monitoring requirements, with 20 out of 78 noting an increase in the number of sudden bankruptcies, and only 13 indicating a decrease.

**Appropriateness/effectiveness of principle place of business provisions (PPoB):** An association of pilots (ECA) felt that the current definition is not sufficiently explicit that other places of business outside the PPoB need to be treated as establishments, and involve the regulatory authorities from the PPoB. Both ECA and the European Transport Federation (ETF, representing cabin-crew) considered that the current definition allows the establishment of flags of convenience which can result in Member States granting licences to offer

advantageous tax and employment conditions and ETF suggested that more specific rules are needed in the case of air services provided from an establishment outside the country issuing the operating licence. In contrast, the French national pilot association felt that the current approach to the PPOB is not a problem. However, they also consider that rules relating to home bases should be followed regardless of where the OL was issued. Finally, the European Cabin Crew Association (EurECCA) added that linking the PPOB to the OL is important to allow for financial supervision to take place in the country most impacted by the activities of that air carrier.

Two traditional scheduled air carriers argued that the current definition of PPOB is not sufficiently specific and should include “and a substantial operational activity (...) are exercised” noting that certain EU carriers select the most convenient PPOB which has social impacts. They added that the PPOB is also selected to avoid O&C restrictions (in the context of Brexit). Another air carrier noted that the definition of the principal place of business is defined differently compared to other regulations (such as the EASA Basic Regulation) and this can cause problems. They felt the Commission should try to ensure a common definition across all regulatory instruments.

**Appropriateness of the PPOB definition in terms of determining the location of where an air carrier applies for an operating licence:** Most national authorities participating in the survey indicated that the criterion of the PPOB was appropriate in determining the location of where an air carrier applies for an operating licence (AT, BE, CZ, DE, FR, IT, SE, IE, ES, EL, FI, PT- only three (EE, MT, PL) indicating to some extent); and the Member State authorities who are best placed to carry out financial and operational oversight. Again, most agreed with this statement (AT, BE, CZ, DE, MT, PT, IE, DK, FR, IT, SE, PL, ES – only three being more negative (EL,FI, EE)). However, the Finnish authority also indicated that complex ownership, subcontracting or dry leasing arrangements make the oversight/location of the PPOB difficult. Therefore, a single position for financial and operational oversight is not always the best. Sometimes it would be more appropriate to recognise that an air carrier has separate places for financial and for operational control or continuous airworthiness management. The Spanish authorities acknowledged that there are companies that develop their operations out of the Member State where they have its headquarters, the main decisions and the continued airworthiness management centre but has no issues with the current definition. The Estonian authority stated that new business models should be taken into account, when determining criteria of the PPOB. The Swedish authority noted that not all countries take full responsibility for the operating licenses they issue. This becomes even more important if most of the air carrier's operations are conducted in a different country from where the company is located.

During interviews with authorities, the Spanish Aviation Safety and Security Agency felt that the definition is appropriate for air carriers with multiple bases outside the PPOB, but not appropriate when the air carriers are subcontracting functions outside the principal place of business. They noted that Spanish air carriers can contract a Continuous Airworthiness Monitoring Organisation (CAMO) as defined in Regulation 1321/2014 that are authorised in another Member State, thereby taking the ability to supervise away from them. Thus, the Spanish agency suggested that the requirement to provide documents for companies based outside their Member State that are supervised by other authorities would be valuable. They also noted the issues of providing operational oversight in the case of carriers who have operational bases all over the EU.

The UK Civil Aviation Authority noted that the PPOB was the most appropriate criterion to determine the location where the air carrier applies for the operating licence, as this should be

from the registered office where the decisions of that air carrier are made. They also noted that it would be best to avoid a situation where the operating licence is granted in one Member State, but the AOC is granted in another as this makes it difficult for the relevant conversations to take place and ensure the right levels of protection. The UK Civil Aviation Authority also acknowledges that air carriers often have decisions being made from locations around the world, but that for them the core decisions need to be taken in the UK. They also noted that the definition is still relevant in light of some air carriers having multiple operational bases outside the Member State, and subcontracting of functions outside the Member State, but that authorities need to be pragmatic and uphold the spirit of the Regulation.

The survey of air carriers a mixed set of responses was given, with eight out of 19 air carriers indicating that the PPOB criterion is appropriate to a very limited extent, while five indicated to a significant extent, and six to the full extent. When split by carrier type, the traditional scheduled carriers largely indicated a very limited appropriateness of the criterion (7 out of 11 network carriers responding), compared to LCCs and chartered carriers who were far more positive, with five out of 8 considering the criterion appropriate to the full extent.

**Challenges/problems arising in view of the multiplication of operational bases and increasing use of subcontracting:** The survey of authorities also investigated the appropriateness given i) the establishment by some air carriers of multiple operational bases outside the territory of the Member State where the principal place of business is located; ii) the subcontracting by air carriers of functions outside the principle place of business (in another Member State or outside the EEA), and iii) other market developments.

Regarding the establishment of multiple operating bases outside the Member State, 11 out of 15 Member States (AT, BE, CZ, DE, FI, FR, IT, MT, SE, IE, ES) participating in the survey felt that the definition is still appropriate, with four others (EE, EL, PL, PT) indicating it was not. The Swedish authority added that it can sometimes be difficult to determine the principal place of business when an air carrier spreads its business in several countries, while the Spanish authority noted that this practice is especially common in markets with strong seasonal variation of the air traffic, in case the LCCs, and in case of groups of transport companies with subsidiaries in several States.

Regarding the subcontracting by air carriers of functions outside the PPOB, 10 out of 15 Member States (BE, CZ, DE, FI, FR, IT, MT, SE, PL, IE) participating in the survey felt that the definition is still appropriate, with five others (AT, EE, EL, PT, ES) indicating it wasn't. The Swedish authority felt it appropriate but that it is harder to control activities outside the Member State. The Austrian authority recognised the problem that Regulation 1008 does not state the absolute minimum requirements for the PPOB (which are the core elements of operational control). The Spanish authority noted that the large transport groups have their centres of management distributed across the EU, and depending on the volume of subcontracted activities, the operative control can move out of the state where the AOC and the licence have been issued. The Finnish authority noted that complicated ownership, subcontracting, and dry leasing arrangements make oversight of this difficult.

- ***Social issues associated with the application of the rules***

Regarding certainty to air crew on the applicable labour law and competent courts, three out of 15 Member States (AT, EE, FI) indicated the OL provisions had not been effective at all, and four (BE, DE, FR, ES) felt it had been effective to a limited extent. The Portuguese and Irish authorities felt that it had been effective to some extent, and the Maltese authority thought it had been effective to a significant extent. The German authority noted that the regulation does not include any rules regarding the applicable labour law and competent

courts, and the Portuguese authority noted the need for clarification regarding the applicable labour law.

On the frequency of rule shopping, six out of 12 Member States (BE, CZ, DE, EE, FR, MT) thought it relatively common, while six others did not know (DK, FI, IT, PL, IE, ES). In additional comments to their response, the Finnish and Irish authorities noted that they are not aware of any cases as the EU is a free market area where the EU principles of freedom of establishment and free movement of people apply, adding that the correct application of EU social and employment law should prevent any issues from arising. However, the German authority noted that Norwegian Air established themselves in Ireland to avoid the Norwegian law that prohibits employment of third country staff. The Danish authority noted that the ability of air carriers to establish multiple home bases in different countries enables rule shopping.

The survey of authorities also asked whether the multiplication of operating bases by air carriers has impacted on employment conditions of aircrews. Eight out of 12 Member States felt there had been an impact (CZ, DE, FR, MT only partly, DK, EE, PT to a large extent, BE, FR to the full extent), while the remaining four either did not know (IT, PL, IE) or considered the question not relevant (FI). The German authority noted that Lufthansa took control of parts of Air Berlin and utilises their aircraft in other Member States with lower social standards. The Danish authority noted that the multiplication of operational bases create complexity, lack of transparency and thus insecurity for the aircrew regarding the applicable law. They referred to the recent ruling of ECJ which shows that the multiplication of bases and the ill-defined concept of home base can lead to employment disputes regarding jurisdiction. The Spanish authority noted that opening bases in other countries will use different employment standards, but it is not possible to estimate the impact in general terms. During an interview the UK Civil Aviation Authority provided a different perspective, noting that despite claims from some labour organisations, employment standards have not suffered from liberalisation of the aviation sector, and that any revision of the regulations should not use social issues to raise barriers within the industry.

12 out of 16 air carriers indicating that rule shopping was very common or extremely common with only four indicating uncommon. Traditional scheduled air carriers were more likely to indicate very common or extremely common, and gave the examples of Ryanair, Norwegian, Primera, Wizzair, DAT, and ACG Slovenia. Two LCCs provided further input, one noting that this practice does not happen, while another felt that the majority of EU passengers are still carried by air carriers based in their country of nationality, and recent licences to large scale operations have been awarded in countries where the regime is not more favourable.

Interviews with unions and workers associations also highlighted the social issues. ETF noted the issue of different interpretations of the rules between Member States, which can result in rule shopping and have huge implications for working conditions. There are perverse incentives for Member States to offer more favourable regulations to encourage air carriers to establish in their country. EurECCA added that some air carriers rule shop to avoid paying social security contributions for cabin crew, a practice mainly followed by LCCs, and this puts downward pressure on working conditions. They added that temporary working contracts make it harder for Member States to supervise this and identify abuse. The French and Danish pilots unions noted that air carriers using multiple operating bases can present problems regarding the payment of taxes and social security.

General public respondents to the OPC largely felt that the rules determining the applicable law and jurisdiction are appropriate (two citizens, three aircrew, five other), while two did not (one aircrew, one other), and one had no opinion (one aircrew).

## ▪ *Ownership and control*

**Issues with the ownership and control (O&C) rules:** Air carriers and their associations had mixed opinions on the O&C rules. During interviews, ERA felt that the O&C requirements are in the best interests of EEA carriers, as problems can arise for third country investment exceeding 49%. One LCC noted that there are differences in how the requirements are enforced between Member States, which can create inefficiencies. A traditional scheduled carrier noted that some consider the rules effective, while others want complete liberalisation as the current rules limit investment and growth opportunities. Another traditional scheduled carrier noted that 49% ownership can still result in effective control. One traditional scheduled carrier had recently gone through a privatisation process, and noted the lack of an objective, quick and expeditious process to understand control.

The unions also noted issues with the Regulation. ECA felt that O&C is not monitored in some places, and where it is breaching the rules is not enforced. ETF had similar comments, noting that tighter oversight of the rules is required.

Authorities largely felt that further clarification was needed of the rules. The Maltese and Spanish authorities pointed to the need to clarify some of the provisions in order to reduce the level of arbitrariness in the analysis that these authorities must do regarding O&C. The French and Polish authorities provided similar comments. The Portuguese authority asked for a revision of the rules.

The general public responses to the OPC were mixed on whether it is important to limit foreign investment in EU air carriers, with 32 out of 78 considering it important, 22 not, and 24 having no opinion. They were also divided on whether the rules should be relaxed, tightened or abolished, suggesting significant uncertainty on this topic.

**Problems with the assessment:** Eight out of 16 Member States (BE, ES, DE, FI, FR, SE, PL, IE) indicated they experienced problems with carrying out O&C assessments under the rules. The Belgian, German, Finnish, Polish, Irish and Spanish (Spanish Aviation Safety and Security Agency) authorities pointed out the difficulty in determining whether air carriers' ownership structures comply with the O&C requirements given the complexity of some of these structures. The Danish Authority felt that the ownership structure appeared rather complex, but that the Commission guidelines on O&C were a great help. The Portuguese authority also mentioned the helpfulness of the guidelines. The Austrian, Greek and Italian authorities had not experienced any problems.

**Contribution to a level playing field in the provision of air services:** Nine out of 16 authorities (AT, CZ, DE, EL, FR, IT, MT, PT, IE) felt that the rules had contributed to a level playing field to a significant extent, and the Spanish authority felt that this occurred to the full extent. Two authorities were less optimistic, with the Polish authority indicating this occurred to some extent, and the Belgian authority indicating to a very limited extent. Four authorities (EE, FI, SE) indicated they did not know to what extent this had occurred.

The German authority further noted that citizens with double citizenship complicate the assessment of the cases, and also pointed out to a specific case where the ownership structure [of the applicant] was complex but in the end all ties lead to a decisive influence of a third country Air carrier Group and their leading management personnel.

**Impacts on the O&C restrictions on access to capital and growth opportunities (including mergers and acquisitions):** The survey of authorities investigated how the limits on the level of foreign ownership have impacted access to capital, including mergers and acquisitions. Authorities largely felt that there was a negative impact on access to capital and growth opportunities, with seven out of 16 Member States (BE, CZ, DE, MT, PL, PT)



indicating some negative impact to the overall access to capital, and six (BE, CZ, DE, FI, ES) indicating a significant negative impact to access to foreign capital. Six Member States (BE, CZ, FR, IT, PL, PT) also indicated some negative impact on merger and acquisition opportunities.

Several authorities noted that the requirements result in less access to capital (DE, EE, PL, Spanish Aviation Safety and Security Agency, Spanish Directorate General of Civil Aviation); obstacles to investment and growth (DE, Spanish Aviation Safety and Security Agency, Spanish Directorate General of Civil Aviation); and limiting competition comparing to third country operators (PL, Spanish Aviation Safety and Security Agency). These are all potential issues identified by the Commission as well. The Belgian authority questioned the ownership limits and the difference between an air carriers held by third country investors by 49% or 51%. The Irish authority took a contrary view and said that since the liberalisation of the EU aviation market using these rules, connectivity and competition throughout the EU has reached record levels. The level of new entrants into the capital-intensive aviation market in the EU over the past 25 years tends to suggest significant positive impact of these rules as they have created a harmonised liberal approach to air carrier finance. However, during interviews the Irish Aviation Authority disagreed with their counterpart who answered the survey (from the Department of Transport, Tourism, and Sport), arguing that the clear rules have provided security in attracting investment.

The UK and Spanish authorities both gave examples of having to remove an operating licence from an air carrier due to financial difficulties, that could have been solved through third country investment but would have breached the ownership and control rules.

The survey of air carriers showed mixed responses, with some respondents noting that the restrictions have had a significant impact on air carriers. Six out of 19 air carriers felt that the limits on the level of foreign ownership had not affected their access to equity capital at all, while 10 felt they were affected. Regarding access to foreign equity capital, three indicated not being affected at all, while 12 indicated being affected. Seven out of 19 air carriers also felt that the limits had affected their competitive position in comparison to non-EEA air carriers to a significant extent. 11 out of 19 air carriers felt that merger and acquisition opportunities had been affected.

Four traditional scheduled and one LCCs from the same group had concerns that non-EU investments were largely based on companies looking to get a foothold in the EU market, rather than on sound business decisions, and that air carriers with good business prospects do not have problems attracting capital. They also noted (along with three other traditional scheduled air carriers outside the group) concerns about air carriers operating with illegal state aid, which requires more enforcement. One LCC noted that other countries have focused on the PPOB rather than O&C, which could be preferable. However, another traditional scheduled air carrier felt that this issue needs to be solved at a global level to avoid problems with traffic rights and ensure a level playing field.

The one workers' union (ETF) who commented on this topic felt that the restrictions have a positive impact by focusing EU investment on EU air carriers.

### *Leasing*

**Pre-approval required for intra-EEA leases:** 10 out of 14 Member States (BE, CZ, DE, EE, FR, IT, MT, SE, PL, IE) participating in the survey of authorities felt that the provisions on leasing requiring prior approval even for the use of EEA-registered aircraft and crews are appropriate to ensure safety, while four (AT, FI, PT, ES) felt that they weren't. The Czech, German, Estonian, Irish and Italian authorities considered the leasing requirements important

to make sure there is an extra step to evaluate safety. The Austrian, Finnish, Portuguese and Spanish Aviation Safety and Security Agency felt that given the common EASA safety rules these provisions are redundant; with the Austrian authority added that for third countries approvals were appropriate.

The survey of air carriers found that most respondents considered the prior approval for intra-EEA leases to have had a negative or no impact on flexibility to respond to changes in demand (seven negative impact, six no impact), cost of operations (seven negative impact, eight no impact), flexibility to respond to seasonal fluctuations (five negative impact, nine no impact), and capacity to enter new markets (three negative impact, 11 no impact). Five respondents highlighted that the complexity of the approval process hinders their response time to required changes in capacity. There were no differences between carrier types.

During interviews, air carriers and their associations had mixed views on the pre-approval requirements. Four respondents (one association and three air carriers) felt that the requirements are not necessary given that all EU air carriers comply with the EASA safety regulations. One air carrier and one association thought it necessary but did not explain why. Another air carrier noted that the constraints reduce air carrier flexibility to comply with operational plans due to delays in approval.

During interviews, ETF and EurECCA both raised concerns that the prior approval mechanism is not sufficient to ensure safety, with ETF providing an example of the Civil Aviation Authority only realising concerns after the aircrew reported back to them. The French association for aircrew thought it an effective process but has to be enforced and made sure third countries meet the same rules. One financing company noted that they would support prior approval to ensure safety, but not for any commercial reasons.

Most of the general public who responded to the OPC did not have an opinion on pre-approval for intra-EEA leases (35 out of 58), and those that did were mixed, with six noting that the rules were appropriate, four that they are appropriate but not well enforced, five that they are not appropriate and should be more flexible, and three that they are not appropriate and should be stricter. Air carriers responding to the OPC largely felt the rules should be more flexible, while authorities felt they should be better enforced or stricter.

**Conditions for approving requests for wet leasing of aircraft registered in third countries:** Almost all Member States (AT, BE, CZ, DE, EE, FI, FR, IT, MT, SE, PL, PT, IE, ES) participating in the survey have not experienced problems with the use of the conditions set in Article 13 of the Regulation for approving requests for wet leasing of aircraft registered in third countries. The German authority was the only respondent to indicate a problem with the need to demonstrate exceptional needs, and no authorities had problems with demonstrating that leasing is necessary to overcome operational difficulties or to satisfy seasonal capacity needs. They noted that in some cases, exceptional needs last longer than 14 months, such as leasing aircraft not available in the EU. However, five authorities (BE, CZ, DE, MT, ES) did identify problems demonstrating that it cannot reasonably lease aircraft registered in the EEA. Regarding the lack of EEA-registered aircraft, the Czech and Maltese German and Irish authority noted difficulties.

The survey of air carriers showed that most respondents (nine out of 18) considered the conditions completely necessary, however others did consider them somewhat unnecessary (three) or not necessary (two or three depending on the condition) at all. However, six traditional scheduled air carriers and one freight carrier, from two different groups, gave the same positive response that the requirements should be upheld. Two air carriers (one traditional scheduled and one low-cost) supported the removal of all restrictions on wet leases from third countries, while two traditional scheduled air carriers supported less limitations

provided a reciprocal approach was taken in the third countries. EBAA noted that the wet-leasing approvals are very complex, and a simpler and faster system would be helpful.

The general public and aircrew who responded to the OPC had mixed views on the appropriateness of these rules. For the general public who gave an opinion, six out of 20 felt that the conditions are appropriate, while two felt they were appropriate but not well enforced, five felt the conditions are not appropriate and should be more flexible, and seven felt they weren't appropriate but should be stricter. The five aircrew who had an opinion felt that the conditions should be stricter (3) or better enforced (2).

**Impact of wet-leasing from third countries on working conditions:** During interviews with authorities, the UK Civil Aviation Authority and Spanish Aviation Safety and Security Agency noted the possibility of negative impacts on working conditions, however the UK Civil Aviation Authority felt that there should be further liberalisation of leasing requirements, while the Spanish Agency felt that the current requirements are important to avoid further abuse of wet-leasing. The Irish Aviation Authority felt that wet-leasing from third countries is not common and is entirely appropriate as it usually relates to aircraft that are out of action for unforeseen circumstances. The French authority noted that the regulation works well, but the main issue is ensuring that social conditions in the third country are similar to prevent issues.

Interviews with air carriers and their associations acknowledged the complexity of third country wet-leasing, and the importance of having requirements to ensure EU working conditions are maintained. The International Air Transport Association (IATA) and Airlines International Representation in Europe (AIRE) considered the concerns regarding European employment legitimate but noted that leasing for seasonal requirements must be enabled or will negatively impact EU air carriers.

The unions interviewed expressed concerns about the lack of consideration of working conditions in wet-leasing agreements. EurECCA and the French association of aircrew suggested that working conditions are also considered in the approval, and the Danish union for flight personnel noted that wet-leasing is currently misused to avoid local employment law, and therefore stricter requirements are needed. ECA also noted the need to consider labour and social aspects of leasing arrangements. ETF raised concerns about the conditions to justify wet-leasing from third countries, and the potential for misuse of this aspect.

- ***Social issues related to wet leases from third countries***

The largest share of Member States agreed that the leasing provisions of the Regulation had contributed to improving safety, social issues and a level playing field in the provision of air services. Seven out of 15 Member States (CZ, DE, MT, SE, PL, IE, ES) agreed that the prior approval requirements for leasing aircraft contributed to ensuring safety issues are properly considered, and a further three (FR, IT, PT) strongly agreed. Similarly, seven Member States (BE, DE, DK, FR, MT, SE, ES) agreed that the leasing provisions contributed to avoiding adverse social consequences, however five others (AT, CZ, IT, PT, IE) did not know what contribution had been made. Seven Member States (AT, CZ, FR, SE, PL, IE, ES) agreed that the leasing provisions had contributed to a level playing field, with a further two (IT, PT) strongly agreeing.

The Spanish Aviation Safety and Security Agency suggested wet leasing should be limited to avoid social dumping and noted that the regulation ensures safety. The Finnish authority disagreed that the rules impact safety and said that they existed only for protectionist reasons. The German authority noted that restrictions on wet-leases are needed to avoid social

dumping, and that this is required for both third countries and intra-EEA leasing, as social standards continue to differ considerably between EU Member States.

The survey of employment authorities did not provide any further insight on this topic. One respondent felt that the Regulation had ensured the protection of employment and working conditions of pilots and cabin crew in the case of wet leasing to a limited extent, while three others did not know, and one felt this question to not be relevant. Discussing the time limitations for wet leasing from third countries specifically, two respondents felt that the Regulation had contributed to avoiding the deterioration of employment and working conditions in their country, while three others did not know.

Contrary to the view presented by authorities, the survey of air carriers showed that seven out of 17 respondents (six traditional scheduled, one low-cost) disagreed that the application of leasing provisions contributed to avoiding adverse social consequences, however five others neither agreed nor disagreed (three charter, one low-cost, one traditional scheduled). However, nine out of 17 air carriers (eight traditional scheduled, one charter) agreed that the prior approval requirements contributed to ensuring safety issues are properly considered, and a further three strongly agreed (two charter, one traditional scheduled). One LCC added that intra-EEA safety is not an issue, but that wet leases from third countries require the rules to ensure equivalence. Regarding prior approval of intra-EEA aircraft leasing requirements, seven out of 15 air carriers agreed they are appropriate, however six others considered them not appropriate. In additional comments to this question, eight air carriers argued that prior approval requirements should be relaxed or removed for intra-EEA wet leases. During interviews, the air carriers and associations noted that third country wet-leasing can be used to circumvent EU law regarding social conditions, while the unions interviewed felt that employment conditions should be included in the requirements for leasing.

#### *Freedom to provide intra-EU services*

**Evidence (or not) of restrictions on code-shares with third countries:** 10 out of 16 Member States (BE, DK, EE, EL, FI, FR, MT, SE, IE, ES) participating in the survey indicated they had not imposed any restrictions on code sharing arrangements between EEA and third country air carriers since the adoption of the Regulation, while five others (AT, CZ, DE, PL, PT) had. The Austrian, Czech, German, French, Polish and Portuguese authorities noted that in some specific cases these restrictions exist, namely at the request of the third country in bilateral agreements.

Eight out of 15 Member States (BE, DE, DK, EE, FI, MT, PT, IE) had not experienced any problems monitoring code share operations involving EEA and third country air carriers, while four (AT, CZ, PL, ES) had to some extent. The Austrian and French authorities noted that oversight is difficult because air carriers are not requested to submit flight schedules and as such they do not know if code-shares are being used or not. The Polish authority highlighted the problems in interpreting bilateral agreements in view of the Regulation.

This picture was supported by the survey of air carriers, where only one charter air carrier out of 18 air carriers had experienced restrictions on the operation of code-shares with air carriers from third countries to some extent. 10 air carriers had not experienced this at all, and six did not consider the question relevant (four low-cost and two charter).

**Overall impact of freedom to provide intra-EU services on the market (competition, connectivity):** Nine out of 16 Member States (BE, DE, FR, MT, SE, PL, PT, IE) felt that the removal of all restrictions or the provision of intra-EEA air services by EEA air carriers, regardless of any bilateral agreements, had occurred to the full extent, with three more (AT, CZ, FI) indicating to a significant extent. The Greek authority felt that this had occurred to

some extent, while the Danish authority felt that this had not occurred at all, as there were no restrictions to be removed.

10 out of 17 Member States felt that there had been a significant positive impact for the level of competition in their country and in the EEA (CZ, DE, DK, EE, FI, FR, SE, PL, PT). However, the Austrian and Belgian authorities felt there had been some negative impact, with the Austrians noting the potential drawbacks of liberalisation which have led to consolidation and lack of competition in many routes.

Regarding the application of provisions of Article 15 and any other impacts not identified above, six out of 16 Member States (BE, DK, EE, MT, SE, PT) felt that no other impacts had occurred. However, the Czech, German and French authorities did identify other impacts. The French authority noted that certain air carriers choose to obtain their operating licence in a specific Member State in order to benefit from a more favourable regulatory regime concerning taxes or employment and working conditions (rule shopping). The Czech and German authorities both identified positive impacts for consumers due to increased connectivity from more competition. However, the German authority also noted that there is an impact on employment conditions but were not sure if this was positive or negative.

During interviews, the ACI Europe (Airports Council International) noted that there has been an improvement in the provision of intra-EU services but a majority of routes are still monopolised. They also commented on the slot allocation rules as an area in need of improvement. One air carrier also noted that the Regulation has had a positive impact on competition.

The survey of air carriers showed 10 out of 19 respondents identified a significant positive impact on the level of competition in their country and in the EEA, with a further six indicating some positive impact. Six out of 10 respondents indicated a significant positive impact on competitiveness in comparison with non-EEA competitors, with a further seven indicating some positive impact.

### *Traffic Distribution Rule*

**Appropriateness of the rule:** The survey of authorities had a very low response rate (three respondents). The French and Italian authorities indicated that the conditions<sup>235</sup> were still appropriate at least to some extent, while the Swedish authority did not consider this relevant to their organisation. The UK Civil Aviation Authority felt that the rules are appropriate for the UK but had heard of problems in other countries. The French authority noted that although they are not responsible for this, that capacity issues in Paris are better addressed by the coordination processes in place, rather than the traffic distribution rules, however they are in favour of maintaining the rules.

However, the survey of air carriers showed that most respondents (11 out of 17, eight traditional scheduled, two low-cost, one charter) felt that the traffic distribution rules had not contributed at all to ensuring transparency of the process and ensuring commercial opportunities of air carriers are not unduly prejudiced when the rules are adopted. Air carriers were slightly more positive regarding reducing strains on airport capacity and better managing

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235 The conditions discussed in this question were, 1) The airports are served by adequate transport infrastructure providing a direct connection making it possible to arrive at the airport within 90 minutes; 2) The airports should serve the same city or conurbation; 3) The airports should be linked to one another and to the city or conurbation they serve by frequent, reliable and efficient public transport services; 4) The airports should offer necessary services to air carriers, and do not unduly prejudice their commercial opportunities.

traffic distribution between airports, with eight and nine respondents respectively indicating a contribution to a very limited extent. One traditional scheduled carrier noted that the rules do not constitute an appropriate solution to the real problem which is the lack of airport capacity where it is needed and are discriminatory by definition. A low-cost carrier added that the rules are administrative and do not reflect market demand.

The survey of airports had mixed responses to the appropriateness of the rules, with one or two airports indicating that the rules are appropriate to some extent, one to a very limited extent, and one to a significant extent. However, the low response rate (four answers and a further two indicating it not relevant) makes it difficult to draw any conclusions from this data.

Most of the general public who responded to the OPC felt that when unable to take a flight from their closest airport, an airport connected by transport infrastructure within 90 minutes of the departure point is a viable alternative (33 out of 78), or somewhat viable (36). However, 43 out of 78 felt that the current level of intervention by national authorities is insufficient to properly distribute air traffic amongst airports in close proximity to each other, with 35 out of that 43 noting that authorities should use market incentives to persuade air carriers to go to another airport (such as by allowing air carriers to sell their licence to use the airport (slots)).

**Clarity of the consultation process requirements as specified in the Regulation:** The survey of authorities investigated whether the respondents had experienced any problems in the adoption of traffic distribution rules due to the absence of a specific definition of the consultation process, interested parties, or other terms in Article 19. The French and Swedish authorities had experienced no problems, however the Italian authority had experienced problems with all three definitions. They noted that the consultation process is not clear as to what happens at the end of the process when one party is against the planned measures. They also felt that it could be necessary to eliminate some stakeholders suggested as interested parties from the consultations (such as air carriers). They also experienced problems with the deadline for a reply by the Commission, which should be modified to be coordinated with the deadlines established in the case of coordinated airports being involved in the process.

In the survey of air carriers, nine out of 17 respondents did not think that the framework consultation process was transparent and clear at all, with eight respondents also considering the framework for participation in the process to not be clear at all.

Airports mostly did not provide input on the clarity of the consultation process. One respondent felt that the provisions concerning the consultation process were clear and transparent to the full extent.

**Potential for discrimination against certain air carriers when implementing rules:** Out of three Member States responding, the Italian authority indicated that the rules had contributed to a very limited extent, noting that better competition could be reached through removing constraints. The French authority felt the rules had contributed to some extent but did not elaborate on this, while the Swedish authority did not know how the rules have contributed.

The survey of air carriers found that 11 out of 17 respondents did not consider the rules to have contributed at all to ensuring there is no discrimination between EEA air carriers or destinations when the rules are applied. The case of Linate/Malpensa was used as an example by five carriers to demonstrate how the rules have been used to discriminate in favour of the national carrier by a Member State.

During interviews, one LCC noted that in some cases the authorities have failed to effectively consult with the air carriers, resulting in favouritism of one air carrier over others. They felt

that this should be addressed within the Regulation, as networks of airports serving a city or region can result in reduced competition. Three air carriers, IATA and AIRE felt that one Member State was not distributing traffic in a transparent and non-discriminatory way, favouring their national carrier. ACI Europe noted that airports where slots are made available might not be of interest to air carriers due to being smaller in size and therefore having limited viability, which could constitute discrimination.

### *Price Transparency*

**Application of the rules:** Six (AT, DE, EE, IT (AGCM), UK) out of 14 respondents reported having taken actions to monitor non-compliance with price transparency rules. However, only the Estonian authority reported having taken actions to monitor non-compliance with price discrimination rules. Five (AT, DE, IT, LT, UK) out of 13 respondents reported having introduced or made changes to penalties for infringement, and two (AT, FI) out of 9 respondents reported having taken other actions.

Regarding the introduction or changes to penalties for infringements, five authorities (AT, DE, IT, LT, UK) provided further information on the changes and introductions they made, while the Finnish authority noted that the normal penalties are applied.

The survey of air carriers found that most respondents had no problems in applying the provisions on price transparency (10-13 out of 15-16), and the remainder mostly indicated that this question was not applicable to them. One traditional scheduled air carrier had problems with ensuring transparency of prices presented and presenting information concerning ancillary services, while one other traditional scheduled air carrier had problems with transparency of prices, information on the exchange rate for multi-currency bookings, and ensuring no discrimination based on place of residence. Most air carriers had not experienced any complaints from passengers about price transparency issues (7-8 out of 11, with the others mostly indicating they did not know), except regarding the display of optional charges, where two traditional scheduled air carriers indicated 10-25%, and one 25-50%, of their complaints were due to this. There was no difference in response between carrier types, however LCCs either indicated they did not know or did not respond regarding the number of complaints experienced. One traditional scheduled air carrier had no problems with the application of the rules, but noted, along with another, problems regarding clarity on prices of ancillary services due to differences in national law. ERA noted that fuel prices could be problematic.

Three consumer organisations (The European Consumer Organisation (BEUC), ECTAA, and Friendly Flying on Behalf of the EPF) noted differences in application across Member States. BEUC noted that this is often a result of national laws that impact on this topic, or on the lack of EU level provisions, such as setting penalties for traders. Friendly Flying and BEUC raised concerns about the inappropriate breakdown of tax fees, the additional charges for using credit cards (ECC Net Italia agreed with this), and Friendly Flying had also received complaints regarding multiple currency transactions that significantly inflate the price.

The association of national travel agents' and tour operators' (ECTAA) noted that overall, they do not feel the Regulation adequately ensures transparency in fares, and needs improving. They also noted that their members raised issues with air carriers' non-compliance of Article 23.2 with their National Enforcement Bodies in charge of Regulation 1008/2008, who have indicated, among other things, that they are not competent to deal with cross-border cases as their scope of control is limited to their national market. ECTAA also noted that air transport is mostly cross-border, and without proper coordination between the National Enforcement Bodies there is no way to tackle cross-border infringements.

ECC Net Italia also noted problems relating to ticket refunds, whereby air carriers do not clearly explain what part of the ticket is refundable, and in some cases charge a disproportionate fee for consumers to apply for a refund or request too much documentation from them.

Over half of the general public who responded to the OPC had experienced issues regarding price transparency when booking a flight ticket in the last 10 years. Issues concerning discrimination in pricing on the basis of place of residence had the most respondents experience this repeatedly with different companies (28 out of 78).

**Complaints received by price transparency authorities:** The survey of price transparency authorities investigated the complaints received regarding compliance with the pricing provisions. Less than half of the authorities had experienced complaints from passengers for each type listed, while no complaints were recorded concerning discrimination in pricing on the basis of place of residence. Even fewer authorities had identified complaints from companies. Most authorities (four to six out of 12 to 13) also felt that there has been no change in the number of complaints per year received. One authority (EL) reported a small increase for surcharges, exchange rates for multi-currency bookings, and transparency of prices (breakdown of TFCs) while three reported a decrease at different levels and different parts. The Italian authority reported a significant decrease in complaints for optional charges, surcharges, and transparency of prices, while the Finnish authority reported some decrease in those categories and the German authority reported a small decrease.

**Problems with enforcement:** The survey of price transparency authorities also investigated whether any problems had been experienced in relation to the enforcement of the provisions. 11 out of 14 (AT, BG, DE, DK, EE, EL, FI, IT, LT, SE, UK) Member States had experienced no problems with checking transparency of air fares, while Italy and Norway had. Italy noted long legal battles with companies in order to enforce the provisions, while Norway noted that section 7.3.3. Art 23 (1) (d) is not contributing to price transparency, on the contrary it can mislead consumers as to what the air fare actually is, and thus have them believe that a larger amount is reimbursable than what is the case. Similarly, 13 out of 14 (AT, BG, DE, DK, EE, EL, FI, IT, IT2, LT, NO, SE, SK) had no problems with checking non-discrimination on the basis of nationality or place of residence, while only the UK reported that this had been more complex to determine and their work had focused on price transparency.

Austria, Italy and Slovakia noted other problems. Austria noted that the price indication in Article 23 is formulated in an unclear manner. Italy felt that they were lacking evidence from passengers to support their complaints, and that they cannot purchase a ticket as a normal passenger to verify the validity of the ticket sales process. Slovakia noted that they can only act on the Slovak market.

**Effectiveness of the rules:** Eight out of 14 Member States agreed that the price transparency rules have increased the comparability of air fares (DK, EL, FI, NO agreed, DE, IT, IT2, UK strongly agreed), while four neither agreed nor disagreed (AT, BG, LT, SE). Six out of 14 Member States agreed that the price discrimination rules have ensured the equal treatment of consumers across the EEA (BG, DE, DK, EE, EL, NO), while four neither agreed nor disagreed (AT, LT, SE, UK). Four out of 15 also agreed that the price transparency and non-discrimination rules have increased the level of price competition (BG, DK, EL, IT2), while three others neither agreed nor disagreed (IT, SE, UK), and six did not know (AT, DE, EE, FI, IT, LT).

The survey of air carriers found that nine out of 16 respondents had changed their approach to the presentation of taxes and airport charges as a result of the Regulation, with changing the



presentation of other surcharges or fees, and seven changing the presentation of ancillary services.

Air carriers also largely felt that the regulations had been effective, with nine out of 17 agreeing that the price transparency rules have increased the comparability of air fares, eight that the price discrimination rules have ensured the equal treatment of consumers across the EEA, and seven that the price transparency and non-discrimination rules have increased the level of price competition. There were no differences between traditional scheduled and low-cost carriers, however one chartered carrier disagreed with the above statements, and the other who responded did not consider the questions relevant to their organisation.

**Relevance of the provisions as currently written given new trends in the sector:**

Regarding the indication of elements of the price that are reimbursable in case the passenger does not show up at the flight, cancels, or is a “no-show”, the survey of price transparency authorities showed that most Member States (six out of 13 (BG, DK, EE, IT, LT, SK)) consider it a problem to some extent that the amount for refund is absent from the published elements. Austria considered this to not be a problem at all, while Germany and Italy considered it a problem to a significant extent, and Greece and Finland a problem to the full extent. In the additional explanations, Germany and Estonia noted that it should be clear which price elements should be refundable, and this would also help harmonise practices across Member States and air carriers. Italy (the Italian Competition Authority (AGCM) and the Italian Civil Aviation Authority (ENAC)) felt that this is a problem as passengers are not aware of their rights. The UK noted that specific and definite obligation to breakdown the fare and show taxes, fees and charges would allow consumers to know which elements are refundable, and a definition of whether air carriers can impose administration charges to propose such refunds, as the amount currently charged varies considerably and does not seem to be based on the cost incurred by the air carrier. Bulgaria disagreed with the above, noting that passengers do not know what the total amount for reimbursement is as they do not read the General conditions and published elements of air fare. Furthermore, most carriers refund the total price paid by the passengers as per the ticket fare, and the rules for reimbursement are defined in Regulation 261/2004.

During interviews, the European Consumer Organisation (BEUC) felt that there is a problem with personalised pricing online using browsing history but would need to consult with their members to consider if this should be addressed through the Regulation. Similarly, the association of national travel agents' and tour operators' (ECTAA) noted that consumers are increasingly using metasearch engines to search through multiple operators and OTA driven offers, but these websites are currently unregulated and can result in significant price differences between what is offered initially and the final payment. They also felt that the metasearch engines should be included within the scope of the Regulation to prevent this.

ECA noted that where subsidies are provided to encourage LCCs to operate from certain areas, these subsidies should be transparent on ticket prices.

**Existence of geographic discrimination in ticket sales:** As noted above, the survey of price transparency authorities showed that there were no complaints on this topic, and that most Member States had no problems checking for geographic discrimination. Most Member States also agreed that the rules have ensured the fair treatment of consumers across the EEA.

During interviews, one LCC noted that the regulation could be effective if the rules were enforced in the same way in all jurisdictions, however the regulators are not strict enough with OTAs. The association of national travel agents' and tour operators' (ECTAA) noted that some air carriers restrict the availability of certain fares or booking classes from market to

market, which results in countries presenting different ticket fares for the same trip and air carrier.

In the survey of air carriers, eight out of 11 respondents indicated that they had received no complaints concerning geographic discrimination in pricing, while the remaining three did not know.

### *Public Service Obligations (PSO)*

**Differences in the use of the rules /or in the interpretation of the rules:** During interviews three air carriers and one association commented on the inconsistencies between Member States in implementing PSOs. An association of regional airlines (ERA), felt that there is little clarity in the PSO awarding process, noting situations where a Member State can make it difficult for air carriers based in other countries to compete for the tender against the national carrier. Another LCC noted that some Member States have a lot of PSOs, and they believe they are designed to favour the national air carrier of that Member State. A third traditional scheduled air carrier noted that the rules in the Regulation are quite basic and lack specifics, while national rules in each Member State vary, presenting a situation that is not very transparent. The fourth traditional scheduled air carrier noted that differences in tax and social security laws significantly affect the cost of payroll, allowing air carriers based in Member States with favourable arrangements to be more competitive in discharging the PSO.

**Appropriateness of the rules:** 12 out of 14 Member States (CZ, DE, DK, EE, EL, FR, IT, MT, SE, PT, IE) responding to the survey noted that service to a peripheral or development region, or a route being vital to economic and social development were both appropriate criteria to determine which routes PSOs should be applied to. During interviews, the UK Civil Aviation Authority and the French authority agreed with the responses collected from the survey, noting that PSOs are important to ensure connections between peripheral regions, or overseas territories that would not otherwise be served by public transport.

Seven Member States (CZ, DE, DK, EL, FR, MT, SE, PT, IE) also felt that the thin route criterion was appropriate, but Estonia and Italy did not as the definition of thin routes (those with few passengers per year) is not a significant criterion. Spain shared the same view (but responded ‘don’t know’), explaining that in their country the fact that a route is thin is not sufficient to justify the imposition of a PSO unless the route also provides service to a peripheral or development region. Italy also noted that PSO routes connecting islands are appropriate with minimal services, however those to peripheral regions might not always be appropriate if the distance to a centre with a well-connected airport is reasonable. Poland noted that their country does not require the imposition of PSO routes domestically (due to geography) but they have doubts on whether the criterion is appropriate for international PSO routes as they don’t think they have a significant impact on the development of EU regions.

The Italian authority considered this criterion to be appropriate since there are positive social and economic impacts, although the ultimate objective of the Regulation is to encourage mobility of people. Respondents suggested that more appropriate criteria might be service to a peripheral or development region, the route being vital for economic and social development, or connecting peripheral regions if there are no other alternative modes of transport or other nearby airports.

The survey of air carriers found that seven out of 16 air carriers felt that the use of PSOs serve the mobility needs of remote regions to a large extent, and a further three to the full extent. A similar response was seen regarding PSOs ensuring economic viability of routes that were otherwise not going to be viable, with five indicating to a large extent, and three to the full extent. There were no significant differences between carrier types.

During interviews, one air traditional scheduled carrier felt that PSOs ensure economic viability of routes that would otherwise be unviable. However, one LCC felt that in theory PSOs should ensure this but are sometimes applied on routes where it is not necessary.

The survey of airports found that three out of six respondents felt that the use of PSOs serve the mobility needs of remote regions to a large extent, and a further two to a partial extent. Two respondents felt that PSOs ensure the economic viability of routes that were otherwise not going to be viable to the full extent, with one other felt this to a large extent, one to a partial extent, and one to a limited extent.

ACI Europe noted that the current rules could allow further flexibility in the time/distance limits on PSOs, and to allow regional authorities to implement them rather than just national authorities. They also felt that PSOs should apply to city-pairs, rather than airports, with added flexibility to serve regions.

This topic received significant attention during the OPC, with many respondents highlighting connectivity issues with remote regions or islands. In response to the OPC, 36 out of 78 general public and aircrew felt that air transport connections are not sufficient in the area where they live, while 22 felt they were quite sufficient, 13 that they are sufficient to a large extent, and seven they were totally sufficient. Respondents also felt strongly that PSOs should service primarily the transport needs of residents of the remote regions and islands (47 out of 78 agreeing with this completely), but were more mixed on whether PSOs have guaranteed mobility needs of remote regions, and have provided good value for money spent by Member States. Citizens and aircrew were most negative about the level to which PSOs have contributed to the economic and social development of remote regions and islands, and whether the conditions imposed by the PSOs are appropriate to satisfy transport needs. That said, most respondents felt that the criteria for establishment of a PSO were still relevant, but wanted the mechanism further expanded by allowing PSOs for regions having low connectivity in general (19 out of 42), allowing PSOs for regions that have insufficient connections to certain other regions or to other Member States (13), and allowing PSOs on any route not having services (9).

**Impacts on competition:** Out of 13 Member States, France and Portugal agreed to the full extent that PSOs under the current rules have not harmed competition, with Poland agreeing to a large extent. However, Czech and Germany agreed to a limited extent, and Estonia, Greece and Ireland did not agree at all. Four Member States did not consider this question relevant. The UK Civil Aviation Authority noted that the PSOs they operate have not had any issues on competition as the routes are very specific and operated using niche aircraft. The French Civil Aviation Authority and the Irish Aviation Authority also noted that there were no negative impacts on competition. ASA gave an example of PSOs having negative impacts on independent ground-handling staff when the route was provided by national carriers who either self-handle, or offer the job to third party handlers.

Air carriers had mixed responses on whether Member States use PSOs to protect their national carriers. Two out of 16 air carriers felt that this did not happen at all, four that this happened to a limited extent, three to a large extent, and one to the full extent. An LCC added that PSO tenders can include specific requirements that favour certain carriers and exclude others.

During interviews, one traditional scheduled and one low-cost air carrier felt that PSOs are unnecessary and are imposed on routes where they are not needed, which has a negative impact on competition. One added that if the service can be provided anyway, PSOs should not be required. However, another traditional scheduled air carrier felt that PSOs have no negative impact on the level competition across the EU. Another traditional scheduled air

carrier felt that social and tax regimes in some Member States cause distortion of the market regarding PSOs, as the air carriers based in favourable regimes have a competitive advantage.

Two respondents to the survey of airports felt that PSOs do not have any negative impact on the level of competition in the EEA aviation market to a large extent, with one other indicating this to a full extent, one to a partial extent, and one to a limited extent.

### *Other services*

**Appropriateness of the Regulation:** 12 out of 14 Member States (AT, BE, CZ, EL, FI, FR, IT, MT, SE, PT, IE, ES) felt that the Regulation is not appropriate to cover the use of drones for deliveries, and 10 (AT, BE, DE, EL, FI, IT, MT, SE, PT, IE) felt it not appropriate to cover cost sharing of flights. Three Member States (AT, BE, MT) also felt that the Regulation was not appropriate to cover other types of air services but did not specify this point any further. The Spanish Aviation Safety and Security Agency took a more positive view, indicated that there is a need of certain requirements related to the possession of an air operators certificate, which should be modified or adapted to this typology of air services.

Regarding cost sharing of flights, the Greek and Irish authorities felt that cost sharing flights are not commercial flights as it does not seem to include flying for reward or hire, and therefore should be part of a different regulation. As in the case of drones, the Italian authorities commented that cost sharing air services go beyond the actual field of application of the Regulation. The French authorities felt that there is a danger of illegal commercial operations and as a result such services need to be defined and monitored in a coordinated way. The Spanish Aviation Safety and Security Agency commented that cost sharing goes against the laws of competition, especially in the case of companies with aircraft of less than 10 tonnes maximum take-off mass and/ or less than 20 seats, which need an air operators certificate and absorb the associated cost. The Portuguese authorities indicated that they have limited experience to be able to comment.

Seven out of 17 air carriers considered the Regulation appropriate for the use of drone deliveries and cost shared flights, and six considering it not appropriate. Nine air carriers also felt that the Regulation was appropriate for virtual air carriers, with six indicating it wasn't. Charter air carriers only indicated that it wasn't appropriate (two no, two don't know), while low-cost carriers only indicated it was (two yes, one don't know). Traditional scheduled air carriers had seven respondents indicate it was appropriate, and three that it wasn't. Six respondents from two air carrier groups further commented that all types of air services identified should be covered by the Regulation, with amendments made accordingly. Three air carriers noted that drones will become increasingly important and impact the internal aviation market. They also suggested that whether the pilot is on board or on the ground should not be a deciding factor for inclusion in the Regulations.

### *Coherence with other legislation*

Regarding coherence with other legislation, the Irish Aviation and a financing company raised concerns with bilateral and multi-lateral agreements between the EU, Member States, and third countries. The financing company noted that these agreements can create commercial difficulties due to the creation of uneven playing fields and should require approval at EU level before being engaged in by specific Member States. The Irish Aviation Authority noted that EU carriers are free to provide services anywhere in the EU, provided they are established in that Member State. However, bilateral agreements allow air carriers established in third countries to fly into Member States, which is a lower requirement than that for EU air carriers.

## **ANNEX 3: METHODS AND ANALYTICAL MODELS**

### **1 Short description of methodology**

The methodology of the evaluation was developed in light of the scope and objective of the evaluation and structured along five evaluation criteria of relevance, effectiveness, efficiency, coherence and EU added value. At the design stage of the evaluation, the Commission set 16 evaluation questions<sup>236</sup> based on the intervention logic as presented in Section 2 of the main report and Annex 4. To address the questions, an evaluation framework (a so-called evaluation matrix) was developed. The latter breaks down the evaluation questions into operational sub-questions and indicates the proposed assessment methods and identified data sources and indicators for each question. The evaluation matrix has been further substantiated and updated through the whole evaluation process. The final evaluation matrix is presented in section 2 of this Annex 3. The evaluation approach relies on series of techniques and methods for the data collection and data analysis.

#### **Data collection**

The data collection was undertaken in the course of the whole evaluation process with a view to collate existing quantitative and qualitative evidence. A certain degree of flexibility was ensured to deal with unexpected issues arising throughout the data collection phase and in particular during the data analysis phase to cover any data gaps.

#### **Desk research**

The methodology used for the gathering of data consisted of collecting information from published sources at EU and Member States level, including Eurostat, national statistical authorities, relevant associations in the field. The existing evidence provided in published literature played an important role in supporting the evaluation in a number of thematic areas. The quantitative data from the previous studies was supplemented with other technical sources, such as data from Eurostat, Eurocontrol, IATA and other studies, projects and models in the field. In addition, other policy papers by the Commission and stakeholders were used where relevant. An updated list of sources is provided in Annex 7.

#### **Field research – stakeholders consultation**

Important part of the data collection phase has been realised through various stakeholder consultation activities, performed by the Commission and Ricardo AEA (2018). The design of the questionnaires and the specific questions addressed to the stakeholders groups were developed on the basis of the evaluation matrix.

*Open public consultation (OPC)* carried out from 22/03/2018 until 7/06/2018 with a view to give mainly to passengers, crew members and citizens in general the chance to express their opinions on the main topics. The questionnaire was available in all official languages. In total 106 answers were received (respectively 72, 6 and 28 answers from citizens, aircrew members and associations or organisation)<sup>237</sup>. Answers were received from respondents residing in, or organisations based in 19 EU Member States (Austria, Belgium, Croatia, Cyprus, Denmark, Estonia, France, Germany, Hungary, Ireland, Italy, Netherlands, Poland, Portugal, Spain,

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<sup>236</sup> The final set of the evaluation questions represent more detailed and substantiated version of questions discussed with stakeholders on the basis of the evaluation roadmap

<sup>237</sup> Provided limited contributions from associations and organisation (28 in total with further more marrow breakdown) their answers were not used for the statistical purposes and were assessed only qualitatively. For the large part of the questions (with exception to the question on the working conditions of the crew members), the replies of citizens and crewmembers were treated together.

Sweden, and United Kingdom) whilst five responses were also received from Switzerland (three), the United States, and Malaysia. The distribution of responses by country of residence or establishment is shown in Figure 1-1. **The largest number of responses was from Italy, with 57 responses (54%), with a high share from Sardinia and Sicily. More than always with OPCs, the statistical value of these responses is therefore very limited.**

*Targeted tailor-made survey* aimed at six stakeholders categories (i.e. national authorities responsible for aviation – licencing authorities; national authorities responsible for price transparency and non-discrimination issues; ministries of employment responsible for employment/social legislation; air carriers; airports; computer Reservation System/Global Distribution System) with the objective to collect data and views on a number of topics. The survey were open for six weeks.

**Table 3.1 Response rate to Surveys**

Survey	Duration	Approached	Responded	Response rate
National authorities responsible for aviation (licensing authorities)	22 <sup>nd</sup> February to 5 <sup>th</sup> April 2018	31	17 (includes 16 MS, two responses from two different organisations in ES)	55%
National authorities responsible for on price transparency and non-discrimination issues	22 <sup>nd</sup> February to 5 <sup>th</sup> April 2018	31	14 (includes 13 MS, two responses from two different organisations in IT)	45%
Ministries of Employment	20 <sup>th</sup> March to 5 <sup>th</sup> April 2018	31	8 (includes 6 MS, two responses from two different organisations in CZ and SE)	26%
Air carriers	22 <sup>nd</sup> February to 9 <sup>th</sup> April 2018	191	22 (12 traditional scheduled, 5 low-cost, 3, chartered, 1 freight)	12%
Airports	22 <sup>nd</sup> February to 9 <sup>th</sup> April 2018	386	7	2%
Computer Reservation Systems/Global Distribution Systems	22 <sup>nd</sup> February to 9 <sup>th</sup> April 2018	20	4	20%

*Targeted structured interviews* aimed at a) following up the findings of the survey (i.e. national authorities responsible for aviation, individual airlines, individual airports, CRS/GDS company) and b) addressing stakeholders who were not targeted by any of the surveys (i.e. associations, EU workers organisations, air service providers representatives, ground handling, logistic companies, tour operators, European Consumer Centres).

**Table 3.2 Interviews**

Type of stakeholder	Initial target	Approached	Responded	% response rate	% completed
National authorities	6	6	6	100%	100%
Air service providers representatives	5	5	4	80%	80%
Individual air carriers	6	8	6238	75%	100%

238 Included 3 traditional carriers, 2 low cost carriers and one regional carrier.

Type of stakeholder	Initial target	Approached	Responded	% response rate	% completed
Airports and their associations	3	4	1	25%	33%
Ground handling providers	1	1	1	100%	100%
Aircraft financiers	2	4	0	0%	0%
Leasing companies/ Air carriers specialised in leasing	2	9	4	44%	200%
EU workers' organisations	3	3	3	100%	100%
National unions	3	4	3	75%	100%
Logistic companies and integrators	1	1	0	0%	0%
Tour operators' representatives	1	1	1	100%	100%
Passenger and consumer protection bodies	2	2	2	100%	100%
CRS/GDS company	1	1	1	100%	100%
European Consumer Centres	2	2	2	100%	100%
<i>Extra (travel fare aggregator)</i>	0	1	1	100%	100%
<b>TOTAL</b>	<b>38</b>	<b>52</b>	<b>35</b>	<b>67%</b>	<b>92%</b>

9 additional structured interviews in the context of five case studies (2 interviews per case study)

Direct information requests – a secondary source of information used to cover data gaps which were identified in the course of the analysis phase. In particular, the direct information requests aimed at increase the level of input from regional airlines, filling in data gaps in terms of the approval rate of applications for operating licences and following up with respondents to surveys. In an attempt to increase the level of input from regional air carriers (since there were no responses by regional air carriers to the main survey) we developed a shorted version of the main survey of air carriers. This focused on the topics of operating licence and principal place of business, ownership and control, costs, leasing and PSOs that were sent to members of the European Regional Airlines Association (ERA) from the association encouraging them to contribute. Respondents were given two weeks to respond to the questionnaire that was distributed with the support of ERA. Unfortunately, we did not receive any response.

To fill in data gaps in terms of the approval rate of applications for operating licences we sent an email to all authorities that were initially contacted to contribute to the authorities' survey asking for data on the number of applications received, applications approved and the reasons for rejecting applications. Authorities were given one week to respond. In total we received eight responses (HU, EL, DE, BG, CZ, AT, IT, ES).

To follow up with respondents to surveys where we required additional data or clarifications to the responses already provided to the surveys. In total eight such requests were sent. This included two airports (on issues related to PSOs and traffic distribution), three air carriers (focusing on operating licence, freedom to provide services, leasing, traffic distribution and price transparency) and two authorities (focusing on operating licence, leasing, freedom to provide services and social conditions). Responses were received from two of them (one airport and one air carrier).

Workshop organised by ECTAA and Amadeus where the industry views on the interactions between the Regulation and Regulation 80/2009 were discussed.

## Data analysis

### **Modelling**

The AERO-MS model was used to produce forecasts of the expected evolution of air transport demand and supply indicators for the period since the adoption of the Third Package. It reflects how intra EEA air transport would have developed in the absence of the Regulation.

For the main baseline (2008-2016) Ricardo AEA (2018) used a version of the AERO-MS model which contains a global aviation flight database for Base Year 2006. For the complementary baseline (1992-2008) Ricardo AEA (2018) used a version of the AERO-MS model that contains a global aviation flight database for Base Year 1992<sup>239</sup>, including air transport data on a city pair level for Intra EEA routes. Data for both Base Years (1992 and 2006) are based on recorded flight data. The main baseline period also accounts for the effects of the EU enlargement in 2004.

For each of the two periods considered, the AERO-MS model was used to develop estimates (forecasts) of the level of air transport demand and supply for the relevant periods using GDP growth and fuel prices as the main demand drivers (input parameters). Typically, the forecasting feature of the AERO-MS model is used to estimate future air transport demand based on expected future economic growth and fuel prices. However, for the purposes of this study historic GDP growth data was used as input for the relevant groups of countries (EEA18 or EEA31) in order to develop forecasts of the expected level of air transport demand and supply for intra-EEA air transport in the baseline. Making use of the AERO-MS model, “theoretical forecasts” for the number of passengers and passenger-km; number of seat-km and number of flights and flight-km were developed.

### **Analysis of the data provided by Eurocontrol**

In order to develop an overview of the actual development of Intra EEA air transport the recorded air traffic data provided by Eurocontrol were used. The Eurocontrol data sets including information on the flights for the following years: 2000, 2003, 2006, 2009, 2012, 2015, 2016 and 2017. Data for the period 1992-2000 were made available by Eurocontrol. The data provided refer to six representative weeks within each of the years identified and cover: airport of departure; airport of arrival; aircraft operator; aircraft type; and air service market segment (traditional scheduled, low cost, charter, all cargo, business, other). These data were processed by Ricardo AEA (2018) to develop the relevant indicators.

**Five targeted case studies** are being developed to analyse specific topics in greater depth. They cover the following topics:

<b>Case study topic</b>	<b>Objectives</b>	<b>Relevance for the evaluation</b>
Ownership and control	Comparison of EU legal framework with that of selected countries with more liberal approach (i.e. Chile and Australia) and more restrictive approach (i.e. US) Examine the impacts on the level of competition (e.g. level of concentration) and operation of the market (number of flights, prices)	Input in assessing whether EU rules of ownership and control affect level of competition and access to finance and their relevance

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<sup>239</sup> 1992 is the year when the Third Aviation Package was adopted and provides an appropriate starting point since no (or very limited) impacts from the legislation should be expected on the aviation market at that specific year.



Case study topic	Objectives	Relevance for the evaluation
Use of PSOs	Compare the use of PSO in 3 Member States (procedures, approach) with high levels of use of PSOs (France, Greece, Norway). Analyse how PSOs have evolved since the adoption of Regulation and the impacts on connectivity, competition, costs.	Input in terms of the effectiveness of the PSO provisions under the Regulation
The application of the principal place of business	Analyse the model of operation (distribution of functions/activities and number of operating bases) used by 3 air service providers representing different business models (e.g. low cost vs. hybrid and full service carriers) and issues arising in terms of defining the principle place of business	Input in examining how different business models challenge the relevance of existing provisions on defining principal place of business
Costs for newly established air carriers	Assess how the licensing process unfolded and quantify the cumulative costs associated with entry into the market, with a focus on the operating licence provisions.	Input in assessing the market efficiency of the rules, unexpected effects on competition.
Milan airport system Traffic Distribution Rule (TDR) application	Assess an important unintended effect of the application of the TDR rule in the case of Milan airport system, i.e. a dehubbing of Alitalia flights from the system that contributed to a 10 percent decrease in flight traffic in the system overall. Examine other impacts of the use of the TDR related to slot allocation as well as impacts on the market (competition, passenger numbers, developments, routes covered).	The analysis informs the effectiveness against the objectives of the regulation, the assessment of unexpected effects on competition and stakeholder groups, costs efficiency and analysis of the coherence with other air transport regulations.

## Synthesis and triangulation

Analysis of the results (including interdependencies, consistencies or contradictions) of various consultation activities was performed. The analysis was carried out on the basis of the consultation topics and it distinguished within different stakeholders with differing and sometimes conflicting views on issues.

## 2 Evaluation matrix

The evaluation breaks down the evaluation questions into operational sub-questions and indicates the proposed assessment methods and identified data sources and indicators for each question. The evaluation matrix has been further substantiated and updated through the whole evaluation process. The simplified version of the final evaluation matrix<sup>240</sup> is presented in this section was developed by the Commission based on the input from Ricardo AEA (2018).

- **Operational sub-questions:** Where relevant separate sub-questions have been developed for each of the seven topics examined.
- **Indicators:** Where possible/relevant quantitative indicators have been identified for each sub-question. In case of the qualitative assessment the indicators are not presented. Moreover, the evaluation matrix does not present the initially intended indicators for which it was impossible to obtain any data.
- **Assessment method** presents the short description of the data sources and main analytical methods.

<sup>240</sup> Compared to the full version of the evaluation matrix, the current version does not detail the relevant sources

1. To what extent has the Air Services Regulation contributed to the achievement of the objectives to increase the market efficiency, to improve the safety of air services and to increase consumer protection? Which different (external) factors have influenced the achievements observed?		
Sub-questions	Indicators	Evaluation approach
<p>What are the 1992, 2008 and 2017 levels of relevant indicators?</p> <p>What is the evolution of these levels between 1992 and 2008? What is the evolution of these levels between 2008 and 2017?</p> <p>What are the driving factors of these changes? What are the hindrance factors?</p> <p>How would the 2008 levels have evolved up to 2017 if the 2008 revision had not taken place?</p> <p>How would the 1992 levels have evolved up to 2017 if the Third Package had not been adopted?</p> <p>Which effects could be attributed to the 2008 revision? And why?</p> <p>Which effects could be attributed to the Third Package? And why?</p> <p>Which are the combined effects?</p>	<p><u>Market efficiency indicators</u></p> <ul style="list-style-type: none"> <li>• degree of concentration on the regular routes and PSO routes;</li> <li>• degree of commercial freedom;</li> <li>• share of low cost carriers;</li> <li>• number of the new entrants;</li> <li>• share of monopoly routes;</li> <li>• traffic growth;</li> <li>• business strategies of air carriers;</li> <li>• services provided by the air carriers;</li> <li>• number of new routes</li> <li>• connectivity between different regions;</li> <li>• degree of competitiveness of EU carriers vs. non EU carriers</li> <li>• access to the capital</li> <li>• equal opportunities for air carriers?</li> </ul> <p><u>Safety indicators</u></p> <ul style="list-style-type: none"> <li>• safety records</li> </ul> <p><u>Consumer rights indicators</u></p> <ul style="list-style-type: none"> <li>• access to air services;</li> <li>• prices of air services</li> <li>• non-discriminatory access to air services</li> <li>• availability of information about the air services and its prices</li> </ul>	<p>The answer for the question is based on the assessment of the EQ2 (achievement of the intended effects) and EQ3 (the unintended effects of the Regulation)</p>

2. To what extent has the Air Services Regulation contributed to the achievement of the main policy objectives? To what extent have the revision of the legal framework in 2008 been effective and have contributed to the achievement of the objectives? Which different (external) factors have influenced the achievements observed?

Sub-questions	Indicators	Evaluation approach
<b>Freedom to provide services</b>		
<p>What are the 1992, 2008 and 2017 levels of the relevant indicators? And what is there evolution between 1992 and 2008 and 2008 and 2017?</p> <p>How would the 2008 levels have evolved up to 2017 if the 2008 revision had not taken place?</p> <p>How would the 1992 levels have evolved up to 2017 if the Third Package had not been adopted?</p> <p>Which effects could be attributed to the Third Package? And why?</p> <p>Have the changes introduced by the revision 2008 been successful in elimination the barriers to the freedom to provide services?</p> <p>Which are the combined effects to the market efficiency and consumer rights?</p> <p>What are the driving factors of these changes? What are the hindrance factors?</p>	<p><u>Market efficiency indicators</u></p> <ul style="list-style-type: none"> <li>• degree of concentration on the regular routes;</li> <li>• degree of commercial freedom;</li> <li>• share of low cost carriers;</li> <li>• number of the new entrants;</li> <li>• share of monopoly routes;</li> <li>• traffic growth;</li> <li>• business strategies or air carriers;</li> <li>• services provided by the air carriers;</li> <li>• number of new routes</li> </ul> <p><u>Consumer rights indicators</u></p> <ul style="list-style-type: none"> <li>• access to air services;</li> <li>• prices of air services</li> </ul> <p><u>Level playing field indicators</u></p> <ul style="list-style-type: none"> <li>• equal treatment of air carriers</li> </ul>	<p>The answer for the question is based on the modelling results (AERO-MS) by Ricardo AEA (2018) and analysis of the relevant Eurocontrol data.</p> <p>The data gaps were complemented by the literature review and the interviews/surveys with the relevant stakeholders.</p>
<b>Operating license and PPOB</b>		
<p>What are the 1992, 2008 and 2017 levels of the relevant indicators? And what is there evolution</p>	<p><u>Level playing field indicators</u></p> <ul style="list-style-type: none"> <li>• equal treatment of air carriers;</li> <li>• differences in number OL issues/suspended</li> </ul>	<p>The answer for the question is based on the analysis of the relevant Eurocontrol</p>

Sub-questions	Indicators	Evaluation approach
<p>between 1992 and 2008 and 2008 and 2017?</p> <p>How would the 2008 levels have evolved up to 2017 if the 2008 revision had not taken place?</p> <p>How would the 1992 levels have evolved up to 2017 if the Third Package had not been adopted?</p> <p>Which effects could be attributed to the Third Package? And why?</p> <p>Have the changes introduced by the revision 2008 been successful in ensuring the level playing field and better enforcement/application of the rules?</p> <p>Have more strict monitoring requirements resulted in the better enforcement of the rules and therefore in more stable operations of the air carrier market?</p> <p>Has the temporary licence helped in assuring the stability of the air carriers operations?</p> <p>Have the provisions on the PPOB brought better clarity for their application? Has this clarity resulted in a better monitoring and enforcement of the provisions in relation to the Operating Licence?</p> <p>What are the effects of the changes to the level playing field?</p> <p>Which are the combined effects to the market efficiency and consumer rights?</p> <p>What are the driving factors of these changes?</p> <p>What are the hindrance factors?</p>	<p>among different Member States in relation to the size of air services market (i.e. number of active license)</p> <ul style="list-style-type: none"> <li>• number of licences issued in relation to the number of application</li> </ul> <p><u>Fitness of air carriers</u></p> <ul style="list-style-type: none"> <li>• number of bankruptcies in general and for new entrants.</li> </ul> <p><u>Stability of air carriers operation</u></p> <ul style="list-style-type: none"> <li>• number of bankruptcies in general and for new entrants;</li> <li>• level of use of the temporary licences</li> </ul>	<p>data and monitoring data.</p> <p>The data gaps were complemented by the literature review and the interviews/surveys with the relevant stakeholders.</p>

Sub-questions	Indicators	Evaluation approach
<b>Leasing</b>		
<p>What are the 1992, 2008 and 2017 levels of the relevant indicators? And what is there evolution between 1992 and 2008 and 2008 and 2017?</p> <p>How would the 2008 levels have evolved up to 2017 if the 2008 revision had not taken place?</p> <p>How would the 1992 levels have evolved up to 2017 if the Third Package had not been adopted?</p> <p>Which effects could be attributed to the Third Package? And why?</p> <p>Have the changes introduced by the revision 2008 been successful in ensuring the level playing field and minimized safety risks?</p> <p>Have the restrained use of the wet leasing resulted in the lower lease of third country carriers? Has it resulted in the better safety records? What are the effects on crew members?</p> <p>Have the common standards resulted in the equal opportunities to the EU carriers? What are the effects of the changes to the level playing field?</p> <p>What are the driving factors of these changes? What are the hindrance factors?</p> <p>Which are the combined effects to the market efficiency and aviation safety? What are the effects on crew members?</p>	<p><u>Stability of air carriers operation (flexibility)</u></p> <ul style="list-style-type: none"> <li>• level of leasing in relation to the level of aviation services;</li> </ul> <p><u>Minimized safety risks</u></p> <ul style="list-style-type: none"> <li>• use of wet-leased crafts from non EU countries</li> <li>• safety levels in EU and in non-EU countries</li> </ul> <p><u>Level playing field indicators</u></p> <ul style="list-style-type: none"> <li>• equal treatment of air carriers;</li> </ul>	<p>The answer for the question is based on the analysis of the relevant literature review and the interviews/surveys with the relevant stakeholders.</p>

Sub-questions	Indicators	Evaluation approach
<b>Price transparency</b>		
<p>What are the 2008 and 2017 levels of the relevant indicators? And what is their evolution between 2008 and 2017?</p> <p>Have the changes introduced by the revision 2008 been successful in ensuring that passengers have better access to the information about the fares?</p> <p>Has the discrimination been eliminated?</p> <p>Have it resulted in lower fare levels?</p> <p>What are the driving factors of these changes?</p> <p>What are the hindrance factors?</p> <p>Has the 2008 revision of the Regulation brought a better choice for consumers?</p>	<p><u>Equal treatment for consumers</u></p> <ul style="list-style-type: none"> <li>Percentage of air carriers and travel agents websites which discriminate on the basis of the place of residence</li> </ul> <p><u>Access to the information</u></p> <ul style="list-style-type: none"> <li>Percentage of air carriers and travel agents providing information on air fares in line with the Regulation requirements</li> </ul>	<p>The answer for the question is based on the analysis of the relevant literature review and the interviews/surveys with the relevant stakeholders.</p>
<b>Ownership and control</b>		
<p>What are the 1992 and 2017 levels of the relevant indicators? And what is their evolution between 1992 and 2017?</p> <p>What are the driving factors of these changes?</p> <p>What are the hindrance factors?</p> <p>Has the Regulation been successful in ensuring the commercial freedom to the carriers?</p> <p>Has the Regulation been successful in maintaining the traffic?</p> <p>What is the effect on the Competitive position of EU carriers in light of the national requirements</p>	<p><u>Commercial freedom</u></p> <ul style="list-style-type: none"> <li>Number of mergers between EEA/EU carriers</li> </ul> <p><u>Competitive position of EU carriers</u></p> <ul style="list-style-type: none"> <li>N/a</li> </ul>	<p>The answer for the question is based on the analysis of the relevant literature review and the interviews/surveys with the relevant stakeholders.</p>

Sub-questions	Indicators	Evaluation approach
of the third countries?		
<b>PSO</b>		
<p>What are the 1992, 2008 and 2017 levels of the relevant indicators? And what is there evolution between 1992 and 2008 and 2008 and 2017?</p> <p>How would the 2008 levels have evolved up to 2017 if the 2008 revision had not taken place?</p> <p>How would the 1992 levels have evolved up to 2017 if the Third Package had not been adopted?</p> <p>Which effects could be attributed to the Third Package? And why?</p> <p>Have the changes introduced by the revision 2008 been successful in ensuring the increase in the number of tenderer?</p> <p>Have the changes introduced by the revision 2008 been successful in ensuring the PSO are only used in the genuine cases?</p> <p>What are the driving factors of these changes? What are the hindrance factors?</p> <p>Which are the combined effects to the market efficiency and consumer rights?</p>	<p><u>Level of the connectivity</u></p> <ul style="list-style-type: none"> <li>• Number of the PSO routes</li> <li>• Number of PSO routes connecting: <ul style="list-style-type: none"> <li>○ Islands;</li> <li>○ Outmost regions</li> <li>○ Domestic mainland</li> </ul> </li> </ul> <p><u>Risks to the competitive distortion on PSO routes</u></p> <ul style="list-style-type: none"> <li>• Number of tenderer</li> <li>• Level of subsidies</li> <li>• Number of air carriers of another Member State awarded the PSO contract</li> <li>• Duration of PSO contracts</li> </ul>	<p>The answer for the question is based on the analysis of the relevant Eurocontrol data and monitoring data.</p> <p>The data gaps were complemented by the literature review and the interviews/surveys with the relevant stakeholders.</p>
<b>Traffic Distribution Rules</b>		
<p>What are the 1992, 2008 and 2017 levels of the relevant indicators? And what is there evolution between 1992 and 2008 and 2008 and 2017?</p>	<p><u>Better management of the airport congestion</u></p> <ul style="list-style-type: none"> <li>• Degree of the airport congestion</li> <li>• Number of TRD systems</li> </ul>	<p>The answer for the question is based on the analysis of the relevant literature review and the interviews/surveys with</p>

Sub-questions	Indicators	Evaluation approach
<p>How would the 2008 levels have evolved up to 2017 if the 2008 revision had not taken place?</p> <p>How would the 1992 levels have evolved up to 2017 if the Third Package had not been adopted?</p> <p>Which effects could be attributed to the Third Package? And why?</p> <p>Have the changes introduced by the revision 2008 been successful in ensuring the increase in number of tenderer and the increase in the competition?</p> <p>Have the changes introduced by the revision 2008 been successful in ensuring the traffic management?</p> <p>Have the changes introduced by the revision 2008 been successful in ensuring the minimized competitive distortion?</p> <p>Has the transparency increased in comparison to the main baseline?</p> <p>Which are the combined effects to the market efficiency and consumer rights?</p>	<p><u>Risks to the competitive distortion</u></p> <ul style="list-style-type: none"> <li>• Number of TRD systems</li> <li>• Number of Commission rejections of the TDR</li> </ul>	<p>the relevant stakeholders.</p>



3. Which unexpected or unintended social, economic and environmental effects (positive or negative) have occurred as a result of the intervention and what factors have influenced those achievements? What are their consequences on different stakeholders?	
Sub-questions	Evaluation approach
<b>Working conditions – PpoB and PSO</b>	
<p>What are the effect of the Regulation on the multiplication of operating bases?</p> <p>What are effects of the multiplication of operating bases on the crew-members and their working conditions?</p> <p>What are the effect of the Regulation on the number of contracts awarded to a non-resident carrier?</p> <p>What are effects on the crew-members and their working conditions?</p> <p>Are there any relevant EU or national legislation that provide the rules on justification and applicable law in cross-border disputes? How are they implemented and enforced?</p>	<p>The answer for the question is based on the analysis of EQ2 and complemented with the legal analysis.</p> <p>The data gaps were complemented by the literature review and the interviews/surveys with the relevant stakeholders.</p>
<b>Right for strike - Leasing</b>	
<p>What are the effects on the Regulation on the rights for strike for EU carriers?</p>	<p>The evaluation approach is the same as for the working conditions</p>
<b>Price transparency</b>	
<p>To what extent has the clarity of the price transparency rules affected the labelling of the price elements?</p> <p>What is the impact on the consumer rights?</p>	<p>The evaluation approach is the same as for the working conditions</p>
<b>Ownership and control</b>	
<p>To what extent have the requirements on ownership and control affected the employment and working conditions in the EU aviation sector? Have these impacts affected negatively EU workers?</p> <p>To what extent have the O&amp;C provisions limited access to capital and therefore on the complete position of the EU carriers?</p> <p>To what extent have the O&amp;C provisions had an impact on increasing complexity of ownership structures</p>	<p>The evaluation approach is the same as for the working conditions</p>
<b>Environmental impacts</b>	

<p>What are the impacts of the Air Services Regulation on the increase on the climate change, pollutant emissions and noise due to the increase of the traffic compared to 1992 and 2008 level?</p> <p>How would the 1992 levels have evolved up to 2017 if the Third Package had not been adopted?</p>	<p>The answer for the question is based on the analysis of the relevant Eurostat data and analysis of EQ2.</p> <p>The data gaps were complemented by the literature review.</p>
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<p>4. To what extent has the legislation been efficient? What are the regulatory costs and savings involved (i.e. substantial compliance costs/savings, enforcement costs/ savings and administrative costs/savings of monitoring and reporting arrangements)? Were the costs proportionate to the benefits achieved? Has the regulation resulted in unnecessary regulatory burdens or inefficiencies? Is there a potential for the reduction of the regulatory costs for any of the stakeholders group?</p>		
Sub-questions	Indicators	Evaluation approach
<p>What, if any, have been the costs for air carriers? • And for other stakeholders (airports)?</p> <p>What have been the costs for national and EU authorities as a result of the monitoring requirements?</p> <p>Are there any other substantial costs for authorities?</p> <p>What is the cost and benefit ratio?</p>		<p>The answer of the question is based on the assessment of the compliance costs, administrative costs and enforcement costs associated with the changes to the legal framework following the 2008 revision. The input for the calculation was provided by the stakeholders in the relevant surveys and cross-checked in the literature.</p> <p>Combine quantified costs/savings with input from the question on effectiveness to assess the cost-effectiveness</p>

5. To what extent are the objectives which were identified at the time of adoption still adequate in the current context and how do they still correspond to the problems and needs of the mature internal aviation market?

Sub-questions	Indicators	Evaluation approach
<p>How the markets have evolved since 1992 and 2008?</p> <p>How the legislation has evolved since 1992 and 2008?</p> <p>Are the objectives of the Regulation still relevant to the current challenges and needs?</p>	<p><u>Market indicators</u></p> <ul style="list-style-type: none"> <li>• degree of concentration on the regular routes and PSO routes;</li> <li>• degree of commercial freedom;</li> <li>• share of low cost carriers;</li> <li>• number of the new entrants;</li> <li>• share of monopoly routes;</li> <li>• traffic growth;</li> <li>• business strategies of air carriers;</li> <li>• services provided by the air carriers;</li> <li>• number of new routes</li> <li>• connectivity between different regions;</li> <li>• degree of competitiveness of EU carriers vs. non EU carriers</li> <li>• access to the capital</li> <li>• equal opportunities for air carriers?</li> <li>• air fares</li> </ul>	<p>The answer for the question is based on the legal analysis, on the analysis performed under the effectiveness.</p> <p>The data gaps were complemented by the literature review and the interviews/surveys with the relevant stakeholders.</p>

<p>6. Considering the technological, market, political and legal developments, to what extent is the existing range of provisions, requirements and conditions still relevant in the current context?</p> <p>7. Considering the technological, market, political and legal developments, to what extent is the existing range of provisions, requirements and conditions still relevant in the current context?</p> <p>8. Considering the technological, market, political and legal developments, to what extent is the existing range of provisions, requirements and conditions still relevant in the current context?</p>	
Sub-questions	Evaluation approach
<p>How the markets have evolved since 1992 and 2008?</p> <p>How the policy has evolved since 1992 and 2008?</p> <p>How the technologies have evolved since 1992 and 2008?</p> <p>Do the objectives of the Regulation still reflect to the current challenges and needs?</p> <p>Do the provisions of the Regulation still reflect to the current challenges and needs?</p> <p>How have the social issues evolved since 1992 and 2008? Does Regulation reflect them accordingly? Is the Regulation the relevant tool to reflect them?</p>	<p>The answer for the question is based on the legal analysis, on the analysis performed under the effectiveness.</p> <p>The data gaps were complemented by the literature review and the interviews/surveys with the relevant stakeholders.</p>

<p>9. To what extent are the requirements and objectives set in the regulation coherent and consistent with one another? If not entirely, what would be the differences, overlaps or contradictions or inconsistencies?</p>	
Sub-questions	Evaluation approach
<p>How do different objectives “co-exist together”? Are there overlaps or contradictions?</p> <p>How different provisions “co-exist together”? Are there overlaps or contradictions?</p> <p>Is the scope of all policy area the same?</p> <p>What are the consequences?</p>	<p>The answer of the question is based on the legal analysis.</p>

<p>10. To what extent are the requirements set in the regulation coherent and consistent with other EU interventions under the air internal transport acquis? In particular, with ground handling services, airport slots, airport charges, the proposal for the EASA basic regulation revision as well as relevant legislation on safety, security, market access and air navigation services? If not entirely, what would be the differences, overlaps or contradictions or inconsistencies?<sup>6057</sup></p> <p>11. To what extent are the requirements set in the regulation coherent and consistent with the EU's external aviation policy, international (ICAO) rules and bilateral and multilateral air services agreements between the EU or its Member States and 3rd countries? If not entirely, what would be the differences, overlaps or contradictions or inconsistencies?</p> <p>12. To what extent are the requirements set in the regulation coherent and consistent with the other EU's principles and policies, notably principles of freedom of establishment and provision of services, with EU competition policy, EU social and employment policy (see inter alia the Practice Guide), EU consumer policy and relevant larger transport policy? If not entirely, what would be the differences, overlaps or contradictions or inconsistencies?</p>	
Sub-questions	Evaluation approach
<p>What are the relationships between the objectives of two legal acts? Same? Different? Partially overlapping?</p> <p>What are relationships between the provisions of different legal acts? Scope?</p> <p>What are the consequences of that?</p> <p>Are two legal acts working together in coherent way? Are they bringing together to their objectives? Or are there any hindrance factors?</p>	<p>The answer for the question is based on the legal analysis.</p>

<p>13. What actual evidence can be found of the EU Regulation adding value, over and above what could reasonably have been expected from interventions of Member States or at international level? What would be the most likely consequences of stopping or withdrawing existing EU intervention?</p>	
Sub-questions	Evaluation approach
<p>What is the effectiveness level of different objectives? What are the effects which could be attributed to the EU intervention?</p>	<p>The answer is based on the assessment of the Effectiveness.</p>

### **3 Limitations and robustness of findings what are the limitations and consequences for the results**

The historical developments of the intervention itself (i.e. adoption of the main provisions within the Third Package and then consecutive changes following the revision of 2008) brought an important challenge and methodological limitations to the design of the intervention. As explained above the overall effects of the intervention could not be assessed in comparison to the main baseline of the Regulation (2008 – 2017) as the main building blocks of the Regulation were introduced by the Third Package. It was attempted to address this gap through the introduction of the complementary baseline (1992 – 2017). Nevertheless, it remains impossible to assess the cumulative effects of the Regulation in relation to the cumulative baseline. This limitation is always clearly spelled out in the assessment of the Effectiveness question.

As regards the available literature and datasets, these formed an important basis for many of the indicators needed to analyse the evaluation questions. At the same time, there were some general limitations that affected the methodology. A common issue was that studies were rather dated (for example, completed before the Regulation was introduced) – in these cases, we used them to support the analysis for the evaluation questions covering the period since 1992. We also made a judgement on the validity of the findings on a case-by-case basis for each question, for instance, where the provisions had been in place since before the Regulation, we were able to draw on the findings as part of the overall evidence base (but aiming to supplement / update them with more recent information). It is explained clearly in the relevant evaluation questions wherever this has been the situation.

Another limitation of the data were incomplete time series to be able to track trends over the relevant period, as well as a lack of data on the most relevant indicators. In these cases, it was attempted to fill the gaps through the surveys and data requests, and also used proxy indicators where possible (for example, where information on air fares was not available due to high disproportionate price, the data on price indices, passenger surveys and the real yield of airlines – all of which provide indirect evidence on the evolution of fares). Where proxy data were not available, the qualitative analysis is performed.

Limitations in terms of the input from stakeholders are most concerning regarding the relatively low response rate from airlines. In particular, no inputs were received to the survey from regional airlines – a shorter survey targeted specifically at these stakeholders was prepared; however, still no responses were received. We were able to interview a representative of the regional airlines (ERA), so their views are represented to some extent. More generally, we aimed to triangulate responses to the surveys and interviews with evidence from the literature, or where this was not possible, by cross-comparing the experiences of different stakeholder groups.

Difficulties with ministries of employment responsible for employment/social legislation and labour inspectorates to be highlighted

Particular difficulties were encountered by stakeholders when answering questions on certain topics, where a large number of “don’t know” responses were received. These are highlighted in the relevant evaluation questions, but tended to affect topics that were indirect impacts (such a social impacts), or where quantitative data were requested (such as costs).

As regards the modelling, the AERO-MS model uses both GDP growth data and fuel prices as exogenous variables. It is assumed therefore that there are not affected by the changes to the Regulation. It is well established that GDP growth is the main driver for growth in aviation

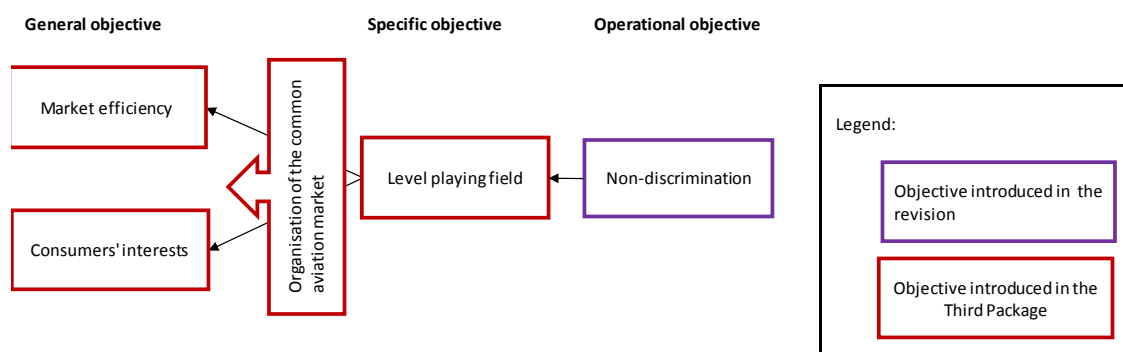
demand. While growth in aviation demand may have a positive effect on GDP, relative to the overall growth in GDP, the positive effect on GDP of aviation is limited. Hence, any growth in aviation, due to the EU legislation, will only have a positive impact on GDP which will be limited compared to the overall growth in GDP. In terms of fuel prices, kerosene prices are driven by development in the global oil market that are not affected by the EU aviation legislation.

## ANNEX 4: OBJECTIVES, BASELINE AND STATE OF PLAY BY POLICY AREA

### 1. PROVISION ON THE FREEDOM TO PROVIDE INTRA-EU AIR SERVICES

#### Objectives and provision on the freedom to provide services

*Figure 4-1: Policy objectives of the provision on the freedom to provide intra-EU air services*



Source: DG MOVE elaborations

Member States committed themselves in 1986 to create an internal aviation market. The decision to create a single market in aviation formed part of the general move to a single internal market across the whole range of economic activities, as embodied in the Single European Act. This was achieved progressively and culminated with the adoption of the “Third Package” in 1992. For the creation of an internal market a level playing field among all players regardless in which Member States they are established is of utmost importance. As part of this, the freedom to provide services is one of the fundamental freedoms indispensable for the functioning of the EU internal market. Regarding the implementation of the freedom to provide services in air transport, the Treaty (now Article 58(1) TFEU) provides that the “*Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport*”.

The EU legislature exercised the power conferred upon it by the Treaty (now Article 100(2) TFEU) to liberalise air transport through secondary legislation (i.e. the “Third Package”, replaced by the Regulation in 2008). Subsequent CJEU case law<sup>241</sup> established that Member States may not apply any national legislation which has the effect of making the provision of air services between Member States more difficult than the provision of service purely within one Member State.

The freedom to provide intra-EU services is the cornerstone of the EU intervention on the aviation market. It aimed at allowing the internal aviation market to be concluded, with significant economic and consumer benefits. The provision on the freedom to provide intra-EU air services aimed at **creating a level playing field** with common rules and abolishing restrictions concerning multiple designation and fifth-freedom traffic rights and phase in cabotage rights in order to stimulate the development of the Community air transport sector and improve services for users. This objective was maintained in the 2008 revision.

<sup>241</sup> C-70/99, *Commission Portugal* and C-92/01 *Stylianakis*



The 2006 Impact Assessment identified restrictions on provision of air services linked to the old bilateral agreements between Member States. Under the Third Package Member States still could grant their national air carriers price leadership<sup>242</sup> for routes from their territory to third countries or/and could ban the possibility for EU carriers from other Member States to combine flight numbers with third-country carriers (code-sharing). This had implications on EU air carrier's freedom to provide intra-EU air services and the equality of treatment between EU air carriers.

The Regulation specifies that an undertaking that has been granted an operating licence by a Member State is considered as an EU air carrier and is entitled to provide air services throughout the EU, in and between all the Member States. The Regulation incorporates measures aiming at ensuring that air carriers can benefit from a maximum of operational flexibility, where commercial decisions are taken without any undue influence from public authorities. At the same time, it aims at the highest possible standard in matters of safety, security, environmental protection and passenger protection (price transparency and supervision of financial viability of air carriers). Any restrictions on the EU air carriers' freedom to provide intra-EU air services arising from old bilateral agreements between Member States are superseded. Regarding code-sharing practices specifically, the Regulation states that any EU air carrier can code-share with any third country air carrier on routes to third countries. This means that if in a bilateral agreement between France and Japan, Air France can code-share between Paris and Tokyo with any non-EU air carrier, Lufthansa must be allowed to do the same. As a safeguard, the article also stipulates that Member States may impose restrictions if the third country does not provide reciprocity, to the extent that these do not restrict competition, and are proportionate and non-discriminatory between Community air carriers. Therefore, if in the France – Japan bilateral ASA Air France is prohibited from code-sharing with non-EU air carriers between Paris and Tokyo, France may prevent Lufthansa from code-sharing on the same route as well.

In this way the Regulation aimed at keeping the integrity of the internal aviation market and ensuring *equal treatment* between EU air carriers.

### **Main baseline 2008 - 2017**

It was expected that without the revision remaining provisions from old bilateral ASAs between Member States would create hurdles by divergent practices between Member States, especially with regard to code-sharing with third country carriers and price setting on 6th freedom routes. This would continue limiting the air carrier freedom to provide services and therefore economic benefits that citizens could reap from the liberalisation of external relations as the price and the choice of connections with third countries will depend on their place of departure in the European Union.

This change aimed at further increasing market efficiency by giving EU air carriers the certainty that bilateral air services agreements between Member States cannot restrict their operations within the EU. It was meant to contribute to levelling the playing field and minimising competition distortions between EU air carriers. In fact, the freedom of code-sharing and the freedom of price setting on routes to third countries would increase competition on these routes and would most probably translate into more supply (in terms of destinations and frequencies) and lower fares on those routes where restrictions applied.

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242 This means that air carriers from the other contracting States could not offer lower fares for the same route than the national carrier.

## Implementation of provisions and state of play

The responses of national authorities suggest that restrictions in bilateral ASAs between Member States on code sharing on services to third-countries have been removed. 14 out of the 16 authorities that responded to the survey indicated that they were removed (Belgium, Germany, France, Malta, Sweden, Poland, Portugal, Ireland, Spain, Greece, Austria Czech Republic, Finland and Denmark). This is also supported by the survey of air carriers, where 11 out of 12 who responded to the question are not experiencing code-share restrictions and 20 out of 21 who responded to another question are not aware of any intra-EEA services they are not allowed to operate.

However, Member States may continue to impose restrictions in their bilateral ASAs with third countries on code-sharing if the third country does not provide reciprocity, to the extent that these do not restrict competition, and are proportionate and non-discriminatory between EU air carriers. Five authorities (Austria, Czech Republic, Germany, Poland and Portugal) indicated that they still imposed code-sharing restrictions on code share agreements between Union (EEA) carriers and third country carriers on this basis.

The freedom to provide services implies that there is no need to formally establish in a country other than that of the principal place of business. However, this has been done in practice with the opening of operating bases. A Member State is entitled to require the respect of applicable national legislation, to the extent it complies with Union law, including with the principles of non-discrimination and proportionality. Following a Commission's invitation to contribute to a comparison of national criteria applied to assess the establishment in the field of air transport in **XX**, 14 Member States provided information on respective definitions, criteria, cases and requirements regarding registration, permanent presence of safety staff and national labour, fiscal or social law. It was found that Member States did mostly not have a specific definition of establishment or a set of criteria to assess it. Nevertheless, a number of Member States seem to have aligned their policy to the Council Statement on the right of establishment of 25 November 2003- 15247/03 ADD1, whereas some have also established further criteria built on that statement.<sup>243</sup>

The 2006 Impact Assessment had also identified that there is a distortive impact on the internal market if Member States grant third-country air carriers traffic rights on intra-EU routes. The Commission proposal for the Regulation included a restriction on such rights unless allowed by an agreement between the EU and the third country. However, this was rejected by the Parliament and the Council. Ricardo AEA (2018) states that the number of non-EEA based air carriers performing flights inside the EEA has become very small. From a business perspective, it is likely that due to the cost of setting up dedicated operations in EU airports, third country carriers would find it hard to compete with EU carriers on intra-EU routes. The Commission in the course of its activities has become aware that non-EU cargo companies operate services between Member States directly competing with EU air carriers. Allegedly, such operations may sometimes be limited to the intra-EU market without connecting on to a third country.

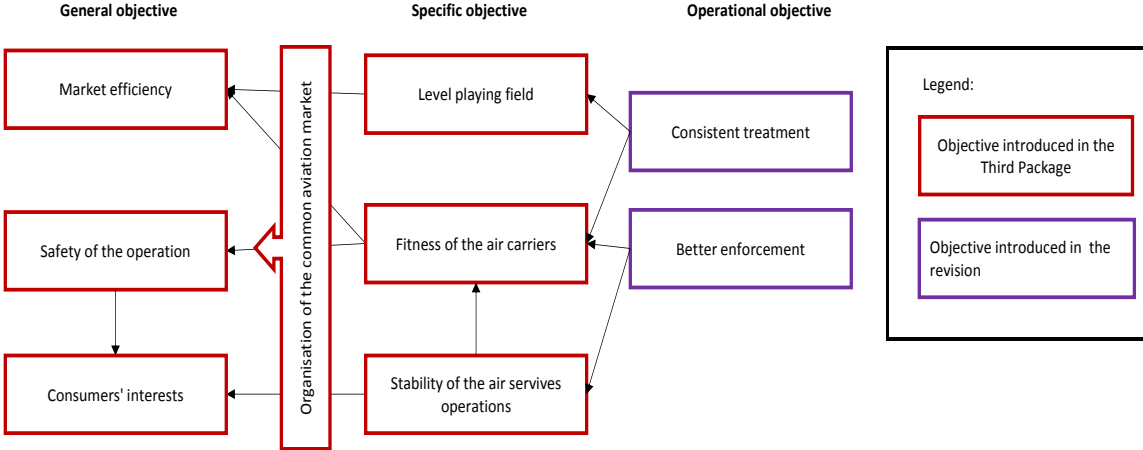
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<sup>243</sup> It is not necessary to expose further details here, nor to analyse the compatibility of the requirements established with Union law.

**2. PROVISIONS ON OPERATING LICENCES, INCLUDING PRINCIPAL PLACE OF BUSINESS**

**a. Objectives and provisions on operating licences, including principal place of business**

*Figure 4-2: Policy objectives of operating licences, including principal place of business*



Source: DG MOVE elaborations

The provisions on operating licenses constitute another pillar of the creation of the internal aviation market. They establish the common rules for the granting of the EU operating licence to EU air carriers, which then allow these EU air carriers to benefit from the freedom to provide intra-EU air services and the rights and obligations related to the internal aviation market. In order to be granted and keep a valid operating licence, EU air carriers are required to: possess a valid air operator certificate (AOC)<sup>244</sup>, have their principal place of business (PPB) in the Member State granting the operating licence, the requirement that the majority ownership and effective control of the air carrier is in the hands of EU Member States and/or their nationals, have one or more aircraft at its disposal through ownership or dry lease agreement, have a corporate structure that allows to implement the provisions on operating licences, meet a number of financial requirements which should ensure its financial health, comply with the insurance requirements as well as with the provisions on good repute. Failure to comply with these requirements and conditions may ultimately result in the suspension or withdrawal of the OL.

The objectives of the Third Package which continue to be pursued in the Regulation were **to achieve a level playing field** in order to contribute to the proper functioning of an internal market. The Third Package aimed also at ensuring **the financial fitness of air carriers** so that an air carrier operates at sound economic level thus supporting the highest safety standards and ensuring the **stability of air services** in the interest of consumers and workers. In addition, there should be clear criteria and non-discriminatory criteria to determine which authority is responsible for oversight of the air carrier.

The 2006 Impact Assessment found that there was inconsistent application of the provisions on operating licences by Member States with respect to the financial assessment required. Airlines in a fragile financial situation could continue operating in some Members States (not

244 There are some undertakings that are required to hold an operating license, but not an AOC, for example cost-shared flights. There is thus a conflict between the Regulation and certain safety rules.

specified which), while in other Member States their licence would have been revoked. This risked distorting competition among EU air carriers and could also create higher bankruptcy risks and indirectly higher safety risks. Moreover, a higher bankruptcy rate of young air carriers was observed (in particular within the first four years of operation). The Impact Assessment concluded that allowing financially unsound air carriers continuing to operate could indirectly lead to safety risks and leave passengers with worthless tickets. It also mentioned the risk of an unstable situation for workers. Therefore, the revision aimed at ensuring *the consistent application* of the provisions and *their better enforcement and application*.

With regards to financial requirements, the Regulation introduced stricter and more detailed financial requirements. In addition, Member States had to strengthen the supervision of the operating licence and to suspend or revoke it when the requirements of the Regulation are no longer met. Thus, if an air carrier can no longer meet its actual and potential obligations for a 12 month period, the authority shall suspend or revoke the operating licence. Pending a financial reorganisation, and provided that safety is not at risk, the authority may grant a temporary licence, not exceeding 12 months. To ensure efficient supervision (given the growing importance of air carriers with operating bases in several Member States) the Regulation also stipulates that the same Member State shall be responsible for the Air Operator Certificate (AOC) and the operating licence. The Regulation also included a definition of “principal place of business” to clarify which authority is responsible for financial oversight and make sure that authorities have access to the information they need for checking the financial fitness.

### **Main baseline 2008 - 2017**

Without a more stringent and homogeneous application of procedures for granting and revoking operating licences, a high failure rate among market entrants was expected to continue with increasing risks to leave their passengers stranded. The precarious financial situation of newly established air carriers would also mean that employment in the airline sector would remain unstable, and therefore less attractive. The aviation market consolidation was expected to gradually happen, but at a slow rate, and leaving European air carriers ill-prepared to take on international competition. Persistent inconsistencies in applying the rules would have worsened competitive distortions.

### **Implementation of provisions and state of play**

During 2009-2017, 524 operating licences were granted (out of which 197 are category A245), 363 suspended (out of which 142 are category A licences) and 36 granted as temporary licences (out of which 26 are category A). In terms of the distribution of licences among Member States (i.e. the authorities that are responsible for these licences) Ricardo AEA (2018) analysis shows that Germany, France and the UK have the highest numbers (together representing 36% of the total). At the same time, Malta has been particularly active since 2009 with 32 licences issued.

The validity of the temporary license is limited in time, it cannot exceed 12 months, pending financial reorganization. Two countries have made greater use of temporary licences (IT 17, SE 11). Other authorities rarely used them, and there are Member States such as Ireland and UK, which are reluctant to grant temporary licenses, as they consider that it can rapidly

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245 Category/Type A licences apply to air carriers applying for operations with aircraft of more than 10 tonnes maximum take-off mass (MTOM) and/or less than 20 seats

deteriorate the financial situation of the company if known by the market or not really necessary, as replaceable by the suspension of the licence in case of financial difficulties.

The total number of airlines that have ceased operations since 2008 has fluctuated considerably over the period, linked to a number of factors including periods of high fuel prices, increased price competition and the downturn in demand due to the global financial crisis. According to the figures provided by the Ricardo AEA (2018), 569 EU15 air carriers have ceased operations since 2008. The decrease in number of active licences can also result from other factors such as mergers.

While the provision in the Regulation regarding operating licences provides for more detailed procedures (compared to the Third Package) and criteria for the process of granting, monitoring and revoking operating licences, its application has depended on the national authorities' interpretation of the provisions. As part of the survey, Member States were asked whether they have adopted additional clarifying guidance. Among those that reported having introduced guidance, only 3 Member States (ES, IT, FR) out of 16 that have replied, stated that the guidance was mainly intended to provide clarifications of the financial conditions, or regarding the procedure for monitoring or revocation of operating licences.

There are differences in the "approval rate" of operating licences, i.e. the number of operating licences granted in relation to the requested (the rate varies from 100% to 0%). Among the 9 authorities that responded (DE, CH, CZ, EL, HU, EE, IT, ES) to additional information requests three (CH, ES, IT) identified the absence of a valid AOC and three (DE, HU, IT) the inability to prove financial health as common or very common reasons for denying the license. Not providing an appropriate business plan was also mentioned as a common reason by DE and IT. One other authority, UK, indicated that applications are not rejected, but changes are requested.

Member States have the obligation to inform the Commission of national procedures developed, but this obligation has not always been respected. In the case of the UK adopting an internal procedure for suspension and revocation of operating licenses in 2009, for example, the Commission has not found evidence that the UK informed the Commission.

The procedures for suspending or revoking operating licences depend much on how national law shapes certain necessary features (e.g. modalities of the monitoring when financial issues are detected, or for guaranteeing the right to be heard).

In relation to the modalities of the financial monitoring requirements, there are differences in the actual frequency of the reviews of the accounts and of more detailed evaluations. 7 Member States (FR, IE, IT, PT, SK, ES and UK) replied in 2011 to a consultant, Steer Davies Gleave, as part of an Impact assessment of passenger protection in the case of insolvency that regular checks tend to take place on an annual basis, but become more frequent in the case that authorities identify problems (monthly or quarterly basis).

In the period between 2017 and 2019, four significant air carriers went bankrupt (i.e. Air Berlin (including NIKI and LGW), Monarch and WOW) or into insolvency proceedings: the results have differed as national legislation applies and regulates a branch of market exit procedures.

The establishment of multiple operating bases is more connected to the LCC business model. When the Regulation was enacted, Ryanair already had a sizeable number of operational bases<sup>246</sup> (32) (see table 3-1 below). That remains the case today, with the Irish LCC having

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<sup>246</sup> Both inside and outside the EEA.

over 80 bases throughout the EEA and third countries. Of the ten LCCs in the table, the number of bases that they operate increased from 92 when the Regulation was enacted, to 228 in 2017.

In contrast, most network carriers have one or very few operational bases (CAPA, 2013). Among the eight network carriers that responded to the survey of air carriers, four indicated that they only have 1 base, while two others have more than one base due to the multi-national nature of their ownership structure. Some air carrier groups have also opened new bases, that has happened not through their legacy brands (e.g., British Airways or Lufthansa), but through new LCC brands (Vueling and LEVEL for IAG, Eurowings for Lufthansa Group, Transavia and Joon for Air France/KLM).

**Table 0-1: Number of operational bases (2008 and 2017) for selected EEA air carriers**

Air carrier	Country of Principal Place of Business	Number of destinations	Number of Operating Bases inside and outside EEA (2008)	
			2008	2017
<b>Low cost carriers</b>				
EasyJet	United Kingdom	138	20	27
Eurowings	Germany	192	5 <sup>247</sup>	11
Flybe	United Kingdom	63	14 (2010)	11
Jet2.com	United Kingdom	58	6	11
Norwegian Air Shuttle ASA	Norway	>150	3	22
Ryanair	Ireland	207	32	86
Transavia	France/Netherlands	114	Not available	6
Volotea	Spain	78	Air carrier founded in 2011	11
Vueling	Spain	131	6	16
Wizz Air	Hungary	141	6	27
<b>Traditional/network</b>				
Aegean Airlines	Greece	94	3	9
Aer Lingus	Ireland	133	4	4
Air Europa	Spain	>130	3	3
Air France/KLM	France	243	2	2
Alitalia	Italy	94	2	2
British Airways	United Kingdom	>200	3	3
Finnair	Finland	>130	1	1
Iberia	Spain	~120	1	1
LOT Polish Airlines	Poland	>90	1	3
Lufthansa	Germany	205	2	2
SAS	Sweden	114	3	5
TAP Air Portugal	Portugal	85	2	2

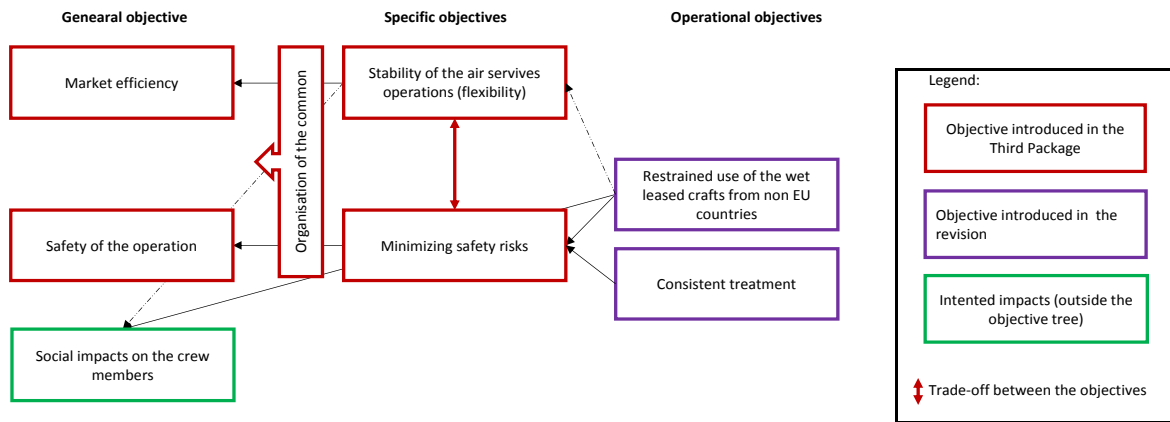
Sources: Ricardo AEA (2018) based information provided by air carrier websites and annual reports

<sup>247</sup> As Germanwings.

### 3. PROVISIONS ON LEASING

#### a. Objectives and provisions of leasing requirements

**Figure 4-3: Objectives of leasing requirements**



Source: DG MOVE elaborations

The Third Package introduced the provisions on leasing. The objectives pursued were to **allow airlines the flexibility** to lease aircraft while **maintaining safe operations**. Therefore the provisions of the Third Package allowed air carriers to lease aircraft registered anywhere in the Community, and lease aircraft registered outside the Community for a short term or under exceptional circumstances, and on the condition that safety standards are equivalent to those applied in the Community. On this basis, the provisions established that Member States should not approve wet-lease agreements to an air carrier to which it has granted an operating licence unless safety standards equivalent to those imposed to the Community AOC holders are met. Further, it provides that aircraft used should be registered in the EU, however EU air carriers could apply for a waiver to this requirement in case of short-term leases. The objectives are not mutually supporting, but are imposed to adjust to the adverse effects of each other.

The 2006 Impact Assessment identified that leasing of aircraft provides important flexibility to EU airlines increasing both economic efficiency and consumers' benefits, but that the previous provisions regarding leasing led to inconsistent application of the rules governing the leasing of aircraft, causing distortions of competition and safety concerns. Further, the regular recourse to and inconsistent application of provisions to aircraft leased from third countries with crew could potentially lead to adverse social implications and distortions of competition when the higher costs linked to the social and labour regulations of the Member States are avoided.

The 2008 revision continued to pursue the objectives of allowing flexibility while minimising safety risks. Further it aimed at increasing market efficiency through ensuring a level playing field between competitors by way of a more *consistent treatment*. Further the objective to *avoid excessive recourse to wet-leasing* of third country registered aircraft was introduced. Another objective was to enhance the safety of air services through stricter requirements for the leasing of aircraft.

The Regulation sets requirements with regards to aircraft leasing in order to minimize the risks of adverse social consequences and to enhance safety as stated in its recital (8). Subject to prior approval, the freedom to wet-lease aircraft registered within the EU is enhanced. The Regulation authorises the wet-leasing of aircraft registered in a third country, but subject to

prior approval from the competent licensing authority under the condition that the safety standards applied are deemed to be equivalent to EU safety requirements and (i) where the carrier demonstrates an exceptional need, or (ii) where the carrier demonstrates seasonal capacity needs, or (iii) where the carrier demonstrates that the leasing is necessary to overcome operational difficulties in case of temporary operational problems. Under the two latter cases ((ii) and (iii)), the Regulation explicitly mentions that it must not be "possible or reasonable" to lease the aircraft needed within the Community. Regarding dry-lease, the Regulation provides that it shall be subject to prior approval in accordance with applicable Community or national law on aviation safety.

#### **b. Main baseline 2008 - 2017**

Absent changes introduced in 2008 leasing agreements of third country aircraft with crew (wet-lease) would likely have increased, while the safety supervision in these instances would not be fully assured leading to higher risks to safety and negatively affect consumer interests. Opportunities to avoid the social security and labour costs through widespread wet-leasing of third-country registered aircraft would have furthermore created competitive distortions in the internal market and undermined working conditions of airlines' staff.

#### **c. Implementation of provisions and state of play**

For the last ten years, leasing practices have continued to develop. The growth in leasing has been significantly impacted by the emergence in different market players - where previously commercial banks were the main source of aircraft financing; now other leasing companies have become established. Ireland assumes a prominent role in this market, with around half of leased aircraft worldwide being registered there. 14 out of the 15 biggest lessors have a presence in the country (Market Research Future (2017)). Wet-leasing is usually provided by air carriers as they also involve crew, instead of merely a transfer of aircrew. However, there are air carriers that specialise in providing wet-lease services, for example HiFly (PT air carrier), Go2Sky (SE air carrier). For some air cargo carriers, their sole business is the provision of wet-lease (ACMI)<sup>248</sup> services and their business model is underpinned by this activity. For such operations the ability to offer wet-leasing services to other EU air carriers and third-country carriers is important to increase their business opportunities. This touches on the negotiations of external dimension through ASAs, a sensitive issue for Member States. This is different from the aspect covered by the Regulation's leasing provisions, which relate to the possibility of dry and wet-leasing **in** aircraft and crew.

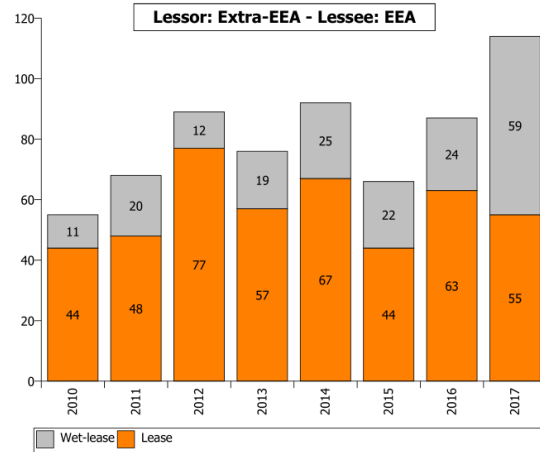
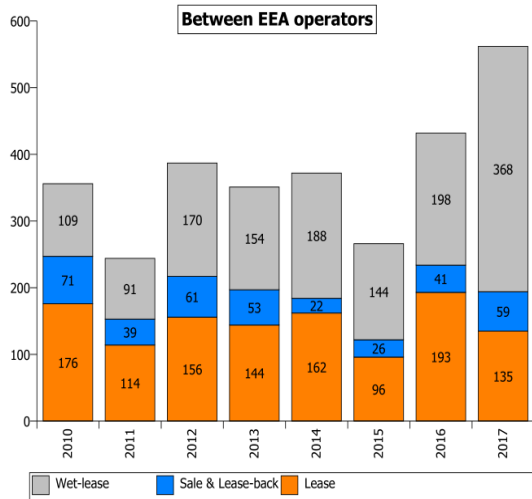
An increase in the recourse to dry- and wet-leasing of both EEA and non-EEA aircraft can be observed. According to the Flightglobal data, wet-leasing third country aircraft in particular has increased over the last three years, going from 22 in 2015, to 24 in 2016 and 59 in 2017.

#### **Figure 4-4:**

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248 Aircraft Control Maintenance and Inspections





Source: Flightglobal

\* Sale & lease-back refers to the practice where a company sells the aircraft and the leases it from the new owner, due to economic benefits associated with the transaction.

The data shows that EEA airlines dry or wet-lease aircraft registered within the EEA significantly more than they dry or wet-lease third country registered aircraft.

Damp lease Unions say that when the cockpit and cabin do not have the same company culture there are often communication problems that can cause safety issues

In terms of leasing requests and approvals, seven of the 16 surveyed Member States have adopted specific methods for verifying compliance with EU and national legislation (FI, SE for dry- leasing, AT, DE, FI, FR, MT, SE for intra-EEA wet-leasing, BE, FI, FR, MT for wet-leasing of third-country aircraft). For example, providing for a simplified notification procedure in the case of short-term operational needs (one Member State). Regarding safety aspects, at least two Member States perform safety checks or carry out an audit for wet-leasing third country aircraft.

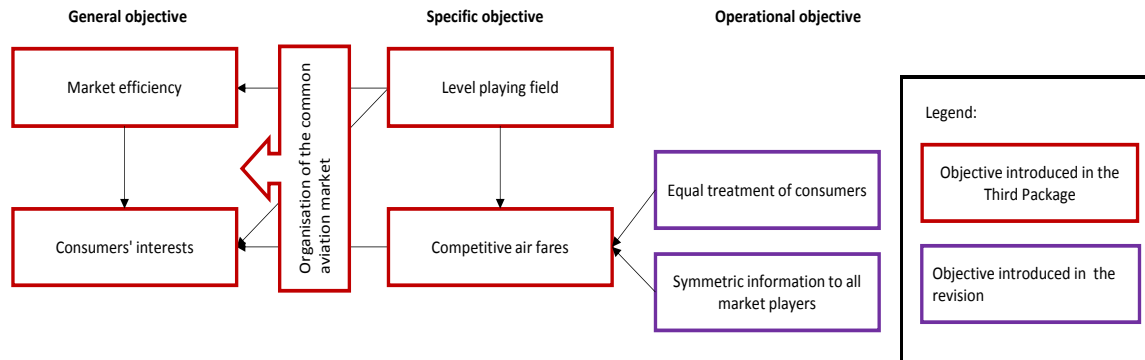
According to Ricardo AEA (2018), rejections of leasing requests is rather uncommon as among eight of the responding Member States, the percentage of leases approved between 2015 and 2017 varied between 75 and 100%. This is confirmed by the data from the survey of airlines since none of the 18 respondents out of 22 reported a request for leasing that has been rejected. In two Member State the rate of approved request was significantly lower; respectively of 36 and 13%. The most common reason for rejections - where they occur - appears to be on safety grounds, i.e. not meeting safety rules at EEA and national level. Among 14 surveyed authorities, four declared that the safety grounds for rejection were "very common" and two "quite common" while about half or surveyed authorities have indicated each other option (e.g.: unable to demonstrate exceptional needs) as never being used or not being relevant. Airlines can experience different individual circumstances leading them to justify either seasonal needs or operational difficulties or exceptional needs.

Experience shows that at least one EU airline (British Airways) wet-leased several third country aircraft from Qatar Airways invoking operational difficulties in the summer 2017. This request for wet-leasing third country's aircraft followed an announced strike of part of the airline's crew.

## 1. PROVISIONS ON TRANSPARENCY CONCERNING PRICING

### Objectives and provisions on pricing freedom and price transparency

Figure 4-5: Policy objectives of pricing provisions requirements



Source: Commission elaborations

The rules on price transparency and non-discrimination were introduced with the revision of 2008. The objective of the price transparency rules are to ensure better consumer protection and to contribute to an increased market efficiency.

These rules aimed at establishing **competitive air fares** by ensuring price transparency and non-discrimination. As regards transparency, it was stipulated that consumers were to be *informed ahead of booking* on the final price including all unavoidable fees, taxes and charges, as well as on the applicable terms and conditions. In addition, the new rules require a breakdown of the total price reflecting the base fare, taxes, fees and charges. As regards non-discrimination, the Air Services Regulation requires that *access to air fares be granted without discrimination* based on residence, nationality and place of establishment of agents or ticket sellers.

Before the adoption of the Regulation in 2008, one could observe a widespread practice of the publication of fares which excluded taxes, charges and fuel surcharges. This approach did not allow consumers to benefit from full information while choosing a flight and neither to effectively compare prices. Finally, the 2006 impact assessment found that on multiple occasions the airlines charged different fares for exactly the same ticket depending on the place of residence of the consumers. The lack of appropriate rules led to reduced price competition and discrimination on the basis of the place of residence.

In order to effectively enforce its new pricing provisions, the Air Services Regulation obliges Member States to ensure compliance with the rules and lay down penalties for infringements thereof. Those penalties shall be effective, proportionate and dissuasive. This way, the Regulation did not require creating a national enforcement body but left the Member States free to decide how and by which authority the enforcement is carried out.

#### Main baseline 2008 - 2017

Level of passengers' awareness of prices was expected to further deteriorate given the confusion with respect to "all-inclusive" fares, fares "exclusive of taxes and charges" and the differences in national legislation concerning fare publication. Without the current regulation, Member States would have the possibility to control the prices; however it is fair to say that

under current market conditions such price control would likely not be exercised. However, price transparency and non-discrimination would not be guaranteed, (e.g. level of details of the final ticket price, non-discrimination in access to air fares, possibility of ineffective price comparison of final prices, inclusive of all taxes, charges and fees) which could be detrimental to consumers. Although the Regulation is a *lex specialis*, horizontal consumer legislation<sup>249</sup> applies as a safety net. Among others, these pieces of legislation contain provisions - –according to which the tax inclusive final price of the product must be communicated to the consumer ahead of purchase, no surcharge can be collected for consumer credit or debit cards, and according to which the use of default options the consumer has to reject in order to avoid additional payments rather than requesting the consumer's express consent to extra payments, such as in the case of pre-ticked boxes on websites is precluded. Therefore the current horizontal and aviation specific rules complement each other which is beneficial to consumers<sup>250</sup>.

### **Implementation of provisions and state of play**

No issues related to the application of the principle of the pricing freedom itself have been observed and only a few cases where discrimination was questioned.<sup>251</sup>

Pricing is also linked to pre-contractual information which should be made available to the consumers in an easy and clear format at the booking stage, referring specifically to the elements included in the headline price.

The key concerns regarding price transparency rules covered by five rulings of the Court of Justice of the European Union (CJEU) were:

[C-112/11 \*ebookers.com\* on transparent optional price elements \(opt-in\);](#)

[C-487/12 \*Vueling\* on transparent pricing for transporting baggage;](#)

[C-573/13 \*Air Berlin\* on transparent publishing final price in case multiple flight options are offered;](#)

[C-290/16 \*Air Berlin\* on distinction and display of core price elements;](#)

[C-330/17 \*Germanwings\* on the currency of booking.](#)

Importantly, several court rulings at national level concerned the displaying of price but limited to the unfair manner of displaying and only made reference to the Air Services Regulation. This fact however shows that price transparency is viewed by enforcers at a broader level of consumer protection policy.<sup>252</sup>

The [2013 CPC sweep exercise](#) screened 552 websites offering travel services (air travel and accommodation) and found 69% breaching consumer law. The second biggest issue was about the optional nature of ancillary services linked to the flight (pre-ticked on the websites).

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249 the Consumer Rights Directive, the Unfair Contract Terms Directive, the Unfair Commercial Practices Directive, the E-commerce Directive, The Payment Services 2 Directive.

250 Only certain provisions of the Consumer Rights Directive apply to contracts for passenger transport services (namely article 8(2), Articles 19 and 22). These provisions include to provide the characteristics and total price of the offered service, prohibit traders from charging consumers, in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of such means and obligation that the trader shall seek the express consent of the consumer to any extra payment in addition to the remuneration agreed upon for the trader's main contractual obligation.

251 e.g. credit card number determining the nationality of the card holder not giving access to certain national markets, access to prices in Computerised Reservation Systems.

252 This fact is recognised also by the CJEU in the judgment C-478/12 *Vueling*, paragraph 32.

Another Top5 issue was that consumers were not given the total price upfront when the main elements of the booking were first displayed (85% of issues identified in case of Online Travel Agents).

The 2013 Fitness check found that in general the pricing provision of the Regulation were fit for purpose but indicated some malfunctions:

<i>Issue identified</i>	<i>Update since the Fitness check</i>
Partially coordinated and effective enforcement	CPC Regulation 2017/2394 should strengthen administrative cooperation amongst Member States authorities for more effective enforcement in the cross-border context by strengthening the minimum powers of the competent authorities, putting in place stronger coordinated mechanisms to investigate and address widespread infringements and allowing external bodies such as consumer and trade associations to post alerts and signal issues to the authorities and the Commission.
Provisions of an appropriate breakdown of TFC	C-290/16 has clarified the requirements.
Credit card charges as unavoidable element <sup>253</sup>	Solved by Consumer Rights Directive and Payment Services Directive 2.
Exchange rate used by airlines	Not widely practised anymore, and even if so it is likely to be more a case of fairness than within the remit of Regulation 1008/2008. In addition, a Commission proposal <sup>254</sup> includes some aspects on the transparency of currency conversion, with the intention to enhance transparency..
Reimbursement of taxes and airport charges in case of cancellation and "no-show"	<i>Issue still open. No general rule exists on reimbursement, being thus regulated by the terms and conditions of carriage<sup>255</sup>.</i>

253 Until 2012 it was commonplace by several airlines to consider a credit card charge as an optional price element. First a voluntary agreement reached among airlines (<https://www.gov.uk/cma-cases/airlines-payment-card-surcharges-investigation>) clarified the situation and airlines started to include credit card surcharge in the final price, considered as unavoidable and foreseeable price element for the vast majority of travellers. This situation was furthered by the Consumer Rights Directive that prohibited overcharging credit card fees and then by the Payment Services Directive 2 which prohibited traders to charge for using consumer credit and debit cards.

254 [http://europa.eu/rapid/press-release\\_IP-18-2423\\_en.htm](http://europa.eu/rapid/press-release_IP-18-2423_en.htm)

255 However, France has recently amended national consumer law forcing parties to reimburse passenger tax and airport charges in case the ticket is not used.

In addition, [Commission Information service Europe Direct](#) has answered 11 complaints with relation to the Air Services Regulation since 2016. The content of nine of them however focused on denied boarding which is addressed under EU rules for passenger rights (and therefore not covered by Regulation 1008/2008). The European Consumer Centres (ECC-net) have also played an intense role in the enforcement of cases which involved airlines. Around 20% of the ECC-net cases between 2016 and 2017 were related to air transport. The most common problems flagged by consumers were delayed or cancelled flights. The ECCs are committed to boost consumer awareness and education about EU consumer rights and redress mechanisms. It must however be acknowledged that the low number of complaints received may not be representative of the issues faced by consumers since consumers are less likely to complain with regard to missing or incomplete pre-contractual information compared to, for instance a faulty product or a long delay of their flight.

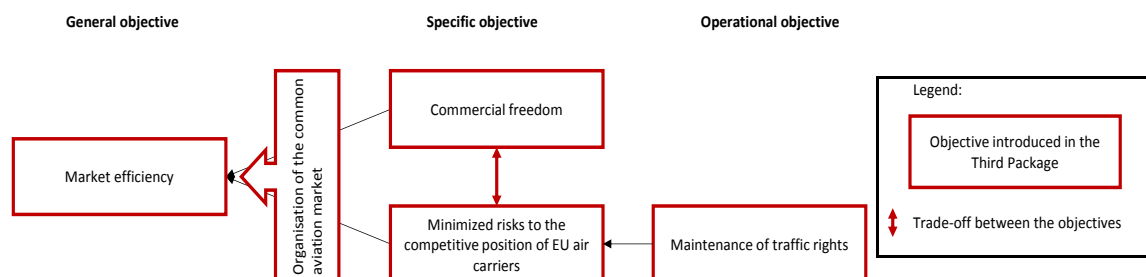
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## 2. PROVISIONS ON O&C OF EU AIR CARRIERS

### Objectives and provision on O&C of EU air carriers

*Figure 4-6: Policy objectives of O&C provisions*



*Source: Commission elaborations*

The rules on ownership and control of EU air carriers exist since the Second Package and were inspired by provisions existing within bilateral ASAs signed between Member States and third countries, all of which have to be seen against the background of the Chicago convention (cf. further below) and contain requirements of the kind. They facilitated freedom of establishment, by allowing EU nationals to own and control air carriers in any Member State, and thus contributed to **greater commercial freedom**. These objectives continued to be pursued by the Third Package. At the same time despite the fact that O&C limitations could hinder EU air carriers' normal business development, it was considered that foreign investment should be limited due to the "basic characteristics of the international aviation system".<sup>256</sup> In particular, it was intended to **minimize risks to the competitive position of EU air carriers** by supporting the maintenance of EU air carriers' traffic rights to non-EU countries. Also, to support the maintenance of traffic rights, the Commission has encouraged non-EU countries to accept the "EU carrier" designation. However, in practice traffic rights to third countries are maintained only if the third country decides to accept the EU designation, which is within the discretion of the third country. These two objectives are not mutually supporting, but they counterbalance each other's' adverse effects.

Neither the Third Package nor the Air Services Regulation made substantive changes to the ownership and control requirements.

As explained, O&C requirements are one of the conditions to obtain an operating license. An air carrier needs to be majority owned (50% of the shares +1) and effectively controlled by EU Member States or their nationals. O&C provisions can be traced back to the beginning of international commercial civil aviation. Article 6 of the Chicago Convention of 1944 specifies, among other technical matters that no air carrier can provide scheduled international air services over or into the territory of a contracting State unless it is specifically authorized to do so by that state. States usually grant the authorization within the context of Air Services Agreements (ASAs). Many ASAs specify that air carriers, which are granted the authorization to provide air services to the other state, must be owned and controlled by the contracting

<sup>256</sup> Explanatory memorandum of the Commission Proposal for a Council Regulation (EEC) for the licensing of air carriers, COM (91) 275 final

state or its nationals to ensure that the rights exchanged under the ASA are exploited by the contracting parties only. Some national laws contained similar requirements. Other reasons such as national security and protectionism have also justified the existence of this restriction.

From a procedural point of view, the Air Services Regulation enhanced the role of the national competent authorities in the assessment of this requirement and introduced a procedural change, eliminating the possibility of Member States to require the Commission to adopt a decision on this requirement. Competent licensing authorities remain responsible for conducting the assessment of whether the requirements of the licence are fulfilled, and the Commission can ask the competent licensing authority for the assessment made in case of doubts.

### **Implementation of provisions and state of play**

Under the Air Services Regulation, national licensing authorities are responsible to carry out the ownership and control assessment. The Commission has also the possibility to carry out its own assessment on the basis of the information obtained from the Member States, and may take a decision to request the competent licensing authority to take the appropriate corrective measures or to suspend or revoke the operating license.

Since the entry into force of the Regulation, no decision has been adopted by the Commission. The Commission has only adopted one decision regarding ownership and control, in 1995 (under the previous Regulation), in the case Sabena/Swissair. The Commission has performed 13 assessments, either as a result of a complaint or ex-officio, from 2008 to 2017. In certain cases, Member States requested amendments to the air carrier corporate structure before granting or maintaining the operating license. The Commission's own assessments were closed with an administrative letter.

The provisions on ownership and control are open to interpretation as to the concrete assessment of notions of “ownership” and “effective control”. Over the years some national competent authorities have specified criteria for assessing compliance with the O&C provision. According to Ricardo-AEA (2018), out of the 16 authorities that replied, 9 have specified criteria: six of them (Estonia, Finland, Italy, Ireland, Spain, UK) have made these criteria public, while three (Germany, Malta, Sweden) only use them for internal purposes. Three authorities (UK, Ireland and Spain) have developed their own national guidelines.

The 2015 Aviation Strategy announced the adoption of Interpretative Guidelines<sup>257</sup> to provide further clarifications on the notions of ownership and effective control, that were finally adopted in July 2017. The Guidelines are drafted on the basis of previous experiences. Nevertheless, issues such as how to determine the owner in the case of companies listed in the stock exchange markets still involve complexity.

Moreover, 4 workshops have been organized in the last years by the UK CAA to share experiences and best practices with other CAA. The Commission has also discussed ownership and control issues with the Member States in the framework of the Market access Committee.

The Commission has received one complaint from an EU air carrier and several requests from national licensing authorities (UK, DE) about non-EU investors who have obtained EU citizenship in a Member State (Cyprus) that has citizenship schemes which can be easily

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257 Commission Notice, Interpretative guidelines on Regulation (EC)1008/2008 - Rules on Ownership and Control of EU air carriers, Brussels, 8.6.2017 C(2017) 3711 final

satisfied through large investments (rather than residence requirements). According to settled case-law of the CJEU, it is for each Member State, having due regard to EU law, to lay down the conditions for the acquisition and loss of nationality.<sup>258</sup> There is concern that such cases where EU citizenship is obtained on the basis of investment alone could potentially circumvent the rules.<sup>259</sup> Non-EU investors could easily obtain EU citizenship and own and control an EU airline, and thereby obtain traffic rights by way of circumvention.

There has been an ongoing global debate, initiated by ICAO, about the need for the restrictions inherent in O&C requirements. To this date, the majority of the States maintain requirements of the kind. Global discussion at ICAO level is currently ongoing with the aim of concluding an agreement that could imply the recognition by third countries, parties to the agreement, of any liberalization of O&C requirement between another two parties to the agreement.

The Regulation not only guarantees freedom to provide services, but also facilitates cross-border establishment, thanks to common ownership and control rules.

The open skies judgments<sup>260</sup> clarified that a Member State were not entitled to maintain ownership and control rules excluding other Member States or their nationals. Many third countries have had since then accepted the renegotiation of the existing agreements to recognise the “EU designation” of an EU air carrier for the purposes of using traffic rights granted under the ASA. Ricardo AEA (2018) refers to ICAO figures that report for 2013, 114 third countries accepting that an EU air carrier can be owned and controlled by any Member State or national within the EU. There remain third countries which do not recognise the EU designation. The number of such countries is slowly declining, but some important 'hold-outs' remain, such as Russia or South Africa.

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<sup>258</sup> Case C-135/08 Rottmann.

<sup>259</sup> In its 2017 Citizenship Report, the Commission announced a report on national schemes granting EU citizenship to investors, describing the Commission's actions in this area, current national law and practices and providing some guidance for Member States. It is foreseen that this report will be published before the end of 2018.

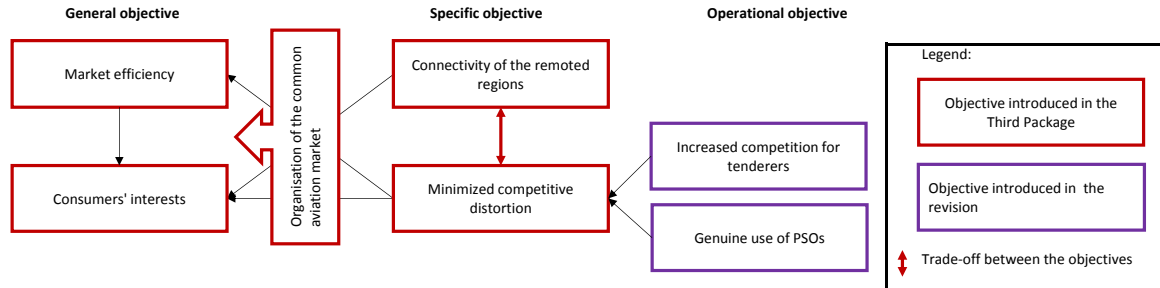
<sup>260</sup> E.g. Case C-471/98.



### 3. PROVISIONS ON PUBLIC SERVICE OBLIGATIONS

#### Objectives and provisions on the Public Service Obligations

*Figure 4-7: Policy objectives of Public Service Obligations*



*Source: Commission elaborations*

The concept of PSOs was introduced by the Third Package. A special provision was considered needed to allow Member States, under limited circumstances to maintain services on certain routes, namely in respect of services to an airport serving a peripheral or development region in their territory or on a thin route to any regional territory in their territory.

The main objective of PSOs **was establishing air links serving less developed peripheral regions** with low traffic demand where the actual and potential traffic volume in these routes would not justify a commercial service. This objective was carried out by the Air Services Regulation, which at the same time set as a second objective **to minimize the competitive distortions** of the market. These two objectives are not mutually supporting, but they counterbalance each other's' adverse effects. .

PSOs are an exception to the general principle of the freedom to provide air services within the EU.

Before the adoption of the revision of 2008, there was growing concern of an excessive, non-harmonised and market-distorting recourse to PSOs as the overall number of PSOs had increased significantly, but only ten Member States had imposed them. This led to the reduced effectiveness of the second specific objective. It was feared that those routes were being safeguarded against competitive forces in a counterproductive way and against the spirit of the deregulatory process itself. According to the findings of the Fitness Check, at the end of 2005, PSOs were imposed on 234 routes in the EU and access to four fifths of these was restricted to an air carrier selected by tender. In short, varying recourse to PSOs by the Member States had led to competition distortions and higher subsidization levels with significant country variations as to the average subsidy level per passenger. The tendency to impose ever more PSO routes increased the risk for travelling citizens to be confronted with monopolies and thus higher fares and reduced supply.

There was also broad agreement on the need to simplify the procedure for fulfilling PSOs and significant proportion of the air carriers that responded to the public consultation preceding the proposal found that there is a risk of distortion of competition in that area. At the same time, in cases where PSOs are necessary, the rules in force before the intervention did not always attract a sufficient number of competitors in the tender procedure (for example because the three year concession period was too short to write off route-specific equipment while the incumbent airline has already the equipment in place). By increasing the time frame

for PSO's (from three to four years and even five years for outermost regions<sup>261</sup>), the new rules aimed at increasing the chance of seeing more air carriers compete in the tenders for routes awarded to a single carrier. This was expected to reduce subsidy-levels and to avoid the potential market distortions when a single locally based air carrier can impose a higher than necessary subsidy level. It was expected that under the main baseline, these trends would have likely continued - as it actually did until 2013 (at the time of the Fitness Check). Without the Regulation, it is anticipated that the number of PSOs would have continued rising driven by the imposition of non-genuine PSOs as the Third Package did not introduce any restrictions. However, the development of other transport modes would have normally led to a reduction of the number of air PSOs over time.

### **Main baseline 2008 - 2017**

The revision aimed that with increased access to information on imposed PSOs – in particular, their justification and economic context – the Commission would be in a better position to monitor the correct application of Community legislation in this area and to limit excessive recourse to PSOs. The clarification of PSO rules and the avoidance of misuse were expected to promote competition on domestic routes where most PSOs are located. This should have resulted in lower fares and higher mobility levels for consumers. Air carriers were to benefit from the reduction of the competition distortions that exist when some air carriers receive public financing on routes where a PSO was not strictly necessary. Subsidy levels would also be reduced. The proposal would also lead to an administrative simplification for national and European authorities as only a very short notice is published in the EUOJ.

### **Implementation of provisions and state of play**

There are currently 178 PSO routes, so the number has decreased since the adoption of the Regulation (in 2013 there were 223 PSOs in place), but the big majority of these are so called closed routes (136, 76,4 %) with exclusivity and in almost all cases also with compensation. Currently 13 Member States (CY, CZ, EL, ES, ET, FI, FR, HR, IE, IT, PT, SE and UK) are using PSOs and only 8 MS (EL, ES, HR, IT, FR, PT, SE and UK) have 10 or more PSO routes and only 5 MS (EL, ES, FR, PT and UK) 20 or more routes. As to others, Czech has just conducted a successful tender for a new route between Brno and Munich; it was previously unsuccessful with two other routes. Cyprus only has one open route, Finland two and Ireland and Estonia both three thin closed routes. According to Ricardo AEA (2018), on average, 11% of all domestic flights in the EU are operated under a PSO and 3.9% of all intra-EU scheduled flights are operated under a PSO routes. The number of PSO has decreased in particular in Italy and France: in 2013 France had 58 and Italy 41 PSO routes and now they have 40 and 14 routes, respectively. The number of MS having them in place has remained stable (Croatia joined EU in 2013 and has 10 PSOs in place).

When comparing number of PSOs in EU-15 and EU-13 in 2017, based on data from DG MOVE and Eurocontrol, it can be concluded that PSOs are much more common in EU-15 (9 Member states with 161 routes) than in EU-13 (4 Member States with 17 routes). There is only one open PSO route in EU-13, the one linking Larnaca to Brussels.

Some Member State support very tight PSO networks, for example in 2017 in Croatia and Ireland all domestic flights operated all year round were on PSO routes. For Sweden there are 10 PSO routes out of 31 domestic routes, for Greece the corresponding figures are 28/84 and for Portugal 21/34), while the passenger share of PSO routes for example in Sweden is only less than 2 % of total domestic traffic.

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<sup>261</sup> Article 16.9 of the Air Services Regulation.

The number of PSOs are very likely to also be affected by a number of various factors, including competition by other transport modes. Also the general economic circumstances have had an important effect on the PSO conditions and the amounts paid as compensation, in particular in case of Greece.<sup>262</sup> In France the financing of PSO has been transferred to the regions and this has led to less availability of budget resources for financing PSOs.

As to the number of complaints against PSOs, the number has decreased from a few per year to none so far in 2018. Complaints normally originate from competitors whose tender was not successful or who consider that the tender specifications for a specific route were drafted in a way to favour a certain carrier. However, there have been also complaints concerning the necessity of a PSO on a certain route and on the whole PSO system as implemented in one Member State, based on large number of PSO routes and the amounts of compensations paid to the national carrier and its subsidiaries. The only case having so far led to adoption of Commission decision on Sardinia was already in 2007 before the adoption of the Regulation and it was based on investigation at the initiative of the Commission services.

The Commission adopted “Interpretative Guidelines on Regulation (EC) No 1008/2008 - Public Service Obligations (PSO)”<sup>263</sup> in 2017. The objective of these guidelines is to explain the Commission's interpretation of the criteria used in the Regulation and describe the applicable procedures to be followed. However, the targeted stakeholder consultation undertaken before the adoption of the guidelines revealed also issues that could only be addressed by a modification of relevant provisions. For example, the applicability of the so called emergency procedure to other situations than the bankruptcy of the carrier operating a closed route; allowing bundling of routes; criteria for assessing substitute airports; division of obligations on open PSO routes with more than one carrier; definition of selection criteria in tenders; the maximum length of the so called continuity guarantee; level of reasonable profit; ex-ante approval of the level of compensation; treatment of intruders on PSO routes.

The number of tenderers remain very low (often only the incumbent), with no difference between Member States. According to the information received from the Member States in the course of the monitoring, for the 127 routes currently awarded to a single carrier after tender, more than 60% were awarded after a tendering procedure with only one bid lodged. In 23 % of cases 2 bids and in 17 % of the cases 3 bids were lodged. According to the survey of national authorities carried out by Ricardo AEA (2018, five out of the 15 authorities responding indicated that the number of individual air carriers tendering for restricted PSOs remained the same (FR, SE, PL, IE, ES), whilst three authorities indicated that it increased (CZ, EL, PT). The survey of air carriers reveals that only two out of the 15 air carriers responding have participated in a call for tender; these are the same air carriers which have also indicated that they have operated air services under a restricted PSO since the adoption of the Regulation. As to nationality of the operating air carrier, according to the monitoring data in the cases of Ireland, Croatia, Italy, Spain, Portugal and Greece, only domestic carriers operated PSO routes in these countries in 2017. In contrast, both PSO routes in Finland are operated by non-domestic EU carriers. In total for only 12 PSO routes, the operator is coming from another Member States than the one having imposed the PSO.

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262 The total amount paid as compensation in Greece in 2017 was about 18,5 m€, while in 2015 at its highest it was 51,6 m€. It will go down to 8,4 m€ in 2018.

263 C(2017) 3712 final, 8.6.2017.

Overall levels of subsidisation have remained in essence unchanged.<sup>264</sup> Based on the information at the Commission disposal, the estimated total amount of PSO compensation paid to air carriers is about 300 million € annually, while the compensation paid per passenger travelled varies significantly, from less than 10 euros to hundreds of euros per trip. In the PSO case study carried out by Ricardo AEA (2018, the average subsidy indicated for France and Portugal was about 20 € per passenger, while for the Scottish PSO routes the same amount was about 60 €. PSOs typically – but not always - have provisions on maximum prices, in particular for residents.

There are many important criteria in the PSO provisions - like peripheral or development region, thin route and vitality for economic and social development – whose content is not defined at all.

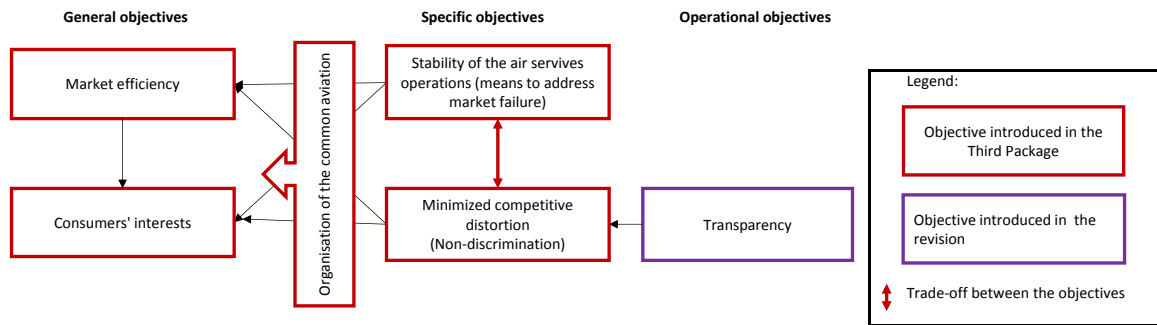
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<sup>264</sup> The findings from the survey of national authorities suggest that the average level of compensation per PSOs has remained largely the same for three of the 15 authorities responding (FR, PL, IE); for two other two authorities it increased (EE, SE) and for the remaining two it has decreased (EL, ES).

## 4. PROVISIONS ON TRAFFIC DISTRIBUTION

### Objectives and provisions on Traffic Distribution

*Figure 4-8: Policy objectives of Traffic Distribution requirements*



*Source: Commission elaborations*

Traffic distribution rules are an exception to the freedom to provide intra-EU air services as they may restrict EU air carriers' freedom to provide services to the airport of their choice.

The possibility for Member States to adopt TDRs was introduced by the Third Package for air transport planning purposes, but on the other hand the provisions aimed to **minimize the risk of competitive distortions and discrimination between air carriers**. For example, Member States adopted TDRs to address strains on airport capacity, or to push traffic to an underused airport and help it develop (Milan airports case). However, there was a risk that Member States could also use TDRs to favour their national carriers by providing them with privileged access to the most attractive airport. Therefore, the Third Package stated that the rules could not discriminate between air carriers on the basis of nationality or identity. These two objectives are not mutually supporting, but balance each other's adverse effects.

The Third Package required Member States to seek approval from the Commission to establish an airport system. Airport systems were already established before the adoption of the Third Package in Copenhagen, Berlin, Paris, Lyon, Rome, Milan, Venice and London. The airport system of Stockholm was added in 1995 with Sweden's accession to the EU. Only Germany had applied to the Commission to establish an airport system in Frankfurt in 2005, but no Commission decision was issued. Once Member States successfully established an airport system, they could adopt non-discriminatory traffic distribution rules based on objective criteria. Such rules were only reviewed by the Commission *ex-post*, either upon its own initiative, or upon request of a Member State.

The 2006 Impact Assessment concluded that this system led to competition distortions. First, it was not clear under which conditions Member States could establish an airport system. The term "conurbation" had not been clearly defined and this was liable to lead to inconsistent interpretation. Second, establishing an airport system had no effect other than to allow Member States to adopt traffic distribution rules. The Commission assessment regarding this step could by definition not consider the effects of any concrete traffic distribution rules as such, as the real source of competitive harm. The Commission was empowered to assess traffic distribution rules on request of a Member State or on its own initiative. However the adoption and application of such rules by a Member State was not subject to prior approval.

The revision aimed to increase market efficiency and reduce competition distortions by increasing the transparency in the process. It brought about a simplification of the rules and a requirement of prior Commission approval for the adoption of traffic distribution rules. The step consisting in the formal establishment of an “airport system” was removed. However, the possibility to introduce traffic distribution rules has been confined to airports responding to certain requirements, namely of those airports serving the same city or conurbation, being accessible through appropriate infrastructure and public transport and providing the necessary services. Any traffic distribution rules must be *transparent, non-discriminatory and proportionate* to the objective pursued. For the purposes of a Commission approval against the applicable criteria, Member States may notify the intended rules after consultation with interested parties.

### **Main baseline 2008 - 2017**

The use of TDRs was not widespread. Under the Third Package 9 airport systems were listed in its Annex. However, since the adoption of the Third Package only two Member States have imposed TDRs, France, and Italy. Still, the unclear provisions of the two-step procedure for Member States adopting TDRs could lead to Member States discriminating in favour of their national carrier leading to competition distortions, as described above.

### **Implementation after the adoption of the Regulation**

Since the adoption of the Regulation France and Italy have amended the traffic distribution rules for the airports serving the city of Paris, and airports serving the city of Milan respectively (initially rules were introduced under the Third Aviation Package). The Commission adopted a decision for Milan airports in 2015. The proposed rules lifted some of the existing restrictions at Linate airport, therefore in fact, liberalising traffic distribution.<sup>265</sup> However, the Commission rejected Italy’s rules for two reasons: a) Italy did not notify the rules to the Commission as it did not consider the amendments to constitute new traffic distribution rules, and b) because Italy had not consulted interested parties. Italy then offered interested parties an opportunity to comment and the Commission subsequently accepted the traffic distribution rules.

In 2016, the Commission approved traffic distribution rules proposed by France after consulting interested parties, that removed certain restrictions, which had been imposed at Paris Orly, and brought the rules applicable to non-EU traffic in line with intra-EU air traffic.

More recently, due to the cap of 500.000 movements at Schiphol airport, the Netherlands has been exploring the possibility of introducing traffic distribution rules for airports serving Amsterdam. It notified the Commission proposed traffic distribution rules a first time on 12 July 2018. After discussions with the Commission the Dutch authorities resubmitted a new notification on 29 March 2019.

The Commission over the years has noticed particularly strong opposition from air carriers to TDRs, where carriers are forced to release slots at well-connected airports and potentially hand them to competitors. Slots are essential for an air carrier to provide air services to/from coordinated (capacity constrained) airports. Especially at air carriers’ hub airports or well-connected airports, which suffer from capacity constraints, the slot portfolio which carriers

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<sup>265</sup> The rules removed the limit on frequencies that air carriers were limited to on certain routes according to the amount of passengers on the route. However, Linate airport is still limited to narrow-body point-to-point traffic.

have acquired, represent an important economic value. Air carriers forced to give up slots through TDRs at such well-connected, capacity constrained airports face an important economic loss without any opportunity for compensation.

**ANNEX 5: SUMMARY OF THE COSTS AND BENEFITS**

<i>I. Overview of costs identified in the evaluation</i>								
	Citizens/Consumers		Air carriers		Administrations		Crew members	
	Qualitative	Quantitative / monetary	Qualitative	Quantitative / monetary	Qualitative	Quantitative / monetary	Qualitative	Quantitative / monetary
<b>Total costs for 2008 – 2017 (inflation adjusted)</b>	<b>N/A</b>	<b>N/A</b>	Limited access to the capital from third-countries  Unequal opportunities in receiving OL and getting an approval for leasing in different Member States  Still existing competitive distortions on PSO routes	<b>118.32 EUR millions</b>	<b>N/A</b>	<b>40.42 EUR millions</b>	As unintended impact from the liberalisation the crew members face some deprivation in their working conditions following the multiplication of the operational bases of air carriers.	<b>Not quantifiable</b>



<i>Overview of benefits identified in the evaluation</i>								
	Citizens/Consumers		Air carriers		Administrations		Crew members	
	Qualitative	Quantitative / monetary	Qualitative	Quantitative / monetary	Qualitative	Quantitative / monetary	Qualitative	Quantitative / monetary
<b>Ongoing benefits for 2008 -2017 (inflation adjusted)</b>	Increase in the access to the air services; Decrease in air services prices Increased access to the information on the air services prices Insured connectivity with the remot regions Decreased level of air carriers bankruptcies (in particular of new carriers) More insured safety standards	<b>Not quantifiable</b>	New equal business opportunities in all EU/EEA countries (commercial freedom) Decreased level of air carriers bankruptcies (in particular of new carriers) More insured safety standards	<b>Not quantifiable</b>	<b>N/A</b>	<b>Not quantifiable</b>	More working opportunities due to the increase in the market	<b>Not quantifiable</b>

## **ANNEX 6: EVALUATION QUESTIONS**

The set of evaluation question was reviewed twice in the course of this evaluation. The first set of indicative evaluation questions was established in light of the publications of the evaluation roadmap in November 2016 and aimed at providing stakeholders with the Commission views on the main topics of the evaluation and getting their feedback with this regards. The list of these evaluation questions is presented in Section 1 of this Annex.

Following the stakeholder feedback and further research on the topic, the Commission services decided to assign part of the evaluation analysis to the external consultant. In order to ensure that all relevant policy areas were sufficiently covered by the intended support study, a new set of questions was established, which is presented in Section 2 of the Annex.

Finally, in light of the preparation of the evaluation SWD in order to ensure the better synthesis and transparency, the Commission prepared the final set of the evaluation questions. The final list of the evaluation questions is presented in Section 3 of this Annex.

### **1 ROADMAP EVALUATION QUESTIONS**

#### **Effectiveness:**

1. To what extent have the existing range of requirements and conditions for operating licence been successful in creating a level playing field, increasing market efficiency, improving the safety of air services and increasing consumer protection?
2. To what extent and how has the existing provision on ownership & control of EU carriers been successful in allowing the EU carriers to maintain their traffic rights?
3. To what extent have the existing provisions on freedom to operate intra-EU flights been successful in ensuring equal treatment of EU air carriers and creating a level playing field within the EU internal aviation market?
4. To what extent have the existing procedures for imposing public service obligations and regulating traffic distribution been successful in minimising competition distortions?
5. To what extent has the existing range of requirements and conditions in terms of pricing freedom and price transparency been successful in enhancing price competition and price transparency?
6. To what extent has the regulation contributed to improve the competitiveness of the aviation sector in general?

#### **Relevance:**

7. To what extent do the objectives address the problems and needs identified at the time?
8. To what extent are the original objectives and instruments still adequate in the current context and how do they still correspond to the current problems and needs of the mature internal aviation market?

#### **Efficiency:**

9. Were the costs incurred by EU air carriers, aviation authorities and national authorities as a result of the regulation reasonable in relation to the benefits?

10. Has the regulation resulted in regulatory burdens or inefficiencies? What were the reasons for this?

**Coherence:**

11. Are the requirements set in the regulation coherent with one another?
12. To what extent is the regulation in line with other EU interventions in the field (e.g. market access, air navigation services, ground handling services, slots, airport charges, safety, security, passenger rights, assistance to disabled persons and persons with reduced mobility, merger and State aid control, antitrust rules)?
13. To what extent is the regulation in line with wider EU policy (e.g. jobs, growth, trade, mobility, competition policy, a forward-looking Climate Change Policy)?

**EU added-value:**

14. What is the added value resulting from EU intervention in operation of air services compared to what could be done at national, or international level without such intervention?
15. What would be the most likely consequences of stopping or withdrawing existing EU intervention?

**2. EVALUATION QUESTIONS FOLLOWED IN THE COURSE OF THE SUPPORT STUDY**

**Effectiveness:**

1. To what extent have the operational objectives of the regulation (i.e. objectives of 2008 revision) been effective and have contributed to the achievement of the specific and general objectives? Have the relevant provisions been effective in addressing the underlying issues identified at the moment of the revision? What are the main drivers and hindrances to its effectiveness? Which different (external) factors have influenced the achievements observed? If there are significant differences in results between Member States (e.g. Eastern vs. Western Europe), please provide examples and explain in which ways and to what extent. Is there any evidence to suggest that there has been “rule shopping”<sup>266</sup> inside the EU regarding any of the provisions? If yes, in which ways and to what extent?
2. To what extent has the global legal framework (meaning the 1992 regulations and the Air Service Regulation) addressed the problems and needs identified at the time it was adopted? (When answering this question please consider the original problems and needs identified at the moment of adoption of the primary legislation feeding into the regulation). Which different (external) factors have influenced the achievements observed?
3. To what extent has the regulation contributed to the achievement of the objectives to increase the market efficiency, to improve the safety of air services and to increase consumer protection? Which different (external) factors have influenced the achievements observed?

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<sup>266</sup> For the purpose of this exercise this expression refers to the practice consisting in "shopping around" between different countries' rules, in order to deliberately exploit differences in the rules and/or their implementation in the Member States and choose the one that provides a more favourable treatment.

4. To what extent has the regulation contributed to improve the competitiveness of the EU aviation sector?
5. Which unexpected or unintended effects (positive or negative) have occurred as a result of the intervention and what factors have influenced those achievements? Please specify the effects for each, airlines, consumers, workers and enforcement authorities respectively.

**Efficiency:**

6. To what extent has the legislation been efficient? What are the regulatory costs and savings involved (i.e. substantial compliance costs/savings, enforcement costs/ savings and administrative costs/savings of monitoring and reporting arrangements) and are they distributed in a fair manner amongst all relevant actors and proportionate to the benefits achieved?
7. Has the regulation resulted in unnecessary regulatory burdens or inefficiencies? What are the reasons for this? Is there a potential for the reduction of the regulatory costs for the main actors?

**Relevance:**

8. To what extent are the objectives which were identified at the time of adoption still adequate in the current context and how do they still correspond to the problems and needs of the mature internal aviation market? Please take into account the technological, market, political and legal developments such as the emergence of new business models, new air services activities (drones or cost-shared flights) or the adoption of the Court of Justice of the European Union's cases as well as any other the consultant may identify.
9. Considering the technological, market, political and legal developments, to what extent is the existing range of provisions, requirements and conditions still relevant in the current context and how do they still correspond to the problems and needs of the mature internal aviation market?
10. Considering the market developments, including modern complex employment arrangements, to what extent does the scope and specific objectives of the regulation reflect the current social challenges of the aviation market?

**Coherence:**

11. To what extent are the requirements set in the regulation coherent and consistent with one another? If not entirely, what would be the differences, overlaps or contradictions or inconsistencies?
12. To what extent are the requirements set in the regulation coherent and consistent with other EU interventions under the air internal transport acquis? In particular, with ground handling services<sup>267</sup>, airport slots<sup>268</sup>, airport charges<sup>269</sup>, the proposal for the EASA basic regulation revision<sup>270</sup> as well as relevant legislation on safety, security,

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267 Council Directive 96/67/EC of 15 October 1996, OJ L 272, 25.10.1996, p. 36-45.

268 Council Regulation (EEC) No 95/93 of 18 January 1993, OJ L 14, 22.1.1993, p. -15.

269 Council Directive 2009/12/EC of 11 March 2009, OJ L 70, 14.3.2009, p. 11–16.

270 Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and

market access and air navigation services? If not entirely, what would be the differences, overlaps or contradictions or inconsistencies?

13. To what extent are the requirements set in the regulation coherent and consistent with the EU's external aviation policy, international (ICAO) rules and bilateral and multilateral air services agreements between the EU or its Member States and 3<sup>rd</sup> countries? If not entirely, what would be the differences, overlaps or contradictions or inconsistencies?
14. To what extent are the requirements set in the regulation coherent and consistent with the other EU's principles and policies, notably principles of freedom of establishment and provision of services, with EU competition policy, EU social and employment policy (see inter alia the Practice Guide referred to at footnote 10), EU consumer policy and relevant larger transport policy? If not entirely, what would be the differences, overlaps or contradictions or inconsistencies?

#### **EU added-value:**

15. What actual evidence can be found of the EU Regulation adding value, over and above what could reasonably have been expected from interventions of Member States or at international level?
16. What would be the most likely consequences of stopping or withdrawing existing EU intervention?

### **3. FINAL LIST OF THE EVALUATION QUESTIONS**

#### **Effectiveness:**

1. To what extent has the Air Services Regulation contributed to the achievement of the objectives to increase the market efficiency, to improve the safety of air services and to increase consumer protection? Which different (external) factors have influenced the achievements observed?
2. To what extent has the Air Services Regulation contributed to the achievement of the main policy objectives? To what extent has the revision of the legal framework in 2008 been effective and have contributed to the achievement of the objectives? Which (external) factors have influenced the achievements observed?
3. Which unexpected or unintended social, economic and environmental effects (positive or negative) have occurred as a result of the intervention and what factors have influenced those achievements? What are their consequences on different stakeholders?

#### **Efficiency:**

4. To what extent has the legislation been efficient? What are the regulatory costs and savings involved (i.e. substantial compliance costs/savings, enforcement costs/ savings and administrative costs/savings of monitoring and reporting arrangements)? Were the costs proportionate to the benefits achieved? Has the regulation resulted in unnecessary regulatory burdens or inefficiencies? Is there a potential for the reduction of the regulatory costs for any of the stakeholders group?

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repealing Regulation (EC) No 216/2008 of the European Parliament and of the Council COM/2015/0613 final - 2015/0277 (COD)

### **Relevance:**

5. To what extent are the objectives which were identified at the time of adoption still adequate in the current context and how do they still correspond to the problems and needs of the mature internal aviation market?
6. . Considering the technological, market, political and legal developments, to what extent is the existing range of provisions, requirements and conditions still relevant in the current context?
7. Considering the market developments, including modern complex employment arrangements, to what extent do the scope and specific objectives of the regulation reflect the current social challenges of the aviation market?

### **Coherence:**

8. To what extent are the requirements and objectives set in the regulation coherent and consistent with one another? If not entirely, what would be the differences, overlaps or contradictions or inconsistencies?
9. To what extent are the requirements set in the regulation coherent and consistent with other EU interventions under the air internal transport acquis? In particular, with ground handling services, airport slots, airport charges, the proposal for the EASA basic regulation revision as well as relevant legislation on safety, security, market access and air navigation services? If not entirely, what would be the differences, overlaps or contradictions or inconsistencies?
10. To what extent are the requirements set in the regulation coherent and consistent with the EU's external aviation policy, international (ICAO) rules and bilateral and multilateral air services agreements between the EU or its Member States and 3rd countries? If not entirely, what would be the differences, overlaps or contradictions or inconsistencies?
11. To what extent are the requirements set in the regulation coherent and consistent with the other EU's principles and policies, notably principles of freedom of establishment and provision of services, with EU competition policy, EU social and employment policy (see inter alia the Practice Guide), EU consumer policy and relevant larger transport policy? If not entirely, what would be the differences, overlaps or contradictions or inconsistencies?

### **EU added-value**

12. What actual evidence can be found of the EU Regulation adding value, over and above what could reasonably have been expected from interventions of Member States or at international level? What would be the most likely consequences of stopping or withdrawing existing EU intervention?

## ANNEX 7: AMENDMENTS TO THE AIR SERVICES REGULATION

### 1 CHANGES INTRODUCED BY REGULATION (EU) No 2018/1139 ON COMMON RULES IN THE FIELD OF CIVIL AVIATION AND ESTABLISHING A EUROPEAN UNION AVIATION SAFETY AGENCY INCLUDING ESSENTIAL REQUIREMENTS FOR UNMANNED AIRCRAFT, AMENDING REGULATION (EC) No 1008/2008 ON COMMON RULES FOR THE OPERATION OF AIR SERVICES IN THE COMMUNITY

Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community	Changes introduced by the EASA Basic Regulation
<p>Article 4 Conditions for granting an operating licence</p> <p>(b) it holds a valid AOC issued by a national authority of the same Member State whose competent licensing authority is responsible for granting, refusing, revoking or suspending the operating licence of the Community air carrier;</p>	<p>Article 134 - Amendments to Regulation (EC) No 1008/2008</p> <p>(1) in Article 4, point (b) is replaced by the following:</p> <p>(b) it holds a valid AOC issued in accordance with Regulation (EU) 2018/1139 of the European Parliament and of the Council either by a national authority of a Member State, by several national authorities of Member States acting jointly in accordance with Article 62(5) of that Regulation or by the European Union Aviation Safety Agency;</p>
<p>Article 6 Air operator certificate</p> <p>1. The granting and validity of an operating licence shall at any time be dependent upon the possession of a valid AOC specifying the activities covered by the operating licence.</p> <p>2. Any modification in the AOC of a Community air carrier shall be reflected, where appropriate, in its operating licence</p>	<p>(2) Article 6 is replaced by the following:</p> <p>Article 6 Air operator certificate</p> <p>1. The granting and validity of an operating licence shall be dependent on the possession of a valid AOC specifying the activities covered by that operating licence.</p> <p>2. Any modification to the AOC of a Community air carrier shall be reflected, where appropriate, in its operating licence.</p> <p>The authority competent for the AOC shall inform the competent licensing authority as soon as possible of any</p>

	<p>relevant proposed changes to the AOC.</p> <p>3. The authority competent for the AOC and the competent licensing authority shall agree measures to proactively exchange information relevant for the assessment and retention of the AOC and operating licence.</p> <p>That exchange may include, without being limited to, information relating to the financial, ownership or organisational arrangements of the Community air carrier which may affect the safety or solvency of its operations or which may assist the authority competent for the AOC in performing its oversight activities related to safety. Where information is provided in confidence, measures shall be put in place to ensure that the information is appropriately protected.</p> <p>3a. Where it is likely that enforcement action will be necessary, the authority competent for the AOC and the competent licensing authority shall consult each other as soon as possible prior to taking such action, and work together in seeking to resolve the issues before action is taken. Where action is taken, the authority competent for the AOC and the competent licensing authority shall notify each other as soon as possible that action has been taken.</p>
<p>Article 12 Registration</p> <p>1. Without prejudice to Article 13(3), aircraft used by a Community air carrier shall be registered, at the option of the Member State whose competent authority issues the operating licence, in its national register or within the Community.</p>	<p>(3) in Article 12, paragraph 1 is replaced by the following:</p> <p>1. Aircraft used by a Community air carrier shall be registered, at the option of the Member State whose competent authority issues the operating licence, either in its own national register or in the national register of another Member State. However, when used under a dry lease or</p>



	a wet lease agreement in accordance with Article 13, such aircraft may be registered in the national register either of any Member State or of a third country.
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**2 CHANGES INTRODUCED BY REGULATION 2019/2 (EU) AMENDING REGULATION (EC) NO 1008/2008 ON COMMON RULES FOR THE OPERATION OF AIR SERVICES IN THE COMMUNITY**

<b>Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community</b>	<b>Changes introduced by Regulation 2019/2</b>
<p>Article 13 Leasing</p> <p>3. (..)</p> <p>one of the following conditions is (b)fulfilled:</p> <p>(i)the Community air carrier justifies such leasing on the basis of exceptional needs, in which case an approval may be granted for a period of up to seven months that may be renewed once for a further period of up to seven months;</p> <p>(ii)the Community air carrier demonstrates that the leasing is necessary to satisfy seasonal capacity needs, which cannot reasonably be satisfied through leasing aircraft registered within the Community, in which case the approval may be renewed; or</p> <p>(iii)the Community air carrier demonstrates that the leasing is necessary to overcome operational difficulties and it is not possible or reasonable to lease aircraft registered within the Community, in which case the approval shall be of limited duration strictly necessary for overcoming the difficulties.</p>	<p>Article 1</p> <p>In point (b) of Article 13(3) of Regulation (EC) No 1008/2008, the introductory phrase is replaced by the following:</p> <p>‘unless otherwise provided for in an international agreement on wet-leasing signed by the Union which is based on an Air Transport Agreement to which the Union is a party and which was signed before 1 January 2008, one of the following conditions is fulfilled’</p> <p>(..)</p>

**ANNEX 8: OVERVIEW OF BUSINESS MODELS IN CIVIL AVIATION**

Since 2000, there has been a notable change in the structure of the aviation market, largely driven by the quickly growing low-cost carrier (LCC) segment<sup>271</sup> in combination with a decline of the flag full-service carrier share<sup>272</sup>. While in 2003, LCCs represented 14% of intra-European seat capacity, in 2008 the share reached 34% (Rozenberg, et al., 2014) and continued after 2008. By 2017 LCCs represented 40% of total seat capacity (Anna.aero, 2018).

Among the key differentiating features between LCC segment and flag full-service carriers is the adoption of a point-to-point services approach<sup>273</sup> most often using secondary airports, in contrast to the hub and spoke model<sup>274</sup> adopted by traditional carriers.

Features	Low fare airlines	Traditional carriers
Network	Point-to-point services	Network / hub and spoke
Airports	Secondary / regional airports	Primary airports
Bases	Multi-country bases	Home country hub
Interlining	No interlining	Interlining and code sharing
Utilisation	High aircraft utilisation / quick turnaround	Lower aircraft utilisation on short-haul flights
Fleet	Single aircraft type	Mixed fleets
Aircraft	High seat density	Mixed class cabin
Product bundling	Pay-for-service (e.g. checked baggage)	Inclusive service
Ticketing	One-way fares	Round trips are often cheaper
Ticket selling	Direct selling	Different channels (e.g. travel agents)

271 This business model is originally an air carrier without most of the traditional services provided in the fare, resulting in lower fares and fewer comforts. Recently, diversification of air carriers' offer has blurred the distinction with full-service or network carriers. Typically, these airlines enjoy a lower operating cost structure than their competitors.

272 Full-service carriers provide a wide range of pre-flight and onboard services, including different service classes, and connecting flights. They have higher level of fixed and operating costs to establish and maintain air services: labour, fuel, airplanes, engines, spares and parts, IT services and networks, airport equipment, airport handling services, sales distribution, catering, training, aviation insurance and other costs.

273 The point-to-point model operates direct flying between two cities. It is associated with low cost carrier business model. This model is the opposite of "hub-and-spoke", where passengers fly through a central hub to reach their final destination.

274 The essence of a hub-and-spoke network is that all destination airports ("spokes") are linked to each other via services into a central or a limited number of hub airport(s). This model allows an air carrier to be efficient by centralising its logistics and achieving economies of scale at the hub and thus saving costs. Passengers making hub connections arguably benefit from closely timed flights, single check-in, more convenient gate and facility locations, and reduced risk of lost baggage.

## **ANNEX 9: OVERVIEW OF CARBON OFFSETTING AND REDUCTION SCHEME FOR INTERNATIONAL AVIATION (CORSA)**

In October 2016, the 39th General Assembly of ICAO Contracting States adopted a Resolution aiming to introduce a global market based measure, namely the ‘Carbon Offsetting and Reduction Scheme for International Aviation’ (CORSA), to offset international aviation’s CO<sub>2</sub> emissions above 2020 levels through international credits.

Since the end of 2016, international experts have been working in ICAO on the technical elements necessary for CORSA’s implementation. In June 2018, the ICAO Council approved the associated Standards and Recommended Practices (SARPs). To date, work is continuing on the additional ‘Implementation Elements’, which notably include rules on eligible fuels and emission units that can be used to comply with CORSA offsetting requirements.

As of 5 November 2018, 76 States have officially notified ICAO that they intend to voluntarily participate in the pilot (2021-2023) and first phase (2024-2026) of CORSA, representing approximately 76% of international aviation activity in terms of Revenue Tonne Kilometres (RTKs).

Preceding the ICAO Assembly of October 2016, a declaration of intent was signed between Transport Commissioner Violeta Bulc and ICAO Secretary General Dr Fang Liu, announcing their intention to continue cooperation in addressing climate change, which included the implementation of CORSA. EASA and EUROCONTROL are also supporting the European Commission on the implementation of CORSA both within Europe and internationally.

What is the difference in operational terms between the EU ETS and CORSA? The EU Emissions Trading System (ETS) is a cap-and-trade system, which sets a limit on the number of emissions allowances issued, and thereby constrains the total amount of emissions of the sectors covered by the system. In the EU ETS, these comprise operators of stationary installations (heat and power as well as industry) and aircraft operators. The total number of emissions allowances is limited (‘capped’) and decreases over time, thus ensuring that the objective of an absolute reduction of the level of CO<sub>2</sub> emissions is met at the system level. In the case of the EU ETS, this is expected to lead to an economy-wide emissions reduction of 43% in 2030 compared to 2005 levels for the sectors covered by the ETS. The gradually more limited supply of allowances drives operators in need of additional allowances to buy them on the market from other sectors in the system – hence cap-and-trade. The need for additional allowances is determined by an operator’s free allocation of allowances and actual emissions. The supply and demand for allowances establishes their price under the ETS, and the higher the price, the stronger the incentive to reduce emissions. As of September 2018, EU Allowances for CO<sub>2</sub> emissions were being traded at over €20 per tonne.

The Carbon Offsetting and Reduction Scheme for International Aviation (CORSA) is an offsetting scheme. An offsetting scheme is a cost-effective solution for the aviation industry, as emissions reductions that cannot be achieved in the aviation sector can be compensated through emission reductions in other sectors where the potential for quicker reductions is greater and the associated costs are lower. This is based on the premise that greenhouse gas emission reductions benefit the climate irrespective of the sector in which they occur. The objective of CORSA is to reach Carbon Neutral Growth 2020 - that is, to ensure that the emissions from international aviation do not exceed the 2020 levels. To that end, aeroplane operators will be required to purchase offset credits in order to compensate for emissions exceeding the 2019-2020 baseline. These offsets, also known as emission units, will be made eligible under CORSA for purchase by aeroplane operators, provided that they comply with an established set of Emission Unit Criteria adopted at ICAO level. The eligible units

contribute to achieving emissions reduction in various sectors of the economy, such as renewable energy or waste management. Each offset credit represents the certification that a tonne of CO<sub>2</sub> has been reduced or avoided compared to a scenario without CORSIA, meaning that the reduction would not have occurred in the absence of the offset-generating activity.

It is worth noting that ETS allowances are not currently accepted under CORSIA, and international offset credits, including those deemed to be eligible under CORSIA, will not be accepted under the ETS as of 1 January 2021.

## ANNEX 10: ISSUES IDENTIFIED IN 2006 IMPACT ASSESSMENT AND THEIR DEVELOPMENT

### a. Developments linked to the main issues identified under the 2006 impact assessment

Area	Problems identified in the 2006 Impact Assessment	Development under 2008 revision baseline
<b>Intra-EEA air services (Freedom to provide services)</b>	<ul style="list-style-type: none"> <li>- Some Member States still granted national carriers price leadership for routes from their territory to third countries</li> <li>- Some Member States banned EU carriers from other Member States to combine flight numbers with third-country carriers</li> </ul> <p>=&gt; This led to distortions of competition and discrimination between EEA carriers based on nationality</p>	<p>It was expected that without the revision remaining provisions from old bilateral ASAs between Member States would create hurdles by divergent practices between Member States, especially with regard to code-sharing with third country carriers and price setting on 6th freedom routes. This would continue limiting the air carrier freedom to provide services and therefore economic benefits that citizens could reap from the liberalisation of external relations as the price and the choice of connections with third countries will depend on their place of departure in the European Union.</p>
<b>Granting and monitoring of operating licences</b>	<ul style="list-style-type: none"> <li>- Substantial differences were found across Member States with respect to the financial assessment required for the granting and revocation of licences. As a result the level playing field was not always ensured</li> <li>- The continued operation of financially unsound airlines might create safety risks, as these airlines did not always have the necessary means to ensure operations under optimal safety conditions. In addition to the safety risk, consumers were exposed more than necessary to the financial risk of being left with worthless tickets in case of an airline's bankruptcy</li> </ul>	<p>Without a more stringent and homogeneous application of procedures for granting and revoking operating licences, a high failure rate among market entrants was expected to continue with increasing risks to leave their passengers stranded. The precarious financial situation of newly established air carriers would also mean that employment in the airline sector would remain unstable, and therefore less attractive. The aviation market consolidation was expected to gradually happen, but at a slow rate, and leaving European air carriers ill-prepared to take on international competition. Persistent inconsistencies in applying the rules would have worsened competitive distortions.</p>
<b>Leasing</b>	<ul style="list-style-type: none"> <li>- The inconsistent application of rules governing the leasing of aircraft from third countries with crew has adverse social implications and causes distortions of competition</li> <li>- The safety assessment of leased aircraft from other Member States and third countries is not pursued with the same rigour, creating concerns about safety levels.</li> </ul>	<p>It could be expected that use of leasing agreements of third country aircraft with crew (wet-lease) would increase, while the safety supervision in these instances would not be fully assured leading to higher risks to the safety and decrease in consumer interests. Opportunities to avoid the social security and labour costs through widespread wet-leasing of third-country registered aircraft would have furthermore created competitive distortions in the internal market and undermined working conditions of airlines' staff.</p>
<b>Pricing</b>	<ul style="list-style-type: none"> <li>- The publication of fares that exclude taxes, charges and even fuel surcharges has become a widespread practice that hampers access to the final price information. Consumers are being misled by seemingly interesting fare offers and are only told the full fare at the moment of payment.</li> <li>- Carriers charged different fares depending on the place of residence of the consumer.</li> </ul>	<p>Level of passengers' awareness of prices was expected to further deteriorate given the confusion with respect to "all-inclusive" fares, fares "exclusive of taxes and charges" and the differences in national legislation concerning fare publication. Without the current regulation, Member States would have the possibility to control the prices; however it is fair to say that under current market conditions such price control would not be exercised but certain elements of price transparency that exist today (e.g. level of details of the final ticket price, non-discrimination</p>

Area	Problems identified in the 2006 Impact Assessment	Development under 2008 revision baseline
		in access to air fares, possibility of ineffective price comparison) would not be present, which could be detrimental to consumers. Although the Regulation is a <i>lex specialis</i> , horizontal consumer legislation <sup>275</sup> applies as a safety net. These legislations provide provisions - among others - that the tax inclusive final price of the product must be communicated to the consumer ahead of purchase, no surcharge can be collected for consumer credit or debit cards, the use of default options the consumer has to reject in order to avoid additional payments rather than requesting the consumer's express consent to extra payments, such as in the case of pre-ticked boxes on websites must be precluded, etc. Therefore the current horizontal and aviation specific rules complement each other which is beneficial to consumers <sup>276</sup> .
<b>Ownership and Control</b>	N/A	N/A
<b>Public service obligations (PSO)</b>	<ul style="list-style-type: none"> <li>- Excessive or non-harmonised recourse to public service obligations</li> <li>- Concern that PSO routes are being safeguarded against competitive forces in a counterproductive way and against the spirit of the deregulatory process itself</li> <li>- Low participation in the tender procedure</li> </ul>	The revision aimed that with increased access to information on imposed PSOs – in particular, their justification and economic context – the Commission would be in a better position to monitor the correct application of Community legislation in this area and to limit excessive recourse to PSOs. The clarification of PSO rules and the avoidance of misuse were expected to promote competition on domestic routes where most PSOs are located. This should have resulted in lower fares and higher mobility levels for consumers. Air carriers were to benefit from the reduction of the competition distortions that exist when some air carriers receive public financing on routes where a PSO was not strictly necessary. Subsidy levels would also be reduced and more efficiently applied. The proposal would also lead to an administrative simplification for national and European authorities as only a very short notice is published in the EUOJ.
<b>Distribution of traffic between airports</b>	<ul style="list-style-type: none"> <li>-Notion of airport systems gives too much room for interpretation and may create legal uncertainty</li> <li>- Risk that traffic distribution was operated in a non-homogeneous way across Member States and that in some cases traffic distribution was based on arbitrary criteria</li> </ul>	The use of TDRs was not widespread. Under the Third Package 9 airport systems were listed in its Annex. However, since the adoption of the Third Package only two Member States have imposed TDRs, France, and Italy. Still, the unclear provisions of the two-step procedure for Member States adopting TDRs could lead to Member States discriminate in favour of their national legacy carrier leading to competition distortions.

275 The Consumer Rights Directive, the Unfair Contract Terms Directive, the Unfair Commercial Practices Directive, the E-commerce Directive, The Payment Services Directive would cover air services and it is probable that non-discrimination rules would be applicable for some extent by the Geoblocking Regulation.

276 Only certain provisions of the Consumer Rights Directive apply to contracts for passenger transport services (namely article 8(2), Articles 19 and 22).

## b. Developments under the main policy area since the 2008 revision

Area	Main provision of the Third Package	Changes introduced by the 2008 revision	Implementation and main developments under the policy area
<b>Intra-EEA air services (Freedom to provide services)</b>	<ul style="list-style-type: none"> <li>- The application in the air transport sector of the principle of the freedom to provide services needs to take into account the specific characteristics of that sector</li> <li>- Abolish certain restrictions on the internal EU aviation market, allow air carriers to exercise traffic rights on routes within the EEA</li> </ul>	<ul style="list-style-type: none"> <li>- Removed restrictions on the free code-sharing and fare setting on routes to third countries</li> </ul>	<p>The responses of national authorities suggest that restrictions in bilateral ASAs between Member States on code sharing on services to third-countries have been removed.</p> <p>However, Member States may continue to impose restrictions in their bilateral ASAs with third countries on code-sharing if the third country does not provide reciprocity, to the extent that these do not restrict competition, and are proportionate and non-discriminatory between EU air carriers.</p>
<b>Granting and monitoring of operating licences</b>	<ul style="list-style-type: none"> <li>- Define non-discriminatory requirements in relation to the location and control of an air carrier applying for a licence</li> <li>- Transparent and common procedure</li> </ul>	<ul style="list-style-type: none"> <li>- Stricter conditions for submission and approval of financial accounts</li> <li>- More regular review of the air carrier meeting the requirements of the operating licence, especially for start-ups</li> <li>- Introduction of a clearer procedure for revocation of an operating licence and temporary licenses</li> <li>- Provision to ensure that the same Member State is</li> </ul>	<p>During 2009-2017, 524 operating licences were granted (out of which 197 are category A), 363 suspended (out of which 142 are category A licences) and 36 granted as temporary licences (out of which 26 are category A).</p> <p>The validity of the temporary license is limited in time, it cannot exceed 12 months, pending financial reorganization. Italy and Sweden made greater use of temporary licences. Other authorities rarely used them, and there are Member States such as Ireland and UK are reluctant to grant temporary licenses, as they consider that it can rapidly deteriorate the financial situation of the company.</p> <p>In relation to the financial monitoring requirements, Member States notify differences in the actual frequency of the reviews of the accounts and of more detailed evaluations.</p> <p>The total number of airlines that have ceased operations since 2008 has fluctuated considerably over the period, linked to a number of factors including periods of high fuel prices, increased price competition and the downturn in demand due to the global financial crisis.</p> <p>During 2017, three significant air carriers went bankrupt (i.e. Air Berlin (including NIKI), and Monarch) or into insolvency proceedings: the results have differed as national legislation applies and regulate a branch of market exit procedures.</p> <p>The establishment of multiple operating bases is more</p>

Area	Main provision of the Third Package	Changes introduced by the 2008 revision	Implementation and main developments under the policy area
		<p>responsible for AOC and operating licence</p> <ul style="list-style-type: none"> <li>- Definition of the principle place of business</li> </ul>	<p>connected to the low-cost carrier business model. Of the ten low-cost carriers on the table, the number of bases that they operate increased from 92 when the Regulation entered into force, to 228 in 2017.</p>
<b>Leasing</b>	<ul style="list-style-type: none"> <li>- Provides possibility to lease aircraft within and outside EU EEA subject to prior approval</li> <li>- Set of common requirements on prior approvals and leasing</li> <li>- Wet-leasing of non-EU aircraft is limited for a short term or in exceptional circumstances</li> </ul>	<ul style="list-style-type: none"> <li>- Stricter requirements for leasing agreements, especially for wet-leasing from non-EU air carriers</li> <li>- Simplification of provisions</li> </ul>	<p>An increase in the recourse to dry- and wet-leasing of both EEA and non-EEA aircraft can be observed. According to Flightglobal data, wet-leasing third country aircraft in particular has increased over the last three years, going from 22 in 2015, to 24 in 2016 and 59 in 2017.</p> <p>In terms of leasing requests and approvals, seven of the 16 surveyed Member States have adopted specific methods for verifying compliance with EU and national legislation.</p> <p>According to Ricardo AEA (2018), rejections of leasing requests is rather uncommon as among eight of the responding Member States, the percentage of leases approved between 2015 and 2017 varied between 75% and 100%. This is confirmed by the data from the survey of airlines since none of the 18 respondents out of 22 reported a request for leasing that has been rejected.</p>
<b>Pricing</b>	<ul style="list-style-type: none"> <li>- EU air carriers can freely set air fares.</li> <li>- Air carriers have to file fares with Member States and Member States could intervene if fares were excessively high or low.</li> </ul>	<ul style="list-style-type: none"> <li>- Transparency of fares information</li> <li>- Provisions for ensuring non-discriminatory fares with respect to place of residence</li> </ul>	<p>No issues related to the application of the principle of the pricing freedom itself have been observed and only a few cases where discrimination was questioned.<sup>277</sup></p> <p>The key concerns regarding price transparency rules are covered by five rulings of the CJEU.<sup>278</sup></p> <p>The 2013 CPC sweep exercise screened 552 websites offering travel services (air travel and accommodation) and found 69% breaching consumer law. The second biggest issue was about the optional nature of ancillary services linked to the flight (pre-ticked on the websites). Another Top5 issue was that consumers were not given the total price up-front when the main elements of the booking were first displayed (85% of issues identified in case of Online Travel Agents).</p>

<sup>277</sup> e.g. credit card number determining the nationality of the card holder not giving access to certain national markets, access to prices in Computerised Reservation Systems

<sup>278</sup>



Area	Main provision of the Third Package	Changes introduced by the 2008 revision	Implementation and main developments under the policy area
<b>Ownership and Control</b>	<ul style="list-style-type: none"> <li>- EEA air carrier needs to be majority owned (50% of the shares +1) and effectively controlled by EU Member States or their nationals.</li> <li>- Allowing EU nationals to own and control air carriers in any Member State, and that air carriers could freely establish operations in all Member States without discrimination based on nationality</li> </ul>	N/A	<p>Since the entering into force of the Regulation, no decision has been adopted by the Commission. The Commission has only adopted one decision regarding ownership and control, in 1995 (under the previous Regulation), in the case Sabena/Swissair. The Commission has performed 13 assessments, either as a result of a complaint or ex-officio, from 2008 to 2017.</p> <p>National competent authorities have introduced specific criteria for assessing compliance with the O&amp;C provision. According to Ricardo-AEA (2018), out of the 16 authorities that replied, 9 have introduced specific criteria: six of them have made these criteria public, while three only use them for internal purposes. Three authorities have developed their own national guidelines.</p> <p>In 2017 the Commission adopted Interpretative Guidelines<sup>279</sup> to provide further clarifications on the notions of ownership and effective control.</p>
<b>Public service obligations (PSO)</b>	<ul style="list-style-type: none"> <li>- Member States may grant PSOs under limited circumstances, for public service obligations necessary for the maintenance of adequate air services to national regions</li> </ul>	<ul style="list-style-type: none"> <li>- Clearer legislation, better description of the conditions attached to the Public Service Obligations.</li> <li>- Longer concession periods: 4 years instead of 3 (5 years in the case of ultra-peripheral regions)</li> <li>- Improvement of the Commission's information on the context of</li> </ul>	<p>There are currently 178 Public Service Obligation routes, so the number has decreased since the adoption of the 2008 revision, but the big majority of these are so called closed routes (76.4 %) with exclusivity and in almost all cases also with compensation. Currently 13 Member States are using PSOs.</p> <p>In 2017 the Commission adopted Interpretative Guidelines to explain the Commission's interpretation of the criteria used and describe the applicable procedures to be followed while applying the Public Service Obligations procedures.</p> <p>The number of tenderers is very low (often only the incumbent), with no difference between Member States. According to the information received from the Member States, for the 127 routes currently awarded to a single carrier after tender, more than 60% were awarded after a tendering procedure with only one bid lodged. In 23 % of cases 2 bids and in 17 % of the cases 3 bids were lodged.</p> <p>The estimated total amount of PSO compensation paid to air carriers is about EUR 300 million annually, while the compensation paid per passenger travelled varies significantly, from less than 10 euros to hundreds of euros</p>

<sup>279</sup> Commission Notice, Interpretative guidelines on Regulation (EC)1008/2008 - Rules on Ownership and Control of EU air carriers, Brussels, 8.6.2017 C(2017) 3711 final

Area	Main provision of the Third Package	Changes introduced by the 2008 revision	Implementation and main developments under the policy area
		Public Service Obligations impositions	per trip.
<b>Distribution of traffic between airports</b>	-Allow Member States to establish non-discriminatory rules for the distribution of air traffic between airports - The Commission could intervene where airport systems established by Member States did not satisfy the specified requirements	- Clear definition of the concept of conurbation and abandonment of the notion of airport system - Enhancement of Commission powers in this matter: prior approval for traffic distribution rules	Since the 2008 revision France and Italy have amended the traffic distribution rules for the airports serving the city of Paris, and airports serving the city of Milan respectively (initially rules were introduced under the Third Aviation Package). More recently, due to the cap of 500.000 movements at Schiphol airport, the Netherlands has been exploring the possibility of introducing traffic distribution rules for airports serving Amsterdam. It notified the Commission proposed traffic distribution rules on 12 July 2018.

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**ANNEX 12: TABLE POLICY TOPICS COVERED UNDER EVALUATION CRITERIA AND QUESTIONS**

Issues/ Criteria	Effectiveness		Efficiency	Relevance			Coherence				EU added value
	EQ1	EQ2	EQ3	EQ4	EQ5	EQ6	EQ7	EQ8	EQ9	EQ10	EQ11
<b>Freedom to provide intra-EU air services</b>	x	Covered at general level	Covered at general level	Covered at level of specific objective	x		Covered horizontally			x	x
<b>Operating licence including principal place of business</b>	x	Covered at general level	Covered at general level	Covered at level of specific objective	x	x	x	x			x
<b>Leasing</b>	x	Covered at general level	Covered at general level	Covered at level of specific objective	x	x	x	x	x		x
<b>Transparency concerning air carriers' pricing</b>	x	Covered at general level	Covered at general level	Covered at level of specific objective	x		x			x	x
<b>Ownership and Control of EU air carriers</b>	x	Covered at general level	Covered at general level	Covered at level of specific objective	x		x	x	x	x	x
<b>Public Service Obligations</b>	x	Covered at general level	Covered at general level	Covered at level of specific objective	x		x	x		x	x
<b>Traffic Distribution Rules</b>	x	Covered at general level	Covered at general level	Covered at level of specific objective	x		x	x			x