

REACHING FOR THE EUROPEAN SKY

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After finishing the process of liberalisation of air transport, the European Union has realised what benefits its air transport sector, carriers and economy could have if it would only spread its common aviation rules outside the borders of the EU.

In the first decade of the 21st century the EU has undergone a systematic revision of bilateral agreements which Member States have concluded with third countries in the air transport sector, but it has also made an interesting twist in its policy towards neighbouring countries. The idea of a common European sky, encompassing much more than the EU itself was incorporated in the 2006 European Common Aviation Area Agreement. The European Union (with its 27 Member States) and another eleven European non-EU countries have signed the agreement, obliging themselves to create a common aviation area based on mutual market access to the air transport markets of all contracting parties and on respect to the same rules in the areas of safety, security, air traffic management, social harmonisation and environment. Today, five years later, the Agreement is still not in force and in spite of that the non-EU parties are eagerly harmonising their laws with the EU acquis and pushing their way forward to become a part of the European Common Aviation Area.

Keywords: *air transport, liberalisation, open skies judgments, air service agreement (ASA), ECAA Agreement, Euro-Mediterranean Agreement, Republic of Croatia.*

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1 AIR TRANSPORT IN THE EUROPEAN UNION – GOING FROM NATIONAL TO GLOBAL

From the late 1980s onwards, each transport industry in the European Union (hereinafter: EU) – road, rail, aviation, maritime, and inland waterways – has undergone liberalisation through numerous legislative “packages” which aimed at harmonising legislation throughout every Member State and making transport sector part of the EU’s Single Market. Although that process was sometimes hard and lengthy, each transport mode having its particular difficulties, today we can finally say that the entire transport sector of the European Union is liberalised, its rules are harmonised and there are no obstacles to free trade and competition in the EU transport market.

But the story of liberalisation of the air transport sector is a particularly interesting one. After the Treaty of Rome was signed in 1957, little has changed in the air transport sector.¹ Namely, air transport, along with sea transport, was treated differently from the rest of the transport sectors, primarily due to the political (un)willingness for change. Therefore, EU legislation for these two sectors was decided to be laid down later, without any notion for following the basic principles of the common market. With years and changes to come, air transport developed, and as the EU strengthened, it slowly began to accept liberalisation.² Opening of the air transport market within the EU was going very gradually, through three liberalisation packages which were enacted and entered into force between 1987 and 1992. Aside from bringing new sets of rules in the air transport sector as a whole, liberalisation also meant the application of EU competition rules in that sector. The most important package among these was the third one, which basically established an “open sky” regime within the EU. The package consists of three regulations which enable Community air carriers to carry traffic on any route within the EU, in any chosen capacity, as well as allow the freedom of pricing with some rules set for preventing excessive or predatory pricing.³ It is important to stress that the third package has set the

¹ See: [http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf\(17/6/2011\)](http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf(17/6/2011)).

² For more details on the role of European Union’s institutions and the position of certain Member States in the liberalisation process of air transport sector see in: Radionov, N., Marin, J. *et al.*, *Europsko prometno pravo (European Transport Law)*, Zagreb, 2011, Chapter VII - Savić, I., *Zračni promet (Air Transport)*, pp. 349-354.

³ Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers, [1992] OJ L 240, p. 1–7; Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-community air routes, [1992] OJ L 240, p. 8–14; and Council Regulation (EEC) 2409/92 of 23 July 1992 on fares and rates for air services, [1992] OJ L 240, pp. 15–17.

rules for licensing and certification of air carriers. After being granted the operating licence, Community carriers are free to operate anywhere in the EU without having to be designated by the government of their licensing state, as they were in the past. The cabotage rights were left to come into effect in 1997.⁴

At the end of the liberalisation process, thousands of regulations and directives were enacted – regulating legal, technical, fiscal and social questions - forming a huge *acquis communautaire* in the air transport sector. All of these rules applied exclusively to traffic within the EU; every other traffic was regulated by bilateral agreements signed between Member States and third countries. This situation slowly started to change with the creation of the “Single European Sky” initiative, which provided a regulatory framework to combine future safety, capacity and efficiency needs in air transport at the European level. Although the European Commission showed the ambition to overtake responsibilities in negotiating several areas of aviation agreements on the Community level already in the 1990s, it was not before 2003 that it finally received a green light to do so.⁵

1.1 *Open skies* judgments – a step closer towards common external aviation policy

The biggest transformation regarding external relations in the EU air transport happened in 2002. In November that year, the European Court of Justice (hereinafter: ECJ) brought judgments by which it declared *open skies* agreements between the USA and eight EU Member States contrary to Community law because of their discriminatory, distortive and destabilizing effect on the Community market (hereinafter: *open skies* judgments).⁶ Namely, the Court declared one of the basic principles of *open skies* agreements, the so-called “nationality clause”, which prescribes that

⁴ Cabotage or ninth freedom of the air is “the right or privilege of transporting cabotage traffic of the granting State on a service performed entirely within the territory of the granting State (also known as a “stand alone” cabotage).” See: Manual on the Regulation of International Air Transport (Doc 9626, Part 4), International Civil Aviation Organization, 2004.

⁵ See: Proposal for a Council Decision on a consultation and authorization procedure for agreements concerning commercial aviation relations between Member States and third countries, COM(90) 17 and Communication from the Commission to the Council, Air Transport Relations with Third Countries, COM (92) 434.

⁶ Judgment of the Court of 5 November 2002, cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475-98, C-476-98 (Commission of the European Communities v United Kingdom, Kingdom of Denmark, Kingdom of Sweden, Republic of Finland, Kingdom of Belgium, Grand Duchy of Luxemburg, Republic of Austria and Federal Republic of Germany), [2002] OJ C 323, p.1-8. Analysis of *open skies* judgments see in: Radionov, N.; Marin, J., *supra* note 2, at 409.

only carriers owned and effectively controlled by the signatory Member State (or its nationals) can be designated in a particular agreement, contrary to the EC Treaty. In accordance with the Treaty and the air transport *acquis*, every Member State has to allow market access and operations on agreed routes with third countries to every Community carrier established in that EU Member State, regardless of the ownership. Every other practice is discriminatory and therefore not allowed. In addition, the ECJ recognised the existing common rules in the air transport sector – i.e. those rules regulating fares and rates (Regulation 2409/92), computer reservation system (Regulation 2289/89), and slots (Regulation 95/93) – to give Community (i.e. EU) the exclusive competence to enter into relations with third countries in the spheres covered by those acts. Furthermore, the Court generally said that all other internal legislative acts whose provisions relate to the treatment of the nationals of non-member countries (or expressly confer on its institutions powers to negotiate with non-member countries), acquire Community exclusive external competence in those areas.⁷

Soon after the *open skies* judgments, in 2003, the Council gave the Commission the “horizontal mandate” to negotiate a few standard clauses in the already existing air service agreements (hereinafter: ASAs) between the Member States and third countries.⁸ In order to achieve harmonisation, in 2004 the Council adopted Regulation 847/2004 on the negotiation and implementation of air service agreements between Member States and third countries.⁹ Regulation 847/2004 has established ways of cooperation between the Member States and the EU through the exchange of information about conclusion of or amendments to the ASAs, to keep them in line with the *acquis*. Since the *open skies* judgements reaffirmed the exclusive Community competence in certain aspects of these agreements, it became necessary to amend or replace all existing agreements which contained provisions contrary to the EU law. Given the number of these agreements, Member States were authorised to negotiate a new ASA with a third country, or modify the existing one, provided that the EU has not decided to exercise its right to, and based on the principle of subsidiarity - negotiate with the third country directly. If a Member State chooses to conduct the negotiations on its own, it is required to notify the Commission about that and to implement relevant standard clauses developed jointly between the Member States and the Commission, in order to achieve compliance with Community law. This

⁷ Case C-476/98 *Commission v Germany*, [2002] ECR I-9855, par. 109.

⁸ The Commission also gained the so-called “vertical mandate” for negotiating air transport agreement with the USA.

⁹ Regulation (EC) 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries, [2004] OJ L 157, pp. 7-17.

means that Member States can enter into negotiations on ASAs as long as they comply with the Community principles contained in agreed standard clauses and meet the terms of provisions on notification set in Regulation 847/2004. In this manner, the Commission remains “privileged” in obtaining its external policy rights and in control over the Member States.

1.2 EU air transport going beyond EU borders

Today the EU openly admits that one of its important objectives of external policy is “*to facilitate the spread of the Union’s policies, such as the internal market principles and rules, to the neighbouring countries*”.¹⁰ Both Partnership and Cooperation and Association Agreements concluded with the countries participating in the European Neighbourhood Policy (hereinafter: ENP) contain provisions on legislative and regulatory approximation over a broad area. When it comes to transport, the EU asks from its trade partners legislative and technical compatibility with EU’s rules and infrastructure.¹¹ Under the disguise of regional cooperation and integration or stimulation of international trade, the EU imposes its rules and policies to the non-EU countries and strengthens its position and the Member States’ development in the global field. Many non-EU, especially poorer, neighbouring countries share common interests and concerns with the EU Member States, which makes it easier for the EU to carry out this kind of policy.

Under the trans-European transport policy (hereinafter: TEN-T policy), the EU proposes horizontal measures which aim at “gradually approximating the neighbouring countries’ legislation and policies with the relevant *acquis communautaire*”.¹² The origin of this approach is contained in the ENP, which calls for “a high degree of alignment” with the EU standards as “a key element” of the EU/ENP relations.¹³ TEN-T measures concern all transport modes and include different kinds of rules and regulations necessary for the total integration of the third countries’ transport

¹⁰ Communication from the Commission to the Council and the European Parliament - Extension of the major trans-European transport axes to the neighbouring countries, Guidelines for transport in Europe and neighbouring regions, COM (2007)32 final, Brussels, 31/1/2007, at 3 [hereinafter: 2007 Communication].

¹¹ *Ibid.*

¹² *Id.*, at 8.

¹³ Non-paper, Expanding on The Proposals Contained in the Communication to the European Parliament and the Council on “Strengthening the ENP” – COM (2006) 726 final, 4 December 2006, ENP – A Path towards Further Economic Integration (not published), at 6.

networks into the EU transport sector.¹⁴ The TEN-T policy becomes ever more integrated into the EU common transport policy.

When talking about aviation in particular, the EU has a few different approaches in negotiating the policy towards its neighbours. “The neighbourhood” stands here for countries which are situated along the eastern and southern EU borders, and even beyond the European continent. This includes countries which aim to become EU members (they do or will take part in the Stabilisation and Accession Process), but also many other countries that - based on geographical, cultural and political status - form an area towards which the EU is developing a certain external policy, such as the Mediterranean countries which participate in the so-called Euro-Mediterranean Partnership (hereinafter: EUROMED).¹⁵ Therefore, apart from the process of harmonising certain rules in the existing horizontal agreements, the EU creates policies specifically directed towards these larger groups of countries (e.g. the Western Balkans, the Mediterranean countries, etc.). This approach looks for certain models of aviation agreements that can be used as basis for creating “common aviation areas” within those geographical regions. In developing the external aviation policy towards countries in those regions, the Commission has come up with two agreement-models:

- European Common Aviation Area Agreement (ECAA Agreement)
- Euro-Mediterranean Aviation Agreement

The ECAA Agreement is based on the single aviation market model. Countries which could come under this model of agreement with the EU include the Western

¹⁴ “[T]hey...include, among others:

- Ensuring technical, legal and administrative interoperability with systems in the EU as regards e.g. railway networks, signalling systems, infrastructure charging schemes.
- Speeding up border crossing procedures by implementing without delay the relevant international conventions, as already adopted in the EU, by introducing “one-stop” offices through shared facilities, simplification and harmonisation of trade and transport related documentation in line with the EU practice.
- Implementation of new technologies like traffic management and information systems in all modes (notably ERTMS12 and SESAR13), including satellite navigation (Galileo), that are effective and compatible with those implemented in the EU territory.
- Measures to improve safety and security and working conditions in all transport modes, e.g. through harmonisation of standards and procedures at the highest level of performance.
- Application of international conventions, social and environmental impact assessment, public procurement procedures etc. in accordance with the EU standards, donors’ funding rules and best international practice.” 2007 Communication, at 9.

¹⁵ EUROMED started off as Barcelona process which represented the EU policy towards the Mediterranean countries as set in Barcelona declaration signed in November 1995. Since the re-launch in 2008 it is based on cooperation (association) agreements between EU and its 16 neighbours in North Africa and Middle East which evolved in the Union for the Mediterranean (UfM). For more details see: <http://eeas.europa.eu/euromed> (20/8/2011).

Balkans, but also other European countries which are part of pan-European aviation cooperation.¹⁶ The other one, Euro-Mediterranean Aviation Agreement, is a form of agreement designed for countries which participate in EUROMED. Although this type of agreement does not offer partner countries the same benefits other countries enjoy under single aviation market model/ECAA model, it still uses the EU air transport *acquis* as the basic frame for the aviation agreement, which provides regulatory harmonisation of certain aspects of air transport and market opening between the EU and each respective country.

The first Euro-Mediterranean agreement in air transport was signed with Morocco in December 2006.¹⁷ By signing that agreement the EU integrated a country from a whole new region to its common aviation market. In December 2010 the EU signed a similar agreement with the Kingdom of Jordan.¹⁸ On the basis of the “Moroccan contract-model”, the EU will negotiate air transport agreements with Algeria, Israel and Tunisia.¹⁹ At the same time, the Commission negotiates similar agreements with Lebanon and Ukraine, and has proposed a mandate to negotiate with Moldova. In its 2011 Communication, the Commission reaffirmed its readiness to propose the negotiation of similar agreements with other neighbouring countries, should they show interest.²⁰ This clearly proves the EU plan for creating the Common Aviation Area in a broader geographical area.

Although the EU pursues the development of the (European) Common Aviation Area with more than one group of countries at the same time and under different

¹⁶ Pan-European cooperation first and foremost encompasses countries who are members of European Civil Aviation Conference (ECAC), Joint Aviation Authority (hereinafter: JAA) and The European Organisation for the Safety of Air Navigation (EUROCONTROL).

¹⁷ Euro-Mediterranean aviation agreement between the European Community and its Member States, of the one part and the Kingdom of Morocco, of the other part, 29.12.2006, OJ L 386, pp. 57-88.

¹⁸ Europa Press Releases, EU and Jordan sign air transport agreement, IP/10/1723, 15/12/2010; Decision of the Council and of the Representatives of the governments of the Member States, meeting within the Council of 15 October 2010 on the signature and provisional application of the Euro Mediterranean Aviation Agreement between the European Union and its Member States, of the one part, and The Hashemite Kingdom of Jordan, of the other part (2011/181/EU), [2011] OJ L 79, pp. 1-2.

¹⁹ Commission requested negotiation mandates for Euro-Mediterranean aviation agreements with those three countries in 2008. See: Communication from the Commission, Developing a Common Aviation Area with Israel, 9/11/2007, COM(2007) 691 final; Communication from the Commission, Creation of a Common Aviation Area with Algeria, 31/10/2008, COM(2008) 682 final; and Communication from the Commission, Creation of a Common Aviation Area with Tunisia, 3/10/2008, COM(2008) 603 final. Commission has gained those mandates and negotiations with Israel and Tunisia are already under way.

²⁰ Communication from the Commission to the Council and the European Parliament, The EU and its neighbouring regions: A renewed approach to transport cooperation, 7/7/2011, COM(2011) 415 final, at 4 [hereinafter: 2011 Communication].

policies, we assume that the ECAA Agreement could be used as the basis for the establishment of a future, unified, *single* pan-European air transport market.²¹ It is hard to predict whether the EU aims at making those Euro-Mediterranean countries new parties to the ECAA at some later point, but there are indications for such a scenario in these words of the Commission: “*It would not be desirable for the Community’s ambition to be limited to developing a web of different relations with the neighbouring countries. (...) It is therefore advisable that (...) the negotiations with neighbouring countries should lead to a measure of coherence. In the longer term (...) the individual agreements between those countries and the Community could be merged.*”²² In its latest 2011 Communication, the Commission confirmed its long-term plan under which all regions and the EU would be integrated into a single ECAA.²³

With implementing this concept, European traffic flows and EU transport market are being brought to a whole new level, which can – and in most cases will – induce legislative changes in the non-EU countries (candidate and potential candidate countries, as well as other non-EU countries). But consequences of these changes are much wider – countries are going through a kind of transformation, changing not only their policies and institutions but also undergoing economic, political and social changes.²⁴ Understandably, in the background of that policy is the EU’s ambition to gain potentially major financial benefits and to uplift its position in the wider pan-European region. Taking into account that traffic volumes between the EU and neighbouring countries are expected to grow by 100% between 2000 and 2020, it is needless to question the nature of the EU interests.²⁵ Besides that, for its big economical contribution, air transport is here perceived as the most important transport mode.²⁶ At the same time,

21 European Commission suggests that EU’s ultimate objective should be establishment of a single pan-European air transport market, based on a common set of rules and encompassing up to 60 countries with approximately one billion inhabitants. See Communication from the Commission, Common Aviation Area with the Neighbouring Countries by 2010 – Progress Report, COM (2008) 596 final, at 2 [hereinafter: 2008 Progress Report].

22 2008 Progress Report, at 6.

23 See 2011 Communication, at 4.

24 Magen, A., Transformative Engagement Through Law: The Acquis Communautaire as an Instrument of EU External Influence, *Journal of Law Reform*, 9(3) 2007, at 375.

25 Statistics from the Report from the High Level Group chaired by Loyola de Palacio, European Commission, November 2005, at 19.

26 In Europe the current direct and indirect contribution to GDP is about €275 billion yearly, employing 4.5 million people. (...) Air transport provides fast, efficient access to markets and stimulates international trade: 35% -by value- of the trade in global manufactured goods is transported by air, 40% of high-tech sales are dependent on high quality transport links. (...) Air transport is also the main vehicle of tourism in Europe, generating receipts of €865 million per day, contributing 3.8% of GDP and providing employment for 11.5 million people:“ See: Europe needs a competitive aviation industry: AEA’s Action Plan 2010-2014, Association of European Airlines, 29/3/2010.

one has to be aware of the EU dominance in the region and its well-planned foreign policy towards the neighbours.

2 DEVELOPING EUROPEAN COMMON AVIATION AREA

2.1 Bilateral agreements vs. common aviation policy

Prior to the liberalisation of air transport, scheduled air services were usually defined in bilateral air service agreements. The so-called “Bermuda agreement”, an air services agreement between the USA and the United Kingdom signed in 1946, established the basis for all future ASAs. During the first decades after the World War II, this standard agreement was the usual way in which different needs and interests of two countries were agreed on. According to ASAs, countries would, based on reciprocity, grant each other traffic rights with specified routes, capacity, frequencies, tariffs and timetables. The question of frequencies, routes and aircraft types was usually set in the Annex to the agreement and was subject to occasional changes. If agreed, fifth freedom was also part of the Annex.²⁷ Every country would designate a carrier who would be entitled to exercise the agreed ASA rights and the carrier was always a state-owned national carrier (flag carrier).²⁸

Creating common transport policy towards third countries after finishing the liberalisation process meant that air traffic market would be opening in the same, unified manner for all EU Members, thus giving the same rights to all Community air carriers. As we mentioned before, since 2003 the Commission has been the one having the mandate to negotiate a few standard clauses in the already existing air service agreements between all Member States and third countries. To achieve that goal, the following issues were openly recognised as subject of the EU’s exclusive jurisdiction: computer reservation system (CRS), intra-Community tariffs and allocation of slots. Not only did this kind of approach expand the Community air law beyond its borders, but it also enabled the Community air carriers to compete more effectively in the world market.

The beginning of the idea of the Common Aviation Area can already be seen in the European Economic Area Agreement, signed in 1993, which allows Iceland,

²⁷ Fifth freedom of the air is “the right or privilege, in respect of scheduled international air services, granted by one State to another State to put down and to take on, in the territory of the first State, traffic coming from or destined to a third State”. ICAO Manual, *supra* note 4.

²⁸ It is possible to designate one or more carriers, as well as indirectly designating a carrier through the code-share agreement.

Liechtenstein and Norway to participate equally, among other things, in the EU internal air transport market. The same principle was applied in the Air Transport Agreement signed between the EU and Switzerland in 2002.²⁹ Soon after that, the Commission started laying down different modes of connecting with various countries, taking into consideration their differences. As for the countries of the Western Balkans, and given the fact that the EU is the most important trade partner for each of them, reaching a Common Aviation Area agreement seemed as a logical step in the direction of creating this “common area” by 2010.³⁰ As the Commission pointed out in one of its Progress Reports, this kind of agreement, “*by allowing full participation in one of the key areas of the single market, provides an example and an incentive for further economic integration of the partner country with the EU*”.³¹

2.2 The ECAA Agreement

2.2.1 Introduction to the ECAA Agreement

Roots of the ECAA date back in the late 1990’s, when in October 1996 the Commission was granted a mandate by the Council to negotiate an agreement with ten EU candidate countries at the time, along with Iceland and Norway. The goal of that agreement was the creation of the Common Aviation Area which would function on the same principles as the EU internal aviation market. It means that the same provisions would apply for all signatories in terms of market access, capacity, freedom of establishment, as well as safety, security and air traffic management (hereinafter: ATM). However, due to the imminent accession of those countries to the EU, the negotiations were stopped and the idea of broadening the Common Aviation Area was set aside for a while. After reaffirming the EU common aviation market, the next desired step was to move its borders outside the EU, and the logical choice for negotiations were the Western Balkan countries. Therefore, the Transport Council gave the Commission another mandate in December 2004 to negotiate the ECAA Agreement with eight Western Balkan countries (Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the Former Yugoslav Republic of Macedonia, Romania, Serbia and Montenegro and the United Nations Mission in Kosovo). The agreement was

²⁹ Agreement between the European Community and the Swiss Confederation on Air Transport, [2002] OJ L 114, pp. 73-86.

³⁰ Communication from the Commission, Developing the Agenda for the Community’s external aviation policy, COM(2005) 79 final, at 8.

³¹ 2008 Progress Report, at 2.

signed in Luxembourg on June 9th, 2006.³² It is the first multilateral transport agreement the EU has signed with the non-EU countries.

The single aviation market created by the ECAA Agreement was not only going to bring economic benefits to the region but also prepare the ECAA partners for the accession to the EU. The economic position of those eleven countries and the quality of relations the EU had with them was different; two of them were parties to the European Economic Area (Iceland and Norway) and the other two became in the meantime full members of the EU (Bulgaria and Romania).³³ The rest of them are still seeking their way into the EU (Croatia and Macedonia as candidates, and Albania, Bosnia and Herzegovina, Montenegro, Serbia and Kosovo as potential candidate countries).

In comparison to the one that had first been negotiated with the initial ten countries (in late 1990s), this agreement was somewhat narrowed, due to the fact that the Stabilisation and Accession process had already been established; hence, some of the issues (e.g. competition) were now being regulated by the Stabilisation and Accession Agreements between the EU and each respective country.

2.2.2 The structure of the ECAA Agreement

The structure of the ECAA Agreement is rather interesting. Formally, the Agreement consists of the Main Agreement and five Annexes to the Agreement. However, practically we can distinguish two different parts of the ECAA Agreement:

1. The multilateral part, which is obligatory for all signatories, and
2. Nine protocols which contain bilateral agreements between the EU and each Associated Party.

This kind of structure reflects the need for gradual approach created for every non-EU country, having in mind their specific positions and needs. Protocols set conditions Parties have to fulfil in each transitional period before being fully included in the ECAA.

The multilateral part of the Agreement consists of the Main Agreement and four Annexes. Annex I lists the complete EU legislation applicable to civil aviation which is to be implemented in the transitional period. Sometimes countries

³² Multilateral Agreement between the European Community and its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on the establishment of a European Common Aviation Area, 16.10.2006, OJ L 285, pp.1-46.

³³ Article 5 of the ECAA Agreement prescribes that its provisions shall not affect the relations between the Contracting Parties of the EEA Agreement.

will be obliged to implement a whole regulation or directive, other times Annex I will specifically point out which articles are to be transposed to national legislation. The complete scope of changes that the ECAA Agreement brings to the countries of the Western Balkans is extremely wide: the EU legislation contained in Annex I is divided into several groups, not all of them being strictly related to air transport. Besides the subject of market access, ATM, aviation safety and security, there are also regulations and directives which refer to specific issues of environmental protection, social aspects, consumer protection and other aviation issues that need to be implemented in order to create a single aviation market. The remaining three Annexes regulate many different issues which are of importance for the proper implementation and functioning of the ECAA Agreement. Therefore, Annex II sets rules regarding the introductory parts and specific terminology of the EU acts, and certain procedural rules for cooperation and exchange of information; Annex III specifies the rules on competition and state aid referred to in the Main agreement; and Annex IV regulates a very important issue on the preliminary rulings procedure before the ECJ and the application of interpretations ruled by the ECJ in courts of a contracting party (especially when they concern provisions of the ECAA Agreement), as well as the rules for the dispute settlement procedure between the contracting parties when referred to the ECJ. Finally, the second part of the Agreement is Annex V, which contains nine Protocols between the EU and each Associated Party.³⁴

The process of creating a single aviation area with every Associated Party is divided into two phases, both of which end upon the positive assessment by the authorised Assessment Visit Team. Although one of the Commission's important goals was for all the Associated Parties of the ECAA Agreement to enter the second phase by the end of 2009, this was not achieved.³⁵ Every phase of the ECAA Agreement brings Associated Parties closer to the goal of the agreement - achieving and becoming part of common aviation area. Upon Agreement's entry into force, third and fourth freedoms are immediately liberalised.³⁶ This means that in order to be able to

³⁴ "The term "Associated Party" means the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Montenegro, Romania, the Republic of Serbia, or any other State or entity that shall have become a party to this Agreement pursuant to Article 32." (Art. 2.1.(b) ECAA Agreement).

³⁵ By the end of 2009 only Croatia has fulfilled all requirements for closing the first phase.

³⁶ Third freedom of the air: "the right or privilege, in respect of scheduled international air services, granted by one State to another State to put down, in the territory of the first State, traffic coming from the home State of the carrier"; Fourth freedom of the air: "the right or privilege, in respect of scheduled international air services, granted by one State to another State to take on, in the territory of the first State, traffic destined for the home State of the carrier." ICAO Manual, *supra* note 4.

fly from one ECAA country to another, the carrier no longer needs the authorisation from the civil aviation authority of the destination country. A simple notification would suffice.

One of the first phase requirements are the following: obtaining a membership in JAA; implementing the regulations on accident investigation and occurrence reporting, and the regulation on passenger rights in case of denied boarding or cancelled flight; ratifying the 1999 Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention); establishing Functional Airspace Blocks (FABs); opening of the groundhandling market, etc.³⁷ After the disbandment of JAA, ECAA partners are invited to participate as observers at the European Air Safety Agency (EASA) meetings.³⁸ Once the Associated Party satisfies those requirements and enters into the second phase, rules on ownership and control will become liberalised and its carriers will enjoy fifth freedom. After the conditions for closing the second phase are fulfilled, the country will enjoy a full ECAA membership, which implies cabotage rights, the right of establishment and the recognition of “one stop security”.³⁹

2.3 Issues in implementation and realisation of the ECAA Agreement

Implementing the ECAA Agreement, i.e. bringing national laws of the Associated Parties into conformity with the EU law can be very complex and an extremely sensitive issue. Each Associated Party meets its own problems when implementing the ECAA Agreement and trying to enter the second phase. Aside from the fact that there are numerous differences among the Parties regarding the aviation sector and their legislation, there is also a problem of transposing the ECAA legislation into the national law. Unlike the EU Member States, the Associated Parties do not fall under the direct effect of the European law. This means they have to adjust, amend or even repeal their national provisions, which often includes finding a way to solve complicated requirements of their own legal systems. In the essence, under the ECAA Agreement countries have the obligation to accept in their national law

³⁷ Functional Airspace Blocks are blocks of airspace based on operational requirements, reflecting the need to ensure more integrated management of airspace, regardless of existing boundaries. Regulation (EC) No 551/2004 of the European Parliament and of the Council of 10 March 2004 on the organisation and use of the airspace in the single European sky, [2004] OJ L 96, pp. 20-25.

³⁸ According to Art. 2.1.(e) ECAA Agreement, the term “ECAA Partner” means an Associated Party, Norway or Iceland.

³⁹ “One stop security” means putting the passenger through security check only once, at the beginning of the journey, regardless of the number of flights on the ticket.

something that was proclaimed by some other sovereign entity, by a foreign legislator. However, this does not only imply their acceptance of foreign existing laws, but also consenting and trusting foreign legislator for his future law-making decisions.

To help them overcome problems with the harmonisation, a special body has been established by the ECAA Agreement, responsible for solving questions relating to its interpretation and application – The Joint Committee. Together with the European Commission, it provides technical assistance and supervision to parties. The establishment of the Joint Committee is envisaged in the ECAA Agreement as well as in the Euro-Mediterranean Aviation Agreement. Committee consists of representatives of all contracting parties and makes decisions unanimously. The Joint Committee meetings are held at least once a year and its decisions are binding upon every party to the ECAA (Art. 18-19).

One of the basic problems in implementing the ECAA rules are differences among countries in terms of legislation drafting rules (nomotechnics). Croatia usually implements the ECAA legislation through ordinances, except for the few EU regulations which have been transposed by legal acts.⁴⁰ Each ordinance usually has only few articles, which specify the EU legislation being implemented, after which that same EU regulation or directive is published in the Annex to the ordinance, translated into Croatian. Montenegro has a different legislative approach – it transposes every article of the specific EU legislation into its ordinances or laws, because the Montenegrin legal order does not allow simple translation of the regulation or directive in Annexes. Macedonia, on the other hand, does not even translate the legislation from Annex I; a simple reference to the corresponding piece of the EU legislation is made at the end of every law or ordinance.

Further problems arise when the new piece of the EU legislation is adopted; however, the previous one regulating the same matter, set out in Annex I of the ECAA Agreement, has not been replaced. This sometimes leads to implementing the new legislation by the Associated Party, while it is still not formally part of the ECAA Agreement.⁴¹ Also, amending the ECAA Annex I does not mean that Protocols have automatically been amended as well, so the Associated Parties are required to implement one piece of legislation according to their Protocol, and another one according to the Annex I.

⁴⁰ Those are, for instance, Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, Regulation 2027/97 on air carrier liability in the event of accident and Regulation 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, which are implemented through Law on Obligatory and Proprietary Rights in Air Traffic from 2009 (Official Gazette, no. 132/98, 63/08, 134/09).

⁴¹ Annex I is changed by the decision of the ECAA Joint Committee.

Apart from these technical issues, there are some major practical problems as well. One of those problems stems from the fact that other, non-ECAA countries are very much present in the the air transport sector of some ECAA Associated Parties. An example is Macedonia, whose airports are under concession. Their Turkish concessionaire strongly opposes to the ECAA requirements, such as collecting the tax payable for the activities of the civil aviation authority or opening of the groundhandling market (the latter one being in line with the concession agreement that gives them the right to an exclusive provision of groundhandling services).

3 CROATIA AND THE EU IN THE ECAA

Agreement between the European Community and the Republic of Croatia on certain aspects of air services was signed in Salzburg in 2006 and is one of the first of its kind.⁴² With its unified rules for granting the authorisations for all Community carriers (as well as for Iceland, Norway, Liechtenstein and Switzerland), this agreement laid the groundwork for the European Common Aviation Area Agreement, which was signed only a month later.

Since 2006 Croatia has made a huge legislative work in the field of air transport law. Namely, the considerable body of air law contained in the ECAA Agreement has been implemented, and in only five years Croatia has adopted more than thirty new ordinances which are practically a copy of the EU rules contained in the EU directives and regulations.⁴³ In this manner the EU law has been “absorbed” in a non-EU country, which is in that field practically becoming a part of the EU legal system, regardless of real progress made in the accession to the European Union.

During the last Assessment Visit in November 2009, Croatia proved its fulfilment of all the ECAA phase 1 requirements; thereby Croatia has become the first ECAA partner to enter the second phase of the Agreement. This was not only big success for the Croatian air transport, but for Croatian transport as a whole, because closing the first transitional phase of the ECAA Agreement, i.e. implementing the core part of the aviation *acquis*, was also the benchmark for closing the Transport chapter in the Croatia-EU accession negotiations. This achievement was planned

⁴² Agreement between the European Community and the Republic of Croatia on certain aspects of air services, [2006] OJ L 136, pp. 121-129.

⁴³ Ordinance has a direct effect in Croatian internal legal order. Except to new ordinances, contents of some EU regulations were, on the other hand, made part of the Air Traffic Act (Official Gazette no. 69/09, 84/11) and Law on Obligatory and Proprietary Rights in Air Traffic (Official Gazette, no. 132/98, 63/08, 134/09). See *supra*, note 40.

to be confirmed by the Joint Committee in December 2010, but in order to allow Croatian air carriers to enjoy the second phase rights even before this meeting, in June 2010 the Commission decided to inform all Member States of this change in Croatia's status and ask them to "*consider favourable requests by Croatian air carriers to exploit their above-mentioned rights foreseen under the second transitional phase of the ECAA Agreement*".⁴⁴ In November 2010 the Council's decision, which formally confirms the achieved status, was drafted, yet never adopted due to the fact that the ECAA Agreement has never been ratified.⁴⁵ Therefore, the Council is not authorised to make any decisions regarding this Agreement, and Croatia has been left without a formal recognition for the achievements. It is somewhat strange that the Draft itself mentions the ECAA Agreement and refers to it as the "existing provision in force". One of the reasons for this could be that the Commission was trying to use this way to put some pressure on those Member States who have not ratified the ECAA Agreement yet.

This turn of events left the Associated Parties, especially Croatia, in a legal vacuum, so to say. Since the ECAA Agreement has not entered into force, the only relevant source of information regarding its provisional application is the Depository's database which contains ratification details and notifications on provisional application.⁴⁶ Some of the countries, like Bulgaria and UNMIK, have notified their provisional application along with signing the ECAA Agreement. Others, like Ireland, have not ratified it yet but did notify its provisional application to the Council. Then, there are those, like Spain, which have ratified it and notified the Council that they would "apply this Agreement pursuant to paragraph 3 of Article 29 from the date on which the Depository has been notified of the completion of its internal procedures necessary for the entry into force".⁴⁷ Finally, there are countries like Luxembourg, Malta or Netherlands, which have ratified the Agreement, but have given no notification whatsoever on the provisional application. However, the actual situation is even more complicated, because what happens in reality can be quite different from what appears on the Depository's list. Therefore, the Associated Parties now depend on the practice of each Member State without having any legal certainty. For example, the country which has ratified the ECAA Agreement and declared its

⁴⁴ Letter from the Directorate General for Mobility and Transport to Directors General of Civil Aviation of Member States, June 8th, 2010.

⁴⁵ See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0653:FIN:EN:PDF> (17/6/2011).

⁴⁶ Instruments of ratification or approval are deposited with the General Secretariat of the Council of the European Union.

⁴⁷ See: <http://www.consilium.europa.eu/policies/agreements/search-the-agreements-database.aspx?command=declaration&id=&lang=en&aid=2006052&partyId=ES&doclang=en> (2/8/2011).

provisional application still does not accept certificates of the Croatian air carriers issued by the Croatian aviation authority without sending certified copies as well, which is contrary to EU legislation (Regulation 1008/2008).⁴⁸ Sometimes, based on question by the Croatian air carriers on the ECAA application, countries that have not notified the provisional application agree to do it nonetheless. There was even the case of the United Kingdom, which provisionally applied the ECAA Agreement without even having ratified it.

Croatia has sent its notification on provisional application to the depository in 2009, and has consequently implemented this principle into its Air Traffic Act. According to Article 172 of the Air Traffic Act, *“until its entering into force, the Republic of Croatia shall provisionally apply the ECAA Agreement, subject to the principle of reciprocity from the other Contracting Party or Parties concerned.”* This means that the ECAA Agreement applies between Croatia and those countries which have also notified the depository on their provisional application. The only problem standing in the way for countries to exercise rights and enjoy benefits of the ECAA is a number of contracting parties that are not being particularly agile when it comes to sending the required notification to the depository. Therefore, interested countries have found an alternative way for bilateral provisional application of the ECAA by signing Memorandums of Understanding individually with the aviation authorities of the ECAA countries. Although this mechanism is not foreseen in the ECAA Agreement, it makes it possible for the countries to reach the long awaited European sky.

4 FINAL REMARKS

During the last, fifth Joint Committee meeting held in November 2010 in Belgrade, the European Commission representative and Chairman of that session, Mr. Burghelle-Vernet, expressed the concern about the consequences arising from the fact that the ECAA Agreement has still not entered into force four years after its signing.⁴⁹ He noticed that for this reason, the Joint Committee is not authorised to make formal decisions, like the ones related to the change of Annex I or the one concerning Croatia’s transition into the second phase. Once again he appealed to all Parties to apply the Agreement at the administrative level, so that all expected benefits ensuing from its application could be attained in the meantime.

⁴⁸ Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, [2008] OJ L 293, pp. 3-20.

⁴⁹ Head of Unit of Internal Market and Air Transport Agreements, DG MOVE.

Situation like this creates frustration as well as insecurity among the Associated Parties; the agreement which requires such deep and sometimes radical changes brings so little in return. In case of Croatia, which is still the only one to have fulfilled all requirements for the second phase, the frustration is even bigger – the obligations have been met, but the rights have not yet been sorted out. At the moment it looks like Croatia will become the next EU member sooner than a formal ECAA member, which brings into question the original intent of the EU when creating this agreement. Was it really the idea of creating the Common Aviation Area or simply preparing the ground, as regards the air transport, for the future EU members? Did the EU have any actual willingness to open its air traffic market to those countries prior to their accession to the EU, after they have fulfilled their obligations?

Optimistically, we believe that the European Commission, the main steering wheel of the EU external aviation policy, really saw the ECAA coming to life in 2010. It can also be seen from its Communications and relations to other countries with which it develops similar aviation policies. The ECAA is the future of the European air transport, and the EU has prepared itself for that with the ECAA Agreement. Article 32 of the ECAA Agreement sets down the right for the EU to ask “any State or entity which is prepared to make its laws on air transport and associated matters compatible with those of the Community” to participate in the ECAA. Another important rule is contained in Art. 28, according to which provisions of that Agreement prevail over relevant provisions of any other bilateral air transport agreement (or arrangement) in force between the EU (or any Member State) and the Associated Parties or among the Associated Parties. All of this shows the importance this Agreement has for the EU, as well as the EU attitude towards the third countries. But the problem with this kind of agreements are the Member States themselves, since their particular interests and intentions do not always match those from the Commission. This is why the Commission has already expressed the possibility of concluding future Common Aviation Area agreements as Community agreements instead of “mixed” agreements.⁵⁰

Between the EU and the Associated Parties traffic density is around 8 million air passengers per annum.⁵¹ It should also be noted that all of the Associated Parties already are or aspire to be a part of the Stabilization and Accession Process to the EU. We hope that this time political goals will not surpass the goals of the ECAA air carriers and other stakeholders for that matter. It remains to be seen to what kind of effect will this continue to happen, especially considering that air transport is a proven incentive to the economic growth and development of every region it is oper-

⁵⁰ 2008 Progress Report, at 10.

⁵¹ See: <http://epp.eurostat.ec.europa.eu/portal/page/portal/transport/data/database> (10/9/2011).

ated in and that most of the EU Member States still continue to find a way to protect their carriers. Taking into account the high seasonality of air traffic in Croatia, this is something worth thinking about.

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Sažetak:

LET PREMA EUROPSKOM NEBU

Poslije završetka procesa liberalizacija zračnog transporta, Europska unija otkrila je da bi njezin sektor zračnog prometa, njezini prijevoznici i europsko gospodarstvo mogli imati velike koristi ako bi EU proširila zajednička pravila (acquis) zračnog prometa izvan svojih granica.

U prvom desetljeću 21. stoljeća EU je prošla sustavnu reviziju bilateralnih ugovora iz područja zračnog prometa, koje su njezine države članice zaključivale s trećim državama. Međutim, Unija je također napravila i jedan zanimljiv zaokret u zračnoj politici prema susjednim državama. Ideja zajedničkog “europskog neba” koje bi uključivalo mnogo više od same EU, ugrađena je u Sporazum o europskom zajedničkom zračnom prostoru iz 2006. godine. Europska unija (i njezinih 27 država članica), s jedne strane, te jedanaest europskih država nečlanica, s druge strane, potpisale su sporazum kojim su se obvezale na stvaranje zajedničkog zračnog prostora koji bi počivao na uzajamnom pravu na pristup zračnom tržištu svake ugovorne strane te na poštivanju jednakih pravila u područjima zrakoplovne sigurnosti i zaštite, upravljanja zračnim prometom, socijalne harmonizacije i zaštite okoliša.

Danas, pet godina nakon potpisivanja, Sporazum o europskom zajedničkom zračnom prostoru još uvijek nije na snazi, a države nečlanice (pridružene stranke sporazuma) unatoč tome revno usklađuju svoje propise s propisima Europske unije i poduzimaju sve kako bi postale dijelom europskog zajedničkog zračnog prostora.

Ključne riječi: *zračni promet, liberalizacija, presude “open skies”, sporazumi o uslugama u zračnom prijevozu (ASA), ECAA Sporazum, Euro-mediteranski sporazum, Republika Hrvatska.*