BRUSSELS AIR TRANSPORT BRIEF: SEPTEMBER-OCTOBER 2020

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European Regulatory Newsletter

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AVIATION REGULATORY AND POLICY

COVID-19: European Commission steps up action to reinforce preparedness and response measures across the EU

On 28 October 2020, the European Commission launched an additional set of actions to help limit the spread of COVID-19. With regard to the air transport sector, the Commission intends to implement the following actions:

- The Commission called on Member States to fully implement the Recommendation for a common and coordinated approach to restrictions to free movement.
- The Commission will work with Member States and agencies on a common approach towards quarantine practices, with inputs from the European Centre for Disease Prevention and Control (ECDC) to be presented in November 2020. The European Union Aviation Safety Agency (EASA) and the ECDC are also working on testing protocols for travelers, to be used by public health authorities, airlines and airports.
- A pilot will allow Member States to prepare for the launch and use of a common EU digital Passenger Locator Form (PLF), taking into consideration data protection.
- The Commission called on Member States to provide accurate and up-to-date information to turn "Re-open EU", i.e., a web platform to support the relaunch of travelling and tourism across Europe, into the one-stop-shop for information about health measures and travel possibilities.
- Regarding restrictions on non-essential travel from non-EU countries into the EU, the Commission presented guidance on categories of persons considered as essential and, as such, exempted from restrictions. This is expected to help Member States implement the Council Recommendation on the temporary travel restriction to the EU.

Aviation Policy: European Commission publishes 2021 work programme - from strategy to delivery

On 19 October 2020, the European Commission adopted its Work Programme 2021 -"A Union of vitality in a world of fragility", which includes new legislative initiatives across the six headline ambitions presented by President von der Leyen in her Political Guidelines (i.e., "A European Green Deal", "A Europe fit for the digital

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age", "An economy that works for people", "A stronger Europe for the world", "Promoting our European way of life", "A new push for European democracy") and follows her first State of the Union Speech. The 2021 Commission work programme marks a shift from strategy to delivery across all six political priorities. Regarding the European Green Deal, the Commission plans on reducing emissions by at least 55% by 2030, compared to 1990 levels. This will be brought together in a "Fit for 55 Package" which will cover wide-ranging policy areas; in the field of air transport, the Commission plans on proposing a series of measures on smart and sustainable transport, including a revision of the Directive on intelligent transport systems. The Commission will start discussions with the European Parliament and Council of the European Union to establish a list of joint priorities on which co-legislators agree to take action.

Airport Slots: European Commission adopts extension to EU rules waiver on the use of airport slots

On 14 October 2020, the European Commission adopted an extension to the waiver of EU rules concerning the use of airport slots. Airlines have to use 80% of the slots allocated to them to secure the same allocation for the next season. Taking into account the impact of COVID-19 on air travel and the aviation sector, a first waiver to this rule was introduced in March 2020. EU Transport Commissioner Adina Vălean highlighted that: "*In extending the waiver, we are responding to traffic data, which show the number of flights in September was still 54% down on September 2019 and traffic is unfortunately unlikely to recover in the near future. This extension provides certainty for airlines, airports and passengers*." The decision extends this waiver until 27 March 2021.

Single European Sky: European Commission proposes upgrade of the Single European Sky for a more sustainable and resilient air traffic management

On 22 September 2020, the European Commission proposed an upgrade of the Single European Sky regulatory framework, aiming to improve the EU airspace's overall efficiency through a reform of the industry providing air navigation services. This follows after the European Green Deal, but also new technological developments, such as the wider use of drones, which have put digitalisation and decarbonisation of transport at the center of the EU aviation policy focus. It also reflects the sharp drop in air traffic caused by COVID-19, which has called for greater resilience of the air traffic management. In addition, the Commission highlighted that not adapting air traffic control capacities would result in additional costs, delays and CO2 emissions. European Commissioner for Transport, Adina Vălean stated in this regard: "*Today's proposal to revise the Single European Sky will not only help cut aviation emissions by up to 10% from a better management of flight paths, but also stimulate digital innovation by opening up the market for data services in the sector. With the new proposed rules we help our aviation sector advancing on the dual green and digital transitions*".

More specifically, the Commission proposes a series of actions, including:

- strengthening the European network and its management to avoid congestion and suboptimal flight routes;
- promoting a European market for data services needed for a better air traffic management;
- streamlining the economic regulation of air traffic services provided on behalf of Member States to stimulate greater sustainability and resilience; and

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- boosting better coordination for the definition, development and deployment of innovative solutions.

The amended proposal will now be deliberated by the Council of the European Union and the European Parliament.

Single European Sky: New Performance Review Body's Annual Monitoring Report 2019 supports implementation of Single European Sky's performance and charging scheme

On 29 October 2020, the Performance Review Body (PRB), tasked to support the European Commission in implementing the Single European Sky's performance and charging scheme, issued its 2019 Annual Monitoring Report. This 2019 Report includes (i) an assessment of the performance of monopolistic air navigation service providers (ANSPs) subject to EU law, and (ii) an assessment of the second reference period (RP2), as 2019 was the final year of this period that started in 2015.

The PRB's key conclusions and recommendations in support of the reform of the Single European Sky are the following:

- As regards safety in the air and on the ground, the report stresses how EU Member States and ANSPs operated safely throughout RP2; nevertheless, environmental performance attributed to air traffic management remained an issue during RP2, as the shortest routes were not always offered to airlines.
- Concerning capacity, en route delays increased throughout RP2, reaching their peak in 2018. To reduce capacity bottlenecks over the EU's core area, the Network Manager together with the ANSPs implemented measures by the summer of 2019, which led to mitigating the impact of staff and capacity shortages.
- Finally, the cost-efficiency EU-wide targets were achieved each year of the RP2 due to the steady growth of traffic experienced until the end of 2019. However, the PRB found underspending between the planned investments and actual project implementation, stressing a need for Member States to increase monitoring their ANSPs' investments.

ANTITRUST AND COMPETITION

State Aid: European Commission publishes results of evaluation of EU State aid rules

On 30 October 2020, the European Commission published a Commission Staff Working Document, which summarized the results of an evaluation of the State aid rules. The evaluation covered, among others, the Guidelines on State aid to airports and airlines, as part of the State Aid Modernisation package. The “fitness check” concluded that, overall, the State aid control system and rules are widely fit for purpose. However, the document indicated that individual rules will require a degree of adaptation in order to reflect recent legislative developments, current priorities, changes in markets and technology developments, also in the context of the European Green Deal and EU's Industrial and Digital Strategies. Regarding next steps and their timeline, the Commission anticipates the review of several State aid guidelines by the end of 2021, whereas the remaining rules pertaining to this “fitness check”, including the Guidelines on State aid to airports and airlines, will be revised in the medium term.

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AIR TRAVEL - PASSENGERS' RIGHTS

Passengers' rights: CJEU rules on passengers' right to compensation in the national currency of their place of residence

On 3 September 2020, the Court of Justice of the European Union (CJEU) issued its judgement in Case C 356/19, *Delfly sp. z o.o. v. Smartwings Poland sp. z o.o.*, formerly Travel Service Polska sp. z o.o., on the matter of the interpretation of Article 7(1) of Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. In 2017, Ms X arrived at the check-in for a flight from city A in a third country to city B in Poland, operated by Smartwings. Ms X's flight was delayed by more than three hours, and she assigned the EUR 400 compensation she was entitled to under Regulation No 261/2004 to Delfly, a company established in Warsaw. Delfty brought an action before the Polish courts requesting from Smartwings to pay this sum in Polish zlotys. The Polish court referred the case to the CJEU asking, in particular, whether Article 7(1) must be interpreted as meaning that passengers or their legal successors, whose flights have been cancelled or subject to a long delay, may demand payment of the amount of the compensation in the national currency of their place of residence. According to the CJEU, there is no express provision for any comparable latitude as regards a national currency, other than the euro, in which that compensation is to be paid, and, therefore, provisions conferring rights to air passengers must be interpreted broadly. Regulation No 261/2004 applies to passengers without making distinctions on the basis of nationality or place of residence; the relevant criterion is the place where the airport of departure of those passengers is located. In light of this, the Court decided that imposing a condition that the amount of the compensation provided for in Article 7(1) may be paid only in euros, and not in the legal tender of a non-euro area Member State, is likely to lead to a difference in treatment of aggrieved passengers or their legal successors. Therefore, Article 7(1) is to be interpreted as precluding a Member State's legislation or case-law to result in the dismissal of an action on the sole ground that the claim was expressed in the national currency of the place of residence.

INTERNATIONAL TRADE - BREXIT

International Trade: WTO allows EU to raise tariffs up to US$4 billion worth of U.S. imports in the Boeing subsidy case

On 13 October 2020, the World Trade Organization (WTO) issued its decision allowing the European Union to raise tariffs on imports worth up to US$4 billion from the United States as a countermeasure for illegal subsides to the American-aircraft-maker Boeing. In October 2019, the United States imposed retaliatory duties affecting EU exports worth US$7.5 billion following a similar WTO decision in a parallel case on Airbus subsidies. Under this latest decision, EU countermeasures may take the form of: (a) suspension of tariff concessions and other related obligations under the General Agreement on Tariffs and Trade (GATT) 1994 on a list of U.S. products to be established in due course; (b) suspension of concessions and other obligations under the Agreement on Subsidies and Countervailing Measures (SCM Agreement); and (c) under the General Agreement on Trade in Services (GATS), suspension of a series of horizontal or sectoral commitments contained in the consolidated EU Schedule of Specific Commitments. On 26 October 2020, the European Commission published a press release

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indicating that it is currently finalising the process, involving EU Member States, to be ready to use the retaliation rights absent a prospect of bringing the dispute to a mutually beneficial solution in a near future.

International Trade: European Commission's and Ukraine's joint statement issued following the 22nd EU-Ukraine Summit

On 6 October 2020, Charles Michel, President of the European Council, Volodymyr Zelenskyy, President of Ukraine, and Josep Borrell, Vice-President of the European Commission issued a statement following the 22nd EU-Ukraine Summit. In a more general context, EU's and Ukraine's representatives reaffirmed their continued commitment to strengthening the political association and economic integration of Ukraine with the European Union, on the basis of the Association Agreement and its Deep and Comprehensive Free Trade Area. In the context of air transport and aviation, the parties stressed that they look forward to further enhancing economic integration and regulatory approximation within the framework of the Association Agreement and reaffirmed their commitment to concluding the Common Aviation Area Agreement at the earliest possible date.

Brexit: Statement by Michel Barnier following Round 9 of negotiations for a new partnership between the European Union and the United Kingdom

From 29 September to 2 October 2020, the ninth round of negotiations between the European Union and the United Kingdom took place in Brussels. On 2 October 2020, Michel Barnier issued a statement on behalf of the EU, outlining the main developments across the 11 negotiating tables, and identifying:

- points of convergence, in particular on some aspects of trade in goods, services and investment, civil nuclear cooperation, and participation in Union programmes;
- positive new developments on some topics, such as aviation safety, social security coordination, and the respect of fundamental rights and individual freedoms, which are considered a prerequisite for judicial cooperation in criminal matters;
- a lack of progress on other topics, including the protection of personal data, climate change commitments or carbon pricing; as well as
- persistent serious divergences on matters of major importance for the European Union.

Negotiations will be continuing over the coming weeks.

PUBLIC CONSULTATIONS AND EVENTS

Public Consultation: European Commission launches public consultation on sustainable aviation fuels

The European Commission launched a public consultation on measures to reduce greenhouse gas emissions in the aviation sector, which lasted until 28 October 2020. The Commission is currently assessing different policy options to enhance the supply and demand for sustainable aviation fuels in the EU. The initiative was announced as part of the European Green Deal in December 2019 and is part of the Commission's work programme for

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2020. The initiative will also be part of the Sustainable and Smart Mobility Strategy, due to be adopted by the Commission in 2020.

Upcoming Event: European Commission's “Digital Transport Days 2020”

On 18 November 2020, European Commissioner for Transport Adina Vălean organized, in cooperation with the German Presidency of the EU Council, the Digital Transport Days 2020, which took place virtually. The event aimed to provide a better understanding on digitalisation's role in boosting resilience against the COVID-19 pandemic. Thematic sessions focused on: (i) the development of a a common European mobility data space and its interaction with other data spaces; (ii) making Europe's transport infrastructure fit for the future in the framework of the Trans-European Transport Network (TEN-T) revision; and (iii) how smart mobility and the European Green Deal can support seamless and multimodal mobility for passengers, smart traffic management and transport automation. The event follows the Conference on Open Data for smart mobility, organised by the German Federal Ministry of Transport and Digital Infrastructure on 17 November 2020.

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