



INSIGHT

LIFTING THE VEIL: COVID-19 AND THE NEED TO RE-CONSIDER AIRLINE REGULATION

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ABSTRACT: Based on the assumption that the COVID-19 pandemic might provide the occasion to re-think the role of aircraft passenger transportation, this *Insight* advocates a re-evaluation of the market models developed over the past decades to deregulate the airline industry. The first aspect on which the *Insight* focuses is the unfeasibility of a long-term generally subsidized air transport sector under EU law, especially in the aftermath of the COVID-19 pandemic: the likely decrease of both supply and demand casts in doubt the consistency of significant distortions necessarily caused by public subsidies in this sector with EU competition law. Moreover, under environmental law and policy perspectives, the *Insight* highlights the inconsistencies between the negative externalities of the current air transport policy and the climate goals fostered by the EU. In this vein, the Author underlines that, *in lieu* of increasing subsidies, an EU transport policy consistent with climate goals should reduce them. This, however, would decrease again the supply of air transportation, in line with the need to reduce the unsustainable levels of emissions of aircrafts. In this scenario, the resulting diminished volume of air transport services is assessed against the rationale originally supporting the deregulation of this sector decided some 30 years ago at EEC level, i.e. the abolition of national monopolies preventing freedom to provide services. In particular, the Author questions whether such a rationale still justifies both the deviations from climate goals and the risk to perpetuate the competitive model in a substantially changed industry. After all, deregulation has led to a substantial concentration in the market but at the same time, as the COVID-19 pandemic shows, a situation of sudden deprivation of the existing transportation network for millions of passengers. And because an airline transportation industry (albeit in more limited size) is essential for industrial policy concerns, the Author proposes thorough reflection in which the coronavirus crisis can be seen as an opportunity for a (modern) re-regulation of this sector.

KEYWORDS: COVID-19 and the EU – State aids – air transport – environmental protection – market regulation – industrial policy.

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I. THE LOCKDOWN OF PASSENGER AIR TRANSPORT AS A RESPONSE TO COVID-19 AND THE QUESTIONS IT RAISES TO POLICYMAKERS

The airline industry, in the EU and at global level, has been enormously hit by the coronavirus pandemic. Data show that from the beginning of the COVID-19 crisis until beginning of April 2020 only, air traffic had dropped by 65 percent.¹ These figures have dramatically worsened during April 2020 and in the following months: preliminary reports show that in Europe passengers dropped by around 60 percent with 106 million passengers lost in March alone.² Indeed, in Europe the deficit of flights since March 1, 2020 compared to the same period of 2019, amounts to 1,241,210 flights: for example, during week 18 (27 April – 3 May) airlines in Europe have reduced their overall flights from an average of 193,183 flights in 2019 to 3,741 flights in 2020, with a reduction equal to 87.9 percent. Figures for May show a reduction of 84.8 percent compared to 2019.³

While in general other transport modes have also been suffering from the coronavirus emergency, with an overall reduction of passengers, one can reasonably hold that, virtually, the airline industry has almost disappeared, and the number of flights and passengers have returned to figures existing decades ago.⁴ Even more striking has been the reaction by the low-cost companies: as far the EU is concerned, these companies have all of a sudden stopped their activity, and some of them, like Germanwings, have closed.⁵

¹ See L. HOOK, A. WIESNIEWSKA, *How Coronavirus Stalled Climate Change Momentum*, in *Financial Times*, 14 April 2020, translated as *Ricominciamo bene*, in *Internazionale*, 24 April 2020, p. 16 *et seq.*

² See Airports Council International, *Unprecedented Impact of Pandemic on European Airports Clear as March Passenger Numbers are Released*, 9 April 2020, www.aci-europe.org, according to which “[p]assenger traffic fell by -59.5% during the month of March, dragging Q1 passenger traffic down by -21%. But while Europe’s airports still handled 5,120,000 passengers on 1 March (-11.7 %compared to the same day in 2019), that number had reduced to just 174,000 by 31 March (-97.1% compared to the same day in 2019)”.

³ Data are available at www.eurocontrol.int. This document is regularly updated by EUROCONTROL and also previous versions can be found on the website. With this said, Alitalia’s commissioners report that in March 2020 revenues have dropped by 76.5 percent and in April by 97 percent, corresponding to 5 million euro per day of revenues (!). See G. DRAGONI, *Una Doppia Newco per Alitalia di Stato*, in *Il Sole 24 Ore*, 30 April 2020.

⁴ The World Bank reports that at global level passengers carried by air transport have increased from 310 million in 1970, to 641.8 million in 1980, to 1.025 billion in 1990, to 1.674 billion in 2000, to 2.628 billion in 2010 and to 4.233 billion in 2018 (see data.worldbank.org). By contrast, recent reports estimate that the impact of COVID-19 on air transport may lead to an overall reduction of 1,815 to 3,213 million passengers in 2020 (see ICAO AIR TRANSPORT BUREAU, *Effects of Novel Coronavirus (COVID-19) on Civil Aviation: Economic Impact Analysis*, 8 May 2020, www.icao.int). If these figures are confirmed, the COVID-19 pandemic may reduce the number of passengers to levels existing respectively 20 or 30 years ago.

⁵ For more details on the initiatives taken by European State and Airline see EUROCONTROL, *State and Airline Response to COVID-19*, 8 May 2020, www.eurocontrol.int. This document also is regularly updated by EUROCONTROL and previous versions can be found on the website. The radical decision adopted by Germanwings is in fact taken by Lufthansa, i.e. its controlling shareholder. However, even if it may be a strategic decision, it still eliminates a low-cost carrier from the market.

In the immediate aftermath of the general lockdown decided as a contingent response to COVID-19, these measures were seen as inevitably linked with the confinement of persons generally decided by States.

Soon after, however, a more deepened analysis started, concerning the medium-term response to be given to avoid further contagion being spread once this first wave has been put under control. In this analysis, the to-dos for the airline industry have been considered, together with other measures to be adopted for other collective transport services, like trains or public transportation.⁶

These measures envisage a period in which airplanes shall be subject to strict sanitization measures after each flight, and travellers shall have to be distanced from one another, thus reducing substantially the passengers' capacity of each aircraft. Analogous measures are envisaged for airports, with further sanitary checks and controls on persons to be carried out, whose ultimate effects shall be that of claiming more time for each passenger on departure or arrival by plane.

While more room onboard may be pleasant for passengers, the whole attractiveness of air travelling seems diminished, and in fact airline carriers and their association (International Air Transport Association – IATA) have announced that, at least for some years, the volume of passengers shall be incomparable to the pre-coronavirus period, and the whole business is going to undergo a severe crisis.⁷

State aids have been already requested by airlines to survive, and States are willing to pay in order to rescue an important economic sector of our global economy, which indeed – among the non-digital realm – is maybe the most globalized one, together with shipping.

And yet, too little has been written on how this pandemic might allow us to entirely re-think the role and functions of aircraft passenger transportation as a unique occasion to implement a radical turnaround.

This *Insight* will therefore try to analyze the situation as it stands or may develop in a business-as-usual scenario.

I will therefore assess in the first place the feasibility of a long-term generally subsidized air transport sector under EU law, highlighting *inter alia* the distortions of trade and markets that subsidies would bring in a prospective situation in which both supply and demand will diminish. Subsequently, I shall present the consistency of a decrease of air transportation in order to cope with the EU and global environmental goals, due consideration being given to the unsustainable levels of emissions generated by aircrafts. In this scenario, I will also try to underline the inconsistencies between the negative externalities brought by the air transport policy and the climate goals fostered by the EU. I will then

⁶ See e.g. the Communication C(2020)3139 final of 13 May 2020 from the Commission on COVID-19: Guidelines on the progressive restoration of transport services and connectivity.

⁷ See IATA, Press Release no. 29 of 14 April 2020, *COVID-19 Puts Over Half of 2020 Passenger Revenues at Risk*, www.iata.org. See also above notes 2 and 3.

evaluate the legacy of air transport deregulation in the EU, moving from its original rationale to unify national markets and dismantle (public) monopolistic airlines, in order to evaluate whether this goal is still relevant and justifies both the sharp deviations from climate goals and the risk of living with a substantially changed industry, in which concentration is growing and users of air transport (including the economic systems), daily served by air connections, are exposed to sudden deprivation of these services. After having hinted to industrial policy concerns that have arisen from the awareness that the system may suddenly crash, or be no longer serving EU interests, I will finally advocate a re-evaluation of the market models developed over the past decades, with a view to considering whether a (modern) re-regulation of this sector may be opportune.

A final caveat: needless to say, I will focus mainly on the EU legal scenario, even though I guess that, in essence, analogous conclusions might be drawn in general for the whole industry.

II. CONCERNS FROM THE COMPETITION LAW VIEWPOINT OF STATE AIDS TO RESCUE AIRLINE COMPANIES IN A POST-EMERGENCY SCENARIO

The first issue we need to concentrate on is represented by the enormous amount of State aids that, in general, airlines (in particular European ones) are claiming or have obtained already from the respective governments: according to some figures,⁸ the amounts at stake surpass dozens of billion euros.⁹

The legality of these State aids must be assessed under relevant EU law: to this end, the EU has recently adopted amendments to regulation no 1008/2009 in order inter alia

⁸ See E. BANNON, *Polluting European Airlines Seek €12.8bn (and Counting) in Bailouts*, in *Transport and Environment*, 22 April 2020, www.transportenvironment.org. In addition, and as indicators that the figures above are only a fraction of the total which might be eventually paid or guaranteed by EU member States, Lufthansa claims some 10 billion euro as rescue package (see A. SCHUETZE, K. LAUER, P. UHLIG, *Lufthansa aims to finalise 10 billion euro rescue package next week*, in *Reuters*, 23 April 2020, uk.reuters.com; its subsidiary Condor obtained 550 million euro (see Commission press release no. 20/752 of 27 April 2020, ec.europa.eu, and has more recently announced the re-nationalization of the Company, subject to the European Commission's decisions (see www.reuters.com); Air France-KLM apparently received a 11 billion euro loan package backed by the French government); Alitalia obtained a loan in the amount of 500 million euro, SAS has received 415 million euro, Brussel Airlines 290 million euro, and Norwegian 255 million euro. Figures are however constantly moving: as at April 28, 2020, in the media it is reported a global amount of State aids for the (first) "parachute" in the range of 60 billion euro worldwide, while IATA estimates in 150-200 billion euro the overall public expenditure for this sector (M. MONTI, *Compagnie Aeree, Oltre 60 Miliardi per il (Primo) Paracadute Pubblico*, in *Il Sole-24 Ore*, 28 April 2020; some of the figures above are drawn from this article). At the time this *Insight* is written, figures continue to move, normally upwards (see e.g. L. CILLIS, *In Europa 30 Miliardi di Sussidi Statali per Salvare le Compagnie Aeree*, in *La Repubblica*, 10 May 2020).

⁹ Some authors refer that in the US the aids to air carrier may reach the amount of 50 billion US dollar (F. COSTA CABRAL, L. HANCHER, G. MONTI, A. RUIZ FEASES, *EU Competition Law and COVID-19*, TILEC Discussion Paper no. DP2020-007, papers.ssrn.com).

to relax the rules on revocation or suspension of operating licenses to Union carriers, and to allow Member States to refuse, limit or impose conditions on the exercise of traffic rights if this action is necessary in order to address the COVID-19 pandemic;¹⁰ furthermore, it has already adopted measures that will in general consider these aids as compatible with the single market,¹¹ similar to what happened after 9-11, or during the 2008-2009 financial crisis.¹² It is worth noticing that also easyJet is included among the beneficiaries of these aids, and in its case the aids have been paid already.¹³ It is out of the scope of this *Insight* to assess whether Brexit may play a role in the evaluation of these aids, given that easyJet, though being a British company, has recently moved its legal seat to Austria,¹⁴ in order not to lose the status of a EU airline (i.e. relevant AOC) under Regulation no 1139/2018.¹⁵

This being the actual or prospective scenario, it does not seem however appropriate to evaluate the situations affecting airlines on a case-by-case or – at best – under a sectoral approach; rather, my belief is that one should try to make an assessment pay-

¹⁰ See Regulation (EU) 2020/696 of the European Parliament and of the Council amending Regulation (EC) no. 1008/2008 of the European Parliament and of the Council on common rules for the operation of air services in the Community in view of the COVID-19 pandemic.

¹¹ See the Communication C(2020)1863 final of 19 March 2020 from the Commission on the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, as amended by the Communication C(2020)2215 final of 3 April 2020 from the Commission on the Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, as well as by the Communication C(2020) 3156 final of 8 May 2020 from the Commission on the Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak. As clarified by the EU Commission Executive Vice-President Margrethe Vestager, under the Temporary Framework “compensation can be granted to airlines under Article 107(2)(b) TFEU for damages suffered due to the COVID-19 outbreak, even if they have received rescue aid in the last ten years” (see Statement n. 20/479 of 17 March 2020 by Executive Vice-President Margrethe Vestager on a draft proposal for a State aid Temporary Framework to support the economy in the context of the COVID-19 outbreak, ec.europa.eu).

¹² See Communication C(2001)0574 final of 10 October 2001 from the Commission on The repercussions of the terrorist attacks in the United States on the air transport industry. On the relation between the financial crisis and States’ support to air transport see inter alia D. DIVERIO, *Gli aiuti di Stato al trasporto aereo e alle banche. Dalla crisi di settore alla crisi di sistema*, Milano: Giuffrè, 2010.

¹³ EasyJet has obtained a loan of 600 sterling pounds (i.e. almost 690 million euro) from UK treasury and banks (see G. TOPHAN, *EasyJet secures £600m coronavirus loan from UK Treasury and Bank*, in *The Guardian*, 6 April 2020 www.theguardian.com).

¹⁴ See *UK’s easyJet sets up new airline in Austria to protect flights post-Brexit*, in *Reuters*, 14 July 2017, www.reuters.com.

¹⁵ Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91.

ing attention to its evolution over time and to the overall medium- to long-term market effects of State aids in aviation.

In particular, it goes without saying that, all other things remaining equal, for years the whole consequences of these aids shall be that of creating a heavily subsidized industry working in a competitive marketplace. One may immediately consider whether this solution, which can be considered as compatible with EU law in an emergency situation under Art. 107, para. 2, let. b), TFEU, is sensible – or consistent with EU competition law – when becoming a standard. The above reasoning is made also by other authors, who have correctly pointed out that, compared to the other “emergency relaxation” of State aids enforcement occurred in the past, we may not necessarily expect that the “temporary framework” envisaged by the Commission to manage State aids under COVID-19 is a proper instrument.¹⁶

If we are not envisaging a contingent situation, I doubt it makes sense to approach the airline crisis with State aids: subsidized industries in competitive markets not only waste money for the taxpayer, but also tend to create distortions in overall competition patterns which will eventually allow only a few to win, while at the same time producing certain and irreversible waste of (precious) public resources for the “losers”.¹⁷

Moreover, and above all, in a generally subsidized industry the richer and more powerful member States are in the best position *vis-à-vis* the other States, for they have “deeper pockets”:¹⁸ this would eventually determine a final blow to the principle of fair access to the EU relevant markets, bring durable and maybe irreversible competitive advantages of some national economic systems *vis-à-vis* others, and raise inequality among firms irrespective of their efficiency.¹⁹ In a word, the possible outcome of the above shows a clear risk of destruction of the pillars on which the single market is founded, not only in the EU aviation industry: as we shall see in more details below,²⁰ air transport services are instrumental to the economy as a whole, and therefore distortions of competitive patterns would extend also to many other sectors, with enhanced prejudice to the level playing field of many industries and services in the EU and be-

¹⁶ F. COSTA CABRAL, L. HANCHER, G. MONTI, A. RUIZ FEASES, *EU Competition Law and COVID-19*, cit. On State aid and COVID-19, see also A. ROSANÒ, *Adapting to Change: COVID-19 as a Factor Shaping EU State Aid Law*, in *European Papers – European Forum, Insight* of 7 May 2020, www.europeanpapers.eu.

¹⁷ See, on this topic, N. ZAHARIADIS, *Winners and Losers in EU State Aid Policy*, in *Journal of Industry, Competition and Trade*, 2013, p. 143 *et seq.*

¹⁸ Out of the 1,900 billion euro of State aids authorized by the Commission under the pandemic emergency, Germany's share is about 1,000 billion (see M. BRESOLIN, *Ai Tedeschi il Record degli Aiuti anti Crisi*, in *La Stampa*, 28 April 2020; G. CHIPELLINO, *Alla Germania 1.000 Miliardi di Aiuti UE su 1.900*, in *Il Sole – 24 Ore*, 3 May 2020). Apparently, these figures are going to increase to the benefit of the German industry (and the consequent distortions in the EU markets to the detriment of non-German EU firms).

¹⁹ See A. D'ARGENIO, *UE Divisa sugli Aiuti di Stato. La Germania Spaventa il Sud*, in *La Repubblica*, 28 April 2020.

²⁰ See Section VII.

yond. In fact, air transportation is not only a matter for competition law; it has substantial implications also for the industrial policy of any State or the EU as such.

With this said, it goes also without saying that the utilization of crisis cartels²¹ or even the extraordinary “bazooka” provided for by Art. 10 Regulation 1/2003,²² even if theoretically thinkable, are hardly compatible with the general interest.²³

The fact that the airline crisis will not be temporary – and needs therefore a diachronic analysis – seems strengthened by other circumstances.

I refer, in the first place, to the measures that are being studied to restore “normal” air travelling in a COVID-19 (or post-COVID-19) era. Apparently, the safety-distancing of passengers should reduce by 2/3 the capacity of each aircraft,²⁴ this implying that either the fares for each trip will substantially increase, or air carriers will operate at loss. Indeed, this scenario is strongly opposed by the low-cost companies, but not only²⁵: their business model would become unsustainable with less capacity onboard, coupled with an increased duration of idle time of the airplanes at any airport because of the need to have them sanitized.²⁶ In such a situation, low-cost companies have plainly declared that, under these conditions, they would shut down their activity.²⁷ More recently, they

²¹ See OECD Global Forum on Competition, *Crisis Cartels*, DAF/COMP/GF(2011)11, www.oecd.org. The literature on the topic is quite extensive; therefore see inter alia A. STEPHAN, *Price fixing in crisis: implications of an economic downturn for cartels and enforcement*, in *World Competition*, 2012, p. 511 et seq.; I. KOKKORIS, *Should Crisis Cartels Exist amid Crises?*, in *The Antitrust Bulletin*, 2010, p. 727 et seq.; G. OLMIERI, A. PEZZOLI, *L'Antitrust e le Sirene della Crisi*, in *Analisi Giuridica dell'Economia*, 2009, p. 115 et seq.; F. AMMASSARI, *Cartelli di crisi e disciplina comunitaria della concorrenza*, in *Diritto dell'Unione Europea*, 2000, p. 111 et seq.; A. FIEBIG, *Crisis Cartels and the Triumph of Industrial Policy Over Competition Law in Europe*, in *Brooking Journal of International Law*, 1999, p. 607 et seq.; F.O.W. VOGELAAR, *The Impact of the Economic Recession on EEC Competition Policy. Part two: Crisis and Export Cartels*, in *World Competition*, 1985, p. 35 et seq.

²² For a preliminary assessment of the Commission measures during the COVID-19 pandemic see L. CALZOLARI, *L'influenza del COVID-19 sulla politica di concorrenza: difese immunitarie o anche altro?*, in *Sidiblog*, 26 April 2020, www.sidiblog.org; P. MANZINI, *Emergenza e concorrenza*, in *I Post di ASDUE – Sezione “Coronavirus e diritto dell'Unione”*, 15 April 2020, p. 32 et seq., www.aisdue.eu; F. COSTA CABRAL, L. HANCHER, G. MONTI, A. RUIZ FEASES, *EU Competition Law and COVID-19*, cit.

²³ See also below, Section VI.

²⁴ See IATA, Press Release no. 39 of 5 May 2020, *Calls for Passenger Face Covering and Crew Masks*, www.iata.org, claiming that “[c]alls for social distancing measures on aircraft would fundamentally shift the economics of aviation by slashing the maximum load factor to 62%. That is well below the average industry breakeven load factor of 77%”.

²⁵ On the one hand, see for example D. KEATING, *Social Distancing Not Viable on Airplanes, Industry Says*, in *Forbes*, 27 April 2020, www.forbes.com; on the other hand, in an interview made to the chairperson of the Italian Aviation authority (ENAC), he claimed that safety-distancing obligations must be lifted, because with less than 80 percent of load factor aviation is hardly a sustainable business (see G. SANTILLI, *No ai voli Semivuoti e via i Vincoli UE. Piano da 10 Miliardi per Ripartire*, in *Il Sole 24 Ore*, 30 April 2020).

²⁶ See above, Section I.

²⁷ See R. DAVIES, *Ryanair Boss Says Airline Won't Fly with “Idiotic” Social Distancing Rules*, in *The Guardian*, 22 April 2020, www.theguardian.com; S. MORGAN, *Europe's airlines rebel against social-distancing jet set*, in *Euractiv*, 29 April 2020, www.euractiv.com.

have anyway announced a sharp reduction of their scheduled flights.²⁸ Besides, this is exactly what they did immediately after the adoption of the pandemic emergency measures: thousands of scheduled flights have been gradually cancelled, thousands of employees have become redundant and have been quickly fired, and millions of passengers have been left on the ground, often with very limited earlier information.²⁹

A second reason is also worth mentioning: in more general terms, there seem to be no discussion that, if policymakers seriously consider a long-term planning to avoid further pandemics (what they actually should), the future of air transportation should be seriously and carefully studied: as a matter of fact, air transport is probably the quickest and more effective vehicle to disseminate worldwide any virus or bacterium whatever their geographic source is. Moreover, COVID-19 is not, and will not remain, an isolated case: for many years, scientific literature – and not only – has been clearly warning that pandemic risks are a credible threat for humans.³⁰ In such a situation, COVID-19 is nothing but an example of other viruses and bacteria that may spread other global contagions in the future.

Thus, one can reasonably affirm that the matter will not be solved with the coronavirus vaccination, whose general administration to the world population is anyway expected to be possible not earlier than 2021, and probably the second half of it: in fact, other infectious diseases may come out in the coming years, especially as a by-product of overpopulation, bad human habits and closeness between humans and (wild) animals.³¹

Left aside a possible “long-term” fear of passengers to be packed in an airplane, even with protective masks and gloves, or any other sanitary precautionary device, there are reasons to believe that, in a sound policy for the passenger aviation in the future, we should expect that passenger capacity on each aircraft should remain substantially reduced for the future, with material increase of costs/prices per seat, also as a consequence of the costs sustained by airports to add safety and health services for the

²⁸ See M. MONTI, *Easyjet taglia il 30 % dei lavoratori Ryanair dimezza la capacità in Italia*, in *Il Sole 24 Ore*, 29 May 2020. As immediately recalled below, it also goes without saying that scheduling a flight is a different thing that making it actually fly.

²⁹ See A. KOTOKY, D. STRINGER, R. SAXENA, *Two-Thirds of the World's Passengers Jets Are Grounded Amid COVID-19 Pandemic. Here's What That Means*, in *Time*, 17 April 2020, time.com.

³⁰ See D. QUAMMEN, *Spillover*, New York: Norton & Company, 2012, Italian translation by Adelphi, 2012. See also the speech made by former U.S. president Obama in 2014 (edition.cnn.com), as well as the famous TED Conference by Bill Gates in 2015, available at www.youtube.com.

³¹ See, again, D. QUAMMEN, *Spillover*, cit., also for further references. Indeed, the risk of pandemic due to the above reasons constituted a widespread (but silenced) knowledge since many years already. See e.g., P. DASZAK, A.H. CUNNINGHAM, A.D. HYATT, *Emerging Infectious Diseases of Wildlife – Threats to Biodiversity and Human Health*, in *Science*, 2000, p. 443 et seq.; P. DASZAK, A.H. CUNNINGHAM, A.D. HYATT, *Anthropogenic Environmental Change and the Emergence of Infectious Diseases in Wildlife*, in *Acta Tropica*, 2001, p. 103 et seq.; W.B. KARESH, R.A. COOK, *The Human-Animal Link*, in *Foreign Affairs*, 2005, www.foreignaffairs.com; A.T. PRICE-SMITH, *Contagion and Chaos: Disease, Ecology, and National Security in the Era of Globalization*, Cambridge: MIT Press, 2009.

passengers transiting through the airport. To this end, it seems problematic to implement some of the proposals made to avoid distance limitation and “pack” again the aircrafts. I refer in particular to the idea of obliging passengers to undergo compulsory sanitary triage procedures before embarking onboard, with a view to detecting in real time any infected or infectious person: *inter alia*, their consistency with the rules on personal data protection is questionable, they would be costly and extremely time-consuming. They would also generally discourage people from accepting this screening: *inter alia*, if denial to flight must be decided immediately before boarding for safety reasons of all other travellers, then any person really planning a flight for any reason whatsoever should either be already aware that they are healthy or have not developed any symptoms, or run the risk to be refused boarding upon starting their journey or (even worse) when returning home.³²

The above leaves us to believe that, in the foreseeable future, and for a non-limited number of years, we will presumably experience a sharp decline in load factors, and a “less efficient” use of aircrafts. This will lead to an increase of costs and therefore of prices. And since pricing is a driving factor for the demand, the unavoidable increase of price will determine a decline also in the demand, unless the price increase is counter-balanced with subsidies.

This option, however, does not seem legitimate in our competitive scenario, and is not even desirable.

III. ENVIRONMENTAL CONCERNS AND AIR TRANSPORT POLICY: A SHARP DECREASE IN THE OFFER OF AIR PASSENGERS’ SERVICES SHOULD BE CONSIDERED

Aviation is recognized as one of the fastest-growing sources of greenhouse gas emissions. According to the European Commission data, “[d]irect emissions from aviation account for about 3% of the EU’s total greenhouse gas emissions and more than 2% of global emissions. If global aviation was a country, it would rank in the top 10 emitters”. Moreover, and as far as the EU is concerned, while our total emissions have decreased over the years, “[i]n 2020, global annual international aviation emissions are already around 70% higher than in 2005. The International Civil Aviation Organization (ICAO) forecasts that, in the absence of additional measures by 2050 they could grow by over further 300%”.³³

³² The (questionable) hypothesis of the triage before boarding is e.g. proposed by the ENAC chairperson (see above note 25).

³³ See ICAO, *Trends in Emissions that Affect Climate Change*, www.icao.int. Citations above are taken from the Commission website, at ec.europa.eu. Put it in another way, some authors highlight that the aviation industry is responsible for an amount of CO₂ emissions into the atmosphere higher than the combined emissions of the 129 lowest emitting countries in the world (A. MURPHY, *Aviation and climate: who acts?*, in F. MUNARI (ed.), *Cambiamenti climatici e trasporti. Un approccio interdisciplinare*, Roma: Aracne, 2017, Appendix).

Unfortunately, however, under a business-as-usual scenario, a “de-carbonized” aviation industry seems out of reach for some decades; furthermore, the idea that the airline industry may be capable of reducing its emissions of greenhouse gases also appears out of question: technology for electric engines in the aviation is taking its first steps nowadays, and the industrialization of this technology will require years. In any case, many more years would be required to phase out the existing aircraft fleets, so that we reckon a carbonized airline industry to endure for the coming two to three decades, at best.³⁴

The Union has moved in the direction of a more sustainable airline industry, yet with little expectations that the EU measures will radically change the picture in the coming future. As a matter of fact, global emissions in the Union peaked in 2007, and yet, transport emissions have continued to grow, with air transport contributing alone for 3.6% of EU overall emissions.³⁵ Moreover, aviation emissions have been booming with an increase of +95% of CO₂ emissions since 1990, and even more for other greenhouse gases.³⁶

The decision adopted in 2008 to apply also to the airline industry the EU Emission Trading Scheme as per directive no 2003/87 is a good policy move.³⁷ But its practical reach is of limited effect, and falls short of adequately helping the achievement of the EU National Determined Contributions (NDCs) submitted under the Paris Climate Agreement.³⁸ Remarkably, the ETS was implemented for EU-based airlines and the Union has pioneered its application also *vis-à-vis* non-European air carriers,³⁹ this eventual-

³⁴ See also references below, notes 41 ff.

³⁵ For these and further data see Commission, *Reducing emissions from aviation*, ec.europa.eu.

³⁶ See European Union Aviation Safety Agency, *Emission*, www.easa.europa.eu, with more data and figures.

³⁷ With Directive 2008/101/EC of 19 November 2008 amending Directive 2003/87/EC (i.e. the EU basic legislation on ETS) aviation activities were inserted in the scheme for greenhouse gas emission allowance trading.

³⁸ In particular, the EU has indicated that, together with the EU Member States, it is “committed to a binding target of an at least 40% domestic reduction in greenhouse gas emissions by 2030 compared to 1990, to be fulfilled jointly, as set out in the conclusions by the European Council of October 2014” (see the Intended Nationally Determined Contribution of the EU and its Member States of 6 March 2015, www4.unfccc.int).

³⁹ See Court of Justice, judgment of 21 December 2011, case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*. For some commentaries on this judgment, see S. BOGOJEVIĆ, *Legalising Environmental Leadership: A Comment on the CJEU's Ruling in C-366/10 on the Inclusion of Aviation in the EU Emissions Trading Scheme*, in *Journal of Environmental Law*, 2012, p. 345 et seq.; A. GATTINI, *Between Splendid Isolation and Tentative Imperialism: The EU's Extension of its Emission Trading Scheme to International Aviation and The ECJ's Judgment in the ATA Case*, in *International and Comparative Law Quarterly*, 2012, p. 977 et seq.; B. MAYER, *Case C-366/10, Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change, Judgment of the Court of Justice (Grand Chamber) of 21 December 2011*, in *Common Market Law Review*, 2012, p. 1113 et seq.; E. DENZA, *International Aviation and the EU Carbon Trading Scheme: Comment on the Air Transport Association of America Case*, in *European Law Review*, 2012, p. 314 et seq.

ly leading to an agreement on aircrafts emissions at ICAO level.⁴⁰ The adoption of Standards and Recommended Practices to complement the resolution and to implement the global system was planned for 2018⁴¹, and an agreement at ICAO level, named CORSIA, was reached soon after.⁴² In essence, air carriers are requested to monitor their emissions and offset their emissions by purchasing eligible emission units generated by reducing-emissions projects. Tentative expectations assume that, by 2035, 80% of the emissions above 2020 levels shall have been offset. However, no indications nor limitations have been put on the volumes of emissions tolerated by the industry, and in any event no caps are foreseen. This is probably at odds with the same contents of the Paris Climate Agreement and the obligation onto all Contracting Parties to indicate their peak of emissions.⁴³

While the CORSIA agreement reminds us of the saying according to which “something is always better than nothing”, it seems hardly disputable that these results are insufficient, and foresee a long-term scenario which is inconsistent with the urgency to cope with environmental needs and with the Paris Climate Agreement goals: indeed, at ICAO level the best option that States have found after years of negotiations was not to cap the increase of emissions, certainly not to stop them and in no way to reduce them.

And yet, also from this viewpoint, the lockdown of the airline industry caused by COVID-19 has showed the fallacy of the apparent “irreversible” environmental long-term scenario. Indeed, flights can be drastically reduced and travellers’ habits can rapidly change. Especially as far as business traveling is concerned, people have directly experienced that much can be done with alternative technologies, such as the numerous apps offering video-meetings at distance. Sure, these technologies cannot entirely replace the traditional way people meet for business purposes, but a large portion of such traditional movement can – and will – be substituted.

Therefore, such an opportunity window should be seriously evaluated also by the EU institutions. This seems particularly true for the Commission and the European Par-

⁴⁰ On October 2016, the ICAO adopted a resolution on the implementation of a global market-based measure from 2021 (Carbon Offsetting and reduction Scheme for International Aviation (CORSIA)) to offset international aviation emissions above 2020 levels.

⁴¹ See ICAO, Report of the Executive Committee on Agenda Item 22 of 6 October 2016, www.icao.int.

⁴² See European Commission, *Reducing Emissions from Aviation*, ec.europa.eu. For an overview of the CORSIA and its origins see A. MENSİ, *Breaking the Ice: Reconciling Extraterritoriality and Multilateralism in the Light of the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA)*, in *Diritto del Commercio Internazionale*, 2019, p. 675 *et seq.*; C. LYLE, *Beyond the ICAO's CORSIA: Towards a More Climatically Effective Strategy for Mitigation of Civil-Aviation Emissions*, in *Climate Law*, 2018, p. 104 *et seq.*; J. SCHEELHAASE, S. MAERTENS, W. GRIMME, M. JUNG, *EU ETS versus CORSIA – A Critical Assessment of two Approaches to Limit Air Transport's CO2 Emissions by Market-Based Measures*, in *Journal of Air Transport Management*, 2018, p. 55 *et seq.*

⁴³ See Art. 4 of the Paris Climate Agreement, available also at unfccc.int.

liament, who have repeatedly underlined the need for international civil aviation to contribute to achieving the goals of the Paris Climate Agreement on climate change.⁴⁴

At States' level, one should also consider that, before the COVID-19 pandemic, environmental concerns had emerged within important (and large) EU Members, aiming at evaluating the prohibition of domestic flights, which should have been replaced by high-speed train services.⁴⁵ And if this growing sentiment started to take root in large States, one can predict that it may be even easier to implement in small Member States.

With this in mind, and to conclude, once again a reasonable option that policy- and decision-makers should consider is a reduction in the supply of passengers' air transport services, i.e. less capacity offered overall, less aircrafts in the skies.

In other words, and to put it consistently with the EU single market jargon, one might well consider statutory or EU-driven restrictions to market access.

IV. FREEDOM OF MARKET ACCESS IN THE PASSENGER AIR TRANSPORT INDUSTRY: NEGATIVE ECONOMIC EXTERNALITIES AND THE NEED TO RETHINK MOBILITY OF PERSONS *VIS-À-VIS* OTHER VALUES AND PRIORITIES

In the preceding paragraphs I have argued that, because of actual and prospective safety reasons, the capacity of passengers' airplanes (i.e. the supply per aircraft) should be diminished, and that, without State aids, airfares shall certainly increase, thus diminishing substantially the demand for air transportation.

I have also argued that – left out the emergency measures adopted in the climax of the COVID-19 pandemic – enduring State aids in this sector seem at odds with a sound environmental policy, and are in fact inconsistent with the need to comply with the emission goals that are mandatory under EU climate action. They are also inconsistent with the existing EU law on ETS, for it makes little sense to introduce a “cap and trade” system for emissions generated by aviation activities as per the relevant provisions contained in Chapter II of the Directive 2003/87,⁴⁶ and at the same time grant operational aids to the entities responsible for these emissions.

⁴⁴ See e.g. Communication COM(2015) 598 final of 7 December 2015 from the Commission, *An Aviation Strategy for Europe*; Communication COM(2016) 501 final of 20 July 2016 from the Commission, *A European Strategy for Low-Emission Mobility*, as well as the three resolutions adopted in this topic by the European Parliament in 2015, 2016 and 2017: for more insights, see European Parliament, *ICAO Agreement on CO₂ emissions from aviation*, www.europarl.europa.eu. A summary of the EU policy on climate and aviation can be found, also for further references at European Commission, *Reducing emissions from aviation*, ec.europa.eu.

⁴⁵ This phenomenon is particularly strong in Sweden and Germany: see A. KRETZSCHMAR, M. SCHMELZER, *Jeder, der fliegt, ist einer zu viel*, in *Zeitonline*, 31 May 2019, www.zeit.de; *Umweltschützer fordern Verzicht auf Flugreisen*, at www.airliners.de, also for further insights.

⁴⁶ Directive 2003/87/EC of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC.

In addition, data show that the industry is heavily subsidized already, especially because air carriers are exempted from paying taxes on fuel tax, and in general this sector is under-taxed. It is therefore not bearing its environmental costs to society.⁴⁷ Such a situation has been specifically assessed many years ago also by the IPCC, and its projections for the future have been (unfortunately) met as far as the aviation's contribution to the global warming is concerned.⁴⁸

In this vein, one could legitimately argue that further subsidizing the airline carriers appears to be, at best, disputable. From the environmental point of view, it seems a suicide akin to the one States have been committing for decades in the fishing industry: the overall increase of subsidies granted by all States for fishermen in order to allow them to cover more and more miles of the seas to maintain their volumes of catch at affordable prices in depleted oceans, have contributed enormously to illegal fishing and to further depletion of the fish stocks.⁴⁹

Subsidizing air carriers enhances the negative environmental externalities brought by this industry, and should therefore be considered with utmost skepticism. Not only do passengers not bear the environmental costs of their travels, but they do not even pay the actual costs of the flight, which are largely borne by taxpayers.

It may be true that the low-cost airlines have boosted air transport and contributed to the growth of some sectors, in particular tourism. But they have done it at the expense of the environment, and probably the cherry-picking they often have been carrying out has deprived other airlines of economies of scope, leading to some inefficiencies as far as unused capacity is concerned. Tellingly, the low-cost airlines have studied the inefficiencies of "traditional" airlines, have invented and developed a successful business model, have been able to discriminate users, reaping as many benefits as possible from some of them.⁵⁰

⁴⁷ A. MURPHY, *Aviation and Climate*, cit., estimates that the exemption from fuel tax for the airline industry amounts to approximately 60 billion US dollars per year.

⁴⁸ See IPCC Special Report, *Aviation and the Global Atmosphere*, Cambridge, 1999, archive.ipcc.ch. A *Summary for policymakers* is available at www.ipcc.ch.

⁴⁹ F. MUNARI, L. SCHIANO DI PEPE, *Tutela transnazionale dell'ambiente*, Bologna: Il Mulino, 2012, p. 244 et seq.; F. GONZÁLEZ LAXE, F. MARTÍN BERMÚDEZ, F. MARTÍN PALMEROC, I. NOVO-CORTID, *Governance of the fishery industry: A new global context*, in *Ocean and Coastal Management*, 2018, p. 33 et seq.; A. SERDY, *Postmodern international fisheries law, or we are all coastal states now*, in *International and Comparative Law Quarterly*, 2011, p. 387 et seq.

⁵⁰ On the business model of low-cost airlines see J. HALSTED, *A low-cost revolution? The power of the short-haul business model*, in *International Airport Review*, 28 March 2017, www.internationalairportreview.com; P. MALIGHETTI, S. PALEARI, R. REDONDI, *Pricing strategies of low-cost airlines: The Ryanair case study*, in *Journal of Air Transport Management*, 2009, p. 195 et seq.; K. BUTTON, S. ISON, *The economics of low-cost airlines: Introduction*, in *Research in Transportation Economics*, 2008, p. 1 et seq.; S. GROSS, A. SCHRÖDER, *Basic Business Model of European Low Cost Airlines – An Analysis of Typical Characteristics*, in S. GROSS, A. SCHRÖDER (eds), *Handbook of Low Cost Airlines – Strategies, Business Processes and Market Environment*, Berlin: Erich Schmidt Verlag, 2007, p. 31 et seq. See also A.L. BITETTO, "Low cost" e dominio (abusato?) dei cieli, in *Mercato concorrenza regole*, 2015, p. 513 et

With this said, not infrequently they have done it also with co-marketing contracts entered into with many regional European airports (often managed by public bodies), i.e. benefitting of further subsidies, thus enhancing the negative externalities highlighted above. Within this economic standpoint, it is immaterial for our purposes to consider whether these subsidies have been considered legal or not from the State aid legal perspective.⁵¹ As a rule of thumb, left outside any other policy, within a pure competitive scenario, subsidies should be always left outside the door.

seq.; D. BOCCHESI, *L'accesso dei vettori aerei "low cost" al mercato del trasporto aereo*, in *Diritto dei trasporti*, 2012, p. 399 *et seq.*; M. ALDERIGHI, A. CENTO, P. NIJKAMP, P. RIETVELD, *Competition in the European aviation market: the entry of low-cost airlines*, in *Journal of Transport Geography*, 2012, p. 223 *et seq.*

⁵¹ Reference is made in particular to the *Charleroi Airport* case: see Commission Decision 2004/393/EC of 12 February 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi, annulled by the General Court (see General Court, judgment of, 17 December 2008, case T-196/04, *Ryanair Ltd v. Commission*), leading to the adoption of a further decision (see Commission Decision (EU) 2016/2069 of 1 October 2014 concerning measures SA.14093 (C76/2002), implemented by Belgium in favour of Brussels South Charleroi Airport and Ryanair). Among the negative decisions with recovery, see Commission Decision of 2 August 2019 on State aid case SA.47867 Aid to Ryanair Montpellier airport; Commission Decision (EU) 2018/117 of 14 July 2017 on State aid case SA.29064 Ireland non-application of the Air Travel Tax to transit and transfer passengers; Commission Decision (EU) 2018/628 of 11 November 2016 on State aid SA.24221(2011/C) (ex 2011/NN) implemented by Austria for the Klagenfurt airport, Ryanair and other airlines using the airport. For further case-law see also Commission Decision (EU) 2017/2336 of 7 February 2017 on State aid cases SA.21877, SA.27585 and SA.31149 Germany – Alleged State aid to Flughafen Lübeck GmbH, Infratil Limited, Ryanair and other airlines using the airport; Commission Decision (EU) 2016/287 of 15 October 2014 on State aid SA.26500 implemented by Germany for Flugplatz Altenburg-Nobitz GmbH and Ryanair Ltd; Commission Decision (EU) 2016/789 of 1 October 2014 on the State aid SA.21121 implemented by Germany concerning the financing of Frankfurt Hahn airport and the financial relations between the airport and Ryanair; Commission Decision (EU) 2015/1584 of 1 October 2014 on State aid SA.23098 implemented by Italy in favour of Società di Gestione dell'Aeroporto di Alghero So.Ge.A.AL S.p.A. and various air carriers operating at Alghero airport; Commission Decision (EU) 2015/1344 of 1 October 2014 on State aid case SA.18857 Alleged aid to Västerås Airport and Ryanair Ltd; Commission Decision (EU) 2016/1944 of 23 July 2014 on the measures SA.22030, SA.29404 and SA.32091 Germany Financing arrangements regarding Flughafen Dortmund GmbH and the schedules of airport charges NERES and NEO; Commission Decision 2013/664/EU of 25 July 2012 on measure SA.23324 Finland – Finavia, Airpro and Ryanair at Tampere-Pirkkala airport; Commission Decision 2011/60/EU of 27 January 2010 on State aid C 12/08 (ex NN 74/07) Slovakia – Agreement between Bratislava Airport and Ryanair. Lastly, see General Court, judgment of 13 May 2020, case T-8/18, *EasyJet Co. Ltd v European Commission*. On the topic, see generally M. ORLANDI, *Differenza tra l'ammontare delle accise applicabili a servizi simili ed aiuti di Stato: in merito alla sentenza "Aer Lingus e Ryanair c. Commissione"*, in *Rivista di diritto tributario*, 2017, p. 58 *et seq.*; M. SCHMAUCH, *EU Law On State Aid To Airlines: Law, Economics And Policy*, Berlin: Lexxion, 2012; C. ARHOLD, *European Airline Wars: German Courts Divided Over Actions Against Low-Cost Carriers*, in *European State Aid Law Quarterly*, 2008, p. 31 *et seq.*; A. LYKOTRAFITI, *Low cost Carriers and State Aids: A Paradox? Reflections on the Ryanair/Charleroi Case*, in *European state aid law quarterly*, 2008, p. 214 *et seq.*; R. GRIFFIN, *State Aid, the Growth of Low-Cost Carriers in the European Union, and the Impact of the 2005 Guidelines on Financing of Airports and Start-up Aid to Airlines Departing from Regional Airports*, in *Journal of Air Law and Commerce*, 2006, p. 341 *et seq.*; C. BARBOT, *Low-cost airlines, secondary airports, and state aid: An eco-*

Generally, air passengers' growth has been 2.6 times more than global GDP growth.⁵² Looking at the EU, low-cost carriers have substantially inflated the demand for air transport services. If we look at statistics, from 2010 to 2018 the number of passengers carried by air within the EU has increased by 43 per cent from 776 to 1,106 million, this increase being substantially higher than that experienced in other transport modes.⁵³

At the same time, if we look at the air cargo sector in a world-wide perspective, its figures have increased consistently with those of global trade⁵⁴ – this growth having diminished since 2018, in line with the already existing deceleration of global trade.⁵⁵

It cannot be clearly demonstrated that the different trends in air transportation between passengers and goods – especially in short-haul markets, where low-costs companies have been more successful⁵⁶ – hide distortions in relevant trade patterns. While carrying of goods is consistent with the upstream markets, carrying of passengers is neither in line with population growth, nor with GDP growth, nor with the combination of the two. Therefore, and again, the increase of air passengers over the past decades – especially in the EU – may have been stimulated by “artificial” push factors, that possibly persons can more easily re-consider, since they are unrelated to “true” needs, or with the enforcement of rights. A right to unfettered mobility, especially by air, seems hardly capable of prevailing with other values and priorities that should be considered within the EU legal system.

Bearing in mind the above, also in this respect the COVID-19 pandemic could be capable of opening a thorough reflection for reforming the models for the airline industry as established in the Union (and worldwide) in the past decades. Such a reflection might drive

conomic assessment of the Ryanair–Charleroi Airport agreement, in Journal of Air Transport Management, 2006, p. 197 et seq.; C. Pozzi, Gli aiuti di Stato al trasporto aereo: prime riflessioni sul caso Ryanair-Charleroi, in Diritto dei trasporti, 2005, p. 501 et seq.

⁵² A. MURPHY, *Aviation and Climate*, cit. For further reference see above note 4.

⁵³ See EUROSTAT, News release no. 186/2019 of 6 December 2019, *Record number of air passengers carried at more than 1.1 billion in 2018*, ec.europa.eu. Moreover, again according to EUROSTAT, the figures for the first half of 2019 indicated a year-on-year rise of 4.9 percent compared with 2018 (see EUROSTAT, *Air passenger transport - monthly statistics*, ec.europa.eu).

⁵⁴ See e.g. the report by Boeing, *World Air cargo Forecast 2018-2037*, www.boeing.com, showing a constant increase from 2007 (199,229 million revenue tonne-kilometer-RTK) until 2018 (256,433 million RTK).

⁵⁵ IATA reports a “notable deceleration” of air cargo demand in 2018, growing 3.4 percent compared with 9.7% growth in 2017, and predicts a further softening of demand during 2019, with a growth of 2.0 percent in freight ton kilometers (FTK) for the year.

⁵⁶ On this topic see inter alia A.M. RODRÍGUEZ, J.F. O'CONNELL, *Can low-cost long-haul carriers replace Charter airlines in the long-haul market? A European perspective*, in *Tourism Economics*, 2018, p. 64 et seq.; M. DE PORET, J.F. O'CONNELL, D. WARNOCK-SMITH, *The economic viability of long-haul low cost operations: Evidence from the transatlantic market*, in *Journal of Air Transport Management*, 2015, p. 272 et seq.; I. ELKING, R. WINDLE, *Examining Differences in Short-Haul and Long-Haul Markets in US Commercial Airline Passenger Demand*, in *Transportation Journal*, 2014, p. 424 et seq.; J. DAFT, S. ALBERS, *A profitability analysis of low-cost long-haul flight operations*, in *Journal of Air Transport Management*, 2012, p. 49 et seq.; G. FRANCIS, N. DENNIS, S. ISON, I. HUMPHREYS, *The transferability of the low-cost model to long-haul airline operations*, in *Tourism Management*, 2007, p. 391.

us much further than a simple voluntary self-restraint to use air transport because of the so called *Flugscham* (shame to fly), or other non-environmental concerns, since it could be backed by an EU policy establishing pros and cons of utilizing air transport services.

V. A BRIEF HISTORY OF DE-REGULATION OF THE AIRLINE INDUSTRY IN THE EU: WHAT'S LEFT AFTER MORE THAN THREE DECADES

The point I want to make here is to assess whether we can really shift to new legal parameters in respect of the mainstream that has dominated the legal theory concerning the (common and then) single market in the EU in the past decades, in particular as applied in the air transport industry.

Indeed, many years have passed and substantial changes have occurred since the European Economic Community started to take its first steps in order to apply the common market and competition rules in the air transport sector. A reconstruction of the milestones in the liberalization of the air transport industry originated by judgments like *European Parliament v Council*,⁵⁷ *Lord Bethell*,⁵⁸ *Nouvelles Frontières*⁵⁹ or *Ahmed Saeed*,⁶⁰ would clearly go beyond the scope of this *Insight*.⁶¹ For our purposes, suffice it to mention that, looking backwards, the EEC has implemented the freedom to provide air transport services after some decades of non-application of Art. 100, para. 2, TFEU (then Art. 84, para. 2, EEC), and that the progressive EU liberalization packages was inspired by the liberalization experience carried out in the US a few years earlier.⁶² Moreover, in those years the liberalization of transport sectors – including air transport – was seen as a powerful tool to demolish national public monopolies entrusted with transport services, that were seen as the largest obstacle to integrate national markets

⁵⁷ Court of Justice, judgment of 22 May 1985, case 13/83, *European Parliament v. Council of the European Communities*.

⁵⁸ Court of Justice, judgment of 10 June 1982, case 246/81, *Nicholas William, Lord Bethell, v. Commission of the European Communities*.

⁵⁹ Court of Justice, judgment of 30 April 1986, joined cases 209 to 213/84, *Lucas Asjes and Others*.

⁶⁰ Court of Justice, judgment of 11 April 1989, case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*

⁶¹ For more insights and further references, see N. ARGYRIS, *The EEC Rules on Competition and the Air Transport Sector*, in *Common Market Law Review*, 1989, p. 5 *et seq.*; J. AUSSANT, R. FORNASIER, *Libre circulation des personnes, des services et des capitaux. Transport*, in *Commentaire Mégret. Le droit de la CEE*, Bruxelles: Editions de l'Université de Bruxelles, 1990, p. 302 *et seq.*; R. SCHMID, *Der europäische Luftverkehr auf den Weg in dem Binnenmarkt*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 1991, p. 20 *et seq.*; J. BASEDOW, M. DOLFEN, *Verkehrs- und Transportrecht*, in M. DAUSES (ed.), *Handbuch des EG-Wirtschaftsrechts*, München: C.H. Beck, 1993, p. 300 *et seq.*; S. BUSTI, *La nuova disciplina comunitaria dei trasporti aerei*, in *Trasporti*, 1993, p. 71 *et seq.*; J. BALFOUR, *Air Transport, A Community Success Story?*, in *Common Market Law Review*, 1994, p. 1043 *et seq.*; F. MUNARI, *Il diritto comunitario dei trasporti*, Milano: Giuffrè, 1996, p. 163 *et seq.*

⁶² See M. LEVINE, *Airline Competition in Deregulated Markets: Theory, Firm Strategy and Public Policy*, in *Yale Journal of Regulation*, 1987, p. 393 *et seq.*; A. KAHN, *Airline Deregulation: A Mixed Bag, but a Clear Success Nevertheless*, in *Transport Law Journal*, 1988, p. 229 *et seq.*

and create a common market, especially because of the capability of transport services to affect also the relevant downstream markets (in particular, in those years, the movement of goods). This was valid also for air transport services.

From a policy viewpoint, in that historical period the focus on creating or enlarging the single market in as many business sectors as possible was therefore understandable.

Moreover, a liberalization of air transports did not seem conditioned by other rules of primary EU law: industrial policy was not falling under the EU competences, and even now, after many years, is one of the supporting, coordinating and supplementary actions (timidly) available for the EU institutions under Art. 6, let. b), TFEU.

At the same time, when the decision to liberalize air transport was adopted at the political level, an EEC environmental policy was virtually non-existent, and in no way was there the tiniest knowledge of the effects provoked by aircrafts' emissions on climate. Even if, for sure, the air transport industry was no longer in its "infant" age, the policy foundations beneath the decision to launch freedom of transport services within the EU were very different from the present situation.

After the first packages of liberalization of air transport in the EEC,⁶³ much has been done also as far as EU legislative acts are concerned: rules have progressively been shaped and refined to cope with the evolution of the air transport industry, both within the EU and in the trade between the EU and third countries.

In this vein, the original decisions to consider air transport within purely competitive policy and legal patterns was neither *de facto* (nor *de jure*) ever re-cast in doubt. Indeed, some exceptions to free market access were maintained, and are still maintained in those airline services for which Member States consider that public service obligations (PSO) should be guaranteed.⁶⁴ But the application of this exception covers limited areas of air transport, which is nothing else than a small fraction as far as passengers' volumes are concerned. According to the Commission, restrictions to market access are legitimate only "to ensure access to isolated or developing regions when a Member

⁶³ See Council Directive 87/601/EEC of 14 December 1987 on fares for scheduled air services between Member States, and Council Decision 87/602/EEC of 14 December 1987 on the sharing of passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air-service routes between Member States.

⁶⁴ See Arts 16 *et seq.* of Regulation (EC) 1008/2008 of 24 September 2008 on common rules for the operation of air services in the Community (Recast). For comments on this regulation, which stands as the backbone of the EU airline legislative acts, see J. WALULIK (ed.), *Harmonising Regulatory and Antitrust Regimes for International Air Transport*, Abingdon-New York: Routledge, 2019; F. SIMONELLI, M.G. CAROLI, *Harmonization of Market Entry Regulation for the Operation of Air Services in the European Union: A Comparative Survey of the Implementation of Regulation (EC) No. 1008/2008 by Member States' Authorities*, in *Journal of Air Transport Management*, 2013, p. 39 *et seq.*; C. PEGATZKY, S. ROCKSTROH, *Die Reform des Europäischen Luftverkehrsrechts durch die Verordnung (EG) Nr. 1008/2008*, in *German Journal of Air and Space Law*, 2009, p. 54 *et seq.*; G.R. FRIEDMANN, *Price Transparency Requirements of the EC Air Services Regulation 2008*, in *Air and Space Law*, 2011, p. 71 *et seq.*; F. ROSSI DAL POZZO, *Servizi di trasporto aereo e diritti dei singoli nella disciplina comunitaria*, Milano: Giuffrè, 2008.

State finds that objectives of regional development policy will not be met adequately if only left to a free play of market forces as the market itself will not deliver an acceptable level of air services to these regions. Thus PSOs are an exception to the general principle of the freedom to provide air services within the EU, guaranteed under Art. 15, para. 1, of the Regulation".⁶⁵

More than three decades of air liberalization have certainly allowed the growth of this industry, even if we do not have a counterfactual analysis telling us what would have happened to transport and air transport (as an instrument to move people and goods) under a regulatory scheme.

Low-cost companies would not have been created, for they are a clear by-product of liberalization. Concentration in the market – especially among “traditional” air carriers – would not have taken place. Finally, industrial viz. social policy concerns in this sector were kept dormant or altogether neglected. The focus has been that of fostering competition, consistently with the tenet concerning the alleged self-correcting capacity of the markets to remedy any failure, and those limited areas of criticism to the overreaching dogma of competition were silenced or remained substantially irrelevant.

After all, at a first glance, some (but not all) national airline industries were prospering and profitable, low-cost services were able to move millions of EU citizens within Europe and with neighboring non-EU States at very affordable prices, and finally, the most efficient EU airlines had progressively gained market shares also in long-range transcontinental traffic.

In such a situation, why should anybody bother to understand in deeper details whether this model had intrinsic weaknesses? Why should we really reverse priorities between freedoms in the skies and environmental protection? Why should we consider the importance of regular and controlled air transport services as a paramount tool for the enjoyment of other fundamental viz. constitutional rights and industrial policy concerns?

VI. WILL THE PANDEMIC BE ABLE TO LIFT THE VEIL FROM OUR EYES?

With COVID-19, the apparent unstoppable advance of the competitive models in our sector has undergone a sharp stop.

All of a sudden, people have virtually cancelled flying. Business travellers, even if generally allowed to fly, opted for – and more often were forced to – other alternative ways to meet one another, and leisure passengers have been prevented from flying. When this

⁶⁵ See the Commission Notice – Interpretative guidelines on Regulation (EC) No 1008/2008 of the European Parliament and of the Council – Public Service Obligations (PSO), para. 1, on which see inter alia U. SCHULTE-STRATHAUS, *Is the European Commission Fulfilling Its Ambitious Aviation Strategy?*, in *Air and Space Law*, 2017, p. 517 *et seq.* The figures and the list of air services PSO are available at European Commission, *Public Service Obligations (PSOs)*, ec.europa.eu.

activity will be possible again, one may legitimately consider that, as long as the present situation of alarm (or at least caution and prudence) remains equal, they might well opt for alternatives to spend their holidays not implying public (air) transportation.

Further veils have been also lifted. The apparent competitive market was not interested at all to preserve non-economic needs and values connected to mobility of persons: the decision by all low-cost companies to immediately shutdown their services, thus leaving on the ground millions of passengers, was made in total disregard of any mobility need of these persons. Interestingly enough, in this decision it did not make any difference if these airlines were connecting routes thanks to so-called co-marketing arrangements with (public) airports capable to attract these companies. The promise to “bring the business” in those airports for developing them or their surrounding areas vanished at the same time in which connections with these airports were interrupted.

It goes without saying that the remedies enforced at EU level to reimburse passengers in case of flight cancellation, whatever their contents may be,⁶⁶ are focused on the single transportation contract between the airline and the passenger, i.e. a bilateral inter-individual contractual relationship. These rules do not catch at all the fundamental effects on the markets of a general shutdown of flights, nor the consequences of a total and sudden loss for cities and regions of the pre-existing adequate levels of air connections, for any purpose whatsoever. Identically, they cannot address in any way the effects on the up-stream or down-stream markets affected by a shutdown of the airline industry. We shall return to this topic below.

In fact, according to the most recent news, low-cost companies: (a) threatened to challenge the State aids paid to the “traditional” companies, because they allegedly alter the “level-playing-field” in the market; at the same time, and more importantly for our purposes (b) have allegedly postponed to the 3rd quarter of 2020 the re-opening of their activity, and have announced that the level of services existing before the pandemic shall not be resumed until summer 2021,⁶⁷ this being however objectively difficult to predict.

By the same token, the enormous amount of aids or loans granted in this sector not only shows that, whatever the rules of the Economic and Monetary Union say, the payer

⁶⁶ At EU level, the regime is in particular established by Regulation (EC) 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. A (less encompassing) regime is also established at international level under the Montreal Convention 1999 on airline liability in the case of death or injury to passengers, as well as in cases of delay, damage or loss of baggage and cargo (see it on www.iata.org). On this topic, see inter alia F. ROSSI DAL POZZO, *Servizi di trasporto aereo e diritti dei singoli nella disciplina comunitaria*, cit.; F. MUNARI, P. CELLE, *Tutela del Passeggero e Concorrenza nella Prospettiva Comunitaria*, in *Diritto del commercio internazionale*, 2006, p. 25 et seq.; F. ROSSI DAL POZZO, B. NASCIBENE, *Servizi di Trasporto e Diritti del Singolo nella Disciplina Comunitaria del Trasporto Aereo*, in M.P. RAGIONIERI, M. MARESCA (eds), *Servizi di Interesse Generale, Diritti degli Utenti e Tutela dell'ambiente*, Milano: Giuffrè, 2006, p. 89 et seq.

⁶⁷ See S. PHILLIP, M. MILLER, C. RYAN, *Ryanair to Cut 3,000 Jobs, as Lockdown Pain Spreads Across Europe's Airlines*, in *Fortune*, 1 May 2020, fortune.com. See also notes 27 ff. above.

of the last resort is always the State. The above not only brings food for thought as regards a topic falling evidently outside the scope of this *Insight*, i.e. the need to reconsider EMU rules that are instead (and probably wrongly) focused exclusively on public debt of the member States, and not on overall levels of debt existing at national level. More specifically for our *Insight*, if the EU taxpayer is required to allow the granting of substantial and generalized aids to air carriers in order to allow them to survive because of the importance of non-economic needs served by them, then one can reasonably conclude that the competitive market model was flawed, since it suffered from hidden structural weaknesses. And even conceding that this was not the case for the past, it goes without saying that, after COVID-19, any sensible policymaker should carefully consider the market failures of this competitive model.

For instance, with the State aids programs that have been or will be launched and implemented to rescue airlines, it will be quite awkward to sustain that the airline industry operates under competitive conditions. And no doubt that this will endure for many years, in which highly undesirable consequences could – and probably will – take place, unless a thorough reflection by policymakers and the EU legislator takes place: *inter alia*: a) acquisitions of EU carriers by other EU carriers that had the privilege, or the possibility, of taking advantage of the deeper pockets of their member State; b) substantial changes in the respective market power of air carriers not for reasons of superior efficiency, but for a stronger support received by their Member States; c) alteration of the competitive conditions among regions of the EU merely dependent on a different level of State support given to the respective airline industries.

In such a situation, it is true that the EU competences in the competition policy *vis-à-vis* those of the Member States are quite different from those concerning the industrial policy. But it would be profoundly myopic (and altogether wrong) not to understand that the decision of nationalizing air carriers that were already in trouble before the coronavirus pandemic is a matter of strategic importance for the concerned Member State, and thus cannot be judged with the lenses of competition law and State aids only. Needless to say, the “private investor criterion” is totally inadequate to provide the answer to the question why an air carrier must be helped, and even nationalized, in order not to go bankrupt, when in the same Member State the market leader previously “competing” with such an air carrier disappeared in one day after COVID-19, leaving millions of EU citizens without air connections.

Indeed, as anticipated earlier,⁶⁸ the Commission has produced its interpretation on how State aids rules shall be interpreted and applied in connection with the COVID-19 pandemic. This decision is important, and possibly opportune, in an emergency situation. In fact, it is maybe the only answer the EU could provide in a few days.

⁶⁸ Above, note 11.

But left to itself, and at least in a medium- long-term perspective, this approach seems unconvincing under different respects.

In the first place, doubts exist as to the possibility for the Commission only to come out with unilateral assessments on how competition law and State aids rules shall be applied in a non-immediate future, due consideration being taken to several factors: consider, for instance, the fact that no-one can still predict the situation of the coronavirus and its evolution, both in itself and as far as the social and economic consequences are concerned. Moreover, one should also take into account that, when relevant political issues are at stake, it can often be impossible to enforce rules without “political” biases; at the same time, however, the interpretation or application of State aids rules cannot be stretched beyond physiological levels, if we want to avoid weakening both the rule of law and the certainty of law, or strengthening a sentiment of distrust in the law enforcement by the Commission.⁶⁹ Finally, the compatibility with the EU legal order of substantial and potentially durable State aids to the airlines has been already and openly contested,⁷⁰ and the challenge does not seem totally deprived of merits from a pure competition law perspective.

Secondly, and more importantly, this approach seems defective from the “constitutional” viewpoint: the need to keep alive the EU airline industry, the ways to do it, and decisions on how to plan its long-term development in line with industrial policy concerns, or consistently with environmental goals, goes far beyond the Commission’s role as guardian of the EU legal order; in fact, it involves political decisions that the Commission must share with other EU institutions and also with Member States. And these decisions, in my view, should not be limited to emergency amendments to Regulation 1008/2009,⁷¹ so far meant to endure until 31 December 2020, even if by this date it might be necessary to establish further prorogations.

It is true that Art. 107, para. 2, let. b), TFEU provides the rationale for the compatibility of State aids granted (also) to air carriers as a consequence of the pandemic. Howev-

⁶⁹ Reference is made, for instance, to the severe criticism met by the Commission in the administration of State aids rules granted to EU banks, after the *TERCAS* judgment (General Court, judgment of 19 March 2019, joined cases T-98/16, T-196/16 and T-198/16, *Italian Republic and Others v. European Commission*). See D. DOMENICUCCI, *Il salvataggio di Banca Tercas non è un aiuto di Stato secondo il Tribunale dell’Unione europea*, in *Eurojus*, 2019, p. 174 et seq.; C. BUZZACCHI, *Il fondo interbancario nel caso Tercas e la tutela del risparmio: mandato pubblico o privato?*, in *Rivista della Regolazione dei mercati*, 2018, p. 279 et seq.; D. DIVERIO, *Le misure nazionali di sostegno al mercato bancario: un’applicazione à la carte della disciplina degli aiuti di Stato alle imprese?*, in *Diritto del Commercio Internazionale*, 2017, p. 603 et seq.; A. ARGENTATI, *Sistemi di garanzia dei depositi e crisi bancarie: c’è aiuto di Stato?*, in *Mercato Concorrenza Regole*, 2015, p. 328 et seq.; F. FERRARO, *Il Tribunale dell’Unione riconsidera la decisione sul caso Tercas in tema di aiuti (non) di Stato alle banche*, in *I Post di AISDUE*, 2019, 5 aprile 2019, www.aisdue.eu.

⁷⁰ See above, notes 16 ff. and *Ryanair CEO Says German, French Bailouts Distort Airline Market*, in *Bloomberg Markets*, www.bloomberg.com.

⁷¹ See above, note 10.

er, in this situation it seems advisable to see the problem under a perspective which is not limited to “pure” competition law issues. In this vein, it makes no difference whether the air carrier was or was not in difficulty before COVID-19, as apparently seems to be the discriminating criterion which the Commission intends to apply to select the legality of aids paid or to be paid to airlines (so that e.g. the nationalization of Alitalia by the Italian State to rescue it would not be considered compatible with EU rules on State-aids).⁷²

VII. INDUSTRIAL POLICY CONCERNS FOR THE FUTURE OF AIR TRANSPORT

Since the earliest time of implementation of the EEC transport policy, leading scholars pointed out that transport is both a service as such under Art. 56 and following TFEU, and at the same time is the cardiovascular system of other fundamental freedoms embodied in the Treaty.⁷³ This situation has not changed, and is clearly valid also for air transport: suffice it mention that air cargo represents less than 1 percent of global trade by volume, but over 35 percent by value.⁷⁴

If one considers passenger services, they are fundamental as well for the connections they allow to different geographic areas, i.e. within a Member State, in the EU and between the EU and third countries.

And yet, as seen above, the market itself is incapable to cope with shocks like the COVID-19, and in general with a decreased demand for air transportation, stemming both from safety reasons to be managed in the medium-long run, and arising out of the awareness that technological substitutes exist to travelling by air.

Since it is unconceivable, and above all unreasonable, to give up air transportation, the moment may have come to evaluate a new approach to this service. More precisely, the principle of free access to routes as presently established by Regulation no 1008/2008⁷⁵ might well be entirely reconsidered, in order to seek whether other models can serve a sound air transport policy capable of preserving both the fundamental returns brought to the EU industry of air transportation, and the non-economic interests it satisfies and will continue to satisfy.

Besides, one should consider that on the agenda of law scholars and policymakers there is a growing debate concerning the need to have the EU and its legal order evolved from an “internal-to-the-EU” perspective, which was focused on competition law within the EU and single market strategies, towards a different set of strategic policies and con-

⁷² See M. BRESOLIN, *Nuove regole UE per gli aiuti di Stato. Ma Alitalia rischia di rimanere fuori*, in *La Stampa*, 5 May 2020.

⁷³ J. BASEDOW, M. DOLFEN, *Verkehrs- und Transportrecht*, cit., pp. 2 and 61; E. PENNACCHINI, R. MONACO, L. FERRARI-BRAVO, S. PUGLISI (eds), *Manuale di diritto comunitario*, Torino, 1984, p. 305 *et seq.*; A. FROHNMEYER, *vor Art. 74*, in E. GRABITZ (ed.), *Kommentar zum EWG-Vertrag*, München, 1992, p. 1.

⁷⁴ Hemisphere, *Flying High. The Growth of the Air Freight Industry*, 17 April 2018, www.hemisphere-freight.com.

⁷⁵ Above, note 66.

sequent rules capable of coping with the global scenarios in which the Union, its firms and citizens have been operating for many years. In this new perspective, a new approach has been correctly advocated concerning e.g. the interpretation and enforcement of competition rules on the control of concentrations, in order to update them to the truly global business scenario in which EU firms operate. The same is being discussed on the application of State aids rules, that do not catch non-EU public entities willing to invest in EU undertakings and sectors: such a situation, coupled with the too weak regime on the control of foreign investments in EU firms,⁷⁶ hampers Member States' capability to carry out strategic decisions of industrial policy *vis-à-vis* non-EU State actors.⁷⁷

Besides, the industrial policy dimension of air transport has never been out of sight for the EU legislator. Suffice it to mention that, as an exception compared to all other firms established in the EU, there is still an EU nationality requirement for the enjoyment of the freedom to provide air transport services within the EU, as well as to and from the Union. More precisely, the release of an operating license by the competent authority of a Member State is statutorily conditioned *inter alia* to the fact that "Member States and/or nationals of Member States own more than 50% of the undertaking and effectively control it, whether directly or indirectly through one or more intermediate undertakings".⁷⁸

With this in mind, it seems legitimate to consider: (a) that air transport matters for the EU well outside an isolated perspective of "freedom to provide air transport services"; (b) that the market failures highlighted above advise against the idea of using competition law tools to heal the present – but durable – crisis of the EU aviation industry; (c) that the risk of losing control over this industry for Member States (as far as air routes connecting their territories are concerned) or for the EU as a whole (as far as global air traffic is concerned) cannot and should not be underestimated.

⁷⁶ Reference is made to Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union. On this issue, see Sabrina Robert Cuendet's contribution to this Special Focus.

⁷⁷ On the relation between foreign investments and the risk posed by the COVID-19 pandemic, see Communication C(2020) 1981 final of 25 March 2020 from the Commission, Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation). More generally, on the need to sharpen state aid control and other competition law instruments to deal with distortions caused by foreign companies that receive state support see M. LEONARD, J. PISANI-FERRY, E. RIBAKOVA, J. SHAPIRO, G. WOLFF, *Redefining Europe's Economic Sovereignty*, Bruegel Policy Contribution, no. 2019/9, www.econstor.eu; G. PETROPOULOS, G. WOLFF, *What Can the EU Do to Keep its Firms Globally Relevant?*, in *Bruegel Blog*, 15 February 2019, www.bruegel.org; B.J.N. GORDON, C.J. MILHAUPT, *China as a National Strategic Buyer: Toward a Multilateral Regime for Cross-Border M&A*, in *Columbia Business Law Review*, 2019, p. 192 *et seq.*; P. JANSEN, *Industrial Policy in the Context of Merger and Foreign Investment Control*, in *Columbia Journal of European Law*, 2018, p. 157 *et seq.*

⁷⁸ See Art. 4, let. f), Regulation (EU) 1008/2008; identical provisions have been established since the very first legislative acts on air transport liberalization within the EU.

Thus, also from this perspective a State or EU renewed intervention in the industry seems now opportune.

VIII. “BACK TO THE FUTURE”: REGULATING THE AVIATION INDUSTRY TO COPE WITH MARKET FAILURES, ENVIRONMENTAL GOALS AND INDUSTRIAL POLICY NEEDS

Policies are not eternal: they are the outcome of historical, economic and social circumstances, that have always been changing over time. More than 30 years ago, reasons existed (and rules did not) fostering the choice to unchain the air transport industry from the existing regulatory framework and liberalize the market for aviation services.

I hope that the analysis above may persuade that the rationale for this market model has been substantially modified. Therefore, the EU and the Member States should seriously think of amending and updating this policy, to cope with the new situation as emerged with the COVID-19 pandemic, i.e. an event capable of suddenly wake all of us from the apparently immutable tenets governing this sector.

If we need, as we need, to re-invent the air transport services for the coming years and decades, economic and non-economic reasons of general interest compel this reasoning. Environmental concerns mandate it even at primary EU law level. In 2020 the principle of integration embodied in Arts 11 TFEU and 37 of the Charter of Fundamental Rights of the European Union, especially in the light of all climate actions and policy statements referred to above,⁷⁹ must play a role in shaping an updated European air transport policy.

The shifting of air transport from a competitive market model to a regulated model under Art. 106, para. 2, TFEU is nothing else but a policy decision, that is discretionally available to Member States.⁸⁰ Of course, because of the present state of the art of EU legislation in this sector, such a decision must be also agreed at EU level, for it implies substantial amendments to the existing EU legislation: this sector is the subject of EU pieces of legislation aiming at liberalizing it. However, the alternative seems to be a long series of confused and prospectively disputable “adaptations” of competition and market access rules over the next years, in which I fear that the exceptions would become the rule. And moreover, these adaptations would be managed and enforced by the Commission only, this being a questionable solution for several reasons, many of which have been highlighted above already.⁸¹ To this end, the inevitable involvement of the Court of Justice to assess the legality of Commission’s decisions would not serve the

⁷⁹ See Section III.

⁸⁰ See *inter alia* General Court: judgment of 16 July 2014, case T-295/12, *Federal Republic of Germany v. European Commission*, para. 44; judgment of 15 June 2005, case T-17/02, *Fred Olsen*, para. 216. See also the authors mentioned below, note 84.

⁸¹ See Section VI.

purpose of shaping an updated air transport policy, and possibly would not even be able to provide certainty of law in a potentially chaotic normative framework. When strong political decisions are at stake, courts should not be involved, their role not being that of supplementing politics.

Besides, in the past decades, and with the contribution of the EU case-law,⁸² models and methodologies to discipline regulated markets have been implemented and fine-tuned. They are capable to provide a reference normative framework to be used, *inter alia*, in order to build a scenario in which: *a*) limited market access for safety and environmental reasons is balanced with the need to have adequate (and efficient) air connections; *b*) the emission trading scheme (ETS) existing at EU level can be effectively monitored and emissions from the aviation can be gradually put down in compliance with EU environmental goals; *c*) the level of air tariffs is set at the optimal level due consideration being taken to the need to avoid negative environmental externalities and, again, reduce air transport emissions; *d*) PSOs can be established for air carriers with a view to allowing continuity and foreseeability of traffic, while at the same time permitting sanitary checks in airports; *e*) the EU Member States can monitor and maintain under control the logistic chain using air transport, both for imports and exports; *f*) movement of persons that air transport services are capable to satisfy are effectively controlled by EU and Member States; *g*) should subsidies be paid to allow minimum frequency connections, they can be assessed under transparent procedures.

The ultimate goal of this regulation should be that of regulating market access for air carriers, shifting movement of persons to alternative and less polluting transportation modes, and preserve exclusively air traffic with acceptable frequencies and schedule upon "political" decisions capable of compromising between mobility, environmental protection and industrial policy. The purpose of this *Insight* is certainly not to go into the details concerning how this shift should be implemented: such an effort would and will require extensive reflection, and possibly a gradual re-introduction of regulatory elements under the same (but reverse) approach used at the time in which the market was progressively liberalized.

Needless to say, this market model shift is radical, and would have substantial consequences also as far as international agreements on air trades with third countries are

⁸² Cfr. *inter alia* Court of Justice: judgment of 20 February 2001, case C-205/99, *Asociación Profesional de Empresas Navieras de Líneas Regulares (Anair)*; judgment of 24 July 2003, case C-280/00, *Altmark Trans GmbH*; General Court, judgment of 12 February 2008, case T-289/03, *British United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd v. Commission of the European Communities*. On the topic, see *inter alia* C. WEHLANDER, *Services of general economic interest as a constitutional concept of EU law*, Den Haag: Asser Press, 2016; U. NEERGAARD, E. SZYSZCZAK, J.W. VAN DE GRONDEN, M. KRAJEWSKI (eds), *Social Services of General Interest in the EU*, Den Haag: Springer, 2013; D. GALLO, *I servizi di interesse economico generale. Stato, mercato e welfare nel diritto dell'Unione Europea*. Milano: Giuffrè, 2010; F. COSTAMAGNA, *I servizi socio-sanitari nel mercato interno europeo. L'applicazione delle norme dell'Unione europea in materia di concorrenza, aiuti di Stato e libera circolazione dei servizi*, Napoli: Edizioni Scientifiche Italiane, 2011.

concerned. And yet, it would not be the first time in which the EU can persuade other States to adhere to new standards, especially taking into account the environmental consequences these new standards would be capable of bringing at global level. After all, the *ATAA* judgment can be a lesson also for the future.⁸³

IX. CONCLUDING REMARKS: COVID-19 AS A “DIDACTIC MOMENTUM”

At least since the 2008 financial crisis, limits have been perceived for an EU whose goals are *de facto* limited to defend the single market achievements. Indeed, these achievements seem in need of re-evaluation, because of the distortions of competitive patterns brought by different tax regimes,⁸⁴ or due to the non-resolved deadlock paralyzing the Economic and Monetary Union.

For many Europeans, the unification of national markets, and the weaponry of competition rules that have been put in place to defend this goal, no longer represent the priority for the Union. If we need to think of an EU for the next decades, other must be the priorities, such as geo-strategic relationships with third countries, border control and global warming issues.

The coronavirus pandemic has shown that models that were apparently thought to last forever were and are much weaker than imaginable, and their collapse must induce policymakers to rethink foundations and principles governing many areas of the single market.

One of the most immediate sectors on which COVID-19 has exposed such weaknesses is the transport sector, and specifically the airborne one. A reform of its model, as developed over the past thirty years, would also serve other important priorities that in the meantime has grown enormously in importance. This is true in particular for the environment, whose protection and promotion *vis-à-vis* the apparently unstoppable acceptance of an increase of air transport emissions can and should be now reconsidered. These priorities have been so far neglected or inadequately considered in order not to question the validity of the competitive model in our sectors; but COVID-19 has

⁸³ See above note 41.

⁸⁴ See inter alia Commission Decision (EU) 2018/859 of 4 October 2017 on State aid SA.38944 (2014/C) implemented by Luxembourg to Amazon; Commission Decision (EU) 2017/1283 of 30 August 2016 on State aid SA.38373 implemented by Ireland to Apple; Commission Decision (EU) 2016/1699 of 11 January 2016 on the excess profit exemption State aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium; Commission Decision (EU) 2017/502 of 21 October 2015 on State aid SA.38374 implemented by the Netherlands to Starbucks; Commission Decision (EU) 2016/2326 of 21 October 2015 on State aid SA.38375 which Luxembourg granted to Fiat. On this topic, see inter alia, L. LOVDAHL GORMSEN, *European state aid and tax rulings*, Northampton: Edward Elgar, 2019; M. ORLANDI, *Principio di libera concorrenza, interpellati e disciplina degli aiuti di Stato: un rapporto complesso*, in *Diritto dell'Unione Europea*, 2017, p. 529 et seq.; P. ROSSI-MACCANICO, *A new framework for state aid review of tax rulings*, in *European state aid law quarterly*, 2015, p. 371 et seq.; S.K. DESAI, *A development in state aid practice: tax rulings and settlements become a focus of attention*, in *European Competition Law Review*, 2014, p. 575 et seq.

shown that alternatives exist, and I believe that this opportunity should not be wasted. In these times of coronavirus, the famous citation by Winston Churchill: “never let a good crisis go to waste” has been often resumed.⁸⁵ Maybe the same holds true also for the airline industry.

The pandemic can become a “didactic momentum”,⁸⁶ in which people, lawyers, and policymakers are requested to reset their beliefs. If this were done, maybe the virus would have brought us at least something good.

⁸⁵ See e.g. Unternehmer Coach, *Never Waste a Good Crisis*, 13 March 2020, www.unternehmercoach.com.

⁸⁶ I take this expression from M. POLLAN, *The Omnivore's Dilemma. A Natural History of Four Meals*, New York: The Penguin Press, 2006.

