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Open Skies Agreement and Code Sharing: What will be The Legal Impact?

Banu BOZKURT*

Yunus ALHAN**

* Dr., Asistant Professor at Akdeniz University Law Faculty Maritime and Insurance Law Department
<https://orcid.org/0000-0002-0630-3681>

**Research Assistant at Akdeniz University Law Faculty Maritime and Insurance Law Department,
myunusalhan@gmail.com
<https://orcid.org/0000-0002-6145-2591>

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Abstract:

Airline carriage has become a more preferred way of transportation day by day. That is why the airline companies, regarding on one hand to develop their flight network and realize more profits on the other, started to cooperate with each other. Such cooperation was intensified with code sharing practice. Although code sharing seems good practice for airline companies, there is a reality that it has some difficulties problematic issues besides its advantages. In our study we will examine code sharing and Open State Agreement' specialities in consideration of air carrier's civil responsibility. We will analyze the possible legal problem that may be concluded from the code-sharing in conjunction with the OSA. In other words, we will examine the problems that occur when these two terms conflicts.

I. INTRODUCTION

In maritime law, the vessels and maritime traders benefits from two important concepts that facilitate them to be more proactive in international free trade. Those concepts are freedom of access¹ and flags of convenience².

The freedom of access and flags of convenience were not accepted in aviation law. The exclusive national sovereignty of the State over the air space above its territory as a general rule of international law was re-emphasized by Paris Convention in 1919. In 1944 the Convention on International Civil Aviation (Chicago Convention) took a step further by stipulating under article 6 that “(n)o scheduled international air service may be operated over or into the territory of a contracting State except with the special permission or authorization of that State and in accordance with the terms of such permission or authorization”.

Therefore, with the growth of the globalization during the years, a need to balance the sovereignty with the economic rights occurred. Such need was satisfied by the creation of open skies agreement (OSA)³.

¹ Freedom of access can be translated as the freedom of navigation in international waters. For further detail please see https://en.wikipedia.org/wiki/Freedom_of_the_seas (last visited 24.04.2016); http://www.un.org/depts/los/convention_agreements/texts/unclos/part10.htm (last visited 24.04.2016); http://legal.un.org/diplomaticconferences/lawofthesea-1958/docs/english/vol_I/19_A-CONF-13-29_PrepDocs_vol_I_e.pdf (last visited 24.04.2016); <https://www.google.com.tr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&cad=rja&uact=8&ved=0ahUKEwjVyoWli6rMAhXpF5oKHYYBBGMQFgg8MAU&url=http%3A%2F%2Fwww.springer.com%2Fcontent%2Fdocument%2Fdocument%2Fdownloaddocument%2F9783642345975-c1.pdf%3FSGWID%3D0-0-45-1402878-p174704876&usq=AFQjCNGKm1WQ6lbDkUcBtb3wVCPat7Pmsg&sig2=6WwoDCESjpicpIPPYv-sKg&bvm=bv.119745492,d.bGs> (last visited 24.04.2016).

² Flag of convenience refers the registration of a vessel under the register of a sovereign state other than the ship owner's. For further detail on flag of convenience please see GREGORY W. R., “*Flags of Convenience: The Development of Open Registries in the Global Maritime Business and Implications for Modern Seafarers*”, Master Thesis, https://www.oceanfdn.org/sites/default/files/Gregory_georgetown.pdf (last visited 24.04.2016); <https://www.hg.org/article.asp?id=31395> (last visited 24.04.2016); https://en.wikipedia.org/wiki/Flag_of_convenience (last visited 24.04.2016); <http://www.itfglobal.org/en/transport-sectors/seafarers/in-focus/flags-of-convenience-campaign/> (last visited 24.04.2016); <http://www.bbc.com/news/world-latin-america-28558480> (last visited 24.04.2016); <http://www.iww.org/unions/iu510/yarbird/yarbird20.shtml> (last visited 24.04.2016); <http://www.panamashipregistry.net/en/pages/flags-of-convenience-definition> (last visited 24.04.2016).

³ At the beginning, the term Air Transport Agreement (or bilateral air transport agreement) was used as including Open Skies Agreement as well. If a distinction should be done between bilateral air transport agreement and OSA; OSA may be defined as more liberalized models of bilateral air transport agreements and is concluded most of the time multilaterally. OSA gives more freedom on fares, capacity, charter flights and air traffic. For further detail and example please see DEMPSEY S. P., “*Public International Air Law*”, (1st Ed. 2008), 528 – 548 (DEMPSEY S. P., Air Law).

At first, OSA was concluded under the name of bilateral air carriage agreements. After the emergence of regional economic integration models (such as EU), multilateral OSA started to be agreed.

Furthermore, during the years, airline carriage became a more preferred way of transportation. That is why the airline companies, regarding on one hand to develop their flight network and realize more profits on the other, started to cooperate with each other. Such cooperation was intensified with code sharing practice.

This paper aims, on one hand to describe OSA and code sharing in the light of the civil responsibility of air carrier and on the other hand to analyze the possible legal problem that may be concluded from the code-sharing in conjunction with the OSA. More specifically, the question that would be raised should be if one of the code-sharing airlines flag is not recognized by the country of destination what might be legal consequences? If one should give an example, in case of the code sharing of Cyprus Airways with British Airways for a flight from Heathrow to Istanbul Atatürk what would be legal consequences⁴? Should Turkish authorities allow this flight or would they have the right to deny landing of such code-sharing flight? Either way, what would be the legal responsibility of air carrier vis-à-vis of the passengers?

Regarding to respond those questions, at first a general definition of code-sharing, OSA and civil responsibility of air carrier would be given.

At the second paragraph the legal consequences of a code-sharing in case of the one of the code-sharing airlines flag is not recognized by the country of destination would be analyzed in details and some possible remedies proposition would be given under the last paragraph.

Last but not least, the legal problems that would be analyzed under this paper would be exclusively related to the international carriage of the passengers by air. In other words, cargo and domestic carriage by air would be out of scope of this paper.

⁴ Turkey is not recognizing Cyprus due to historical reasons. For further detail on Cyprus issue please see https://en.wikipedia.org/wiki/Cyprus_dispute (last visited 24.04.2016); http://www.mfa.gov.tr/cyprus-issue-summary_en.mfa (last visited 24.04.2006); <http://www.mfa.gr/en/the-cyprus-issue/> (last visited 24.04.2016).

II. IN GENERAL

A. CODE SHARING

Regarding to define code sharing; one should explain first what it is a code. Every air carrier is assigned by a two characters distinctive code by International Air Transport Association (IATA)⁵.

There exists different definition of code sharing practice. Basically, it can be defined as the use of joint code by two or more airlines for a flight operated only by one of them⁶.

Code sharing practice increased with the common use of Computer Reservations Systems (CRSs) by the travel agents in the 1980's and 1990's. CRSs were created to be a neutral system than the airlines' own reservations systems for the use of the travel agents who were (and still are) selling the tickets of one or more airlines (as IATA agents⁷). The CRSs system was giving higher priority to online connections between two flights of the same airline than the interline connections of two or more airlines. Regarding to create a practical and economical solution, the airlines adopted code sharing that appears online connection as far as the CRSs system is concerned⁸.

⁵The characters might be constituted from a letter or number or combination of both. The importance here is that they should be distinctive. For further detail on IATA's codes please see CENGİZ A, "Kod Paylaşımı Sözleşmesi", (Code Sharing Agreement), 1 – 4; https://en.wikipedia.org/wiki/Airline_codes (last visited 24.04.2016); <http://www.iata.org/publications/Pages/code-search.aspx> (last visited 24.04.2006).

⁶CENGİZ A, 15 – 18; CONTI C, *Code Sharing and Air Carrier Liability*, Air and Space Law, Vol: 26/1, (February 2001), <https://www.google.com.tr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0ahUK EwjgvmFyK7MAhWiYZoKHfPLASIQFggqMAI&url=http%3A%2F%2Fwww.airandspaceclub.com%2Fforum%2Findex.php%3Faction%3Ddlattach%3Btopic%3D1530.0%3Battach%3D262&usq=AFQjCNEU5B3bwtGFO6baMm-diTnc9uZRpA&sig2=cuBz4 PH00RkcYMBhe-y0w&bvm=bv.120551593,d.bGs> (last visited 26.04.2016), pp. 4 – 5; DIEDRIKS – VERSCHOOR, "An Introduction to Air Law", (8th Revised Ed. 2006), 25; KANE M. R, *Air Transportation*, (15th Ed. 2007), 142; VAN HOUTTE B, "Community Competition Law in Air Transport Sector", Air and Space Law, Vol. 18, (1993), 275 – 287, <http://www.kluwerlawonline.com/abstract.php?area=Journals&id=AILA1993010> (last visited, 24.04.2016).

⁷ For further detail on IATA agents please see <http://www.iata.org/services/accreditation-travel/accreditation-travel/Pages/application.aspx> (last visited 24.04.2016).

⁸ DEMPSEY S. P, MILDE M, "International Air Carrier Liability: The Montreal Convention of 1999", (1st Ed. 2005), 21; Steer Davies Gleave, Beaumont&Son, Lewis Scard Consulting, European Commission Final Report on "Competition Impact of Airline Code Share Agreements", 2007, <http://ec.europa.eu/competition/sectors/transport/reports/airlinecodehsare.pdf>(last visited 23.04.2016), 7 (EC Report).

The most common form of the code sharing is the marketing of a flight from two or more air carriers that only one of them is operational carrier⁹. Operational carrier may be defined as the actual carrier who operates the code sharing flight¹⁰.

One may ask why the airlines prefer code sharing instead of operating the flight by themselves. Code sharing helps to the airlines to reduce their operational cost on one hand and extend their flight connections on the other¹¹. Code sharing is a most effective way especially in long haul operations. Furthermore, due to the increase of the capacity of the aircrafts, code sharing appears to be a functional practice for reducing the operational costs and filling up the capacity of passengers¹².

It should be emphasized here that, the creation of the airlines alliances is one of the most concrete consequences of the increase of the code sharing practice¹³.

Regarding to enter a code sharing cooperation or increase the code sharing practice; OSA might be useful. More concretely, creating a regulatory ground on the performance of cooperation or collaboration in commercial air services might give a legal guarantee to the code sharing airlines and enhance their cooperation¹⁴.

In relation to the subject of this paper, last but not least, the impact of the code sharing on traffic rights¹⁵ should be discussed. In other words, is it possible that the code sharing

⁹ ICAO Circular 259-AT/110 on Implications of Airline Code Sharing, www.icao.int/sustainability/Documents/C269_en.pdf, (last visited 23.04.2016) (ICAO Circular); EC Report, 7 – 8.

¹⁰ For further detail on operational carrier and its place in aviation law please see paragraph II/C.

¹¹ For further detail on the economic impact of the code sharing please see ABEYRATNE R, “*Legal and Regulatory Issues of Computer Reservation Systems and Code Sharing Agreements in Air Transport*”, Forum for Air and Space Law, Vol:3, (1995), 119 – 121, www.heinonline.com (last visited 24.04.2016), EC Report, 8 – 9. Code sharing is especially useful for the domestic connections after a long haul flights. For instance, a Turkish passenger might buy a ticket from İstanbul to Guangzhou via Shanghai thanks to code sharing of Turkish Airlines with Air China.

¹² The operational cost should, most of time, be calculated per person and that is why when the flight is filled up, operational cost would be diminished.

¹³ Code sharing at the beginning was a very controversial practice especially in relation to competition law and the protection of the consumer. Even today, its impact on competition law regarding to creation or not a dominant position is a controversial issue. For further detail please see EC Report, 9 – 26; DIEDRIKS – VERSCHOOR, 26; ICAO Circular, 23 – 25, 29 – 34.

¹⁴ Creation of the Single European Sky (SES) might be given as an example. After the creation of the SES, the code sharing between the European airlines companies has been increased notably. Such increase may be ascertained by the enhancement of the number of the alliances between the European airlines companies. Furthermore, the boosting effect of the creation of the SES might not be denied for the conclusion of the Open Sky Agreement 2007 (OSA Plus) between the US and the EU. For further detail on the OSA Plus please see below paragraph II/B and DEMPSEY S. P, Air Law, 565 – 578.

¹⁵ For the definition and further details on traffic rights please see DEMPSEY S. P, “*Air Traffic Rights*”, Course Notes, www.mcgill.ca/iasl/files/iasl/ASPL633-Air_Traffic_Rights.pdf (last visited 23.04.2016) (DEMPSEY S. P, Course Notes); www.icao.int/Pages/freedomsAir.aspx (last visited 23.04.2016); ICAO Circular, 20 – 22; KANE M. R, 348 – 349; KILINÇ S, *Avrupa Birliği – EUROCONTROL Sivil Havacılık Düzenlemeleri ve Türkiye*, (1st Ed. 2012), 36 – 39; MERCADAL B, *Droit des Transports Terrestres et Aériens*, (1st Ed. 1996),

practice might be interpreted as entitling traffic rights to the contractual carrier(s)? Regarding to respond this question, firstly it should be underlined here that the traffic rights of the operational carrier is not controversial. In other words, the operational carrier should be entitled with the traffic rights especially for the country of destination regarding to realize the flight.

The controversial issue is on the traffic rights of the contractual carrier(s). The entitlement of the contractual carrier with the traffic rights by the code sharing is discussed in the aviation law doctrine. According to some of the writers, even though the contractual carrier is not entitled a *de facto* traffic rights; *de jure* entitlement should be recognized as such code sharing is used most of the time for by-passing the OSA. Therefore, most of the writers, by agreeing the use of the code sharing for bypassing the OSA, argue that the code sharing is an important, even main tool for marketing. That is why, according to them, it is not possible to accept the entitlement of the traffic rights to the contractual carrier(s)¹⁶.

B. OPEN SKIES AGREEMENT

As mentioned under the introduction paragraph, the freedom of access is rejected in aviation law. This rejection constitutes the principal cause of the conclusion of the bilateral air transport agreements and OSA between the sovereign countries.

More specifically; as emphasized under the first Article of Chicago Convention, each State enjoys “*complete and exclusive sovereignty over the airspace above its territory*”. That is why any aircraft who would fly over the airspace of another State than its national State should obtain an explicit or tacit approval. This principle of territorial sovereignty constituted an important obstacle before the outgrowth of civil aviation and international trade and economy¹⁷.

Regarding to eliminate this important obstacle, sovereign States started to conclude bilateral air transport agreements. Before the conclusion of the bilateral air transport agreements

281 – 282.

¹⁶ For further detail and discussion please see CENGİZ A, 94 – 98 and Paragraph III/C. The writer is arguing that the discussion is not important vis-à-vis of the article 6 of Chicago Convention as this article recognizes the exclusive permission right of the Territory State for the operation of a foreign aircraft and such regulation is actually made with air transport agreements. Therefore, in most of the bilateral or multilateral air transport (or open skies) agreements, the code sharing issue is not stipulated or regulated. This practice is more concrete when it comes to Turkish law as in nearly all of the bilateral/multilateral agreements that Turkey is signatory, there is not an express stipulations on code sharing. This assessment is also made by the writer as well. Please see CENGİZ A, 98. For further detail on air transport agreements please see below paragraph II/B.

¹⁷ For further detail please see POGUE L. W, “*International Civil Air Transport – Transition Following WWIP*”, MIT, Report FTL-R79-6, [http://dspace.mit.edu/bitstream/handle/1721.1/67930/FTL_R_!/\)_=&.pdf;sequence=1](http://dspace.mit.edu/bitstream/handle/1721.1/67930/FTL_R_!/)_=&.pdf;sequence=1) (last visited 06.06.2016); p. 3; DEMPSEY S. P, Air Law, 518 – 521. Furthermore, it should be underlined here that during the gathering of Chicago Convention, an Interim Agreement was concluded regarding to establish a provisional organization which would become ICAO afterwards.

and OSA, the freedom of access was accorded basing on the principle of reciprocity and comity¹⁸. Therefore, as the States have discretionary power over the application of the principles of reciprocity and comity; more legal and regulatory solution was found by the conclusion of bilateral air transport agreements and OSA.

After the WWI, the States tried to reach to a multilateral consensus on the freedom of access in aviation law. In spite of the failure to reach to this multilateral consensus; the States agreed on the adoption of a Form of Standard Agreement for Provisional Air Routes during the Chicago Conference in 1944¹⁹. That form as a structural model, was a keystone for the conclusion of the bilateral air transport agreements and OSA²⁰.

The post WWII era was noticed by the conclusion of bilateral air transport agreements. Bermuda I that was concluded between US and UK was one and most important bilateral air transport agreement as that constituted a model for other worldwide bilateral air transport agreements and OSA because of the insistency on an explicit prohibition of capacity predetermination and pooling²¹. Conclusion of bilateral air transport agreement and OSA is important as these agreements have impacts on one hand on the development of civil aviation and its industry and on national security on the other. That is why the balance between the liberalization and security should be sustained. This balance was obtained for a long time with Bermuda I model of explicit prohibition of capacity predetermination and pooling.

In the conclusion of bilateral air transport agreements and OSA, the participation of US was played an important role as US was and still is an important role player in the aviation industry. The liberalization in the aviation law policy of US and the intense economic integration of the EU played crucial roles on the conclusion of OSA.

¹⁸ DEMPSEY S. P, Air Law, 519.

¹⁹ For further detail please see PAULIN C, *Droit des Transports*, (1st Ed. 2005), 80 – 81; SAND H. P, LYON T. J, PRATT N. G, “*An Historical Survey of International Air Law*”, <http://lawjournal.mcgill.ca/userfiles/other/8058569-sand.pdf> (last visited 06.06.2016), p. 129, 136; DEMPSEY S. P, Air Law, 520; KANE M, R, 349.

²⁰ It should be underlined here that the conclusion of multilateral air transport agreements and OSA was discussed during the conference. Therefore, most of the participant States, due to the national security concerns, rejected to conclude multilateral agreements. That is why afterwards, bilateral air transport agreements were dominated the civil aviation. For further detail please see SAND H. P, LYON T. J, PRATT N. G, 135 – 137.

²¹ For further detail on Bermuda I and its stipulations please see: WARDEN A. J, “*Open Skies at a crossroads: How the United States and European Union Should Use the ECJ Transport Cases to Reconstruct the Transatlantic Aviation Regime*”, *Northwestern Journal of International Law & Business*, V:24, Issue: 1, (Fall 2003), <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1575&content=njilb> (last visited 06.06.2016), 230 – 231; DEMPSEY S. P, Air Law, 521 – 528; KANE M. R, 351; KILINÇ S, 40 – 41; POGUE L. W, 19 – 25; PAULIN C, 82; SAND H. P, LYON T. J, PRATT N. G, 136 – 137.

The multilateral air transport agreement between US and BENELUX countries of 1978 and bilateral air transport agreement between US and Israel of 1978 may be cited as the examples of first generation OSA that are characterized by their price flexibility; unrestricted capacity; possibility of designation of multiple national air carriers for international flights; new fifth freedom rights; the application of national rules to charter flights and elimination of any kind of unfair competition methods between national and foreign air carriers²².

With the establishment of new “Cities Program” of US Department of Transportation (DOT) in 1990’s, a second generation of OSA appeared. This second generation OSA is characterized with the open entry on all routes; unrestricted capacity and frequency on all routes; unrestricted route and traffic rights; some additional freedom on pricing; liberal charter arrangement; liberal cargo regime; open code sharing opportunities; possibility of self-handling; liberalization on competition rules and non-discriminatory operation and access to CRS²³.

The second generation OSA constitutes an important key stone for code sharing as the code sharing was started to be seen as stipulation sine qua non for a bilateral or multilateral air transport agreement to be classified as OSA²⁴.

The first “modern” multilateral OSA (so-called MALIAT) containing multilateral exchange of all five freedoms as drafted during the Chicago Conference of 1944 was concluded between the US and four Pacific-Rim countries of Brunei, Chile, New Zealand and Singapore in 2001. This agreement permits to the signatory States’ airlines to give unrestricted services to the airlines of the countries involved to, from and beyond others’ territories, without prescribing where carriers fly, the number of flights they operate and the prices they charge²⁵. More specifically, MALIAT gives possibility to the air carriers of the signatory States to enter into the code-sharing arrangements²⁶ with any other non- signatory State’s air carrier.

²² For further detail please see DEMPSEY S. P, Air Law, 533 – 541.

²³ For further detail please see FITZGERALD P. P, “Darkening Skies”, (2010), http://cil.nus.edu.sg/wp/wp-content/uploads/2010/05/Liberalisation-of-Air-Transport_Paul-Fitzgerald.pdf (last visited 06.06.2016); DEMPSEY S. P, Air Law, pp. 543 – 546; KANE M. R., 359; www.airlineinfo.com/1992orders/order920813.pdf (last visited 06.06.2016); WARDEN A. J, 236 – 237.

²⁴ Second generation OSA was characterized with the liberalization in civil aviation and code sharing possibility without an authorization was constituted one of the most important concrete example of this liberalization. DEMPSEY S. P, Air Law, 546, 548 – 552; WARDEN A. J, 237 – 238.

²⁵ For further detail on MALIAT and full text please see DEMPSEY S. P, Air Law, 553 – 558; www.maliat.govt.nz/agreement/ (last visited 06.06.2016); www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp034_en.pdf (last visited 06.06.2016); www.transportation.gov/policy/aviation-policy/multilateral-agreement-liberalization-international-air-transport (last visited 06.06.2016).

²⁶ MALIAT gives to the signatory States air carriers to enter into the other cooperative marketing arrangements as

Despite the liberalization policy of the US, ICAO remained on the insistence of the restrictions on the ownership and control of the aircrafts. That insistence has been reviewed during the ICAO's Fifth Worldwide Air Transport Conference. Therefore, even though the intent on liberalization has been underlined at the conclusions remarks; the designation, in written, of the permitted air carrier(s) to/in the foreign signatory State was stipulated in the model clause that has been proposed as regulatory arrangement²⁷. Therefore, as for the liberalization, a non-governmental air carrier's right of enjoying the freedoms accorded by the bilateral air transport agreements and OSA has been recognized²⁸.

When it comes to the EU, after the establishment of Single European Market, air transportation intra-EU was liberalized with the Regulation 2408/92 in 1992. More specifically, with this Regulation, the cabotage rights inside the Union were accorded to all EU licensed air carriers²⁹. Therefore, the rights of the conclusion of bilateral air transport agreements and OSA of the Member States with the third countries were discussed for a long time. In other words, The Commission was arguing that such individual conclusion of OSA violated its exclusive authority to conduct external trade relations with third countries where the Member States were continuing to conclude OSA. The decision of the European Court of Justice (ECJ) put an end to this discussion. In 2002, the ECJ rendered its long-awaited decision by rejecting the Commission's exclusive competence on negotiating air transport trade issues where it accepted the exclusive competence of the EU organs on fares and rates in intra-EU routes and CRSs³⁰. After this decision, some provisions of the bilateral agreements and OSA became inconsistent with EU law such as the effective ownership and control clauses; air fares and rates on intra-EU clauses; CRSs and airport slot allocations clauses³¹. Despite the ECJ decision, the Member

well. Therefore as the subject of this paper is code-sharing other subjects would not be treated here. For other arrangements please see DEMPSEY S. P, Air Law, 554 – 558; www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp034_en.pdf (last visited 06.06.2016); www.transportation.gov/policy/aviation-policy/multilateral-agreement-liberalization-international-air-transport (last visited 06.06.2016).

²⁷ For further detail please see DEMPSEY S. P, Air Law, 559 – 565; www.icao.int/Meetings/ATConf5/Documents/ATConf5_conclusions_en.pdf (last visited 07.07.2016).

²⁸ That is why ICAO's 5th Worldwide Air Transport Conference was recognized as an important liberalizing conference as equal rights was provided for non-governmental air carriers as well. Therefore, when it comes to the code sharing, this was not liberalizing as the designation of the ownership and control was still a must for the model clause. www.icao.int/Meetings/ATConf5/Documents/ATConf5_conclusions_en.pdf (last visited 07.07.2016).

²⁹ For further detail and full text of the Regulation please see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992R2408:EN:HTML> (last visited 08.07.2016); DEMPSEY S. P, Air Law, 565 – 566; MERCADAL B, 282; PAULIN C 83 – 85.

³⁰ For further detail and full text of the ECJ decision please see <http://curia.europa.eu/en/actu/communiqués/cp02/aff/cp0289en.htm> (last visited 08.07.2016); DEMPSEY S. P, Air Law, 573 – 575; PAULIN C, 83; WARDEN A. J, 241 – 244.

³¹ DEMPSEY S. P, Air Law, 573 – 575; PAULIN C, 83; WARDEN A. J, 244 – 254.

States continued to conclude bilateral agreements and OSA with third countries including these inconsistent clauses³².

On the other hand, during this time, the works on the establishment of the Single European Sky (SES) were started. On October 2001, the Commission prepared a proposal on the establishment of SES that was accepted and adopted on March 2004. That was nominated as SES I package where the airspace over the Member States was accepted as the airspace of the EU for every kind of air carriage purpose (that includes some military purpose as well)³³. After the establishment of SES, amendments were made with so called SES II and SES 2+ packages regarding to enhance the cooperation and deepen the integration in air transportation³⁴.

Especially after the establishment of Single European Market, the authorities of the EU emphasized, in several reprises, their willingness of establishment of a Transatlantic Common Aviation Area (TCAA). Therefore, US were not willing as the negotiations of bilateral OSA were started with the majority of Member States³⁵. Therefore after the decision of the ECJ and the establishment and enhancement of SES, US and EU agreed and concluded OSA in 2007. The OSA between the US and the EU has been ratified by 27 Member States of the EU in 2008³⁶.

If some assessment should be done regarding the effect of the propagation of the OSA on code-sharing; even though the conclusion of the OSA facilitates the entrance to the national market of a third country for foreign air carriers; the cost diminishing effect of the code-sharing

³² DEMPSEY S. P, *Air Law*, 574 – 575.

³³ For further detail on SES I Package please see GÜNEL V. R, *Uluslararası Havacılık Hukuku*, (1st Ed. 2010), 198 – 199; http://ec.europa.eu/transport/modes/air/single_european_sky/ses_1_en.htm (last visited 07.07.2016); KILINÇ U. S, 104 – 112.

³⁴ For further detail on SES II and SES 2+ packages please see http://ec.europa.eu/transport/modes/air/single_european_sky/ses_2_en.htm (last visited 07.07.2016); KILINÇ U. S, 114 – 116.

³⁵ DEMPSEY S. P, *Air Law*, 570 – 572; WARDEN A. J, 246 – 252.

³⁶ DEMPSEY S. P, *Air Law*, 573 – 578; GÜNEL V. R, 199 – 208. For further detail and the enhancement of the OSA please see http://ec.europa.eu/transport/modes/air/international_aviation/country_index/united_states_en.htm (last visited 07.07.2016); http://europa.eu/rapid/press-release_MEMO-10-103_cs.htm?locale=en (last visited 07.07.2016); <http://www.businesstravelnews.com/Business-Globalization/Second-Phase-EU-US-Open-Skies-Deal-Draws-Mixed-Reaction> (last visited 07.07.2016). The impact of the BREXIT on the SES and EU-US OSA will not be analyzed here as this subject stays out of the scope of this article. Therefore, if some suggestions would be done here; the exit terms and conditions of the UK and the reactions in the EU should be seen at first. More concretely, any suggestion that is given without knowing the UK approach on staying in the SES or not would constitute nothing than a speculation. For further detail on possible scenarios please see <http://monev.cnn.com/2016/06/26/news/companies/brexit-uk-referendum-airlines/> (last visited 07.07.2016); www.breitbart.com/news/easyjet-demands-eu-flights-certificate-after-brexit-6/ (last visited 07.07.2016); www.iata.org/publications/economic-briefings/impact-of-brexit.pdf (last visited 07.07.2016).

is importantly remarkable that the airlines would continue to share their codes. Furthermore, more liberalized OSA would have an increasing effect on code-sharing practice. More concretely, in the bilateral air transport agreements and first generation OSA, the air carriers that would enjoy the freedoms accorded by the agreement should be cited in the conclusion. Therefore, with the liberalization of the OSA, this obligation disappeared and in the actual OSA, every air carrier of the signatory State(s) may enjoy from the freedoms accorded by the agreement and may enter freely to the code sharing practice with every air carriers. The air carriers that might be code sharing partner of the signatory State's air carrier should not be cited in the new generation OSA. In other words, an airlines company of the signatory State may enter into code sharing practice with a third country airlines company without needing any approval or authorization

Last but not least, it should be emphasized here that the OSA renders the world smaller. Thanks to this agreement, the worldwide access of the passengers may be furnished easily by their national air carriers.

C. CIVIL LIABILITY OF AIR CARRIER

Air carrier is the other party of the air carriage agreement that will realize the carriage by aircraft. Air carrier may be defined as the real person or legal entity who undertakes to carry the passenger (or the goods) with the aircraft, in the agreed itinerary and on the agreed timeline³⁷.

Air carrier might be actual carrier or contractual carrier. More specifically, a passenger might be carried by an actual carrier with whom he did not conclude the carriage agreement. Thus, the contractual carrier may be defined as the other party of the air carriage agreement. Therefore, contractual carrier is not obliged to realize the air carriage; actual carrier might be the operational carrier³⁸. This distinction of contractual and operational carrier is tightly related with code sharing as the operational carrier appeared in aviation law with the emergence of code sharing practice. In other words, the operational carrier is one of the code sharing air carriers who operates the aircraft³⁹. The legal status of the actual carrier was regulated under

³⁷ BOZKURT BOZABALI B, *Havayoluyla Yolcu Taşıma Sözleşmelerinde Taşıyanın Ölüm ve Cismani Zarardan Doğan Hukuki Sorumluluğu*, (1st Ed.2013), 28 – 29, 43; SÖZER B, *Havayoluyla Yük Taşıma Sözleşmesi*, (2nd Ed. 2009), 36 – 44.

³⁸ This list of carriers might be extended to the successive carriers, air freight forwarders, agents of the air carriers etc. Therefore, as the subject of this paper is limited with the air carriage of the passenger; other actors would not be explained here. For further detail on the other persons and legal entities that are accepted as air carriers, please see GENÇTÜRK M, *Uluslararası Eşya Taşıma Hukuku (Gecikmeden Doğan Sorumluluk)*, (1st Ed. 2006), 30 – 34;BOZKURT BOZABALI B, 30 – 31; DEMPSEY S, MILDE M, 72 – 74; SÖZER B, 46 – 48.

³⁹ For further detail please see BOZKURT BOZABALI B, 29 – 30, 43; DEMPSEY P, MILDE M, 22; DIEDRIKS

the Guadalajara Convention of 1961. Accordingly, actual carrier is accorded with the same rights and obligations of the contractual carrier⁴⁰

When it comes to the liability of air carrier, it is subjected to a numerous international agreements. The first agreement that regulates the civil liability of air carrier is Warsaw Convention of 1929 that was amended several times⁴¹. The newest agreement that replaces Warsaw Convention is Montreal Convention of 1999⁴².

Even though a lot of amendments have been done on the civil liability of air carrier; the main obligation of the carrier remains: Carry the passenger to the agreed itinerary, in the agreed time and in the good conditions (without having any accident).

Therefore, one subject would be treated here as this is the only related issue with the subject of this paper: What would be the responsibility of the air carrier in case of the non-possibility of the air carrier to carry the passenger on the agreed itinerary? More specifically, what would be the responsibility of the air carrier if he could not land to the agreed destination?

The international conventions and protocols that are mentioned above do not contain a response to this question. Therefore, the question would be responded in the light of the main air carriage agreement. More specifically, if the air carrier could not transport the passenger in the agreed itinerary, it should be understood that he did not accomplish his undertaking in conjunction with the air carriage agreement and should compensate the damages that have been arisen in causation with. In other words, this situation constitutes a breach of the air carriage agreement and should be compensated in relation with the stipulations related to the breach of contract in domestic laws⁴³. Furthermore, it should be underlined here that if the non-

– VERSCHOOR, 157 – 160; GENÇTÜRK M, 28 – 30; SÖZER B, 44 – 46.

⁴⁰ For further detail on Guadalajara Convention please see BOZKURT BOZABALI B, 61 – 65, 43; DEMPSEY P, MILDE M, 21 – 22; DIEDRIKS – VERSCHOOR, 157 – 162; SÖZER B, 70 – 71.

⁴¹ The amendments of Warsaw Convention were, most of the time related with the amount limits of the air carrier's liability. More concretely Warsaw Convention is foreseen a limited liability of the air carrier in case of death and bodily injury of the passenger. These limits were doubled with the Hague Protocol of 1955, reviewed and increased with Montreal Intercarrier Agreement (applicable only for the air carriage that would be realized to/from US) of 1966 and replaced the currency of Poincaré Frank with Special Drawing Rights with Montreal Protocols of 1975. Guadalajara Convention of 1966, as an addition to Warsaw Convention, extended its scope of application to actual carrier as well. For further detail on Warsaw Convention and its amendments please see BOZKURT BOZABALI B, 49 – 76; DEMPSEY P, MILDE M, 11 – 31; DIEDRIKS – VERSCHOOR, 103 – 170; SÖZER B, 57 – 74.

⁴² Montreal Convention of 1999 is the newest Convention that regulates international civil aviation. It is not a protocol but a convention that replaces Warsaw Convention and all its amendments. It includes the stipulations of Guadalajara Convention of 1966 on actual and operational carrier and all the necessary amended stipulations of Warsaw Convention of 1999. For further detail on Montreal Convention of 1999 please see BOZKURT BOZABALI B, 76 – 81; DEMPSEY P, MILDE M, 36 – 44, 57 – 264; DIEDRIKS – VERSCHOOR, 170 – 179; SÖZER B, 74 – 79.

⁴³ For further detail on the civil responsibility of air carrier arising from the non-accomplishment of the air carriage

accomplishment of the undertaking is caused by the force majeure, the responsibility of the air carrier would be lifted.

Last but not least, one may ask if, under such case, the air carrier may benefit from the limited liability that has been foreseen under Warsaw and Montreal Conventions. The response would be negative as both of the Conventions foresee unique (exclusive) basis of claims⁴⁴.

III. CODE SHARING AND CIVIL RESPONSABILITY OF AIR CARRIER

As mentioned under the introductory paragraph, the main question of this paper is what might be the civil responsibility of air transporter in case of non-recognition of one of the code sharing flight's flag by the country of destination.

Under this paragraph, possible scenarios would be treated in relation with the civil responsibility of air transporter.

Before giving further details on the subject, it should be mentioned here that the analyzed hypothesis is based on the recognition of the operational carrier's flag by the country of destination. In other words, in relation with the explication under this paragraph, the operational carrier is deemed as carrier with recognized flag by the country of destination whereas the contractual carrier is not.

The code sharing flight of the contractual carrier to the country of destination who is not recognizing its flag may be ended in two ways: The country of destination would not allow to the landing of the code sharing flight and the flight should land to another place than the country of destination or it might allow to the landing and hold responsible the operational carrier for the legal consequences.

Therefore, these two scenarios would be treated under this paragraph whereas the impact of OSA and possible remedies would be analyzed under the last paragraph.

A. CIVIL RESPONSABILITY IN CASE OF LANDING TO ANOTHER COUNTRY THAN THE COUNTRY OF DESTINATION DUE TO THE

agreement in Anglo-Saxon and Continental law please see BRAHINSKY-RENAULT C, *L'Essentiel du Droit des Obligations*, (1st Ed. 2015), 81 – 89; CABRILLAC R, *Droit des Obligations*, (11th Ed. 2014), 132 – 162; HATEMİ H, GÖKYAYLA E, *Borçlar Hukuku Genel Bölüm*, (1st Ed. 2011), 251 – 266; KILIÇOĞLU A, *Borçlar Hukuku Genel Hükümler*, (18th Ed. 2014), 688 – 743; LEGIER G, *Droit Civil – Les obligations*, (16th Ed. 1998), 80 – 100; NOMER H, *Borçlar Hukuku Genel Hükümler*, (11th Ed. 2012), 253 – 283; OĞUZMAN K, Ö T, *Borçlar Hukuku Genel Hükümler*, (11th Ed. 2014), 379 – 455; REİSOĞLU S, *Türk Borçlar Hukuku Genel Hükümler*, (25th Ed. 2014), 369 – 391; SAMUEL G, *Law of Obligations and Legal Remedies*, (2nd Ed. 2001), 350 – 351; WILSON J, *Carriage of Goods by Sea*, (7th Ed. 2010), 347 – 350.

⁴⁴ For further detail please see BOZKURT BOZABALI B, 82 – 88; DEMPSEY P, MILDE M, 204 – 212; DIEDRIKS – VERSCHOOR, 141 – 145; SÖZER B, 92 – 104.

NON-RECOGNITION OF THE FLAG OF THE CONTRACTUAL CARRIER

The first scenario that has to be treated here is the non-authorization of landing of the code sharing flight. More concretely, as a sovereign State, the country of destination would have every right to non-authorize the landing of the code sharing flight if one of the flag countries of the code shared airlines is not recognized by him.

This scenario would be possible if the operational carrier's flag country is not recognized by the country of destination or if it is accepted that the traffic rights is accorded to the contractual carrier as well. In other words, the country of destination may not authorize the landing of the code sharing flight if the operational carrier's flag country is not recognized by him or if the country of destination accepts that the traffic rights would be accorded, beside the operational carrier, to the contractual carrier as well. In those cases, the country of destination, as a sovereign State would have every right to not authorize the code sharing flight to land his country.

Therefore, in case of non-authorization; the flight should be de-routed. In other words, the flight would be landed in another country than the country of destination.

Under this scenario, the air carrier would be responsible for the damages arisen due to the non-accomplishment of his undertaking under the air carriage agreement. More concretely, one of the main undertakings of the air carrier is to carry the passenger to the agreed destination which could not be accomplished according to this scenario.

Therefore, the air carrier would be responsible for the damage arisen due to the landing to another country than the country of destination. The responsibility of compensation may be fulfilled by the payment of the damage and/or by organizing a successive carriage from the country of landing to the country of destination. In other words, firstly it should be accepted that the air carrier should indemnify the damage by the compensation payment⁴⁵. Secondly, the air carrier might, regarding to decrease the damage, organize the carriage of the passengers from the country of landing to the country of destination. This successive carriage might be

⁴⁵ The compensation amount should be determined according to the law that would be applied to the litigation. The compensation amount might be calculated basing on the positive damage (namely damage due to the confidence accorded to the agreement) or negative damage (namely damage arisen by the non-accomplishment of the contractual undertakings). For further detail please see BRAHINSKY-RENAULT C, 83 – 84; CABRILLAC R, 147, 158 – 162; HATEMİ H, GÖKYAYLA E, 259 – 266; KILIÇOĞLU A, 732 – 743; LEGIER G, 88 – 90, 96 – 99; NOMER H, 259 – 283; OĞUZMAN K, ÖZ T, 391 – 413; REİSOĞLU S, 373 – 391; SAMUEL G, 341 – 387.

organizing by road, air or sea according to the distance between the country of landing and country destination. In any case, the air carrier should choose the most convenient way of transport.

As another and last question that should be responded under this scenario would be which carrier should be responsible for the compensation? More concretely would it be actual (operational) carrier or contractual carrier who should indemnify the passengers? As the passengers might only know the contractual carrier; it should be contractual carrier who should indemnify them. In any way, the actual (operational) and contractual carrier should be jointly responsible vis-à-vis of the passengers. When it comes to the subrogation, the contractual carrier who indemnifies the passenger may subrogate it from the operational carrier because as a due diligent air carrier⁴⁶, the operational carrier should foresee the possibility of the non-authorization of landing of the code shared flight to the country of destination.

B. CIVIL RESPONSABILITY IN CASE OF LANDING TO THE COUNTRY OF DESTINATION WITH A NON-RECOGNIZED FLAG OF THE CONTRACTUAL CARRIER

Other scenario that should be treated here would be the civil responsibility of air transporter in case of landing of the code sharing flight to the country of destination with a non-recognized flag of one of the code shared airlines.

Firstly it should be underlined here that this scenario would be possible only if the operational carrier's flag country is recognized by the country of destination. More concretely, under this scenario, the operational carrier who has the traffic right should be the airlines of a recognized country flag and it should be accepted here that the traffic rights is not granted to the contractual carrier of the code sharing flight. If the contractual carrier's traffic right is accepted, it would not be possible to authorize the landing or if the landing authorization is granted, such authorization would be understood as *de lege* recognition of the flag country of the contractual carrier by the country of destination⁴⁷.

⁴⁶ For further detail on the due diligence of air carrier please see BOZKURT BOZABALI B, 104 – 108; DEMPSEY P. S, MILDE M, 149 – 165; DIEDRIKS – VERSCHOOR, 122 – 124; SÖZER B, 246 – 248.

⁴⁷ For further detail on de jure and de lege recognition of the countries please see ACERY, KAYAİ, *Uluslararası Hukuk Temel Ders Kitabı*, (5th Ed. 2014), 239 – 259; AKSARY, *Teoride ve Uygulamada Uluslararası Hukuk I*, (2nd Ed. 2012), 239 – 259; CAŞINM. H, *Modern Uluslararası Hukukun Temel Esasları*, (1st Ed. 2013), V: I, 405 – 433; COMBACAU J, SUR S, *Droit International Public*, (6th Ed. 2004), 285 – 306; DOĞANI, *Devletler Hukuku*, (2nd Ed. 2013), 284 – 287; EROĞLU H, *Devletler Umumi Hukuku*, (2nd Ed. 1984), 124 – 129; PAZARCI H, *Uluslararası Hukuk*, (5th Ed. 2015), 3rd Book, 2 – 25, 335 – 350; SUR M, *Uluslararası Hukukun Esasları*, (4th Ed. 2010), 121 – 125.

Under this scenario, for the country of destination, the code sharing flight is not accepted as legally code sharing flight because the country of destination's authorities do not have any legal contact with the contractual carrier. In other words, under this scenario, as the contractual carrier does not and should not have traffic rights for the country of destination, the country of destination's aviation authorities would not have any relation with the contractual carrier. Therefore, operational carrier deems to be the only carrier for the country of destination in relation with the code sharing flight⁴⁸.

As the operational carrier deems to be the sole carrier for the country of destination, there would not be any responsibility based on the non-recognition of the contractual carrier's flag by the country of destination. More concretely, as the operational carrier deems to be the sole carrier for the country of destination, every authorization would be accorded to him and any kind of civil liability due to the lack of authorization should be indemnified by him. Therefore, the lack of authorization, under this scenario, would not be caused by the non-recognition of the flag of the contractual carrier by the country of destination as the landing authorization is granted. That is why under this scenario, there would not be any civil responsibility arising from the non-recognition of the flag of the contractual carrier.

C. THE IMPACT OF OPEN SKIES AGREEMENT AND POSSIBLE REMEDIES

As explained above, before the conclusion of OSA, bilateral air transport agreements were dominating civil aviation. The main characteristics of those bilateral air transport agreements were the explicit prohibition of capacity predetermination and pooling. That is why entry into a code sharing with airlines of non-recognized flag by the country of destination was not possible for the bilateral air transport agreements. In other words, as the pooling and capacity predetermination were under the control of both of the aviation authorities of the air transport agreements signatories States, a code sharing flight of a non-recognizing flag airlines would be prevented by the aviation authorities of the country of destination at organization level; before the tickets were sold.

⁴⁸Landing to a country of destination with a non-recognized flag of one of the code sharing air carrier would be against the international public law rules (diplomatic courtesy rules etc) and should obviously have legal consequences for the operational carrier and operational carrier's flag country. Therefore, as the subject of this article includes only the civil liability of the air carrier; the public law consequences would be out of scope of this article and would not be analyzed here.

Under the first generation OSA and the model accepted during the 5th Annual Conference of the ICAO, as the permitted air carrier(s) should be designed in written; it would not be possible the freely enter into the code sharing practice.

The possibility of landing (or preventing) a code sharing flight to a country of destination that does not recognize one of the flag countries of the code shared airlines may be arrived in case of the conclusion of the second generation OSA as the 2nd generation OSA liberalizes the carriage of the passengers with unrestricted services to the airlines of the countries involved to, from and beyond others' territories, without prescribing where carriers fly, the number of flights they operate and the prices they charge. In other words, the 2nd generation OSA, aiming to liberalizing civil aviation, opened to signatories States airspaces to the third States airlines companies use that are not part of this OSA.

That is why, regarding to provide possible ambiguities due to the flights of the code sharing airlines that are not recognized by the country of destination; an express obligation of the parties to limit the code sharing activities of their flag carrying airlines should be stipulated. More concretely, OSA should stipulate that the signatories States would be under the obligation to control the code sharing activities of their flag carrying airlines and prevent the code sharing activities of them in case of the non-recognition of the flag of other code sharing airlines from the country of destination. As a remedy, one may proposed that the signatory States fulfill that obligation practically during the issuance of the authorization (or license) of the code sharing flight.

Last but not least, whether the code sharing activity accords traffic rights to the contractual carrier or not constitutes the core of this discussion.

In case of the acceptance of the traffic rights accordance to the contractual carrier; the country of destination would have every right as a sovereign State to non-authorize the landing of the code sharing flight.

As mentioned under the paragraph II/a, the majority of the aviation doctrine accepts that the code sharing activity does not accord traffic rights to the contractual carrier. This view is accepted by the majority as it simplifies the administrative procedure and enables the increase of the code sharing activities. More concretely, in case of the non-accordance of traffic rights to the contractual carrier; it would be only the operational carrier who should fulfill the administrative obligations of landing and obtain the necessary permission from the country of

destination. That is why, regarding to decrease the costs and encourage the development of civil aviation, the majority of the doctrine is in favor of this view.

Therefore, one should be aware of the lack of the OSA that does not contain a limitation on code sharing activities. Otherwise, one should deal with the ambiguities due to the flights of the code sharing airlines that are not recognized by the country of destination.

IV. CONCLUSION

Aviation carriage of the passenger is a trade activity. That is why airlines companies' one of the main aims is to make profits. Regarding to make optimum profits, the civil aviation market creates its own solutions.

One of the solutions created with the development and propagation of the carriage of the passengers by air was the code sharing practice. Regarding to diminish the costs and expand the flights to worldwide; the airlines companies entered into code sharing practice with their competitors/colleagues.

On the other hand, bilateral air transport agreements and OSA were and still are concluded regarding to simplify the administrative procedure especially related to traffic rights and the use of the airspaces in civil aviation.

The simplification of administrative procedure with especially the 2nd generation OSA where the signatory States airspaces are opened to the use of the third country airlines companies with the liberalization of the code sharing practices creates an important problem as well: Possibility of the flight organization between two countries that are not recognizing each other. More concretely, with the free code sharing practice, an airlines company of a signatory State may enter into the code sharing with a third country airlines company and organize a code sharing flight to a country of destination that is not recognizing the third country. In such case, two possibilities appear: either the country of destination would not grant a landing authorization and the flight should be de-routed or the country of destination; by accepting the operational carrier as the sole carrier of the flight would grant the landing authorization. In any one of the case, the aviation or international law legal sources would be breached. An express stipulation concerning the obligation of the signatory States to control the code sharing practices of their flag carrying airlines companies should be foreseen in the OSA regarding to prevent this breach.

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