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Legal Report
on the Possibilities
to Restrict Foreign Air Services
with the Purpose to Prevent Carbon Leakage

Investigation of the ASAs
between the Russian Federation and Germany
and between the Turkish Republic and Germany

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A. Background of the report

In 2021, the European Commission proposed its “Fit for 55” program which is part of the European Green Deal for reducing greenhouse gas emissions by net 55% compared to 1990 levels by 2030. The European Commission aims to reduce greenhouse-gas emissions within the aviation sector by implementing several measures. These include revising the European Union Emissions Trading Scheme (EU-ETS), introducing a tax on kerosene, and obligating aviation fuel suppliers to provide Sustainable Aviation Fuels at Union airports.

European airlines may be faced with competitive disadvantages and the risk of carbon leakage occurs. Those companies fear an evasion strategy of passengers which would cause passenger hubs to shift to the Russian Federation or to the Turkish Republic, especially for intercontinental flights.

This report thus analyses the possibilities to increase Air Services provided by Russian or Turkish operators under the scope of existing Air-Service Agreements within the German territory and investigates on the legal requirements for modifications of such international contracts in order to restrict the possible number of flights with the described intention.

B. Introduction to the legal framework of international civil aviation

The aviation sector is governed by different legal requirements within the multilevel system of national, European and International Law. To understand the relation of those different legal sources, one may have a further look on their interaction. The focus of this legal report are the Public Law aspects, especially those which concern the relation of sovereign states regarding the regulation of flight rights within their territories.

I. The Chicago Convention on International Civil Aviation

First of all, the Chicago Convention[1] on international civil aviation has a fundamental importance to the legal framework as a whole. The Convention is signed by 193 signatory states and grants an international framework to unify and harmonise legal and technical standards for cross-border flights. On this international level the signatory states are obliged to act in accordance with the provisions of the Chicago Convention. For the impact of this report, it is important to understand, that the Chicago Convention itself grants the air sovereignty of any signature state, hence, any general right to enter a foreign territory is not given to an operator under the scope of the Chicago Convention itself.[2]

II. Introduction to Air Service Agreements

To establish rights to enter into a foreign territory, the sovereign national states which keep their air sovereignty according to Art. 1 of the Chicago Convention agree on bi- or multilateral Air Service Agreements (ASAs) as international contracts to give mutual allowance to perform civil aviation action in the respective other territory. Those contracts are international contracts as well, but they provide further specific regulation on the flight service between the agreeing states which can be individuallynegotiated by the parties to the contract with respect to their political and economic understanding.

Air Service Agreements contain at least

- rules to clarify which operators are allowed to operate between the agreeing countries (Designation Clauses),
- which routes and airports are open for those operators,
- how often and for how many passengers the service is available (Determination Clauses), and

[1] Chicago Convention on International Civil Aviation, ICAO Doc. No 7300/9, Full text of the convention is to be found under: https://www.icao.int/publications/Documents/7300_cons.pdf, last visit 27th of February 2022; *Schaefer*, Recht des Luftverkehrs, para. 26 ff.

[2] Art. 1 of the Convention states that „*The contracting states recognize that every State has complete and exclusive sovereignty over the airspace above its territory*"; in detail: *Hoffman-Grambow*, RdTW 2017, 161 (161).

- rules about the applicable tariffs.[3]

Besides this minimum, content parties can agree additionally on many different aspects regarding tax advantages, visa for the operator's crew members, specific technical requirements, etc., which are not subject to this report.

1. Designation Clauses

Rules to clarify which operators are allowed to perform aviation services under the scope of an Air Service Agreement, the so-called Designation Clauses, require that the agreeing states name at least one operator which shall be affected by this Air Service Agreement and give notice to the other party of the contract.

Those **Designation clauses** can appear as single and multiple designation clauses. A so-called single designation clause allows the agreeing state to name just one single operator to perform Air Services under the scope of the contract. More common are multiple Designation Clauses, which establish the right to name more operators which can benefit from the contract.[4]

To regulate the number of flights and the volume of passengers, Air Service Agreements have different mechanisms.

2. Determination Clauses[5]

Some Air Service Agreements contain **predetermination clauses**: In that case, to perform Air Services under such contracts a pre-approval is required which depends on the individually negotiated number of flights between the national authorities. The parties lay down in advance which flights should be scheduled for a certain number of passengers. If one operator intends to increase the number of flights its national authority must find a consent with the other party of the relevant Air Service Agreement.

[3] *Conrady/Fichert/Sterzenbach*, Luftverkehr, p. 39; *Schaefer*, Recht des Luftverkehrs, para. 90.

[4] *Conrady/Fichert/Sterzenbach*, Luftverkehr, p. 40.

[5] For a summary of the different clauses see: *Conrady/Fichert/Sterzenbach*, Luftverkehr, p. 41.

If an Air Service Agreement contains **ex post facto control clauses,** parties to the Air Service Agreement do neither agree in advance on a fix number of flights nor a fix number of passengers but parties observe the market and if they detect a relevant disbalance compared to the operated flights by their national operators, the number of upcoming flights can be restricted to ensure fair distribution of services within the scope of the relevant Air Service Agreement.

Lastly, Air Service Agreements can provide a **free determination clause**, which is the absolute opposite of a pre-determination clause.[6] Under the scope of such clauses, there is neither a limitation for the number of flights nor the volume of passengers and the operators can decide on their own which economical behavior, especially increasing or decreasing the number of flights on a certain route is in accordance with the actual market demand to achieve the highest financial outcome. There is no control mechanism to prevent an upcoming market distortion.

III. Air Services Agreements and European Law

Within the European Union, things turn out to be more complicated. Member States gave up on national sovereignty and transferred sovereign rightsto the supranational European Union.[7] Therefore, on the one hand, Member States arenot free to agree on Air Service Agreements as such international contracts have an impact on legal issues which are no longer an exclusive Member State competence.[8]
But on the other hand, the European Union does not hold exclusive competence neither. Therefore, in principle for the conclusion of Air-Service Agreements, the

[6] Which can be found in agreements based on open-skies-policies, *Schaefer*, Recht des Luftverkehrs, para. 91.

[7] For more detail about the general construction of the European Union as supranational organization see: *Kirchhof*, NJW 2020, 2057 ff.; for the aviation sector see: *Schadebach*, Luftrecht, p. 68 ff.

[8] See 100 sec. 2 TFEU; Judgement of the ECJ of 05. November 2002, Commission of the European Communities v. Federal Republic of Germany, C-467/98, ECLI:EU:C:2002:631; Judgement of the ECJ of 05. November 2002, Commission of the European Communities v. Kingdom of Denmark, C-467/98; ECLI:EU:C:2002:625; Judgement of the ECJ of 05. November 2002, Commission of the European Communities v. Kingdom of Sweden, C-468/98, ECLI:EU:C:2002:626; Judgement of the ECJ of 05. November 2002, Commission of the European Communities v. Republic of Finland, C-469/98, ECLI:EU:C:2002:627; Judgement of the ECJ of 05. November 2002, Commission of the European Communities v. Kingdom of Belgium, C-471/98, ECLI:EU:C:2002:628; Judgement of the ECJ of 05. November 2002, Commission of the European Communities v. Grand Duchy of Luxembourg, C-472/98, ECLI:EU:C:2002:629; Judgement of the ECJ of 05. November 2002, Commission of the European Communities v. Republic of Austria, C-475/98, ECLI:EU:C:2002:630; Judgement of the ECJ of 05. November 2002, Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland, C-466/98, ECLI:EU:C:2002:624; see also *Bartlik*, TranspR 2004, 61, 65 ff.

European Union and its Member States must act in close cooperation.

Thus, the European Commission can negotiate an Air Service Agreement with a third state which leads to a mixed agreement[9] between the European Union and its Member States, if the European Commission holds a valid mandate from the Council to do so. Additionally, Member States can still enter into an Air Service Agreement with a third state but in principle the approval of the European Commission is necessary to ensure that the negotiated provisions are in accordance with European Law. To simplify this process – from a European perspective – **Regulation (EC) No. 847/2004[10]** is in force. Therefore, standard clauses are laid down in the European Commission Decision on approving the standard clauses for inclusion in bilateral air service agreements between Member States and third countries[11], which provide drafted standard terms and conditions to ensure the conformity with the requirements set out by the European Law. As long as the Member States use those terms the provisions are considered as approved by the commission and no further approval process is required.[12]

After this short introduction of the legal framework of international aviation and general principles of Air Service Agreements, the concerned Air Service Agreements between Germany and the Russian Federation and Germany and the Turkish Federation will be analysed in a more specific way to find out which market control or market restrictions are legally possible on the basis of those existing Air Service Agreements to avoid carbon leakage.[13]

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[9] A mix agreement is an international agreement with the European Union and its Member States on the one side as two subjects to international law and a third party on the other side. As the neither European Union nor its Member States have the power to rule on all the subjects which are governed in an ASA they normally have to act jointly to prevent conflicts of competence within the internal relationship between the EU and its Member States.

[10] Regulation (EC) No 847/2004 of the European Parliament and the council of 29 April 2003 on the negotiation and implementation of air service agreements between Member States and Third countries, ECI: http://data.europa.eu/eli/reg/2004/847/oj, last visit 23 Feb. 2022.

[11] Commission Decision 29/03/2005 on approving the standard clauses for inclusion in bilateral air service agreements between Member States and third countries jointly laid down by the Commission and the Member States, C(2005)943, https://transport.ec.europa.eu/system/files/2016-09/standard_clauses_en.pdf, last visit 23 Feb. 2022; See for the detailed procedure *Rossbach*, in: Hobe/von Ruckteschell, Kölner Kompendium des Luftrechts, Band 1: Grundlagen, Teil II A. Luftraum und Lufthoheit, para. 146 and *Hoffmann-Grambow*, RdTW 2017, 161, 164 f.

[12] *Rossbach*, in: Hobe/von Ruckteschell, Kölner Kompendium des Luftrechts, Band 1: Grundlagen, Teil II A. Luftraum und Lufthoheit, para. 148.

[13] For the purpose of this report, it has to be considered that only the German and the Russian respectively Turkish versions of the concerned agreements are legally binding to the parties. For this legal study the author made not-binding translation into the English language, for further information

C. The Air-Service Agreement between Germany and the Russian Federation

Germany and the Russian Federation agreed on an Air Service Agreement on the 14th of July 1993. This contract can be understood as an agreement with protectionist purpose. It contains a multiple designation clause and predetermination clause, in Art. 9 in conjunction with Art. 8 of the ASA.

In detail: under Art. 2 sub. 1 lit. c of the ASA[14] it is granted to the other party, for purpose of operating international scheduled air transportation by designated air carriers on defined routes, to land in its territory for the purpose of receiving and discharging passengers, baggage and cargo on a commercial basis.

The parties define the flight routes under the scope of Art. 2 sub. 2 of the ASA, where it is stated that the parties' air transport authorities coordinate the routes which the designated airlines operate in an airline schedule. Their agreement upon the routes will get a legal binding effect by "*exchange of notes*". An "*exchange of notes*" is a procedure under Art. 13 lit. b of the Vienna Convention on the Law of Treaties (VCLT)[15] to conclude on an international agreement, which works mostly like the well-known contracts in private law by offer and acceptance. One party submits an offer, and the accepting party usually just repeats the offers' wording and returns it to the other party

about the interpretation of multilingual contracts see: *Nehls*, Die Auslegung mehrsprachiger vökerrechtlicher Verträge, 2019.

[14] Art. 2 of the ASA:

(1) A Party shall grant to the other Party, for the purpose of operating international scheduled air transportation by designated air carriers on the routes established pursuant to paragraph 2 of this Article, the right to

   a) overfly its territory without landing,

   b) land in its territory for non-commercial purposes

   c) to land in its territory at the points specified on the routes established pursuant to paragraph (2) of this article for the purpose of receiving and discharging passengers, baggage and cargo on a commercial basis.

(2) The routes on which the designated airlines of the Parties may operate international scheduled air transportation shall be coordinated in an airline schedule between the air transportation authorities of the Parties and confirmed by exchange of notes.

(3) Paragraph (1) does not grant the designated air carriers of a Party the right to pick up passengers, baggage and cargo in the territory of the other Party and transport them for payment to another point within the territory of that other Party (cabotage).

[15] Vienna Convention on the Law of Treaties, UNTS Vol. 1155 p. 331.

to express its commitment. Hence, such an agreement technically consists of the exchange of two written documents, and every party is in possession of a document signed by the other party. A further process of ratification as legislative approval is not necessary to achieve an international binding agreement between the parties[16]. It is therefore a very rapid processing.[17] However, it must be seen that an agreement under Art. 2 sub. 2 of the ASA does not modify the Air Service Agreement itself, it just rules on the specific question of flight routes without any further modification of the contract.

Art. 8 of the ASA states the principles of operation of air traffic within the scope of the Air Service Agreement between Germany and the Russian Federation. Each designated air carrier of each Party shall be granted, on a fair and equal basis, the opportunity to operate scheduled air transportation on the established routes, Art. 8 sub. 1 of the ASA. To achieve such a fair and equal basis, Art. 8 sub. 5 of the ASA states, that in order to ensure fair and equal treatment of each designated air carrier, the frequency of service, the types of aircraft envisaged in terms of capacity, and the schedules shall be subject to approval by the air transport authorities of the parties. The supply of seats by the designated carriers of both Parties shall be balanced and shall not exceed a specified ratio which shall be agreed upon by the air transport authorities.

But the Air Service Agreement itself does not rule on a specific procedure how to agree upon this ratio which must be defined by the national air transport authorities. In any case an "*exchange of notes*" is not explicitly required for an agreement under Art. 8 sub. 5 of the ASA. The execution of the procedure of this agreement is not published by the German national air transport authority and therefore cannot be object of further

[16] For the national and intra-german procedure see: §§ 7 sub. 1, 29 of the Guidelines for the treatment of international treaties (" Richtlinien für die Behandlung völkerrechtlicher Verträge RvV nach § 72 Abs. 6 GGO)", http://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_05032014_50150555.htm, last visit 23th of Feb. 2022.

[17] Art. 59 of the German Basic Law states: "*Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements, the provisions concerning the federal administration shall apply, mutatis mutandis.*" Hence, the "*exchange of notes*" is not the standard proceeding to agree on international contracts for the German Federation, but as the main contract, the ASA itself is ratified by the Government, which expressively allows the administration to conclude on an international binding contract for the determination of flight routs without any further participation of the parliament, this proceeding is in accordance with national constitutional law; *Hoffman-Grambow*, RdTW 2017, 161 (162).

investigation.

However, to grant this principle of equal market-access, as it is defined for this agreement, and to ensure the parties agreement under Art. 8 sub. 5 of the ASA, the operators need an approval to perform services: Art. 9 states that each designated air carrier under the scope of this Air-Service-Agreement shall submit for the approval of the parties' air transport authorities, not later than one month prior to the expiration of scheduled air service on the established routes, for each upcoming scheduled period, the nature of the services, the intended aircraft types, and the schedules, Art. 9 sub. 1 of the ASA.

Thus, the designated operators under this Air Service Agreement need an approval in advance, which depends on the question whether the requirements set out by the agreement of the national air transport authorities regarding the balance of market share between the parties' operators are met or not. Therefore, nor German neither Russian operators can increase the number of flights under the scope of this Air Service Agreement, if this would lead to a market distortion, as defined by Art. 8 sub. 1 of the ASA. In conclusion: the predetermination mechanism prevents an increase of Russian AirServices within the German territory without any amendment of the existing Air ServiceAgreement. The existing Air Service Agreement offers a possibility for market protection measures to avoid carbon leakage.

D. The Air Service Agreement between Germany and Turkish Republic

The Air Service Agreement between Germany and the Turkish Republic was concluded the 21st of December 1962. Even if this agreement is older than the Air Service Agreement with the Russian Federation, this older agreement is less restrictive and less market protectionist. The German-Turkish Air Service Agreement follows the example of the so called "*Bermuda I Contract*" between the USA and Great Britannia in the year 1946, which was used as a draft for many agreements in this epoch.

Typically for "*Bermuda I agreements*", this Air Service agreement contains a multiple designation clause under Art. 3 sub. 1 lit. b of the ASA. The determination of flight routes is equal to the sample of the Russian agreement and requires an exchange of notes between the contracting parties, Art. 2 sub. 2 of the ASA.

More interesting for the purpose of this report is the contained **ex post facto control mechanism**, which is ruled in Art. 9 and 10 of the ASA.

Most of the international Air Service Agreements nowadays are based on a capacity regulation, which neither strictly lays down nor completely liberalises the capacity or the number of frequencies, but rather describes the capacity regulation in abstract terms with reference to general requirements. Those principles are abstract legal terms which do not provide a sustainable definition. Therefore, Art. 9 sub. 3 of the ASA states that "*the principal purpose of international scheduled air transportation on the routes established (…) shall be to provide a transportation service which meets the foreseeable traffic demand to and from the territory of the Contracting State (..)*".

Art. 9 sub. 3 lit. a-c of the ASA defines this general principle further: "*The right of such an air carrier to provide transportation between points on a route established in accordance with Article 2 Sub 2 (…) shall, in the interest of the orderly development of international air transportation, be exercised in such a manner that the transportation offered is adapted to*

> *a) to the demand for transportation to and from the territory of the Contracting State which has designated the air carrier*
>
> *b) to the demand for transportation existing in the territories through which it flies and considering local and regional routes*
>
> *c) to the requirements of economic operation of the through airlines*".

Hence, it must be seen that this clause offers a wide scope of economical decision making. Operators are not bound by strict determined capacity rules. Under the scope of the German-Turkish Air-Service-Agreement, there is no mechanism to rule on a specific ratio between origin and foreign Air Services within the territory of contracting states.

However, this right to perform Air Services under the scope of such an Agreement is

not unlimited.[18] Art 9 sub. 1 of the ASA states that each designated air carrier of each Party shall be granted, on a fair and equal basis, the opportunity to operate scheduled air transportation on the established routes. In this context, this clause must be seen as a principle of bilaterality and mutual fairness.

To ensure the requirements set out by this "Bermuda I Clause", the Air-Service Agreement contains a control mechanism. Art 10 sub. 1 of the ASA states that *"the* designated *air carriers shall notify the Air Transport Authorities of both Contracting States not later than one month before the commencement of operations on the established routes (…) of the nature of the operations, the intended types of aircraft and the flight plans. The same shall apply to subsequent changes."* This notification duty under Art. 10 sub 1 does not provide a permissive element, therefore, the parties only observe the upcoming or planned operations.

Furthermore, the parties to the Air Service Agreement are obliged to provide the other party with statistics to have an *ex post* control about the already performed Air Services, Art. 10 sub 2 of the ASA.

If the parties discover a breach of the above-named economic principles under Art. 8 of the ASA including the principle of mutual fairness, the contract offers special procedures. Thus, parties can insist on an exchange of opinions under Art. 13 of the ASA to grant a good cooperation of the contracting states. If this informal proceeding does not lead to a solution, the Air Service Agreement provides a consultation procedure under Art. 14 of the ASA. Under this provision every party is allowed to make a request for consultation to address the issues in a more formal procedure. As ultima ratio, if parties cannot find a consent under the Art. 13 or 14 of the Air Service Agreement an international court of arbitration is competent to rule on the legal issues arising out of the interpretation and application of the contract.

But from a substantive perspective, as the principle of mutual fairness is based on the economic principles laid down in Art. 8 of the ASA, there is no room for market protectionist measures which do not fall under the scope of Art. 8 of the ASA. Art. 8 of the ASA defines the requirements for the principle of mutual fairness under the scope of this Air Service Agreement which constitutes a level playing field based on an open market. If the market is disturbed by external factors this is not governed by this Air

[18] *Hoffmann-Grambow*, RdTW 2017, 161 (168).

Service Agreement, this problem must be solved otherwise.

E. Requirements on the Termination and Adaptation of Air Service Agreements

As shown above under the scope of the current Air Service Agreement between Germany and the Russian Federation, the market access is already restricted by a predetermination clause. In contrast to the Russian Agreement, a restriction of market access for flights between Turkey and Germany for market protectionist reasons is not possible under the current Air Service Agreement. Therefore, as ultima ratio a termination of the contract would be legally possible if no consensus for an adaptation of the Agreement can be found. In the course of such an adaptation the parties to the concerned contract are free to agree on measures to avoid carbon leakage by ensuring a level playing field.

As a termination of an Air Service Agreement is legally possible but leads to the effect that operators lose every right to perform Air Services within the others territory which would end the cooperation between the contracting states in the field of Air Services, the study explains the legal framework for such terminations but focusesmainly on the possibilities to adapt the current and valid contract. Therefore, this section outlines firstly the legal requirements and consequences of a termination of an Air Service Agreement and secondly the legal requirements and procedures on an adjustment of such contracts concluded by an EU Member State and a third country.

I. Requirements and Consequences of a Termination

Air Service Agreements in general contain clauses which give the parties unilateral rights to terminate the contract at any time; if a party exercises this right the contract ceases to apply after a transition period of one year.[19] The parties shall give notice to

[19] Both, the contract with the Russian Federation and the contract with the Turkish Republic contain such termination clauses:

Art. 23 of the ASA with the Russian Federation states:

"(1) A Party may at any time notify the other Party of its decision to terminate this agreement. (…)

(2) In that event, the Agreement shall cease to be in force twelve months after the date of receipt of the notification by the other party"

Art. 16 of the ASA with the Turkish Republic states:

"(1) Either contracting state may terminate this agreement at any time.

the ICAO about the termination,[20] see also Art. 81 of the Chicago Convention.

That means within one year after the termination the contract is still a valid legal basis to perform mutual Air Services under the legal scope of this Air Service Agreement with all rights and obligations thereof. After this year, the contract loses all its legal effects, hence, any access to the airspace of the other contracting state can only be granted by a new Air Service Agreement or other international treaties, since especially the Chicago Convention grants the sovereignty of the contracting states.

Germany and the Turkish Republic are contracting states to the so-called International Air Services Transit Agreement,[21] which grants the first and the second freedom of the air, namely the right to fly over a foreign country without landing and the right to refuel or carry out maintenance without embarking or disembarking passengers or cargo. If one party terminates the bilateral Air Service Agreement the mutual rights under the independent Transit Agreement are not affected.

Since the Russian Federation is not a contracting state of this Transit Agreement operators have in general no rights to enter the others territory besides those rights which are stated in a bilateral Air Service Agreement. If there is no longer a valid Air Service Agreement even the first and second freedom are not applicable to any operator.

As shown, a termination has far-reaching economic and political consequences[22] and therefore should only be considered as ultima ratio. Therefore, first of all an adaptation of the Air Service Agreement between the Turkish Republic and Germany should be considered.

II. Renegotiating and Adaptation of Air Service Agreements

In general, Air Service Agreements can be renegotiated and adapted if both parties to

(2) The agreement shall terminate one year after the date of receipt of the notification by the other party".

[20] See Art. 23 of the ASA with the Russian Federation and Art. 17 of the ASA with the Turkish Republic.

[21] International Air Service Transit Agreement signed at Chicago on the 7th December 1944, ICAODoc. Number 7500.

[22] See *Rossbach*, in: Hobe/von Ruckteschell, Kölner Kompendium des Luftrechts, Band 1: Grundlagen, Teil II A. Luftraum und Lufthoheit, para. 139.

the contract agree on the modification. If Member States of the European Union intend to (re-)negotiate an Air Service Agreement, they must act in accordance with European Law even more, since such contracts concern competences which have been transferred to the European Union. Therefore, in principle, Member States negotiated terms need an approval of the European Commission under the regulation.[23]

The approval procedure is governed by Art. 4 of Regulation (EC) No 847/2004. In any case a Member State must notify the European Commission about the result of the negotiations, Art. 4 sec. 1 of the Regulation. As long as the drafted contract contains the relevant standard clauses, the Member State is allowed to enter into the Air Service Agreement according to Art. 4 sec. 2 of the Regulation on its own and no further or explicit approval is required by the European Law.[24] In contrast, according to Art. 4 sec. 3 of the Regulation, if the drafted contract does not contain relevant standard clauses,[25] the Member State is only allowed to sign the Air Service Agreement, if the agreement is approved under a committee procedure of comitology. Within a committee procedure, it will be especially examined whether the proposed Air Service Agreement may harm the object and purpose of the Community common transport policy.[26] However, standard clauses only rule on the designation andrevocation [of carriers], references to nationals or air carriers of a Member State, tariffsto be charged for carriage wholly within the European Community and ground handling. Since the standard clauses do not specify which market access scheme shall be used, in principle, an adaptation of an Air Service Agreement with the intention to restrict market access by a different scheme will not need any special approval by the European Commission as long as the standard clauses are included.

[23] Regulation (EC) No 847/2004 of the European Parliament and the council of 29 April 2003 on the negotiation and implementation of air service agreements between Member States and Third countries, ECI: http://data.europa.eu/eli/reg/2004/847/oj, last visit 23 Feb. 2022.

[24] *Rossbach*, in: Hobe/von Ruckteschell, Kölner Kompendium des Luftrechts, Band 1: Grundlagen, Teil II A. Luftraum und Lufthoheit, para. 148.

[25] The committee procedure is already needed if a drafted term's wording deviates from the wording of a standard clause even if the content is comparable. The requierements are strict, see for further information: Schaefer, Recht des Luftverkehrs, para 88.

[26] *Rossbach*, in: Hobe/von Ruckteschell, Kölner Kompendium des Luftrechts, Band 1: Grundlagen, Teil II A. Luftraum und Lufthoheit, para. 149; Schaefer, Recht des Luftverkehrs, 2017, para. 88.

1. Regulatory Possibilities and Restrictions

According to Art. 3 of the Regulation, a Member State shall not enter any new arrangement with a third country, which reduces the number of Community air carriers which may, in accordance with existing arrangements, be designated to provide services between its territory and that country, neither in respect of the entire air transport market between the two parties nor on the basis of specific city pairs. Art. 3 of the Regulation prohibits a discrimination between operators from different Member States and aims therefore that such operators are not generally excluded from offering flights between the agreeing states of the Air Service Agreement. Hence, a designation clause which entitles a Member State only to designate its own operators ´would harm European Competition Law, hence, even if such contracts contain single designation clause the Member States must be able to designate operators from other European Countries to ensure to avoid a discrimination for other European flight operators.

Besides this, Art. 3 of the Regulation does not prohibit the step back to a more restrictive market access scheme such as the implementation of predetermination clauses. The parties of an Air Service Agreement could also agree on a more detailed ex post facto control, e.g., they could agree to implement certain measures only when carbon leakage is found.

Furthermore, of course, the parties are free to agree on specific environmental measures within their Air Service Agreements. If such measures are under the scope of EU competences the European Union must be involved.

Another way would be to seek for an agreement on an international level, especially at the ICAO, to avoid carbon leakage by certain measures.

2. Conclusion: Adaptation of the Air Service Agreement between Turkey and Germany

To restrict market access, an adaptation of the Air Service Agreement between Turkey and Germany is required. Germany is competent to agree on more restrictive market access scheme, esp. a predetermination clause. To do so, Germany must renegotiate

the Air Service Agreement with Turkey in accordance with procedure laid down in the Regulation (EC) No. 847/2004 of the European Parliament and of the Council of 29 April 2004 on the Negotiation and Implementation of Air Service Agreements between Member States and Third Countries. As long as the standard clauses are included, only notifications would be required, but an authorisation to conclude on a more restricted market access would be given automatically by Art. 4 sec. 2 of the Regulation (EC) No. 847/2004. An explicit approval by the European Commission is not necessary.