Air Transport 2021

Contributing editors
Tom van der Wijngaart and Inês Afonso Mousinho

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Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

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Tom van der Wijngaart and Inês Afonso Mousinho
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Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Air Transport*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Luxembourg and Sweden.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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REGULATORY FRAMEWORK

Regulators and primary legislation

1 | Which bodies regulate aviation in your country? Under what basic laws?

The European Commission (the Commission) is the European Union's regulatory body for aviation. Within the Commission, the Directorate General for Mobility and Transport (DG Move) is responsible for developing and implementing EU transport policies. The Directorate General for Competition (DG Comp) is responsible for the application of EU competition law in the air transport sector, including state aid matters since 2010.

The Commission is responsible for ensuring the implementation and, where applicable, enforcement of EU law by the member states, national agencies and companies. If a member state fails to implement EU legislation, the Commission may, after it has followed certain procedural warning steps, bring a case against it before the European Court of Justice (ECJ).

EU air transport policy covers a wide variety of aspects of the air transport sector, including the EU single aviation market and liberalisation of air transport (subject to conditions and limitations) on routes between the EU and third countries, aviation safety, and air traffic control. Other important fields include slot allocation, ground handling services, computerised reservation systems (CRS), noise emissions, denied boarding, baggage controls, personnel licensing, accident investigation and occurrence reporting, airline passenger liability and aviation security.

The applicable legislation can be broken down into the following four broad categories:

- implementation and functioning of, and access to, the EU single aviation market;
- competition;
- aviation regulation including safety, environmental and consumer protection; and
- relations between the EU (and its member states) and third countries.

EU single aviation market

The implementation of a single aviation market across the EU is one of the main objectives of EU regulation in the aviation sector. The EU sought to realise this goal through the adoption of three liberalisation packages, which have harmonised national laws for airfares, market (route) access and capacity, and introduced the application of the EU competition rules. The first package, adopted in 1987, initiated the relaxation of existing national rules. For instance, it limited the rights of governments to object to the setting of new fares and provided for limited liberalisation of capacity sharing. The second package, adopted in 1990, introduced further flexibility for the setting of airfares and capacity sharing. The third liberalisation package established a single EU air transport market, as of 1 January 1993. The third legislation package, initially consisting of Regulation (EEC) Nos. 2407/92, 2408/92 and 2409/92, was subsequently consolidated into Regulation (EC) No. 1008/2008.

Regulation (EC) No. 1008/2008 covers the following areas:

- licensing of carriers: issuance, suspension and revocation of EU-wide air carrier operating licences. For an air carrier to obtain an operating licence, it must comply with the requirements set down in the regulation, including ownership and control requirements, financial fitness and insurance;
- market access: establishment of the basic principle of free access for EU air carriers to intra-EU air routes, according to which all EU air carriers are granted unconditional access to all member states' territories (including freedom to provide cabotage, ie, domestic air services within a member state); and
- pricing: liberalisation of intra-EU airfares, setting an imposition of an obligation on air carriers to publish airfares in a clear and unambiguous way.

On 3 February 2019, a regulation to amend article 13(3)(b) of Regulation (EC) No. 1008/2008 came into force, designed to bring the wet-lease regime of Regulation (EC) No. 1008/2008 in line with the 'open' wet-lease regime provided for in the EU–US Air Transport Agreement. The recitals to the amending regulation note that the Commission is in any event undertaking a review of Regulation (EC) No. 1008/2008, including its wet-leasing provisions, which may lead to a more general revision in the future.

Separate regulations deal with other aspects of access to the EU single aviation market, including Regulation (EEC) No. 95/93 on slot allocation at congested airports, and Directive 96/67/EC on access to ground handling services.

Competition

EU competition law is fully applicable to the aviation sector. The Commission has full powers to apply articles 101 (restrictive agreements and concerted practices), 102 (abuse of dominance) and 107–109 (state aid) of the Treaty on the Functioning of the European Union (TFEU), as well as the merger control provisions contained in Regulation (EC) No. 139/2004. Regulation (EC) No. 487/2009 (replacing Regulation (EEC) No. 3976/87) enables the Commission to grant block exemptions to certain agreements and forms of cooperation normally restricted by articles 101 and 102 TFEU. Block exemptions were used in the past to exempt certain forms of revenue-sharing and capacity coordination, computer reservation systems and ground handling as well as the International Air Transport Association slot and tariff coordination conferences. However, these block exemptions have been gradually phased out and no aviation-specific block exemptions are currently in force. The Commission has, so far, expressed no intention to issue any new block exemptions for the aviation sector.

Aviation regulation relating to safety, environmental and consumer protection

The EU has adopted a regulatory framework in the field of aviation safety, with the establishment of the European Aviation Safety Agency, and of air traffic control with the Single European Sky initiative. It has also adopted rules dealing with environmental issues, such as noise and aircraft emissions, as well as consumer protection (eg, compensation and assistance in the event of denied boarding or flight cancellation).

External aviation relations

In the field of external aviation relations, the ECJ declared in the 2002 Open Skies judgments that the Commission has exclusive competence in certain limited areas previously covered by international bilateral agreements. More importantly, nationality clauses, which reserve the right to operate services between contracting states to the carriers that are majority owned and effectively controlled by nationals of those states, were held to infringe the principle of freedom of establishment enshrined in articles 49–54 TFEU. As a result, the existing bilateral agreements concluded between the member states and third countries had to be amended or replaced. After these judgments, the Commission received a Council mandate to negotiate horizontal agreements between the EU and third countries to rectify the situation and, with regard to the US, a transatlantic open aviation area (OAA).

The negotiation of an EU–US air transport agreement took place in two stages. A first-stage agreement came into force on 30 March 2008 and allowed for the liberalisation of air services between the EU and the US in a number of important respects, although certain significant limitations continued to apply. The main provisions can be summarised as follows:

- any EU carrier has the right to fly between any point in the EU and any point in the US, without any restrictions on pricing, capacity or frequency (although this right does not extend to flights within the US);
- EU and US carriers have the right to operate flights beyond the EU and the US to third countries;
- foreign investment (including EU) in US airlines remains capped at a maximum of 25 per cent of voting capital;
- all European airlines must be recognised as EU carriers by the US authorities, allowing for consolidation between EU airlines;
- EU airlines are granted certain access rights to the US 'Fly America' programme;
- convergence mechanisms were established concerning competition law enforcement, state aid and security;
- joint EU–US approaches in international organisations and in relations with third countries were developed;
- an EU–US technical cooperation was established in relation to climate change;
- institutional mechanisms were put in place, including a dispute settlement procedure with arbitration provisions; and
- provisions relating to franchising, branding, code-sharing and wet-leasing were included.

The second-stage agreement, which was signed on 24 June 2010, had the following key outcomes:

- commitment from both the US and EU to aim to remove all remaining access barriers, with an annual progress review;
- enhanced access for EU carriers to the US 'Fly America' programme;
- relaxation of the 25 per cent limit on EU-owned voting rights in US airlines (still in force), subject to legislative change;
- provision that the EU will allow majority ownership of EU airlines by US nationals (for the time being still prohibited), subject to legislative change;
- link between the revision of the process for the introduction of noise-based airport restrictions in the EU and additional access rights for EU carriers to fly between the US and non-European countries;
- relaxation of restrictions on EU and US investment in third-country airlines;
- enhancement of the EU–US cooperation on environmental matters;
- inclusion of a dedicated article on the social dimension on EU-US aviation relations; and
- enhancement of the EU–US regulatory cooperation.

However, with significant ownership restrictions and the prohibition for EU carriers to operate US domestic services remaining in place, the second stage agreement failed to produce the OAA originally envisaged by the Commission.

The Commission also has a mandate to negotiate at the EU level horizontal agreements with third countries other than the US, with a view to bringing existing bilateral air services agreements in line with the Open Skies judgments (replacing in particular national ownership and control provisions with an EU air carrier clause). Many EU horizontal agreements have been signed and others are being negotiated. Member states can continue negotiating certain aspects of the agreements, as long as they do not deviate from certain standard clauses developed by the Commission.

Another important pillar of the EU's external aviation policy relates to the creation of a European Common Aviation Area (ECAA) between the EU and its partners from southern and eastern Europe as well as Iceland and Norway. The aim of the ECAA is to open up new commercial opportunities for the European aviation industry. The agreement ensures a high level of uniformity (including with regard to competition rules) and safety. The ECAA was signed in 2006 and was originally expected to be fully implemented by 2010. However, it only entered into force on 1 December 2017, after finally having been ratified by all member states.

On 7 December 2015, the Commission published a comprehensive strategy for the European aviation sector (the 'Aviation Strategy for Europe') with a view to ensuring that it remains competitive. The Commission stated that its goals are to place the EU as a leading player in international aviation, while guaranteeing a level playing field; tackling limits to growth in the air and on the ground; maintaining high EU standards for safety, security, the environment, social issues and passenger rights; and making progress on innovation, digital technologies and investments.

More concretely, in 2017, the Commission adopted interpretative guidelines on the application of Regulation (EC) No. 1008/2008 on the ownership and control of EU air carriers to provide more certainty for investors and airlines alike. The guidelines aim to make it easier for undertakings that apply for or hold an operating licence, to assess whether they are in compliance with EU regulation. The guidelines take into account the *Swissair/Sabena* decision, in which the Commission established that companies from third countries can enjoy the benefits of the internal market insofar as they remain within the limits set out by the aforementioned regulation concerning ownership and control.

The guidelines have been adopted in the context of its 'open and connected aviation' package, which was adopted on 8 June 2017 and includes four initiatives to support the achievement of two of the main priorities of the Aviation Strategy for Europe: maintaining leadership in international aviation; and tackling the limits to growth in European skies. The open and connected aviation package initiatives included, in addition to the above-mentioned interpretative guidelines, a legislative proposal (now in force, see below) for a regulation on safeguarding competition in air transport, repealing Regulation (EC) No. 868/2004; interpretative Guidelines on Regulation (EC) No. 1008/2008 on public services obligations; and a Commission staff working document on practices favouring air traffic management service continuity.

On 15 March 2018, the Commission launched a public consultation on Regulation (EC) No. 1008/2008. To date, the outcome has not been published yet but, interestingly, answers to the question relating to the current rules on ownership and control of EU air carriers, especially the nationality requirement, have been very varied: some want them to be tightened or at least maintained without changes, others want them relaxed or even abolished.

Regulation (EU) No. 712/2019 on safeguarding competition in air transport and repealing Regulation (EC) No. 868/2004 came into force on 30 May 2019. It seeks to support fair competition between EU and third-country carriers by empowering the Commission to adopt redressive measures in relation to 'practices distorting competition' between EU and third-country carriers. It tackles a number of perceived unfair practices, and in that respect is broader than Regulation (EC) No. 868/2004, which applied only to subsidisation and 'unfair pricing practices'. It also lowers the evidential bar faced by complainants.

AVIATION OPERATIONS

Safety regulations

2 | How is air transport regulated in terms of safety?

Air transport safety is principally governed by Regulation (EU) No. 1139/2018 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (EASA), which applies to the design, production, maintenance and operation of aeronautical products, parts and appliances, as well as to personnel and organisations involved in these activities. It also applies to personnel and organisations handling aircraft operation.

EASA is the main body responsible for air transport safety. Under Regulation (EU) No. 1139/2018, its main functions are as follows:

- to assist the Commission to develop common rules in the field of civil aviation and to provide it with technical, scientific and administrative support to carry out its tasks;
- to conduct standardisation inspections to ensure that these rules are correctly applied within the member states;
- to issue certificates under the regulation to European companies involved in aircraft design and certify the aircraft used in Europe;
- to issue certificates under the regulation to air carriers, maintenance organisations and training organisations located in third countries;
- to assist national competent agencies in carrying out their tasks;
- to contribute to establishment, measurement, reporting and analysis of performance measures;
- to promote EU aviation standards at an international level by establishing cooperation with third countries and international organisations; and
- to cooperate with other EU institutions, bodies, offices and agencies.

Regulation (EU) No. 1139/2018 is implemented through a number of other regulations, including in particular, the following:

- Regulation (EU) No. 748/2012 (as amended) laying down implementing rules for the airworthiness and environmental certification of aircraft and related products, parts and appliances, as well as for the certification of design and production organisations;
- Regulation (EU) No. 1321/2014 (as amended) on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations and personnel involved in these tasks (ie, maintenance);
- Regulation (EU) No. 1178/2011 (as amended) laying down technical requirements and administrative procedures related to civil aviation aircrew;
- Regulation (EU) No. 965/2012 (as amended) laying down technical requirements and administrative procedures related to air operations;
- Regulation (EU) No. 452/2014 (as amended) laying down technical requirements and administrative procedures related to air operations of third-country operators;
- Regulation (EU) No. 373/2017 laying down common requirements for providers of air traffic management/air navigation services and other air traffic management network functions and their oversight, which repealed Regulation (EU) No. 1034/2011;
- Regulation (EU) No. 340/2015 laying down detailed rules for air traffic controllers;
- Regulation (EU) No. 1332/2011 (as amended) laying down common airspace usage requirements and operating procedures for airborne collision avoidance;
- Regulation (EU) No. 923/2012 (as amended) laying down the common rules of the air and operational provisions regarding services and procedures in air navigation;
- Regulation (EU) 2019/2153 on the fees and charges levied by the EASA, which repealed Regulation (EU) No. 319/2014; and
- Regulation (EEC) No. 3922/91 (as amended) on the harmonisation of technical requirements and administrative procedures in the field of civil aviation (which will be repealed by the new civil safety aviation rules).

A complete set of relevant regulations, organised by subject matter, can be found on EASA website.

Member states must recognise certificates of compliance issued in accordance with Regulation (EU) No. 1139/2018, without further technical requirements or evaluation conditions. However, a member state may take immediate appropriate measures in the event of a safety problem, provided that it notifies EASA, the Commission and the other member states.

EU regulations applicable in the field of airports and air traffic control also contain certain provisions relating to safety. Furthermore, the Commission has adopted measures relating to the safety of operations by third-country carriers to and from EU airports. In 2011, the Commission launched the Better Airport package, adopting a communication that addressed airport capacity and efficiency to promote growth, connectivity and sustainable mobility, and as part of the European Aviation Strategy, the Commission expressed the need for having adequate slots rules.

In addition, to address a possible 'capacity crunch' at Europe's busy main airports, the Commission proposed a number of measures, consistent with its approach to enhance air safety at airports as increased traffic levels require improved safety measures throughout Europe. Measures include the extension of EASA's responsibilities to cover airport safety regulation, the use of global navigation satellite systems, and the development and implementation of technological solutions to help improve airport safety and efficiency, such as advanced-surface movement guidance and control systems for controlling air traffic movements under all weather conditions. Moreover, one of the major targets of the airport package, namely the adoption of an EU-wide regime on airport charges, was achieved in March 2009, when the directive on airport charges entered into force.

In relation to air traffic control, the Single European Sky I (SES I) package included four regulations with the aim of promoting a more rational organisation of European airspace, increasing capacity and ensuring uniformly high safety standards. In June 2008, the Commission published a communication setting out the shortcomings of the implementation of the SES legislation, such as the continued fragmentation of European airspace. To improve the performance and sustainability of the European aviation system in key areas such as safety, capacity,

as well as flight and cost efficiency, Regulation (EC) No. 1070/2009 was adopted as part of the SES II initiative (amending the SES I package). In June 2013, the Commission sought to accelerate the implementation of the SES programme. To this end, it published a communication and proposed further measures (SES2+) to build on previous reforms. However, in its 2018 Work Programme, the Commission stated that one of the proposals, a regulation on aerodromes, air traffic management and air navigation services, would be withdrawn. The Commission did so in July 2018, as the proposal's content had been incorporated in Regulation (EU) No. 1139/2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency. The remainder of the SES2+ package remains blocked in the legislative process due to the dispute over the status of Gibraltar. In a Joint Statement in July 2018, the EU's Commissioner for Transport and the Chair of the European Parliament's Transport and Tourism Committee called on member states and stakeholders to help bring about the SES2+ reforms.

SESAR (Single European Sky ATM Research) is the technological pillar of the Single European Sky initiative. It aims to improve Air Traffic Management (ATM) performance by modernising and harmonising ATM systems through the definition, development, validation and deployment of innovative technological and operational ATM solutions. SESAR is coordinated by a Joint Undertaking (SESAR JU), a unique public–private partnership that aims to develop a new generation of air traffic management (ATM) system capable of coping with growing air traffic, under the safest, most cost-efficient and environmentally friendly conditions. It is also the 'guardian' of the European ATM Master Plan, the roadmap for all SESAR JU's activities and their future deployment, all directed towards the achievement of the performance objectives of the SES.

In accordance with Regulation (EC) No. 768/2006, EASA is also entrusted with the tasks related to the Safety Assessment for Foreign Aircraft programme, which implemented Directive 2004/36/EC regarding the collection and exchange of information on the safety of aircraft using EU airports and the management of the information system. The directive introduced a uniform approach to enforcement of international safety standards within the EU, by harmonising the rules and procedures operated by the then Joint Aviation Authorities for ramp inspections of third-country aircraft landing at airports in the member states. As Regulation (EC) No. 216/2008, the predecessor to Regulation (EU) No. 1139/2018, established a complete framework for the safety of third-country aircraft, Directive 2004/36/EC was repealed, but without prejudice to the implementing measures on collection and exchange of information and ramp inspection.

Based on Regulation (EC) No. 2111/2005, the Commission has prepared and updated an EU blacklist of unsafe airlines since 2006. The most recent version of this list came into force on 4 June 2020 (Implementing Regulation (EU) No. 736/2020).

The Commission's aforementioned December 2015 communication, 'An Aviation Strategy for Europe' included, inter alia, a proposal for a revised Basic Regulation for common rules in the field of civil aviation safety – now in force as Regulation (EU) No. 1139/2018, replacing its predecessor, Regulation (EC) No. 216/2008. In addition, in aiming to optimise Europe's busiest airports, and monitor intra-EU and extra-EU connectivity, the Strategy notes the need to complete the Single European Sky project.

As previously mentioned, the Commission's June 2017 Communication 'Aviation: An Open and Connected Europe for Jobs, Growth, Investment and Global Leadership' seeks to deliver on two core priorities of the Aviation Strategy for Europe, including to 'Tackle limits to growth in European skies'.

3 What safety regulation is provided for air operations that do not constitute public or commercial transport, and how is the distinction made?

Regulation (EU) No. 1139/2018 applies to all aircraft except the following:

- those with certain historic or scientific value;
- aircraft built by amateurs;
- military aircraft;
- emergency service aircraft; and
- very small aircraft.

Safety requirements for these aircraft fall under the scope of individual member states' national law and are not governed at the EU level.

Market access

4 How is access to the market for the provision of air transport services regulated?

Market access within the EU has been liberalised, and the operation of EU air services and access to the EU market is governed by Regulation (EC) No. 1008/2008.

Ownership and control

5 What requirements apply in the areas of financial fitness and nationality of ownership regarding control of air carriers?

Financial fitness and nationality requirements regarding control of air carriers are governed by Regulation (EC) No. 1008/2008. To carry passengers, mail or cargo for remuneration within the EU, article 3 of Regulation (EC) No. 1008/2008 requires an air carrier to have an EU operating licence granted by a competent member state's licensing authority.

Financial fitness

Regulation (EC) No. 1008/2008 specifies that, inter alia, applicants for an operating licence must satisfy detailed requirements with regard to their financial fitness. Less stringent provisions apply to smaller carriers and existing operators. An applicant for a licence must be able to demonstrate the following:

- that it will be able at any time to meet its actual and potential obligations under realistic assumptions for a period of 24 months from the start of operations; and
- that it can cover its fixed and operational costs for at least three months without taking into account its operating income.

To facilitate assessment of these conditions, applicants must submit a business plan for at least the first three years of operation, and provide a thorough financial assessment (as detailed in Annex 1 of Regulation (EC) No. 1008/2008) demonstrating compliance.

Once a licence has been granted, there are continuing financial reporting obligations on the licence holder, including the obligation to provide audited accounts on a regular basis and details of any substantial changes in activities, and planned increases or reductions of fleet. The licensing authorities may at any time assess the financial performance of an undertaking, and must in any case do so two years after the granting of a new licence. The licensing authorities are also obliged to undertake an in-depth assessment of the financial situation of a licence holder if there are clear indications that financial problems exist or when insolvency proceedings are opened. Finally, if the undertaking is unable to meet its financial obligations for a 12-month period, they must suspend an operating licence, although a temporary licence may be granted.

Nationality

To qualify for an EU operating licence, inter alia, an undertaking's principal place of business must be located in the member state in which the operating licence is granted (ie, its principal place of business must be within the EU). Other than where specific agreements are in place, the undertaking must also be majority owned and effectively controlled by a member state or EU nationals (article 4, Regulation (EC) No. 1008/2008). Foreign investors are therefore entitled to hold a maximum of 50 per cent minus 1 share of EU airlines, and effective control has to remain within the EU. On 8 June 2017, the Commission adopted interpretative guidelines on the rules on ownership and control of EU air carriers contained in Regulation (EC) No. 1008/2008. The guidelines underline the importance of checking the nationality of the ultimate owner of the airline; and in relation to the concept of effective control they provide a detailed description of the criteria that the Commission uses in its assessment, as regards corporate governance, shareholder rights, financial links and commercial cooperation of the non-EU investor.

As mentioned above, on 15 March 2018, the Commission launched a public consultation on Regulation (EC) No. 1008/2008, and the feedback the Commission has received so far in relation to the nationality requirements of the EU's current licensing regime has been mixed.

Licensing

6 | What procedures are there to obtain licences or other rights to operate particular routes?

EU carriers require operating licences under Regulation (EC) No. 1008/2008, which are granted by the competent authorities of the member states. Accordingly, the procedural requirements for obtaining an operating licence are a matter of member states' national law. However, Regulation (EC) No. 1008/2008 does specify that member states must make these procedures public and decide on applications no later than three months after receiving all the necessary information. Once a carrier has obtained an operating licence in one member state, it is free to operate on any intra-EU route, although separate licences may be needed in order for it to operate routes to and from certain third countries. The updated civil aviation safety rules amended Regulation (EC) No. 1008/2008 to allow EASA to become the competent authority for the issuance and supervision of air operator's certificates, and to establish close cooperation among the competent authorities for the monitoring of air operator certificate and the operating licence respectively.

7 | What procedures are there for hearing or deciding contested applications for licences or other rights to operate particular routes?

The procedural requirements for obtaining an operating licence are a matter of member states' national law and as such Regulation (EC) No. 1008/2008 contains no specific provisions on appeal procedures in the event that a licence application is rejected or an operating licence is suspended or revoked. Article 14 of Regulation (EC) No. 1008/2008 does provide that the air carrier must be given the opportunity to be heard and requires national authorities to inform the Commission if an operating licence is suspended or revoked. Under article 15(3) of Regulation (EC) No. 1008/2008, the Commission has the authority to 'take the appropriate corrective measures or to suspend or revoke the operating licence'.

Competition policy

8 | Is there a declared policy on airline access or competition? What is it?

There is a common EU air transport policy. One of its main objectives is to eliminate national barriers between the member states and establish a single aviation market in the EU. To this end, EU-wide measures are in place liberalising airfares, market (route) access and capacity. The EU competition rules apply fully to air transport services within the EU and on routes to and from the EU.

Requirements for foreign carriers

9 | What requirements must a foreign air carrier satisfy to operate in your country?

This is a matter for member states' national law (see national chapters). However, the Commission, in conjunction with the competent national agencies of the member states, publishes a blacklist of airlines that are prohibited from operating within EU airspace.

Public service obligations

10 | Are there specific rules in place to ensure aviation services are offered to remote destinations when vital for the local economy?

A member state may impose a public service obligation (PSO) in respect of scheduled air services between an airport in the EU and an airport serving a peripheral or development region in its territory. A PSO may also be imposed on a 'thin' route to any airport on its territory if the route is considered vital for the economic and social development of the outlying region. A PSO can only be imposed to the extent necessary to ensure the minimum provision of fixed standards of continuity, regularity, pricing or minimum capacity, which air carriers would not assume if they were solely considering their commercial interest.

A PSO must be imposed in accordance with the provisions laid down in Regulation (EC) No. 1008/2008. The member state first determines the conditions of the planned PSO in terms of the routes concerned, date of entry, capacity, flight frequency, fares and other parameters. It then communicates a description of the proposed PSO to the Commission, other member states and airports concerned as well as any carriers operating the route in question. The Commission publishes an information notice setting out the details of the PSO.

If no carrier has started operations or plans to do so, the member state may then restrict access to the route or routes covered by the PSO to a single carrier for a maximum period of five years and may grant that carrier financial compensation in exchange for compliance with these obligations. In that case, the carrier operating the service must be selected through a public tender procedure as specified in article 17 of Regulation (EC) No. 1008/2008.

DG Move of the Commission publishes a list of PSO routes on its website. As part of 'An Aviation Strategy for Europe', the Commission has adopted interpretative guidelines explaining the current rules governing PSOs. The guidelines provide more clarity for national authorities so that they can use PSO when justified and authorised and they aim at achieving a more rationalised use of PSOs.

Charter services

11 | How are charter services specifically regulated?

Charter services are not specifically regulated. The EU regulatory framework applies to all charter and scheduled services within the EU, including air taxi and general aviation services for the transport of passengers, cargo and mail for remuneration. The EU regulatory

framework is therefore general in scope, applying to all commercial air services (including charter).

Regulation of airfares

12 | How are airfares regulated?

Airfares are not regulated. According to Regulation (EC) No. 1008/2008, EU carriers set airfares freely for intra-EU air services, although certain restrictions may apply in the case of PSOs. Equally, air carriers of third countries can set their fares freely for intra-EU services subject to reciprocity. With respect to fares between member states and third countries, member states may not discriminate on the grounds of nationality or identity of air carriers. Regulation (EC) No. 1008/2008 also imposes certain obligations to ensure transparency of passenger fares.

Drones

13 | How is the operation of unmanned aircraft systems (drones) regulated?

Regulation (EU) No. 1139/2018 includes for the first time rules on civil drones. The new regulation takes into account concerns in relation to privacy and data protection, security, safety or environment. This framework ensures their safe use in civil airspace and creates legal certainty for the industry. Low-risk drones must comply with the EU market surveillance mechanisms, but the drone operators whose drones are capable of transferring more than 80 joules of kinetic energy upon impact with a person will have to register mandatorily as from 31 December 2020. More detailed rules have been adopted by the Commission with the assistance of EASA, which regulates drone operations and develops industry standards.

Regulation (EU) No. 945/2019 sets out requirements for:

- the design and manufacture of drones;
- the types of drones that are subject to certification;
- rules for making drones intended to be used in the 'open' category (ie, drones that do not require operation authorisation); and
- rules for third-country drone operators.

Regulation (EU) No. 947/2019 sets out rules for the operation of drones and personnel, including, for example, competency of remote pilots.

AIRCRAFT

Aircraft register

14 | Who is entitled to be mentioned in the aircraft register? What requirements or limitations apply to the ownership of an aircraft listed on your country's register?

This is a matter for member states' national law.

Mortgage register

15 | Is there a register of aircraft mortgages or charges? How does it function?

This is a matter for member states' national law.

Detention

16 | What rights are there to detain aircraft, in respect of unpaid airport or air navigation charges, or other unpaid debts?

This is a matter for member states' national law.

Maintenance

17 | Do specific rules regulate the maintenance of aircraft? What are they?

Aircraft maintenance is governed by Regulation (EU) No. 1321/2014, which is enforced by the European Aviation Safety Agency (EASA).

Owners of aircraft have to ensure the continued airworthiness and safe operation of their aircraft and are subject to inspections by the competent national authority. Any maintenance must be carried out by a maintenance organisation approved by EASA. This may either be the operator or an external approved organisation, which would issue a certificate of release to service to the operator. Annex II to Regulation (EU) No. 1321/2014 describes the requirements to qualify as an approved maintenance organisation.

AIRPORTS

Ownership

18 | Who owns the airports?

In the EU, there are state-owned airports and privately owned airports. The control of many airports has been transferred from state to regional authorities (in some cases to be operated by public companies), while others have been privatised.

Licensing

19 | What system is there for the licensing of airports?

This is a matter for member states' national law.

Economic regulation

20 | Is there a system of economic regulation of airports? How does it function?

In general, this is a matter for member states' national law. The Commission issued Directive 2009/12/EC with regard to airport charges (ie, aircraft landing charges), charges for the processing of passengers and freight and other charges related to the use of airport infrastructure that has been transposed by all member states.

The Directive does not impose a particular calculation method of charges, but aims at harmonising the principles applicable to the setting of airport charges by member states' competent authorities.

The Directive applies to EU airports with an annual passenger volume of 5 million or more, or, if none of the airports in a given member state reaches this threshold, to the airport with the highest passenger volume in that member state. The Directive allows for the differentiation of services according to the needs of individual airlines ('tailored services'), but requires member states to apply specific principles when determining airport charges, in particular 'non-discrimination', and 'transparency'. Moreover, Directive 2009/12/EC obliges member states to put in place consultation procedures between airport managing bodies and airport users with respect to the system and the level of airport charges. An independent supervisory entity must be set up to resolve disagreements between airport users and the airport managing body.

From April to June 2018, the Commission ran a public consultation on charges for the use of airport infrastructure to assess the potential impact of a revision of the Directive. The Commission was expected to adopt a proposal for a revised Directive, but none has yet been published.

In July 2019, the Commission published an evaluation of Directive 2009/12/EC. In this evaluation, the Commission found that airport competition had increased overall, but that it remained limited in some larger capacity-constrained airports, leaving open the possibility for those airports to charge prices that would not be achievable

in a market with effective competition. The evaluation also found some improvements in transparency of charging systems, but concluded that transparency remains an issue.

In addition, in February 2014, the Commission issued guidelines on state aid to airports and airlines. These guidelines consolidate and replace the 1994 guidelines on state aid to the aviation sector and the 2005 guidelines on the financing of airports and start up aid to airlines departing from regional airports.

Access

21 | Are there laws or rules restricting or qualifying access to airports?

Under Regulation (EC) No. 1008/2008, EU air carriers enjoy the general right to provide air transport services on all routes within the EU. Member states may impose PSOs in respect of scheduled air services to specified regions or on vital routes for the economic development of certain regions.

Slot allocation

22 | How are slots allocated at congested airports?

Slot allocation at congested airports is governed by Regulation (EEC) No. 95/93 as amended by Regulation (EC) No. 545/2009, as well as Regulation (EU) No. 459/2020 dealing specifically with the impact of the covid-19 outbreak, known as the 'Slot Regulation'. Under the Slot Regulation, the definition of slots also includes the use of the airport infrastructure.

The Slot Regulation applies to congested airports, which fall into two differently regulated categories, as follows:

- 'schedule-facilitated' airports, where there is potential for congestion at some periods of the day, week or year and a facilitator has been appointed to assist the operating carriers in regard to slot availability; and
- 'slot coordinated' airports, where more serious congestion problems occur and a coordinator has been appointed to actively allocate take-off and landing slots to applying carriers.

The Slot Regulation is not applicable to airports not falling into either of these two categories.

A slot facilitator is not responsible for the actual slot allocation but rather advises and recommends air carriers on alternative take-off and landing times, when congestion is likely to occur. A slot coordinator, on the other hand, is fully responsible for the allocation of slots. The coordinator allocates a series of slots from the pool to the applicant carriers allowing the use of the airport infrastructure for the purposes of take-off and landing at the time and for the season for which they were requested. Once it has been determined that an airport must be schedule-facilitated or slot-coordinated, member states must appoint a knowledgeable natural or legal person as the airport's schedule facilitator or slot coordinator. The facilitator or coordinator must be truly independent and must have the necessary financial resources to accomplish its tasks. It must act in a neutral, non-discriminatory and transparent way.

Under the Slot Regulation, a carrier has the right to retain slots allocated to it for the next corresponding season, provided it can satisfactorily demonstrate to the coordinator that it has operated such slots for at least 80 per cent of the time. If this is not the case, slots must be returned to the pool (the 'use it or lose it' principle). The rights of a carrier to retain already held and used slots are called grandfather rights. The Commission has in certain extraordinary circumstances (eg, the terror attacks of 11 September 2001 and the SARS outbreak of 2003) made exceptions to the 80 per cent usage rule. A similar amendment to the 80 per cent usage rule entered into force in June 2009 with respect to the 2010 summer scheduling period in response to the severe economic downturn that led to a substantial decline in air traffic. Last time such amendment to the 80 per cent usage rule was made was in March 2020 when Regulation (EU) No. 459/2020 mentioned above was adopted, clarifying that slots unused due to the outbreak of covid-19 would be considered as having been operated.

The Slot Regulation further provides that 50 per cent of the slots in the slot pool at a given airport must be provided to new entrants. In situations where requests cannot all be accommodated, preference is to be given to commercial air services, scheduled services and programmed non-scheduled air services. In cases of competing requests under the same category, priority will be given to year-round operations. Slots may be transferred between air carriers that hold a slot for an alternative route or between parent and subsidiary companies.

Secondary slot trading is the process whereby slots are exchanged in return for monetary or other compensation. Following a 2008 Commission communication, this practice is considered compatible with, but not mandated by, the Slot Regulation, provided it takes place in a transparent manner, and it respects all the other administrative requirements for the allocation of slots.

On 1 December 2011, the Commission announced its Better Airports Package, comprising legislative proposals on slots, ground handling and noise as well as a communication. As concerns the proposed amendments to the Slot Regulation, key proposals included an express permission for secondary slot trading and stricter 'use it or lose it' rules, including increasing the slot utilisation threshold from 80 to 85 per cent. A 'General Approach' was agreed upon by the EU Council in October 2012, however, the text, which has also been reviewed by the EU Parliament, deviated from the Commission's proposal significantly and does not include the Commission's proposal to increase the 'use it or lose it' threshold. In December 2012, the EU Parliament voted to maintain the current slot utilisation rules (80 per cent 'use it or lose it' rule), as well as the current slot series length. The EU Parliament instead favoured strengthening the penalty system in order to dissuade air carriers from holding slots without using them or taking too long to return them to the pool. The EU Parliament did support the Commission's proposals expressly to permit secondary trading of slots. As with the SES2+ package, the legislative process is still on hold due to the Gibraltar dispute. In its communication 'An Aviation Strategy for Europe', the Commission urged the EU Council and the EU Parliament to adopt the revised Slot Regulation.

Ground handling

23 | Are there any laws or rules specifically relating to ground handling? What are they?

Directive 96/67/EC provides the regulatory framework with respect to ground handling services at EU airports, and has been transposed into member states' national law. The Directive applies to all types of airside and landside ground handling services, such as passenger and baggage handling, aircraft services and aircraft maintenance, fuel and oil handling and catering services at all EU airports open to commercial traffic with annual traffic over two million passenger movements or 50,000 tonnes of cargo.

The main aim of Directive 96/67/EC was to open up the ground handling market to competition. For example, it prescribes that for certain services the number of suppliers may be no fewer than two for each category of service. It also governs self-handling, access to installations, selection procedures for suppliers and the separation of accounts for ground handling services from other activities.

On 1 December 2011, the Commission announced its Better Airports Package, comprising legislative proposals on slots, ground handling and noise as well as a communication. The Commission had proposed the replacement of Directive 96/67/EC with a ground handling regulation

that would aim at further liberalising the European ground handling market, providing more control to airports over ground handling services at the airport and giving extra protection to ground handling workers in particular by providing for their transfer when the contract for ground handling services transfers from one provider to another. However, in early 2015 the Commission announced the withdrawal of the regulation proposal, stating that there was 'no foreseeable agreement' but announced in its communication 'An Aviation Strategy for Europe' that it would undertake an evaluation of the ground handling services directive and then decide if the legislation needs to be reviewed. Regulation (EU) No. 1139/2018 introduces additional safety requirements on ground handling services and empowers the Commission to adopt detailed rules on safe ground operations.

Air traffic control

24 | Who provides air traffic control services? And how are they regulated?

In the EU, air traffic control and management services are principally provided by the national control units. As previously mentioned, a long-term overhaul of the European air traffic management is currently under way: the SES programme (in its various iterations), aims to create a truly pan-European air traffic management system, built around nine functional airspace blocks (FABs) covering EU airspace.

The SES programme covers not just the EU member states but most European countries. It is being developed and regulated by Eurocontrol, an intergovernmental body of which the SES member states are members and, in parallel, the EU.

The SES I package consisted of the following:

- a framework regulation (Regulation (EC) No. 549/2004) (the Framework Regulation), which established the Commission as the regulator for the civil sector and the Single Sky Committee to assist it in its regulatory activities;
- the Airspace Regulation (Regulation (EC) No. 551/2004), which will establish a single European Upper Information Region and within it organise airspace into functional airspace blocks;
- the Service Provision Regulation (Regulation (EC) No. 550/2004), which establishes a common licensing system for civil air traffic management providers; and
- the Interoperability Regulation (Regulation (EC) No. 552/2004), which aims to ensure that systems, equipment and procedures operate seamlessly.

In 2009, a significant reform of the SES I took place based on five key and interrelated pillars (SES II), as follows:

- safety;
- environment (including decarbonisation of the sky);
- capacity and cost-efficiency;
- performance monitoring; and
- incentive mechanisms.

As part of this reform, the Framework Regulation and the three technical regulations were all amended by Regulation (EC) No. 1070/2009.

The SES II package of legislation now also comprises the following:

- Regulation (EU) No. 317/2019 laying down a performance scheme for navigation services and network functions;
- Implementing Regulation (EU) No. 123/2019 laying down detailed rules for the implementation of air traffic management (ATM) network functions, which repealed Regulation (EU) No. 677/2011; and
- 2011 Commission Decision on the nomination of the network manager for air traffic management network functions of the SES.

Also relevant is the legislation on airport safety.

The aim of the SES II reform is to improve aviation performance, to adapt the legislation to changes having arisen since SES I, and to succeed in creating a truly unified European airspace. In July 2014, the Commission formally requested 18 member states, members of six different FABs, to make a decisive move towards common airspace management by implementing their FABs.

In June 2013, the Commission attempted to accelerate the implementation of SES. To this end, it issued a communication and proposed further measures (SES2+) to build on the previous reforms. The proposal aims to update the SES package and amends the rules governing EASA and focuses on the improvement of the oversight of air traffic control organisations, the strengthening of air traffic management performance, the creation of new business opportunities in support services and the enabling of industrial partnerships. However, the SES2+ package has faced resistance from certain stakeholders, including some unions. In March 2014, the European Parliament preliminarily approved the SES2+ proposals. One of the Commission's proposals was withdrawn in July 2018 as the Commission considered that its content had been incorporated in Regulation (EU) No. 1139/2018; the remainder of the package remains blocked in the legislative process.

Licensing of air traffic controllers is carried out at a national level, but Eurocontrol is responsible for the development of a harmonised licensing policy for air traffic controllers employed within the European civil aviation countries. The Framework Regulation also sets the licence standards to be applied by national authorities.

Within the framework of European air traffic control, the following further legislative instruments are also of importance:

- Regulation (EC) No. 2150/2005 on the flexible use of airspace, which establishes rules and procedures between civil and military authorities responsible for air traffic management;
- Regulation (EU) No. 373/2017 laying down common requirements for providers of air traffic management/air navigation services and other air traffic management network functions and their oversight, which repealed Regulation (EU) No. 1034/2011 and Regulation No. 1035/2011 (effective as from 2 January 2020);
- Regulation (EU) No. 1185/2016 on airspace classification and access of flights operated under visual flight rules above flight level 195; and
- Regulation (EU) No. 373/2017 on common requirements for providers of air traffic management and air navigation services and other air traffic management network functions and their oversight.

As mentioned above, SESAR is the technological pillar of the Single European Sky, and seeks to improve Air Traffic Management (ATM) performance by modernising and harmonising ATM systems through the definition, development, validation and deployment of innovative technological and operational ATM solutions.

LIABILITY AND ACCIDENTS

Passengers, baggage and cargo

25 | What rules apply in respect of death of, or injury to, passengers or loss or damage to baggage or cargo in respect of domestic carriage?

There are currently three regulations setting out the obligations arising in cases of death or injury of air passengers, for the loss or damage of their baggage, and accidents regarding mail.

Regulation (EC) No. 889/2002 (amending Regulation (EC) No. 2027/97 on air carrier liability in the event of accidents) aligns EU law with the provisions of the Montreal Convention of 18 May 1999 for the unification of certain rules for international carriage by air, establishing

a regime of unlimited liability in the case of death or injury of air passengers, and creating a uniform system of liability for international air transport. Regulation (EC) No. 889/2002 thus implements the relevant provisions of the Montreal Convention, while laying down certain supplementary provisions, and extending its application to carriage by air within a single member state.

Regulation (EC) No. 785/2004 on insurance requirements for air carriers and aircraft operators, amended by Regulation (EC) No. 1137/2008 and Regulation (EU) No. 285/2010, contains the corresponding insurance requirements for all air carriers and aircraft operators flying within, into, out of or over the territory of a member state, and defines the minimum insurance requirements for liabilities linked to passengers, baggage, cargo and third parties. Moreover, the regulation specifies the minimum insurance coverage for non-commercial operations and the liability in respect of baggage and cargo and third parties. Member states have the possibility to introduce rules establishing adequate insurance on points that are not covered by the regulation.

Finally, according to Regulation (EC) No. 1008/2008 (article 11), air carriers should be insured so as to cover liability arising from accidents with respect to mail.

Surface damage

26 | Are there any special rules about the liability of aircraft operators for surface damage? What are they?

Regulation (EC) No. 785/2004 (as amended by Regulation (EC) No. 1137/2008 and Regulation (EU) No. 285/2010) establishes that an air carrier must also be insured towards third parties to cover liability in case of accidents. The regulation further specifies the minimum insurance cover, which varies depending on the maximum take-off mass of the aircraft (ie, a certified amount that is specific to all aircraft types, and is stated in the aircraft's airworthiness certificate).

Accident investigation

27 | What system and procedures are in place for the investigation of air accidents?

The fundamental principles governing the investigation of civil aviation accidents and serious incidents are set out in Regulation (EU) No. 996/2010 (as amended, and replacing and repealing Directive 94/56/EC). Article 5 of the Regulation, as amended by the updated civil safety aviation rules, requires that (subject to limited exceptions relating to the type of aircraft involved) every accident or serious incident that has occurred within EU territory or involves aircraft registered in a member state or operated by an undertaking established in a member state is reported and subject to a safety investigation.

Usually, the safety investigation will take place in the member state in which the accident or serious incident occurred. Article 4 of the Regulation states that safety investigations are to be conducted or supervised by a permanent civil aviation safety investigatory authority capable of carrying out a full safety investigation, either on its own or through agreements with other safety authorities. The sole objective of the safety investigation is to prevent further accidents, not apportion blame. They are intended to complement any judicial or administrative investigation that may take place under member states' national law (article 5(5)).

Each safety investigation must be concluded with a report and must contain, where appropriate, safety recommendations. The report should be made public within 12 months of the date of the accident or serious incident. If that is not possible, the authority is required to release an interim statement at least every anniversary of the accident or serious incident (article 16). The safety investigation authority may also make safety recommendations at any stage of its investigation (article 17).

Regulation (EU) No. 996/2010 also mandates that member states shall establish between themselves a European Network of Civil Aviation Safety Investigation Authorities with a view to raising standards of safety investigations (article 7).

In May 2019, the Commission published an evaluation of Regulation (EU) No. 996/2010, concluding that the Regulation contributes to improving civil aviation. It found that the quality of safety investigation has generally improved since the Regulation entered into force, though smaller Safety Investigation Authorities can lack resources.

Accident reporting

28 | Is there a mandatory accident and incident reporting system? How does it operate?

EU law provides for a mandatory accident or incident reporting system. According to Regulation (EU) No. 996/2010, any person who has knowledge of the occurrence of an accident or serious incident shall notify without delay the competent safety investigation authority in the state of occurrence. The safety investigation authority will then notify without delay the Commission, European Aviation Safety Agency (EASA), the International Civil Aviation Organization and appropriate member states and third countries (article 9).

The regulation also provides for the exchange of information between EASA and member states' authorities on occurrences.

Since November 2015, following the entry into force of Regulation (EU) No. 376/2014 of the European Parliament on the reporting, analysis and follow-up of occurrences in civil aviation, which repealed Directive 2003/42/EC and amended Regulation (EU) No. 996/2010, pilots and other professional staff – be they employees or contract workers – are able to report safety occurrences. Regulation (EU) No. 376/2014 also provides for the establishment of a safety management system aimed at preventing air accidents. Its aim is to put in place provisions against the inappropriate use of safety information and provide for stricter protection of the reporter of a safety occurrence. In addition, the Regulation mandated the setting-up of an 'appeal body' at a national level.

COMPETITION LAW

Competition law

29 | Do sector-specific or general competition rules apply to aviation?

The general EU competition rules have applied in full to the aviation sector since 2004, when the previous sector-specific regime of Regulation (EEC) No. 3975/87 was abolished. Accordingly, articles 101 Treaty on the Functioning of the European Union (TFEU) (prohibiting and making void anticompetitive agreements and concerted practices) and 102 TFEU (prohibiting the abuse of a dominant position) apply fully to all agreements and behaviour concerning air transport services that may affect trade between member states, including those relating to routes between the EU and third countries. The Commission has full enforcement powers under Regulation (EC) No. 1/2003 when applying EU competition rules in cases concerning the air transport sector. Likewise, the EU merger control rules under Regulation (EC) No. 139/2004 (the EC Merger Regulation – EUMR), and the EU state aid rules under articles 107 to 109 TFEU apply fully to the aviation sector.

Previous block exemptions from the application of article 101 TFEU (covering, for instance, International Air Transport Association (IATA) passenger tariff consultations and slot allocation conferences) implementing the (now defunct) Regulation (EEC) No. 3976/87 on the application of article 101(3) TFEU to certain categories of agreements and concerted practices in the air transport sector have been abolished. With respect to the IATA airport slot allocation conferences,

the Commission has expressly stated that they do not restrict competition, and thus a block exemption is unnecessary. Finally, while the Commission retains the power to adopt block exemptions under Regulation (EC) No. 487/2009 currently in force, it has so far expressed no intention to exercise this power.

Regulator

30 | Is there a sector-specific regulator, or are competition rules applied by the general competition authority?

There is no EU-level sector-specific regulator concerning the application of competition law in the air transport sector. Within the Commission, DG Comp enforces the EU competition rules, including (since 2010) EU state aid rules. Member states' authorities and courts have concurrent but subsidiary powers to apply articles 101 and 102 TFEU (but not the EUMR).

Market definition

31 | How is the relevant market for the purposes of a competition assessment in the aviation sector defined by the competition authorities?

When defining the relevant product and geographic market in the context of a competition assessment in the aviation sector, the general market definition principles under EU competition law apply.

The starting point when defining the relevant product market is to assess whether two products can be considered as substitutes from a demand-side perspective. In mergers and alliance agreements between airlines, the well-established approach to relevant market definition in passenger services is the origin and destination (O&D) city-pair. Accordingly, the relevant product market includes all relevant services on the O&D city-pair in question. The relevant market may, where appropriate, be further segmented between the market for premium (mainly business) passengers, and the market for non-premium (mainly leisure) passengers.

Only in exceptional circumstances will the possibility of indirect services be seen as exercising a significant competitive restraint on nonstop short-haul services (eg, when a one-day round trip is not possible on nonstop services of indirect services account for a significant share of passengers). On long-haul services, the Commission traditionally included only indirect services that are seen as credible alternatives taking into account connection and overall journey time. More recently, however, the Commission has suggested a more flexible approach at least as concerns long-haul routes, including all one-stop bookings in the market definition, stating that if one-stop services are not a credible alternative then they will only account for a very small share of passengers anyway.

The city-pair approach means that the relevant market may include competing flights from neighbouring airports, if there are significant overlaps between the catchment areas of the relevant airports. Likewise, services by other modes of transport such as high-speed trains may also form part of the same relevant market. These are fact-specific questions that the Commission will assess on a case-by-case basis. These broader market definitions are generally more likely to be valid options for non-premium rather than for premium passengers.

Code-sharing and joint ventures

32 | How have the competition authorities regulated code-sharing and air-carrier joint ventures?

The Commission reviews code-sharing and other forms of airline alliances in the context of article 101 TFEU (prohibiting and making void anticompetitive agreements and concerted practices).

The EU merger control rules under the EUMR apply only to 'full-function' joint ventures (ie, those that perform, on a lasting basis, all the functions of an autonomous economic entity), which means that most forms of airline alliances are not caught. There has only been one case (*KLM/Alitalia*) in which an airline alliance met the full-function condition and was, therefore, examined under the EUMR.

Assessing competitive effect

33 | What are the main standards for assessing the competitive effect of a transaction?

To assess the competitive impact of a transaction in the air transport sector (eg, an airline merger or an alliance), the Commission examines whether the transaction raises concerns on those O&D city-pairs where the parties' services overlap, or could potentially overlap (ie, where, in the absence of the agreement, the parties would be actual or potential competitors). The Commission pays particular attention to overlaps on hub-to-hub routes.

The Commission assesses whether a sufficient number of actual competitors would remain active in the relevant market post-transaction so as to prevent the parties from obtaining incremental market power as a result of the transaction. The Commission also takes into account competitive constraints exercised by potential entrants in the relevant market and, where appropriate, alternative possibilities (such as indirect flights or other modes of transport) on the city-pair.

With regard to potential competition, a carrier will only be considered as a potential competitor on a specific O&D city-pair if that city-pair's traffic size is such (taking into account both local and connecting flights) as to allow for and justify the offering of a competing service.

Furthermore, entry of a specific carrier must be reasonably expected in the sense that it must be in line with that carrier's operational and strategic business plans. In assessing the likelihood of potential entry, the Commission uses as a benchmark whether the following applies to the carrier in question:

- operates services on other O&D city-pairs of similar size and characteristics;
- already has a local market presence, in particular through the operation of a hub or a base at either end of the O&D city-pair; and
- has appropriate aircraft that could be deployed on the relevant O&D city-pairs.

The Commission recognises verifiable efficiencies created by airline alliances and mergers that are found to have some anticompetitive effects on the relevant market, provided that such efficiencies are passed on to the consumer, and the consumer benefits outweigh, or at least equal, the identified competition concerns. The Commission conducts a separate assessment of the efficiencies for each of the affected O&D city-pairs. In more recent alliance cases, the Commission has (subject to important restrictions) also indicated a willingness to accept 'out-of-market' efficiencies (ie, efficiencies created not on the overlap routes in question, but on other routes in the network where the alliance leads to consumer benefits (eg, better or more frequent services and connections)).

Finally, where the parties' arguments concerning the existence of efficiencies sufficient to offset potential competition concerns are not (fully) confirmed by the investigation, remedies will be required to enable entry by competitors on 'problem' city-pairs.

Remedies

34 | What types of remedies have been imposed to remedy concerns identified by the competition authorities?

Remedies typically offered by parties in airline mergers or alliances to remove competition concerns include the following:

- slot divestitures at congested (hub) airports at one or both ends of the 'problem' city-pairs, primarily designed to encourage entry by new competitors (this is by far the most important element of the Commission's remedy policy in aviation cases);
- code share, interlining obligations, special pro rata agreements and arrangements for combining fares; and
- remedies relating to access to joint frequent-flyer programmes and computerised reservation system displays.

In some early cases, the Commission imposed pricing constraints and frequency freezes. However, such measures have not been included in more recent cases, and they can be considered as no longer forming part of the Commission's remedy policy. The Commission has also requested member states to relax the fifth and sixth freedom rights restrictions on 'problem' city-pairs to further encourage entry in such O&D city-pairs.

Moreover, following an inquiry in 2008 into the effectiveness of remedies in the airline sector, the Commission has also required measures designed to enhance the likelihood that slot commitments are taken up by new entrants and in particular carriers envisaging to operate services on several of the routes where slot remedies are required. These include, for instance, measures facilitating the more flexible use of slots acquired as a result of the remedies, provided the slots have been used for a certain period of time to provide services on one or more of the 'problem' routes (referred to in the remedies as 'grandfathering'), preference given to carriers able to start new services on several problem routes, and (where the concerns relate to short-haul routes) measures designed to facilitate the establishment of a base operation by the new entrant at one of more of the airports concerned. Finally, the Commission has also sought to facilitate the new entrant's access to behind and beyond routes through the conclusion of special prorate agreements and fare combinability arrangements with the parties.

FINANCIAL SUPPORT AND STATE AID

Rules and principles

35 Are there sector-specific rules regulating direct or indirect financial support to companies by the government or government-controlled agencies or companies (state aid) in the aviation sector? Is state aid regulated generally?

Both general and aviation-specific state aid rules apply to the provision of direct or indirect financial support to companies active in the air transport sector.

The general state aid rules applicable to the aviation sector are as follows:

- article 107 Treaty on the Functioning of the European Union (TFEU) containing the general prohibition of the unlawful grant of state aid, specifying generally what constitutes state aid, and granting exemptions;
- article 108 TFEU creating a standstill obligation;
- article 106(2) TFEU on undertakings entrusted with services of general economic interest (SGEIs);
- Regulation (EU) No. 2015/1589 (Procedural Regulation), laying down detailed rules for the application of article 108 TFEU;
- Regulation (EC) No. 794/2004 (as amended), setting out detailed provisions on notifications and annual reports referred to in the Procedural Regulation;
- Directive 2006/111/EC laying down rules on the transparency of financial relations between member states and public undertakings, where an air carrier is a state-controlled undertaking;
- Regulation (EU) No. 651/2014 (General Block Exemption Regulation), as amended by Regulation (EU) No. 1084/2017, declaring certain categories of aid compatible with the internal market in application of articles 107 and 108 TFEU;
- 2014 guidelines on state aid for rescuing and restructuring non-financial undertakings in difficulty;
- 2008 notice on the application of articles 107 and 108 TFEU to state aid in the form of guarantees;
- the Commission's SGEI package comprising:
  - a 2011 communication on the application of state aid rules to compensation granted for the provision of SGEIs;
  - Decision No. 21/2012 on the application of article 106(2) TFEU to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEIs (the SGEI Decision);
  - a 2011 communication on the EU framework for state aid in the form of public service compensation; and
  - Regulation (EU) No. 360/2012 (as amended) on the application of articles 107 and 108 TFEU to de minimis aid granted to undertakings providing SGEIs; and
- Regulation (EU) No. 1407/2013 on the application of articles 107 and 108 TFEU to de minimis aid (the De Minimis Regulation).

In addition, in February 2014 the Commission issued the 2014 aviation state aid guidelines. These guidelines consolidate and replace the 1994 guidelines on state aid to the aviation sector and the 2005 guidelines on the financing of airports and start up aid to airlines departing from regional airports and have been in force since April 2014. In January 2019, the Commission launched a comprehensive state aid policy evaluation. As part of this evaluation, it has opened a consultation on the 2014 guidelines. The Commission will also evaluate Regulation (EU) No. 1084/2017 on the General Block Exemption Regulation as regards its provisions on aid for airport infrastructure.

Under the current 2014 guidelines, the following applies:

- smaller airports (ie, airports with fewer than 3 million passengers per year) may be permitted to receive a limited amount of aid for operating purposes for a transitional period of 10 years (starting from 4 April 2014). Airports receiving operating aid must demonstrate that they will be capable of fully covering their operating costs by the end of the 10-year transitional period;
- unless there are 'very exceptional circumstances', aid to finance infrastructure investments is allowed only for airports with fewer than 5 million passengers per year. Below that threshold, there are different bands of permissible aid intensity (ie, the maximum permissible amount of state aid as a percentage of infrastructure costs) depending on the number of passengers per year (the smaller the airport, the higher the permissible intensity). According to the guidelines, state aid for investment purposes must have satisfactory medium-term prospects; and
- airlines launching a new route with the aim of increasing connectivity of a region may be permitted to receive 'start-up' state aid. To qualify for the aid airlines must either present a business plan showing that the route in respect of which aid is being received has prospects of becoming profitable without public funding after three years or give an irrevocable commitment to the relevant airports to operate the route for a period at least equal to the period of state aid funding.

The Commission's SGEI Decision also contains specific provisions on airports providing SGEIs. In April 2012, the Commission adopted, as the final pillar of the package, the De Minimis Regulation for the field of SGEI.

In response to the covid-19 outbreak, the European Commission published a Communication setting out a Temporary Framework relating to the application of article 107(3)(b) TFEU for state aid

measures to support the economy by specifically providing for more flexibility of the state aid framework. The Temporary Framework applies across sectors, including aviation. In addition, in light of the fact that the covid-19 pandemic hit the aviation industry particularly hard, the Commission accepted that, in so far as the sector is concerned, the covid crisis qualified as an exceptional occurrence according to article 107(2)(b) TFEU.

36 What are the main principles of the state aid rules applicable to the aviation sector?

The general EU principles relating to state aid, namely, the 'market economy operator principle', the 'proportionality principle', the 'one time, last time principle', and the 'principle of neutrality of property ownership' also apply to the aviation sector.

In particular, the 'market economy operator principle' is used to assess whether a public investment in an undertaking is made under conditions that would be acceptable to a long-term private investor operating under normal market conditions. If this is the case, a member state's intervention is regarded as economically rational and therefore does not constitute state aid within the meaning of article 107 TFEU. Depending on the type of the relevant transaction, variations of this principle such as the 'market economy lender principle', the 'market economy creditor principle', and the 'market economy guarantor principle' apply on the same basis.

The 'proportionality principle' must also be observed by member states when granting aid under the exemptions of article 107(3) TFEU, meaning that only aid that is proportionate to its objective (eg, the restructuring programme under consideration) may be exempt under article 107(3)(c) TFEU.

Under the 'one time, last time principle', member states may contribute to the rescue or restructuring of one and the same undertaking under the exemption of article 107(3)(c) TFEU only once every 10 years. This principle is explained in the Commission guidelines for rescue and restructuring of non-financial undertakings in difficulty.

The 'principle of neutrality of property ownership' also applies in this sector, allowing member states to set up public undertakings, to acquire shareholdings, and to nationalise existing undertakings that operate in all sectors of the economy, provided, however, that the conditions set by the market economy investor principle are met.

Consistent with the Commission's communication on state aid modernisation, the 2014 aviation state aid guidelines state that to be considered compatible with the internal market, the following must apply:

- a state aid measure in the aviation sector must contribute to a well-defined common interest objective;
- state intervention must be necessary (eg, addressing a market failure or an equity or cohesion concern);
- state aid must be an appropriate policy instrument;
- the aid must have an appropriate 'incentive effect' on the undertaking concerned;
- the aid must be proportionate (ie, limited to a minimum);
- the aid must not have undue negative effects on competition and trade between member states; and
- transparency of the aid, such that all relevant stakeholders can have access to all pertinent information and documents concerning the aid.

Exemptions

37 Are there exemptions from the state aid rules or situations in which they do not apply?

The general exemptions to the prohibition of article 107(1) TFEU contained in article 107(2) and (3) TFEU, and the General Block Exemption Regulation are fully applicable to the aviation sector. The 2014 aviation state aid guidelines provide a sector-specific framework for a state aid analysis. In principle, the generally applicable rules do not exempt operating aid. However, the 2014 aviation state aid guidelines do contain a limited exemption for certain categories of operating aid.

Aid granted to allow for the restructuring and privatisation of a state-owned company is usually assessed under article 107(3)(c) TFEU. Such a restructuring will be tested against the conditions described in the Commission's rescue and restructuring guidelines. With regard to the privatisation process as such, aid is generally excluded, and therefore notification is generally not required under article 108(3) TFEU, if, upon privatisation, the following conditions are fulfilled:

- the participation of the private entity is made by way of an unconditional public tender process on the basis of transparent and non-discriminatory terms;
- the participation is granted to the highest bidder; and
- the interested parties are given sufficient time to prepare their offer and receive all the necessary information to undertake a proper evaluation.

In addition, privatisations by flotation or competitive tender on the above conditions generally need not be notified to the Commission in advance for examination of aid implications, but member states may notify, if they desire greater legal certainty.

Regulation (EU) No. 1407/2013 on De Minimis Aid, which also applies to the air transport sector, provides for an exemption to article 107(1) TFEU, when the aid does not exceed €200,000 over any three-year period. Loans may also be covered by the exemption if they are secured by collateral covering at least 50 per cent of the loan and the loan does not exceed either €1 million and a duration of five years or €500,000 and a duration of 10 years. Loan guarantees may be covered by the exemption to the extent that the guarantee does not exceed 80 per cent of the underlying loan and either the guaranteed part of the loan does not exceed €1.5 million and the duration of the guarantee does not exceed five years or the guaranteed part of the loan does not exceed €750,000 and the duration of the guarantee does not exceed 10 years. To avoid abuses, forms of aid the inherent aid amount of which cannot be calculated precisely in advance (ie, non-transparent aid), and aid to firms in difficulty are excluded from the de minimis exemption. Rules on cumulation of aid apply.

In accordance with Commission Decision 21/2012 on the application of article 106(2) TFEU to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEIs, member states are exempt from the obligation to notify compensation for the provision of SGEIs by airports with 200,000 or fewer passengers per year.

Finally, the Temporary Framework adopted in March 2020 in response to the covid-19 outbreak lifted a number of restrictions in view of enabling member states to use the full flexibility foreseen under state aid rules to support the economy in those unprecedented circumstances. As mentioned above, the Framework applies across sectors, including aviation, and certain airline state aid packages were based on the Temporary Framework. Other packages had article 107(2)(b) TFEU as their legal basis, taking advantage of the fact that, in so far as the aviation sector is concerned, the Commission recognised that the covid-19 crisis qualifies as an exceptional occurrence within the meaning of that article.

Clearance of state aid

38 | Must clearance from the competition authorities be obtained before state aid may be granted? What are the main procedural steps for doing so?

Yes, unless the block exemption de minimis rule or SGEI exception applies.

As set out in article 108(3) TFEU, the Commission's supervision of state aid is based on a system of ex ante authorisation (see also the Procedural Regulation). Member states are thus required to inform the Commission upfront of any plan to grant or alter state aid (which is not covered by the General Block Exemption Regulation), and they may not grant such aid prior to Commission approval ('standstill obligation' – see article 108(3) TFEU and article 3 Procedural Regulation). State aid granted without such formal approval is automatically 'unlawful', and the member state involved may be required by the Commission to recover it from the recipient.

Member states may, and are in fact generally encouraged to, notify (national) aid schemes, rather than individual measures (eg, 2014 guidelines on state aid to airports and airlines).

Procedural steps

The main procedural steps to obtain clearance of state aid are provided by the Procedural Regulation, and can be distinguished in two distinct phases:

Phase I

The member state concerned must notify planned aid measures to the Commission. The Commission's preliminary (Phase I) examination can result in any of the following types of decision:

- a clearance decision, on the basis that the notified measure does not qualify as aid within the meaning of article 107(1) TFEU;
- a clearance decision, on the basis that, although the notified measure qualifies as aid, it is compatible with the internal market. In this case, the Commission shall specify which exemption provision it has applied (the Commission cannot attach conditions to a positive decision in Phase I); or
- the opening of formal (Phase II) investigation, on the basis that the notified measure qualifies as aid that raises serious concerns with regard to its compatibility with the internal market.

The Commission must adopt a Phase I decision within two months following the receipt of a complete notification.

Phase II

Where the Commission has serious concerns, it adopts a decision declaring the commencement of a formal investigation (article 6(1) Procedural Regulation). The decision contains a summary of the relevant issues of fact and law, and a preliminary assessment of the proposed aid, identifying the Commission's serious doubts as to the compatibility of the aid with the internal market. The member state concerned must submit its comments within one month from the day on which the decision was communicated to it. The Commission also invites member states and interested parties to submit comments. Other member states and interested parties may submit their comments within one month from the day the decision is published in the Official Journal. If the notifying member state wishes to make oral submissions to the Commission, meetings for this purpose must be held within three months, at the latest, upon receipt of the letter stating that the procedure has been initiated.

The formal investigation procedure is concluded by a Commission decision, which should normally be adopted within 18 months of the opening of the Phase II procedure, and may be either a positive decision allowing the implementation of the aid, possibly subject to conditions, or a negative decision prohibiting the implementation of the aid.

Recovery of unlawful state aid

39 | If no clearance is obtained, what procedures apply to recover unlawfully granted state aid?

Where the Commission finds that the notified aid is incompatible with the internal market, the aid cannot be put into effect (article 9(5) Procedural Regulation).

Where the Commission finds that granted aid is incompatible with the internal market, the aid must be recovered from the beneficiary by means of a recovery decision (article 16 Procedural Regulation). Member states must take all necessary measures to recover the aid, except if such recovery is contrary to a general principle of EU law. Recovery takes place in accordance with the national procedural rules of the member state concerned. In addition, the aid to be recovered must include interest at market rate, to be calculated from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery. The interest rate is to be applied on a compound basis. The Commission updates the interest rates applicable in recovery cases regularly.

A negative Commission decision is final and fully binding upon the member state concerned, which has the right to seek its annulment by the EU courts. In principle, appealing a Commission decision does not suspend the challenged decision's enforcement, unless the EU court orders the grant of interim measures following application by the member state concerned. The only occasion where a member state is justified not to recover the aid is where it is absolutely impossible to do so, as provided for in the relevant case law.

CONSUMER PROTECTION

Passengers

40 | What rules regulate denied boarding, cancellation or (tarmac) delay?

Regulation (EC) No. 261/2004 establishes common rules on compensation and assistance to passengers in the event of denied boarding, cancellation or the long delay of flights. It applies to passengers departing from an airport in the territory of a member state as well as to passengers departing from an airport in a third country to an airport in the territory of a member state, on condition that the passengers have a confirmed reservation on the flight concerned, and presented themselves for check-in at the indicated time or, if no time is indicated, no later than 45 minutes before the published departure time. The regulation does not apply to passengers travelling free of charge or at a reduced fare not available directly or indirectly to the public and only applies to motorised fixed-wing aircraft.

Under the Regulation, air carriers must compensate passengers for denying them boarding against their will. In that event, the passengers concerned have a right to reimbursement of the cost of the ticket (within seven days), or a return flight to the first point of departure or rerouting to their final destination. They also have a right to care (refreshments, meals, hotel accommodation, transport between the airport and place of accommodation, two free telephone calls, telex or fax messages or emails) and to compensation of €250 for all flights of 1,500km or less; €400 for all intra-EU flights of more than 1,500km and non-intra-EU flights between 1,500 and 3,500km; and €600 for all other flights. Compensation can be reduced where the passenger is offered a rerouting alternative that does not exceed the time of arrival of the original flight by a certain number of hours (depending on flight distance). In the case of flight cancellations, passengers are entitled to claim reimbursement or rerouting as well as similar types of care and compensation (unless the passenger was informed of the cancellation at least two weeks in advance or was given rerouting alternatives that do not exceed the time of arrival of the

original flight by a certain number of hours; or the cancellation was the result of extraordinary and unavoidable circumstances). In the case of delays, the passenger is entitled to care and (when the delay is at least five hours) reimbursement or rerouting, but not compensation.

In July 2010, the Commission published a report following a public consultation on the regulation of air passenger rights. It found that, although some progress has been made since the introduction of the regulation, further important steps should be taken to ensure that airlines apply the rules more consistently, and that member states enforce them more rigorously. Between December 2011 and March 2012, the Commission carried out a public consultation on possible revisions to Regulation (EC) No. 261/2004 and a report of responses has been published on the DG Move website.

In March 2013, the Commission announced a package of measures to strengthen air passengers' rights to information, care and rerouting when they are stranded at an airport, to improve complaint procedures and clarify grey areas in respect of, inter alia, delays and cancellations, extraordinary circumstances and contingency planning. The proposal aims to provide for better complaint procedures and enforcement measures. In February 2014, the European Parliament backed the Commission's proposal, but as with the SES2+ package and the amendments to the Slot Regulation, its legislative progress is currently blocked.

On 15 June 2016, the Commission published interpretative guidelines on Regulation (EC) No. 261/2004 summarising the existing case law and consolidating all ongoing practices. These guidelines will apply pending the adoption and entry into force of the new air passenger legislation.

In March 2020, the European Commission published interpretative guidelines on how certain provisions of the EU passenger rights legislation should be applied in the context of the covid-19 outbreak (eg, under what circumstances compensation may be refused). In May 2020, the Commission further issued a Recommendation on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services.

Package holidays

41 | What rules apply to the sale of package holiday products?

On 30 December 2015, the Package Travel Directive 2015/2302/EU entered into force. It repealed its predecessor, Package Travel Directive 90/314/EEC, to cover the traditional pre-arranged packages (as well as those that are tailored to individual consumers' requirements) and clarify grey areas in respect of consumer protection. The aim is to make consumers better informed, to provide for fairer and more predictable prices, enhanced protection for travellers and savings and to facilitate cross-border trade for businesses. Member states were required to apply national transposition measures by 1 July 2018. By March 2019, all 28 member states had transposed the Directive into national law. Directive 2015/2302/EU determines the minimum standards concerning the protection of passengers that have purchased a package holiday.

In particular, the directive covers matters in relation to the following:

- the information to be provided to the consumer;
- the formal requirements for package travel contracts;
- the compulsory rules applicable to contractual obligations (cancellation, modification, the civil liability of package tour organisers or retailers, etc); and
- the protection of consumers in the case of the package tour organiser's insolvency.

As required by the Directive, on 21 June 2019, the Commission published a report on the new provisions of the Directive relating to click-through packages (where package travel services are purchased from separate traders through linked online booking processes), finding that click-through packages are rarely offered by the business operators who contributed to their consultation. The Commission is required to produce a further general report on the Directive by 1 January 2021, and as part of this will further assess click-through packages on the market.

Other consumer legislation

42 | Is there any other aviation-specific consumer legislation?

In addition to the measures discussed above, EU law contains aviation-specific passenger protection legislation relating, in particular, to the following issues, each of which is briefly described below:

- disabled passengers;
- computerised reservation systems (CRS); and
- airfares.

Disabled passengers

The rights of disabled passengers are set out in Regulation (EC) No. 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air. According to the Regulation, disabled persons or persons with reduced mobility cannot be refused air transport on the grounds of their disability, except for justified safety reasons or physical impossibility. Designated points of arrival and departure should be established to allow the disabled persons or persons with reduced mobility to announce, with ease, their arrival at the airport and request assistance. They should be given assistance at airports and on board after advance notice of their specific needs. The managing bodies of the airports have the overall responsibility for providing such assistance (Annex I to Regulation (EC) No. 1107/2006), and the airlines will be responsible for the assistance on board (Annex II to Regulation (EC) No. 1107/2006). Disabled persons or persons with reduced mobility are entitled to receive assistance at no additional charge, although airports may levy a specific non-discriminatory charge on airport users to fund this assistance. In addition, the regulation sets out a number of requirements in relation to the provision of air transport services to disabled passengers, including matters such as the transmission of information, the quality standard for the assistance, the training of personnel, and the available complaint procedures.

In June 2012, the Commission supplemented Regulation (EC) No. 1107/2006 by publishing interpretative guidelines on the application of this regulation.

CRSs

The revised and restated CRS Code of Conduct (Regulation (EC) No. 80/2009) applies to the offering of air transport products (and rail transport products when offered in combination with air transport products) by CRS providers within the EU.

Despite being commonly referred to as a Code of Conduct, the regulation contains binding rights and obligations, including the following:

- non-discriminatory access to and participation of transport providers in the CRS;
- non-discrimination with respect to data handling and distribution facilities;
- neutral, non-discriminatory and comprehensive display of schedule information;
- right of subscribers (ie, travel agents) to participate in other CRSs;
- supply of marketing, booking and sales data to participating carriers on a non-discriminatory basis; and
- non-discrimination by parent carriers against competing CRSs.

The revised CRS Code of Conduct obliges participating carriers to ensure that data submitted by them to a CRS is accurate, and contains provisions reinforcing the protection of personal data (processing, access and storage).

The Commission has clearly defined powers of investigation in the case of infringements of the CRS Code of Conduct, and may impose fines of up to 10 per cent of the total turnover in the preceding business year. However, few fines have so far been imposed for breach of either incarnation of the CRS Code of Conduct and none has been anywhere near the 10 per cent cap.

In March 2009, the Commission published an explanatory note on the meaning of 'parent carrier' for the purposes of the CRS Code of Conduct. In summer 2011, DG Move commissioned a mid-term evaluation of and stakeholder consultation on the CRS Code of Conduct. The final report was issued in September 2012. The final report considered that continued regulation of the area was necessary and did not recommend any fundamental changes to the regime. In 'An Aviation Strategy for Europe', the Commission provided for a fitness check of the CRS Code of Conduct, noting concerns that it may no longer be suitable. As part of this evaluation, a public consultation was held between September and December 2018. The outcomes have not yet been published.

In 2016, DG Comp started an informal investigation, sending questionnaires to airlines, CRSs and travel agents to collect information relating to the distribution arrangements and practices in force between those industry players to assess whether any of these arrangements or practices may potentially give rise to competition concerns. In November 2018, the Commission announced that it had opened an investigation into Amadeus and Sabre, two leading CRS suppliers, examining whether certain of their contractual terms restrict the abilities of airlines and travel agencies to use alternative suppliers. The investigation is currently still ongoing.

Airfares

Regulation (EC) No. 1008/2008 imposes certain obligations to ensure transparency of passenger fares offered from an airport in an EU member state. In particular, the final price to be paid for any offer (published on the internet or elsewhere) must always be indicated and specify the fare, the applicable tax, charges, surcharges and fees that are unavoidable and foreseeable at the time of the publication. Optional price elements have to be communicated clearly, and customers must be able to accept them on an opt-in (rather than opt-out) basis. The regulation also prohibits price discrimination between passengers solely on the basis of their nationality or their place of residence within the EU.

INSURANCE AND SECURITY

Insurance for operators

43 | What mandatory insurance requirements apply to the operation of aircraft?

Regulation (EC) No. 785/2004 (as amended) on insurance requirements for air carriers and aircraft operators establishes minimum insurance requirements for air carriers and aircraft operators, for both commercial and private flights. It requires air carriers and aircraft operators to be insured, in particular with respect to passengers, baggage, cargo and third parties, covering the risks associated with aviation-specific liability (including acts of war, terrorism, hijacking, sabotage, unlawful seizure of aircraft and civil commotion). The coverage levels do not apply to flights over the territory of a member state carried out by non-EU air carriers and by aircraft operators using aircraft registered outside the EU, which do not involve landing in, or take off from, that territory. There are also minimum insurance requirements for liability in respect of third parties per accident and per aircraft.

The Commission's public consultation on the operation of Regulation (EC) No. 785/2004 was concluded in April 2008. The Commission's general conclusion was that the regulation effectively fulfilled its objective of ensuring appropriate insurance coverage and that, despite the claim of certain stakeholders that the established requirements are inappropriately high for some categories, the minimum requirements have not caused any substantial problems in the majority of member states. Along with other internal aviation market legislation, the regulation also underwent a 'fitness check', the final report on which was issued in July 2012.

Aviation security

44 | What legal requirements are there with regard to aviation security?

Aviation security has largely been addressed on a national and intergovernmental basis by Regulation (EU) No. 1998/2015 (as amended), which repealed and replaced Regulation (EU) No. 185/2010 (as amended) to ensure clarity and certainty.

At the EU level, a common security policy has been adopted to give legal force to the rules and mechanisms for cooperation through Regulation (EC) No. 300/2008 on common rules in the field of civil aviation security, which has been in full effect since April 2010, repealing Regulation (EC) No. 2320/2002 (adopted as a consequence of the 11 September 2001 attacks in the United States). Regulation (EC) No. 300/2008 is supplemented by Regulation (EC) No. 272/2009 (as amended), Regulation (EC) No. 1254/2009, Regulation (EU) No. 18/2010 and Regulation (EU) No. 2096/2016 and it is implemented by Regulation (EU) Nos. 72/2010 and 1998/2015 (as amended).

Regulation (EC) No. 300/2008 aims at safeguarding civil aviation against acts of unlawful interference, by setting out common rules and basic standards on aviation security, and mechanisms for monitoring compliance. Common basic standards relate, inter alia, to airport and aircraft security (such as planning requirements, access control and security checks), passengers and cabin baggage (screening, etc), hold baggage, cargo and mail, in-flight security measures and staff recruitment and training. Member states retain the power to apply more stringent measures provided they are relevant, objective, non-discriminatory and proportional to the addressed risk. They must also implement a national civil aviation security programme (NSP), namely a national quality control programme that ensures and monitors compliance with the regulation. Similarly, airport operators and air carriers must implement security programmes, including internal quality control provisions, indicating how they will comply with the regulation and the NSP. Regulation (EC) No. 300/2008 also empowers the Commission to conduct – in cooperation with the competent national authority – inspections (including unannounced inspections) and to adopt general measures amending non-essential elements of the common basic standards. Regulation (EU) No. 72/2010 establishes the applicable procedures for conducting Commission inspections in the field of aviation safety. Finally, the member states are in charge of determining the entity bearing the costs of security measures (eg, the state, the airport operators, airlines or users), and the penalties applicable to infringements of the Regulation.

While Regulation (EC) No. 300/2008 sets out standards for airport security screening equipment, it does not establish a legally binding assessment scheme to ensure compliance with these standards across EU airports. In September 2016, the Commission published a proposal for a regulation establishing an EU certification system for aviation security screening equipment to address the issue. Its progress through the legislative procedure remains on hold, owing to the Gibraltar dispute.

At an international level, the EU and the US have reached two important agreements on forms of data-sharing. These agreements were triggered by two 2006 European Court of Justice (ECJ) judgments annulling two Commission decisions regarding US legislation requiring airlines carrying passengers to, from or across the US to grant US authorities electronic access to passenger name records

(PNRs). One decision concerned the processing and transfer of PNR data by air carriers to the US authorities, while the other related to the adequate level of the protection of personal data contained in the PNR data transferred to the US authorities. The Commission held that the US authorities offered a sufficient level of protection for personal data transferred from the EU. The ECJ found that neither of the decisions had an appropriate legal basis and that the decision on adequacy was adopted ultra vires and infringed fundamental rights. The ECJ therefore did not have to assess the validity of the substance of the Commission decisions. The resulting agreements concerned PNRs and consumers' financial data. The former agreement reduced the amount of passenger data now collected by US authorities but included, inter alia, names, contact data, payment details and itinerary information. It has now been superseded by a 2011 PNR agreement that entered into force on 1 July 2012 and bolsters data protection, taking into account the Communication from the Commission on the Global Approach to the transfer of PNR data. For example, PNR data is now depersonalised six months after being sent by air carriers. In the latter agreement, the US agreed to restrict use of any data received from the banking consortium Swift exclusively for counterterrorism purposes, and to retain the data for a maximum of up to five years. In addition, the Commission agreed to appoint an eminent European judge to monitor the US use of Swift data (French judge Jean-Louis Bruguière). The intention had been for an interim agreement, signed in 2009, to take effect and be replaced by a longer-term agreement in due course. Following concerns about privacy safeguards, however, the European Parliament withheld consent for the interim agreement. A longer-term agreement with strengthened safeguards came into force on 1 August 2010.

Furthermore, article 9 of the first-stage air transport agreement between the EU and US and the second-stage agreement both provide for regulatory convergence mechanisms in security, which are key for the creation of a 'one-stop security' approach (checking passengers and luggage only at the start of their journey and not again at every transfer). The one-stop security approach is also explicitly advanced in Regulation (EC) No. 300/2008.

The EU published Directive 2016/681/EU (the PNR Directive) on the use of PNR for the prevention, detection, investigation and prosecution of terrorist offences and serious crime. Member states had until 25 May 2018 to transpose the PNR Directive into their national law. The PNR Directive seeks to place proportionate safeguards on data protection and privacy. The measure ensures that the PNR for extra-EU flights is to be shared with a passenger information unit in every member state. Multiple member states have already adopted individual mechanisms; however, this development may impose stricter conditions on data when it is shared with countries outside the EU.

Serious crimes

45 | What serious crimes exist with regard to aviation?

This is a matter for member states' national law.

UPDATE AND TRENDS

Emerging trends

46 | Are there any emerging trends or hot topics in air transport regulation in your jurisdiction?

No.

Coronavirus

47 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The covid-19 outbreak has had an impact on several pieces of EU legislation.

Operation of air services

Regulation (EU) No. 696/2020 of 25 May 2020 has amended Regulation (EC) No. 1008/2008 to provide for a new legal framework applicable to the operation of air services in view of the covid-19 pandemic. It is immediately applicable.

EU air carriers that were financially healthy before the covid-19 pandemic suffered significant liquidity problems as a result of the impact of the covid-19 crisis. Reflecting these extraordinary circumstances, Regulation (EU) No. 696/2020, therefore, temporarily amended the financial fitness obligations contained in Regulation 1008/2008. As a result, failure to meet these obligations as a result of the impact of the covid-19 crisis will not trigger the suspension or revocation of air carriers' operating licences or their replacement by temporary licences.

State aid

On 19 March 2020, the European Commission published a Communication setting out a Temporary Framework for state aid measures to support the economy in the covid-19 outbreak. This Framework is based on article 107(3)(b) TFEU and recognises that the entire EU economy is experiencing a serious disturbance. To remedy that, it specifically enabled member states to adopt five types of aid designed to ensure that sufficient liquidity remains available to businesses to preserve the continuity of economic activity during and after the pandemic.

Member states made use of this tool in the aviation sector (eg, a €7 billion French aid measure consisting of a state guarantee on loans and a shareholder loan to Air France to provide urgent liquidity to the company, both approved by the Commission on 4 May 2020).

Similarly, on 25 June, the European Commission has approved a German plan to contribute €6 billion to the recapitalisation of Deutsche Lufthansa AG (DLH), the parent company of Lufthansa Group. Aiming at restoring the balance sheet position and liquidity of DLH in the exceptional situation caused by the coronavirus pandemic, while maintaining the necessary safeguards to limit competition distortions, the measure was found necessary, appropriate and proportionate in line with article 107(3)(b) TFEU and the general principles as set out in the Temporary Framework. This recapitalisation measure was part of a larger support package that also includes a state guarantee on a €3 billion loan that Germany plans to grant to DLH as individual aid under the German scheme approved by Commission decision of 22 March 2020. The Commission's approval of the aid came, however, with strings attached (eg, Lufthansa has committed to make available slots at its Frankfurt and Munich hub airports, where it has significant market power). This will give competing carriers the chance to enter those markets, ensuring fair prices and increased choice for European consumers.

In addition to state aid packages based on the Temporary Framework, which has article 107(3)(b) as its legal basis, certain member states granted state aid using article 107(2)(b) TFEU, taking advantage of the fact that, as mentioned above, the devastating impact of the covid-19 pandemic on the aviation sector has been recognised by the Commission as an exceptional occurrence within the meaning of that article.

For example, on 15 April 2020, the Commission has found a Danish state guarantee of up to approximately €137 million on a revolving

credit facility in favour of Scandinavian airline SAS to be justified on the basis of article 107(2)(b) TFEU.

'Use it or lose it' rule

Regulation (EU) No. 459/2020 was adopted on 31 March 2020 with the objective of considering slots unused owing to the outbreak of covid-19 as having been operated for the purpose of the compliance with the 80 per cent usage rule.

Air passenger rights

Finally, in the field of air passenger rights, the Commission issued several pieces of soft law to provide guidance on the application and adaptation of the law in the context of the covid-19 outbreak.

On 18 March 2020, it published interpretative guidelines on how certain provisions of the EU passenger rights legislation should be applied in the context of the covid-19 outbreak, thereby ensuring clarity and legal certainty. For instance, it acknowledged that the current circumstances are 'extraordinary' and clarified that compensation could be refused in certain particular circumstances, including where cancellations were made more than 14 days in advance or where the cancellation could not have been avoided even if all reasonable measures had been taken. These interpretative guidelines came with an information note on the Package Travel Directive in connection with the covid-19, published on 19 March 2020.

With respect to the form of compensation, the Commission issued Recommendation (EU) No. 648/2020 on 14 May 2020. While reaffirming that under EU rules passengers have the right to choose between vouchers or cash reimbursement for cancelled flight tickets or package travel, the Commission sought to ensure that vouchers become a viable and more attractive alternative to reimbursement for cancelled trips in the context of the current pandemic. The Commission clarified that carriers or travel organisers may propose vouchers to passengers or travellers as an alternative to reimbursement in money, subject, however, to the passenger's or traveller's voluntary acceptance.

ReedSmith
Driving progress through partnership

Geert Goeteyn
ggoeteyn@reedsmith.com

2nd Floor
Avenue Marnix 23
Brussels 1000
Belgium
Tel: +32 2 320 3500
Fax: +32 2 320 3599
www.reedsmith.com

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