

Air Transport 2021

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Contributing editors

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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?

Transport, including civil aviation, falls within the competencies of the Ministry of Infrastructures and Housing.

The two main authorities in the civil aviation sector are the Portuguese Civil Aviation Authority (ANAC) and – NAV Portugal EPE (NAV).

ANAC is the independent regulatory authority for civil aviation. It has powers to license, certify, authorise and approve the activities and procedures, entities, personnel, aircraft, infrastructure, equipment, systems and other means allocated to civil aviation, as well as to define the requirements and technical assumptions underlying the issuance of relevant legislation. Furthermore, ANAC has the powers to organise, retain and keep updated the national aeronautical register, regarding Portuguese aircraft and its parts and components. ANAC's statutes were approved by Decree-Law 40/2015.

NAV is the entity responsible for providing air traffic services in Portugal (including in both autonomous regions – the Azores and Madeira) and its statutes were approved by Decree-Law 404/98, as amended. Recently, pursuant to Decree-Law 7/2020, which amended Decree-Law 109/2008, NAV is now the entity coordinating the slot allocation procedure and the schedules facilitator.

A number of other entities play a role in the aviation sector, in particular the Aircraft and Railways Accident Prevention and Investigation Office, whose statute was approved by Decree-Law 318/99, as amended.

AVIATION OPERATIONS

Safety regulations

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

Air transport in Portugal is bound by EU rules. With regard to civil aviation safety, the key regulation is the Basic Regulation (2018/1139) on common rules in the field of civil aviation and establishing an EU Aviation Safety Agency.

Each of the matters covered by this regulation are further governed by other EU statutes (generally implementing or delegated regulations), including:

- the Airworthiness and Environmental Certification Regulation (748/2012), as amended; and
- the Rules for Aircrew Regulation (1178/2011), as amended.

Irrespective of the above, the rules of the Chicago Convention on International Civil Aviation are also applicable.

The above international legislation is complemented by national legislation, as well as rules issued by the Portuguese Civil Aviation Authority.

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

Safety of air operations is governed by various statutes, including the Air Operations Regulation (965/2012, as amended), which, among other matters, sets forth:

- detailed rules on the conditions and procedures for the declaration by operators engaged in commercial specialised operations of aeroplanes and helicopters or in non-commercial operation of complex motor-powered aircraft of their capability and the availability of the means to discharge the responsibilities associated with the operation of aircraft, and for the oversight of such operators; and
- detailed rules on the conditions under which certain high-risk commercial specialised operations shall be subject to authorisation in the interest of safety, and on the conditions for issuing, maintaining, amending, limiting, suspending or revoking the authorisations.

The distinction between the abovementioned activities and any other is made considering the definition of 'commercial operation' (*a contrario*) and 'specialised operation' provided for in the regulation, as follows:

- 'commercial operation' means any operation of an aircraft, in return for remuneration or other valuable consideration, which is available for the public or, when not made available to the public, which is performed under a contract between an operator and a customer, where the latter has no control over the operator; and
- 'specialised operation' means any operation other than commercial air transport where the aircraft is used for specialised activities such as agriculture, construction, photography, surveying, observation and patrol, and aerial advertisement.

Market access

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

The Air Services Regulation (1008/2008), as amended, on the common rules for the operation of air services in the European Union is the most important regulation on the matter on air transport services within the European Union and is directly applicable to Portuguese air carriers.

Under the regulation, carriage by air of passengers, mail or cargo for remuneration or hire, or both, is subject to the appropriate operating licence. The issuance of such licence is dependent on compliance with various requirements, including:

- holding a valid air operator certificate issued in accordance with the Basic Regulation;
- having one or more aircraft at its disposal through ownership or a dry lease agreement;
- having as its main occupation the operation of air services in isolation or combined with any other commercial operation of aircraft, or the repair and maintenance of aircraft;
- complying with the insurance requirements; and
- complying with the provisions on good repute.

To operate extra-EU scheduled flights, air carriers are required to obtain a specific operation authorisation from the Civil Aviation Authority pursuant to Decree-Law 116/2012.

For non-scheduled air services, air carriers must comply with Decree-Law 19/82 (as amended), which requires a specific licence.

Naturally, besides the air operator certificate and the operating licence, the air carriers will also need traffic rights and slots at the airports.

Ownership and control

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

The Air Services Regulation regulates the financial requirements that an EU air carrier must meet in order to be granted an operating licence.

As a general rule, if an undertaking applies for the first time for an operating licence, it shall be able to demonstrate that:

- it can meet its current and potential obligations established under realistic assumptions at any time, for a period of 24 months from the start of operations; and
- it can meet its fixed and operational costs incurred by operations according to its business plan and established under realistic assumptions, for a period of three months from the start of operations, without considering any income from its operations.

For the purposes of that assessment, each applicant shall submit a business plan for, at least, the first three years of operation. Moreover, a first-time applicant must provide various pieces of information, such as:

- the most recent internal management accounts and, if available, audited accounts for the previous financial year;
- a projected balance sheet, including profit-and-loss account, for the following three years; and
- the basis for projected expenditure and income figures on items such as fuel, fares and rates, salaries, maintenance, depreciation, exchange rate fluctuations, airport charges, air navigation charges, ground handling costs, insurance and traffic/revenue forecasts.

On a national level, financial capacity is assessed under Decree-Law 116/2012 on extra-EU scheduled flights by demonstrating that the operation of the air services in question is an economically profitable activity that does not adversely affect the financial capacity of the air carrier; financial capacity should also be demonstrated under Decree-Law 19/82 on non-scheduled air transportation.

As per the nationality of ownership requirement set out by the Air Services Regulation, the air carrier must be at least 50 per cent owned by member states or its nationals, or both, and be effectively controlled thereby, whether directly or indirectly, through one or more intermediate undertakings, unless provided for in an agreement to which the European Union is a party with a third country.

Under Decree-Law 116/2012, the authorisation to operate extra-EU scheduled flights is dependent on, among other requirements, the existence of an operating licence under the Air Services Regulation.

Therefore, the nationality of ownership requirements mentioned above should be complied with.

Lastly, Decree-Law 19/82 imposes no nationality of ownership requirements.

Licensing

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

According to the Air Services Regulation, as a rule any licensed air carrier may freely provide intra-EU air services. Nevertheless, there are specific exceptions. For instance, in a proportional, adequate, non-discriminatory and transparent manner, a member state may 'refuse, limit or impose conditions on the exercise of traffic rights to deal with sudden problems of short duration resulting from unforeseeable and unavoidable circumstance'. Also, temporary rules concerning restrictions to the exercise of traffic rights were adopted pursuant to the covid-19 pandemic.

The exercise of traffic rights in extra-EU scheduled flights to or from Portugal is subject to an application to be filed before the Civil Aviation Authority pursuant to Decree-Law 116/2012.

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

Considering the public body nature of the Civil Aviation Authority, its acts may be challenged under the general administrative rules, in particular as provided for in the Administrative Procedure Code (Decree-Law 4/2015).

Moreover, Decree-Law 116/2012 sets forth that the Civil Aviation Authority's decisions may be challenged before the administrative courts and, pursuant to the Civil Aviation Authority's statutes, any disputes concerning administrative penalties must be subject to the specialised court of competition, regulation and supervision.

Competition policy

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

There is no sector-specific policy on airline access or competition in Portugal.

Requirements for foreign carriers

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

If the foreign air carrier is an EU air carrier and it wishes to provide intra-EU air services, it has to comply with the Air Services Regulation. If such EU air carrier wishes to provide extra-EU scheduled air services to and from Portugal, it has to comply with Decree-Law 116/2012, in the same way a Portuguese carrier would have to.

If the foreign air carrier is not an EU air carrier, in case of scheduled air services, it should, as a rule, comply with any requirements provided for in the specific bilateral air services agreement. In case of non-scheduled air services, it should comply with Decree-Law 274/77 (as amended) – that is, in principle, it will be subject to a notification or authorisation regime depending on the classification such flights fall into.

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?

Under the Air Services Regulation, member states, 'following consultations with the other member states concerned and after having informed the Commission, the airports concerned and air carriers operating on the route' have the right to:

impose a public service obligation in respect of scheduled air services between an airport in the Community and an airport serving a peripheral or development region in its territory or on a thin route to any airport on its territory any such route being considered vital for the economic and social development of the region which the airport serves. That obligation shall be imposed only to the extent necessary to ensure on that route the minimum provision of scheduled air services satisfying fixed standards of continuity, regularity, pricing or minimum capacity, which air carriers would not assume if they were solely considering their commercial interest. The fixed standards imposed on the route subject to that public service obligation shall be set in a transparent and non-discriminatory way.

Also, given the geographic particularities of the Portuguese territory, comprising both the continental mainland and two archipelagos (the Azores and Madeira's autonomous regions), Decree-Law 138/99 regulates the public services obligations in the specific context of the regular flights:

- between the mainland and the archipelagos;
- between the archipelagos;
- within any archipelago; or
- to any peripheral or less developed region of the Portuguese territory.

Charter services

11 | How are charter services specifically regulated?

Charter services are not specifically regulated – they are subject to the same rules and regulations as other air carriers, in particular:

- compliance with the Air Services Regulation;
- holding a valid air operator certificate issued in accordance with the Basic Regulation; and
- compliance with Decree-Law 19/82.

Regulation of airfares

12 | How are airfares regulated?

The Air Services Regulation sets forth the general pricing freedom principle (with the exception of the public services obligations), according to which EU air carriers may freely set airfares for intra-EU services. This freedom is extended to third-country air carriers, on a reciprocity basis.

Under Decree-Law 116/2012, there are no specific restrictions applicable to prices, but such prices may be taken into account to award traffic rights. Nevertheless, rules on airfares may be provided in bilateral air services agreement.

Drones

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

Civil Aviation Authority Regulation 1093/2016 establishes the conditions applicable to the operation of drones. Below are some key general rules set out by the relevant Regulation:

- drones may only fly during daylight, on visual line-of-sight, up to 120 metres/400ft above the ground;
- drone operation should minimise risk to people, goods and other aircraft;
- drones must maintain a safety distance from people and goods in order to avoid damage in case of accident; and
- the remote pilot must give priority to any manned aircraft and move away from those whenever, for any reason, such manned aircraft are flying at a height close to the drone.

In addition, Decree-Law 58/2018 establishes a mandatory registry and civil liability insurance applicable to drones and drone operators. Image capturing is subject to an authorisation from the National Aeronautical Authority, following Decree-Law 42071 and Ordinance 17568 (as amended).

As of 31 December 2020, drone operation will be subject to the Unmanned Aircraft Implementing Regulation (2019/947), as amended by the Commission Implementing Regulation (EU) 2020/639 of 12 May 2020 and Commission Implementing Regulation (EU) 2020/746, of 4 June 2020.

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?

Aircraft are registered with the National Aeronautic Registry. Initial registration of an aircraft is subject to the following requirements and documents:

- sale and purchase agreement or a bill of sale;
- deregistration certificate from the previous registration country's aeronautical registry, or a non-registration certificate;
- customs clearance certificate if the aircraft is imported from a non-EU member state; and
- two pictures of the aircraft, one taken from the front and a profile picture, with the nationality and registration marks painted on, in a 9x12 format, without margins and printed in natural colours.

In principle, the entity that is mentioned in the register is the owner; however, depending on the transaction underlying the use of the aircraft, the lessee (for instance) may also be mentioned.

Mortgage register

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

Yes. The interested party must fill in the mortgage registry form made available on the Civil Aviation Authority's website and submit it to the Civil Aviation Authority alongside the original, or an authenticated copy, of the document that constitutes the mortgage.

Detention

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

Decree-Law 254/2012 establishes the regulatory framework applicable to the concession of airport public service management to ANA – Aeroportos de Portugal SA. According to the decree-law's provisions, if an air carrier is in debt in respect of airport charges, any of its goods (including any aircraft) that are located at an airport or an airdrome may be detained until either the debt is fully paid or any judicial decision rendered.

Further, pursuant to the Common Charging Scheme for Air Navigation Services Implementing Regulation (391/2013), EU member states shall ensure that effective enforcement measures are applied as regards air navigation charges. These measures may include denial of services, detention of aircraft or other enforcement measures in accordance with applicable law.

Portugal has ratified the Convention on the International Recognition of Rights in Aircraft 1948 (known as the Geneva Convention). Pursuant to Portuguese law and the convention, mortgages may be registered in Portugal and they may also be enforced.

Maintenance

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

There are at least three pieces of EU legislation regarding the maintenance of aircraft that we believe should be highlighted:

- the Basic Regulation (2018/1139), on common rules in the field of civil aviation and establishing an EU Aviation Safety Agency;
- the Airworthiness and Personnel Approval Regulation (1321/2014), as amended; and
- the Airworthiness and Environmental Certification Regulation (748/2012), as amended.

As for national legislation, Decree-Law 66/2003 regulates the certification, approval and authorisation of the entities responsible for the conception, project, production and maintenance of civil aircraft, as well as the certification, approval and authorisation of products, parts, components and equipment used in civil aviation.

AIRPORTS

Ownership

18 | Who owns the airports?

The Portuguese state owns the airports opened to international commercial operations.

Licensing

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

In Portugal, Decree-Law 254/2012 (as amended) establishes the regulatory framework applicable to the concession to ANA – Aeroportos de Portugal SA of the airport public service. ANA is also the entity responsible for licensing the use of the public domain at those airports.

Economic regulation

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

Yes. Decree-Law 254/2012 sets forth the rules for the economic regulation of the airports.

Such rules are applicable to:

- every airport and aerodrome located in the Portuguese territory that are open to commercial traffic whose annual traffic exceeds five million passengers;
- airport networks with an annual global traffic volume exceeding five million passengers; and
- airports or aerodromes submitted to economic regulation by a Civil Aviation Authority decision.

The objective scope of such economic regulation is:

- the definition of common principles and rules applicable to the collection of charges paid by airport or aerodrome users for the use of facilities provided and services provided exclusively by the airport managing body in connection with the landing, take-off, lighting and parking of aircraft, and the processing of passengers, freight and mail; and
- setting the quality of service indicators to be observed at airports and aerodromes.

Access

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

Both EU regulations and Portuguese legislation apply to the access to airports. For instance, regarding security, two EU regulations may be highlighted:

- the Aviation Security Regulation (300/2008), as amended; and
- the Aviation Security Implementing Regulation (2015/1998), as amended.

Furthermore, Decree-Law 254/2012 (as amended) states that without prejudice to the rules applicable to the use of the airport public domain, the occupation of land, buildings or other facilities, and the exercise of any activity and service in the area of airports and national public aerodromes, require a licence from the airport managing entities that are entrusted with its management and operation.

Slot allocation

22 | How are slots allocated at congested airports?

Pursuant to the Slot Regulation (95/93), as amended, the congested airports in Portugal shall be designated as 'coordinated'. Decree-Law 109/2008, as lastly amended by the Decree-Law No. 7/2020, designates as 'coordinated airports' the following:

- Lisbon Airport;
- Porto Airport;
- Madeira Airport; and
- Faro Airport, during the International Air Transport Association's summer period.

Slots in congested Portuguese airports shall be allocated according to the Slot Regulation. The Slot Regulation was recently subject to an amendment, providing for specific and temporary measures to apply in the context of the covid-19 pandemic, such as the suspension of the 'use it or lose it' general rule.

Ground handling

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

Decree-Law 275/99 (as amended) regulates ground handling activities, including the provisions regarding the licensing of ground handling operators and market access. This statute takes into account the rules

provided for in the Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports.

Recently, Regulation (EU) 2020/696, which amended Air Services Regulation, provided for temporary rules on the supply of ground handling services at EU airports, in the context of the covid-19 pandemic and derogated some provisions of the above-mentioned Council Directive 96/67/EC.

Air traffic control

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

Navegação Aérea de Portugal – NAV Portugal EPE (NAV) is the entity responsible for providing air traffic services in Portugal. Its statutes were approved by Decree-Law 404/98, as amended.

The provision of air traffic management and air navigation services (ATM/ANS) in the Single European Sky airspace and the design, production, maintenance and operation of systems and constituents used in the provision of those ATM/ANS is subject to, among other statutes, the Basic Regulation (2018/1139), which establishes common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency.

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?

The Carrier Liability Regulation (2027/97), as amended, implements the relevant provisions of the Montreal Convention in respect of the carriage of passengers and their baggage by air and lays down certain supplementary provisions. It also extends the application of these provisions to carriage by air within a single member state.

Decree-Law 321/89 on mandatory insurance contract in air transport activity also sets forth provisions on this matter.

Surface damage

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

Yes, Order 287/96 establishes limits to the amounts of compensation based on liability for surface damage caused by aircraft in flight or by their loose objects. Decree-Law 321/89 on mandatory insurance contracts in air transport also sets forth provisions on this matter.

Portugal signed the 1952 Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, but it has not yet ratified it.

Accident investigation

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

The Civil Aviation Accident Investigation and Prevention Regulation (996/2010) establishes the main principles and procedures that shall be followed for the investigation of air accidents:

- that occur in the territory of any EU member state;
- that, having occurred outside the EU territory, involve aircraft registered in a member state or operated by an air carrier established in a member state, when such investigations are not to be conducted by another state;
- in which a member state is entitled to appoint an accredited representative to participate as a state of registry, state of the operator,

state of design, state of manufacture or state providing information, facilities or experts by request of the state conducting the investigation; or

- in which a member state, having special interest by virtue of fatalities or serious injuries to its citizens, is permitted by the state conducting the investigation to appoint an expert.

Among other measures, this regulation establishes the obligation of each member states to create an independent safety investigation authority and, together, to establish an EU Network of Civil Aviation Safety Investigation Authorities seeking to promote information sharing and cooperation between the authorities.

Pursuant to that regulation, the Aircraft and Railways Accident Prevention and Investigation Office (GPIAAF), which is responsible for the investigation of accidents and incidents involving civil aircraft, was created (its statutes were approved by Decree-Law 318/99, as amended).

As per this decree-law, the GPIAAF shall be notified of all accidents that occur within the Portuguese territory or its air space, irrespective of the type of aircraft involved in the casualty. This notification must be done by the following entities:

- the aircraft pilot-in-command;
- the involved aircraft's operator and its owner;
- either the relevant airport's, aerodrome's or heliport's director; or
- air traffic controllers or shift managers of the air traffic's inspection body of the area in which the accident occurred.

Upon the notice of an accident, the GPIAAF's director should designate an investigator-in-charge, responsible for directing the investigation. If deemed necessary, other entities with expertise in other fields of knowledge may be required to collaborate with the investigation.

No later than 30 days after the accident, the investigator-in-charge must send a preliminary report to the entities listed at Annex 13 of the Chicago Convention. The investigator-in-charge must then draft the final report, which shall be sent to the GPIAAF's director for endorsement. Subsequently, the report should be notified to the government, to the entities listed at Annex 13 and to the European Commission. The GPIAAF must publish the final report within 12 months of the accident.

Accident reporting

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

As regards safety reporting, at least the following pieces of legislation should be taken into account: Basic Regulation (2018/1139); Regulation (EU) No 376/2014 of the European Parliament and of the Council of 3 April 2014 on the reporting, analysis and follow-up of occurrences in civil aviation (as amended) and Commission Implementing Regulation (EU) 2015/1018 of 29 June 2015, laying down a list classifying occurrences in civil aviation to be mandatorily reported (as amended).

COMPETITION LAW

Competition law

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

The aviation sector is subject to general competition rules established in the Portuguese Competition Act (19/2012), as well as the EU competition rules.

Regulator

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

The Portuguese Competition Act and the EU legislation on competition are applied by the Portuguese Competition Authority (PCA). Pursuant to the Portuguese Competition Act, the Civil Aviation Authority is entitled to issue opinions prior to the adoption of decisions by the PCA, both on the field of antitrust and merger control, relating to the aviation sector.

Market definition

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

The PCA's practice in the aviation sector is generally in line with the European Commission. The PCA has defined product and geographic markets that correspond to the airline routes – that is, to the pairs of origin or destination (O/D) in which the undertakings concerned have overlapping activities, and defined separate product markets for air transport of passengers and air transport of cargo or mail. These pairs of O/D include all airports at the same destination, as the PCA has not found the need to analyse and define markets more narrowly. The PCA has generally indicated that, in relation to the air transport of passengers, the assessment of whether direct and indirect flights form part of the same market/route should be done on a case-by-case basis. Separate markets have been identified for services relating to air transport, such as ground handling services and catering services.

Code-sharing and joint ventures

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

Although there are no specific rules regarding these arrangements, code-sharing and other air carrier agreements may fall under the scope of the general prohibition of agreements and concerted practices between undertakings that restrict competition by object or effect, under both Portuguese and EU law. So far, the PCA has not issued any decisions regarding anticompetitive practices in the airline sector.

As for air carrier joint ventures, these may be subject to the general Portuguese and EU rules on merger control and, therefore, subject to mandatory prior notification and clearance by the competent authority, provided they constitute full-function joint ventures and the notification thresholds (in terms of turnover or market share in the affected markets) are met.

Assessing competitive effect

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

Pursuant to Portuguese Competition Act, the assessment of a transaction under merger control is based on the analysis of whether such concentration is likely to create significant impediments to effective competition in the domestic market or a substantial part of it, in particular if the impediments derive from the creation or reinforcement of a dominant position in a given relevant market. For the purposes of this assessment, the PCA will take into consideration several factors, such as:

- the structure of the relevant markets;
- the position of the undertakings concerned compared with those of their main competitors;
- potential competition; and
- the existence, in fact or in law, of barriers to entry into the market, among others.

In the airline sector, Concentration Procedure 12/2009 concerning TAP/SPdH was blocked by the PCA as it found that the transaction would reinforce a dominant position in the market for ground handling services in the airports of Lisbon, Porto, Faro, Funchal and Porto Santo, as well as in the related market for the air transport of passengers. As the merger had already taken place prior to notification, the PCA imposed several measures to revert it and re-establish effective competition between the parties.

Remedies

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

To remedy competition concerns, the PCA may subject the approval of a merger to the adoption of structural (ie, divestment of businesses/assets) or behavioural commitments. The PCA has stated in its decision practice that structural commitments are considered preferable to behavioural commitments, as they generally allow the entry of new market players. In relation to divestment commitments, the acquirer of the divested business or asset is subject to prior approval by the PCA in order to constitute a viable and competitive alternative in the relevant market.

In the airline sector, the PCA has approved both structural and behavioural commitments in Concentration Procedure 57/2006 concerning TAP/Portugália, which were specifically aimed at permitting the entry of a new market player in the route Lisbon–Porto. The main commitments consisted of:

- providing slots at Lisbon and Porto Airports for a new entrant having an offer capacity at least equivalent to the target company;
- freezing the number of flights operated by the acquirer on the affected routes; and
- providing passenger fees equivalent to the one of highly competitive routes.

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?

Portugal has no specific rules regarding state aid: this is a matter dealt with only at EU level. Portugal follows the general rules established by article 107 of the Treaty on the Functioning of the European Union, which contains a general prohibition on state aid, as well as the State Aid Block Exemption Regulation (994/98). As for the aviation sector, Portugal follows the European Commission Guidelines on State Aid to Airlines and Airports (2014/C 99/03), which establish the conditions under which EU member states can grant state aid to airlines and airports.

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

The European Commission Guidelines on State Aid to Airlines and Airports are aimed at promoting the sound use of public resources to allow effective aid measures, while minimising distortions of competition. In general terms, these guidelines allow:

- investment state aid for airport infrastructure if there is a genuine transport need and the public support is necessary to ensure the accessibility of a region. The guidelines define a maximum permissible aid intensities depending on the size of an airport, allowing higher amounts for smaller airports than for larger ones;

- operating aid to regional airports (with fewer than three million passengers a year) for a transitional period of 10 years under certain conditions to give airports time to adjust their business model. To receive operating aid, airports need to work out a business plan paving the way towards full coverage of operating costs at the end of the transitional period; and
- start-up aid to airlines to launch a new air route, provided it remains limited in time. The compatibility conditions for start-up aid to airlines have been streamlined and adapted in the 2014 guidelines, considering recent market developments.

Exemptions

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

EU law establishes that de minimis aid, not exceeding €200,000 per undertaking over any period of three fiscal years, does not fall under the scope of the general state aid prohibition, pursuant to the De Minimis Aid Regulation (1407/2013). Furthermore, aid covered by a block exemption applicable to certain categories of state aid, under the General Block Exemption Regulation (651/2014 (GBER)) are considered automatically approved and compatible with the internal market, without the need for scrutiny by the European Commission, and provided the conditions established in the GBER are fulfilled.

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?

EU state law subjects the adoption of any state measures to mandatory prior notification to the European Commission, except in the cases of exemptions referred to previously. Notification triggers a preliminary investigation and locks the member state to a standstill obligation. The Commission has a two-month period to adopt a decision or open a formal investigation under article 108(2) of the Treaty on the Functioning of the European Union where it has serious doubts about the aid's compatibility with EU state aid rules. Should the notification be deemed incomplete, the commission may submit requests for information to the notifying member state, in which case the deadline will restart. If the member state fails to reply to an information request in the prescribed period of time, the notification is deemed to be withdrawn. The preliminary or formal investigation phases are closed by a:

- a positive decision, finding that the measure does not constitute state aid or is compatible with EU law;
- a conditional decision, imposing conditions to ensure compatibility of the measure; or
- a negative decision, blocking implementation of a measure deemed incompatible with EU law.

Recovery of unlawful state aid

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

Should the European Commission reach a decision that a state measure that has already been granted is incompatible with state aid law, it will open a recovery procedure to force the member state to recover the aid with interest from the beneficiary (unless such recovery would be contrary to a general principle of EU law). If the member state does not comply with the decision in due time, the Commission may refer the procedure to the European Court of Justice by initiating an infringement procedure under article 258 of the Treaty on the Functioning of the European Union. There is a limitation period of 10 years for recovery from the beneficiary.

CONSUMER PROTECTION

Passengers

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

The Flight Compensation Regulation (261/2004) is the main statute on this matter. Article 4 regulates the passengers' rights in case of denied boarding; article 5 applies to rights derived from flight cancellation; and article 6 regulates passengers rights if a flight gets delayed. In the context of the covid-19 pandemic, the Commission issued the 'Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with covid-19' and the Recommendation (EU) 2020/648 of 13 May 2020 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the covid-19 pandemic.

An air carrier that does not grant the rights provided for in those rules may be sanctioned pursuant to Decree-Law 209/2005 that establishes the sanctioning system regime related to the Flight Compensation Regulation.

It is also worth mentioning that Portugal has ratified the Convention for the Unification of Certain Rules for International Carriage by Air Montreal.

Package holidays

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

Following the adoption of the Package Travel Directive ((EU) 2015/2302), Decree-Law 17/2018 was issued to set forth the rules applicable to the access and performance of the tourism and travel agencies' activities in Portugal. Due to the covid-19 pandemic, Decree-Law 17/2020 was approved to provide for exceptional and temporary measures for the tourism sector applicable to among other, trips organised by travel and tourism agencies.

Other consumer legislation

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

Yes. The Passenger with Reduced Mobility Regulation (1107/2006), as well as Decree-Law 254/2012, which contains rules on the rights of disabled persons and persons with reduced mobility, should be highlighted.

INSURANCE AND SECURITY

Insurance for operators

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

The mandatory insurance requirements applicable in Portugal are established in a variety of legislative pieces, from which we want to highlight the following:

- the Aircraft Insurance Regulation (785/2004), as amended, whose requirements apply to all air carriers and to all aircraft operators flying within, into, out of, or over the territory of an EU member state;
- Decree-Law 321/89 on mandatory insurance contract in air transport activity (as amended), which is applicable to the air carriage of passengers, baggage and cargo, including animals and mail, with aircraft registered in Portugal or any other aircraft that flies over the Portuguese air space;
- Decree-Law 223/2005, which sets out the appropriate minimum insurance cover to cover passenger liability in respect of non-commercial operations with aircraft and establishes the obligation

to provide evidence of compliance with the minimum insurance requirements for aircraft pursuant to the Aircraft Insurance Regulation; and

- Decree-Law 58/2018, which establishes a mandatory civil liability insurance applicable to drones and drone operators.

Aviation security

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

The Aviation Security Regulation (300/2008) establishes common rules to protect civil aviation against acts of unlawful interference that jeopardise the security of civil aviation and also provides the basis for a common interpretation of Annex 17 to the Chicago Convention on International Civil Aviation.

Also, the Aviation Security Implementing Regulation (2015/1998), as amended, sets forth detailed measures for the implementation of the common basic standards for safeguarding civil aviation against acts of unlawful interference that jeopardise the security of civil aviation, referred to in article 4(1) of the Aviation Security Regulation, and the general measures supplementing those common basic standards, referred to in article 4(2) of that regulation, are set out in the annex.

On a national level, Decree-Law 142/2019 approved the National Civil Aviation Security Programme and created the system of penalties applicable to the legal framework of the common basic standards on civil aviation security established by the Aviation Security Regulation.

Serious crimes

45 | What serious crimes exist with regard to aviation?

Certain crimes related to aviation are duly punishable under Portuguese law, including:

- non-compliance with an order or rightful instruction to guarantee the safety, good order and discipline on board, issued by the aircraft commander or other crew member on his or her behalf, during a commercial flight in a civil aircraft (article 4 of Decree-Law 254/2003);
- disclosing false information related to the flight during a commercial flight in a civil aircraft, causing concern and anxiety among the passengers (article 4 of Decree-Law 254/2003);
- takeover or deviation from the normal route of an aircraft in flight with passengers on board (article 287 of the Portuguese Criminal Code);
- jeopardising the safety of the aircraft by:
 - destroying, eliminating, damaging or disabling its facilities, material or signalling;
 - placing obstacles to its functioning or circulation;
 - issuing a false alarm or warning; or
 - performing an act from which a disaster may result (article 288 of the Criminal Code); and
- operating an aircraft without being able to do so safely or violating driving rules, and, by this conduct, causing a danger to someone's life, physical integrity or assets of high value (article 289 of the Criminal Code).

The above-mentioned does not exclude the criminal responsibility for crimes committed on board and that are able to be committed anywhere else (eg, murder, theft). When a crime against life, physical integrity, personal freedom, sexual auto-determination, dignity or property is committed on board and endangers the safety of the aircraft, the applicable penalty is increased by one-third in its minimum and maximum limits, subject, however, to a maximum of 25 years of imprisonment and 900 days of fine.



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The Criminal Code is applicable to the crimes committed on board Portuguese aircrafts.

The crimes set forth in Decree-Law 254/2003 (as amended) are also punished when committed on board:

- an aircraft without crew, rented to an operator with its head office located at Portugal or established therein; and
- a foreign aircraft landing in Portugal with the alleged infringer still on board.

UPDATE AND TRENDS

Emerging trends

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

The current hot topic is the approval by the European Commission of a rescue loan of up to €1.2 billion liquidity to support to TAP Air Portugal. Currently, the Portuguese State and TAP Group are discussing the terms of the loan. Other solutions, such as nationalisation may be considered in case there is no agreement.

The development of the drone market still seems to be a trend, although the applicability of the Unmanned Aircraft Implementing Regulation (2019/947) (that was expected to begin in 1 July 2020) has been delayed to 21 December 2020. In fact, recently, the Portuguese Civil Aviation Authority launched a public consultation concerning training, examinations and certificates of competency for remote pilots of unmanned aircraft.

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?

As a member of the EU, Portugal is bound by all emergency legislation issued at the EU level, such as:

- Regulation (EU) No. 2020/459 of the European Parliament and of the Council, which amended Slot Regulation (95/93), allowed the suspension of the general rule 'use it or lose it';

- Regulation (EU) No. 2020/696 of the European Parliament and of the Council of 25 May 2020 that amended Regulation (EC) No. 1008/2008 on common rules for the operation of air services in the Community in view of the covid-19 pandemic, to provide, among other matters, for temporary rules concerning restrictions to the exercise of traffic rights and the supply of ground handling services at EU airports; and
- Commission Implementing Regulation (EU) No. 2020/746 of 4 June 2020 amending Implementing Regulation (EU) No. 2019/947 as regards postponing dates of application of certain measures in the context of the covid-19 pandemic, which allowed the postponement of the applicability of the regulation on the rules and procedures for the operation of unmanned aircraft to 31 December 2020.

At state level, various measures were taken to address the impacts of the covid-19 pandemic on the aviation sector, such as temporary flight restrictions to some countries. Also, the Portuguese Civil Aviation Authority (by means of various Aeronautic Information Orders) approved measures motivated by the covid-19 pandemic such as the extension of validity periods or legal deadlines (concerning, for instance, licences, endorsements and medical certificates) and exemptions on certain rules (related to, for instance, crew members' flight and duty time limitations).

Given that the regulatory stream caused by the covid-19 pandemic is ongoing, it is advisable to keep updated on pieces of legislation in force at any given moment.

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