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Law

Business

Research

Overview John Balfour <i>Clyde & Co LLP</i>	3
Argentina Elizabeth Mireya Freidenberg <i>Freidenberg, Freidenberg & Lifsic</i>	7
Australia Simon Liddy, Matthew Brooks and Richard Davis <i>HWL Ebsworth Lawyers</i>	14
Austria Hannes Jarolim, Martina Flitsch and Stefan Rust <i>Jarolim Flitsch Rechtsanwälte GmbH</i>	22
Belgium Birgitta van Itterbeek <i>Dugardyn & Partners</i>	30
Brazil Kenneth Basch, Renata Iezzi, Marcela Correa, Nicole Cunha and Caroline Godoi <i>Basch & Rameh</i>	36
Canada Gerard A Chouest and Carlos P Martins <i>Bersenas Jacobsen Chouest Thomson Blackburn LLP</i>	41
Chile Maximiliano Prado and José Luis Ibáñez <i>Allende Bascuñán y Cía Ltda</i>	48
China Jin Yu-Lai <i>Shanghai Kai-Rong Law Firm</i>	54
Colombia Bernardo Rodríguez Ossa, Juan Felipe Reyes, Daniel Escobar and César Barajas <i>Parra, Rodríguez & Cavellier</i>	59
Costa Rica Alina Nassar <i>Nassar Abogados</i>	67
Denmark Morten Lundqvist <i>Jakobsen Gorrissen Federspiel</i>	72
Ecuador Xavier Rosales <i>Corral & Rosales</i>	77
European Union Geert Goeteyn <i>Shearman & Sterling LLP</i>	81
France Carole Sportes <i>BOPS Law Firm</i>	92
Germany P Nikolai Ehlers <i>Ehlers, Ehlers & Partner</i>	99
Greece Betty Smyrniou and Vicky Veli <i>Bahas, Gramatidis & Partners</i>	105
Hong Kong Anthony W Y Chan <i>Brandt Chan & Partners in association with SNR Denton</i>	114
Iceland Erlendur Gíslason <i>Logos Legal Services</i>	120
India Lalit Bhasin <i>Bhasin & Co Advocates</i>	126
Ireland Gerry Carroll, Robin Hayes and Kate Higgs <i>WhitneyMoore</i>	134
Italy Laura Pierallini <i>Pierallini & Associati</i>	141
Lithuania Jūratė Rusteikaitė-Bakšienė <i>Attorneys at Law Borenus / Švirinas & Partners</i>	148
Malta Tonio Grech <i>Dingli & Dingli Law Firm</i>	155
Mexico Javier Alegre and Carlos Campillo <i>Alegre, Calderón y Márquez Abogados</i>	162
Netherlands Jeroen Timmermans and Laetitia Kunst-den Teuling <i>Stek</i>	169
New Zealand Frank Porter and Anita Birkinshaw <i>Buddle Findlay</i>	175
Nigeria Olawale Akoni, Elejo H Pitan and Kehinde Daodu <i>Babalakin and Co</i>	182
Peru Jorge Velarde <i>Rodrigo, Elias & Medrano Abogados</i>	187
Portugal João P Alves Pereira and João Marques de Almeida <i>Alves Pereira, Teixeira de Sousa & Associados</i>	194
Russia Mikhail Sokolov, Anna Arkhipova and Sergey Seliverstov <i>Sokolov, Maslov and Partners</i>	201
Singapore Lok Vi Ming SC and Joseph Lee <i>Rodyk & Davidson LLP</i>	207
South Africa Tania Siciliano <i>Bell Dewar Inc</i>	212
Spain Rodolfo A Gonzalez-Lebrero <i>Lebrero Abogados, SRLP</i>	218
Sweden Magnus Eriksson, Erik Hellners and Christina Waering <i>Setterwalls</i>	225
Switzerland Andreas Fankhauser <i>Gerspacher Bell Fankhauser</i>	231
Turkey M Ali Kartal <i>Aybay & Aybay</i>	237
United Arab Emirates Donald H Bunker, Ian Veall and Christine Veall <i>Donald H Bunker and Associates</i>	241
United Kingdom John Balfour <i>Clyde & Co LLP</i>	245
United States Timothy J Lynes and James Calder <i>Katten Muchin Rosenman LLP</i>	251
Uruguay Gonzalo Yelpo <i>Yelpo & Facal – Abogados</i>	260
Venezuela John R Pate De Sola <i>Pate & Brown</i>	265

Austria

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General

1 Which bodies regulate aviation in your country, under what basic laws?

In Austria, aviation is regarded as a federal matter in respect of legislative and administrative competence. The basic law is the Austrian Aviation Act (LFG), but there are several other national laws regulating aviation matters. The Austrian federal minister of transport, innovation and technology (BMVIT), as supreme civil aviation authority, has been allocated the competence to pass regulations in a large number of aviation matters (such as use and registration of aircraft, aviation safety, etc). Since 1995, Austria has been a member of the European Union, which has an extensive regulatory competence in aviation matters.

The BMVIT is also the supreme administrative authority in all aviation matters. Since 1994, the administration of aviation matters in first instance is divided between the BMVIT, the Austro Control GmbH, a state-owned private entity, the Austrian Aero Club (ÖAeC), and provincial and municipal authorities. The Austro Control GmbH is in charge of all operational, technical and licensing matters in respect of commercial aviation.

Regulation of aviation operations

2 How is air transport regulated in terms of safety?

The Austrian Aviation Act (LFG) provides several rules relating to the safety of air transport operations. Aircraft may only be operated if they are airworthy, which is certified by the Austro Control GmbH. The federal minister of transport, innovation and technology (BMVIT) has issued the Civil Aircraft and Aviation Instrument Regulation (ZLLV 2010), which provides further prerequisites in respect of equipment, maintenance or airworthiness, taking into consideration the regulations of the Joint Aviation Authorities (JAA) and EC legislation. Aircraft operators need an air operating certificate (AOC) and an operating licence (see questions 4 and 5).

Persons involved in aviation operations need to be licensed by the Austro Control GmbH. The BMVIT has determined certain minimum requirements (eg, minimum age, reliability and fitness), training and instruction programmes, which have to be met by potential candidates (Civil Aviation Personnel Regulation, ZLPV 2006).

Aircraft of non EEA-countries (third-country aircraft) are subject to ramp checks under the Law on safety measures for third-country aircraft (implementing EC Council Directive No. 2004/36/CE on the safety of third-country aircraft using Community airports).

These national provisions are complemented by EU legislation, in particular the EC Regulation No. 216/2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (as last amended by EC Regulation No. 1108/2009), EC Regulation No. 1702/2003 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 (as last amended by EC

Regulation No. 1194/2009), and EC Regulation No. 2042/2003 (covering EASA part M, part 145, part 66 and part 147) on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations and personnel involved in these tasks (as last amended by EC Regulation No. 127/2010).

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

According to article 102 of the LFG, non-commercial air operations with aircraft carrying no more than four passengers, or which are only carried out to drop out parachutists, do not need an operating licence. Non-commercial air operations are those for which only the effective costs are reimbursed by the passenger.

Apart from certain modifications for small aircraft such as hang or paragliders, the general safety regulations must be respected.

4 Is access to the market for the provision of air transport services regulated, and if so how?

Air carriers providing air transport services need an operating licence according to the EC Regulation No. 1008/2008 on common rules for the operation of air services in the Community (Recast of the EEC Regulation No. 2407/92 on licensing of air carriers (Community air carrier)). The operational and technical requirements for licensing are set out in the Austrian Air Operator Certificate Regulation (AOCV 2008), which refers to the JAR OPS 3 and the EASA OPS 1 (annex to the Council Regulation (EEC) No. 3922/91 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation (last amended by EC Regulation No. 8/2008 and 859/2008), as regards common technical requirements and administrative procedures applicable to commercial transportation by aeroplane). Community air carrier have access to routes within the EU without any further approvals. Air transport services offered on routes other than within the EU market are subject to a route licensing under Austrian law.

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

The financial fitness of an applicant is a requirement for obtaining an operating licence. Financial fitness has to be demonstrated by submitting at least a three-year business plan to the respective authority. The business plan must outline that the applicant can meet its actual and potential obligations at any time established for a period of 24 months from the start of operations and meet its fixed and operational costs for the first three months without taking into account any income from its operations. Direct or indirect financial links to other commercial activities must be revealed. Air carriers exclusively

engaged in operations with aircraft of less than 10 tons maximum take-off weight or fewer than 20 seats, or both, are exempt from this requirement. They are required to at all times be able to demonstrate a minimum net capital instead. Nevertheless the competent licensing authority may apply the above-mentioned provisions to such an undertaking if that undertaking intends to operate scheduled air services or if its turnover exceeds €3 million per year.

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

An operating licence does not grant the right of access to specific routes but generally includes the right to operate any route within the EEA. For third-country (ie, non-EU or countries granted the same status by interstate agreement) routes, air service agreements are concluded, according to which air carrier will be designated by the governments. The principles are laid down in the Law on Interstate Air Transport 2008 (BGzLV 2008). This law has implemented the provisions of EC Regulation No. 847/2004 on the negotiation and implementation of air service agreements between member states and third countries. Upon conclusion of such air service agreements the federal minister of transport, innovation and technology (BMVIT) shall, upon fulfilment of certain requirements (in particular a subsidiary in Austria and certain minimum technical and financial equipment), nominate any Community air carrier to benefit from the respective route operation rights. Such right shall be withdrawn if the Community air carrier does not fulfil all necessary requirements or does not make any use of the allocated right within or for a period of six months.

Where there is a lack of air service agreements, third-country air carriers may apply for a licence to operate routes to and from Austria, which may be issued by the BMVIT, if Community air carriers with a subsidiary in Austria are granted the same rights in their country of origin and if it does not conflict with public or safety interests. Community air carriers may apply to operate routes to and from Austria from and to third countries within the scope that such rights are granted to Community air carriers residing in Austria by the respective third country. Cabotage rights are no longer reserved to Community air carriers and may be granted to third-country carriers subject to the provisions of the BGzLV 2008.

In addition, any air carrier planning to operate routes to and from third countries must have the respective flight schedule authorised by the Austro Control GmbH. Such authorisation must be applied for at least 30 days before operations are started and may only be granted if the operation of these routes does not conflict with public or safety interests.

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

Any air carrier eligible for nomination to benefit from route operating rights from concluded air service agreements or – in the absence of such air service agreements – applying for a licence to operate routes to and from Austria from and to third countries, may file a complaint against the BMVIT's decision to the Austrian Supreme Administrative Court or – if it believes the BMVIT's decision does not comply with the Austrian Constitution – the Austrian Supreme Constitutional Court.

Decisions of the Austro Control GmbH are subject to the control of the BMVIT, to which an administrative appeal can be addressed. If that decision is negative, a further complaint can be filed to the Austrian Supreme Administrative or Constitutional Court.

8 Is there a declared policy on airline access or competition, and if so what is it?

There is no national declared policy on airline access or competition. As a member state of the EU, the common EU air transport policy applies, the main aim of which is the liberalisation of the aviation market and the elimination of all national barriers of access to the aviation market.

9 What requirements must a foreign air carrier satisfy in order to operate to or from your country?

For air carriers of EU member states providing commercial air transport, EC Regulation No. 1008/2008 on common rules for the operation of air services in the Community applies (see questions 3 and 4).

For air carriers of non-EU member states the requirements are subject to the conditions set out in air service agreements which Austria has concluded according to the BGzLV 2008. Where there is a lack of air service agreements, third-country air carriers may apply for a licence to operate routes to and from Austria from the BMVIT (see question 6).

Based on the air service agreements (granting the necessary traffic rights) the Austro Control GmbH is responsible for the approval of various kinds of flight permissions, such as scheduled air traffic and charter flights.

Requirements for the approval of scheduled flights to and from Austria are:

- application to the Austro Control GmbH;
- valid certificate of insurance (complying with EC Regulation No. 785/2004 on insurance requirements for air carriers and aircraft operators);
- valid AOC;
- valid noise certificate;
- certificate of airworthiness; and
- if applicable, the wet-lease, dry-lease or sub-lease agreement.

Requirements for the approval of charter flights (freight or passenger) to and from Austria are:

- application to the Austro Control GmbH;
- valid certificate of insurance (complying with EC Regulation No. 785/2004 on insurance requirements for air carriers and aircraft operators);
- valid AOC;
- valid noise certificate;
- in case of an inclusive tour charter flight, a copy of tour literature (in which hotels passengers will stay, excursions, etc) must be attached;
- in case of a 'fifth freedom charter flight', a non-objection declaration of the Austrian carriers must be attached; and
- slots must be coordinated with the airport.

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

EC Regulation No. 1008/2008 on common rules for the operation of air services in the Community (amending EEC Regulation No. 2408/92 on access for Community air carriers to intra-Community air routes) is applicable, which provides that member states may, after consulting other concerned member states and informing the European Commission and the respective airports and air carriers operating such routes, impose a public service obligation to ensure operation of services to peripheral or development regions or on a thin route, if 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. To date, Austria has not made use of this possibility.

11 Are charter services specially regulated?

For charter services within the EU, there are no special regulations. The general EU regulatory framework applies.

According to article 14 of the BGzLV 2008, charter services to and from third countries are subject to a licence issued by the Austro Control GmbH. Such licence may only be issued if no public or safety interests or specific interests of the air transport market are opposed. The Austro Control GmbH may issue such licence subject to conditions.

12 Are airfares regulated, and if so, how?

According to EC Regulation No. 1008/2008 on common rules for the operation of air services in the Community (amending EC Regulation No. 2409/92 on fares and rates for air services), Community air carriers and, on the basis of reciprocity, also air carriers of third countries shall freely set fares for passengers and cargo, except in the case of a public service obligation (see question 10). The published price for the service (including publishing on the internet) has to include the fare and all applicable taxes, charges, surcharges and fees which are unavoidable and foreseeable at the time of publication. In addition, details must be given of the different components of the price (fares, taxes, airport charges and other costs). Discrimination in access to fares between passengers or between users of the cargo service on the basis of their place of residence or their nationality within the Community is prohibited.

In case of subsidisation and unfair pricing practices which cause injury to Community air carriers in the supply of air services from non-European member states, the European commission can, according to EC Regulation No. 868/2004 (concerning protection against subsidisation and unfair pricing practices causing injury to Community air carriers in the supply of air services from countries not members of the European Community), determine redressive measures by imposing duties upon the non-Community carrier concerned.

Outside the scope of EU legislation, the determination of airfares is subject to conditions and other restrictions defined in air service agreements. In the absence of such agreements, the BMVIT has the authority to authorise airfares and impose certain restrictions or conditions (article 17 of the BGzLV 2008).

In addition to the EC Regulation, the Austrian Pricing Act requires airlines for transparency reasons to mark the total (gross) airfare payable for their services in advertisements and other public announcements.

Aircraft

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

The Austrian Aircraft Register and the data registered therein are regulated in article 16 of the LFG and articles 6 to 10 of the ZLLV 2010. While the aircraft operator is disclosed in the public available aircraft register and in the registration certificate, the name of the owner of the aircraft is kept confidential by the Austrian Aircraft Register.

Specific requirements for the registration of an aircraft in the Austrian Aircraft Register do not apply to the owner of an aircraft but only to its operator. An aircraft can be registered in Austria, if the operator (as a legal entity) has been established under the laws of an EU member state and has a company seat, administration or

principal place of business within an EU member state. Further, a process agent in Austria has to be nominated, provided that no person is authorised to accept delivery of official documents in Austria.

14 Is there a register of aircraft mortgages or charges, and if so how does it function?

There is no register of aircraft mortgages or charges in Austria.

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

There are no rights to detain aircraft in respect of unpaid airport or air navigation charges, or other unpaid debts. The respective creditor has to obtain an enforceable judgment with which it may initiate enforcement proceedings. The Austrian Enforcement Act contains provisions according to which a judicial pledge of the aircraft may be obtained.

Since the use of airport facilities and airport services are matters of private law, the airport may refuse the provision of services to airlines in case they have outstanding airport charges.

16 Do specific rules regulate the maintenance of aircraft?

Article 12 of the LFG states that an aircraft must be maintained in an airworthy condition.

All aircraft are fully and exclusively subject to the harmonised Community maintenance provisions, in particular, EC Regulation No. 216/2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency respectively (repealing EC Regulation No. 1592/2002; as last amended by EC Regulation No. 1108/2009), EC Regulation No. 1702/2003 laying down implementing rules for the airworthiness and environmental certification of aircraft and related products, parts and appliances, and for the certification of design and production organisations (as last amended by EC Regulation No. 1194/2009) and EC Regulation No. 2042/2003 on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations and personnel involved in these tasks (in particular part 145 and part M; as last amended by EC Regulation No. 127/2010).

On a national basis, the ZLLV 2010 and the AOCV 2008 provide detailed rules on the maintenance of aircraft (in particular performance according to approved maintenance programmes and manuals, and documentation provisions). These rules are only applicable to aircraft listed in annex 2 of EC Regulation No. 216/2008.

The Austro Control GmbH is the relevant authority for all aircraft maintenance matters.

Airports

17 Who owns the airports?

Austrian Airports are mostly directly or indirectly (through state-owned companies) owned by the province or city the airport is located in, or both. There are six airports in Austria: Vienna, Graz, Innsbruck, Klagenfurt, Linz and Salzburg. Vienna Airport, as the largest Austrian airport, is the only one owned by a public limited company whose shares are listed on the stock exchange. According to the annual report for 2010, 50 per cent of its shares are in free float and 20 per cent each are owned by the city of Vienna and the province of Lower Austria. The remaining 10 per cent are owned by an employee foundation.

18 What system is there for the licensing of airports?

For the operation of (civil) airports the LFG provides a two-step licensing procedure. Both licences are issued by the BMVIT.

First, a civil airport licence is required to establish an airport or change the extent of an airport. Such a licence may be obtained by a national of the EU or a country granted the same status by interstate agreement and – if he or she is not domiciled in Austria – has named a national representative, or a legal entity duly established in a member state of the EU or a country granted the same status by interstate agreement and, if it has no registered office in Austria, has named a national representative. The application must, in particular, contain information on the extent of operation (eg, type of aircraft, type and dimension of the runways), the planned non-aviation premises, the expected aviation barriers and the impact of such undertaking on third-party rights. The establishment of the planned airport must also be of public interest (eg, more than 100km away from an existing airport without compromising that airport's duties).

Then, a start-up licence must be obtained to put the airport in operation. Such a licence is issued if the applicant is in possession of a civil airport licence and fulfils further prerequisites of the Austrian Civil Airport Regulation. Non-aviation premises require their own licence. Larger projects, which might have a significant impact on the environment, are subject to an additional environmental impact assessment.

- 19** Is there a system of economic regulation of airports, and, if so, how does it function?

The Austrian Aviation Act requires every airport operator to issue conditions of use, which shall guarantee non-discriminatory access to, and safe and economic operation of, the airport. These must be approved by the federal minister of transport, innovation and technology (BMVIT). These conditions of use must also contain the applicable airport charges regime. The payable airport charges must be calculated on the basis of objective attributes (eg, type and weight of aircraft, type and purpose of flight). The regime may also contain rules and conditions for reductions and determine the creditor of the respective charges.

This regulatory system has the effect that every Austrian airport has its individual conditions of use and applicable airport charges regime.

- 20** Are there laws or rules restricting or qualifying access to airports?

Each airport applies its individual conditions of use, which also regulate access to that airport. Within the principles of non-discrimination, the airport operators may determine restrictions for access to their airports. Within the defined conditions of use, the airport operator is obliged to contract with a prospective user. If the airport operator denies access to an interested party that fulfils all prerequisites of the conditions of use, that party may enforce the airport operator's contracting obligation before a court.

- 21** How are slots allocated at congested airports?

The slot allocation procedure is set out in EEC Regulation No. 95/93 on common rules for the allocation of slots at Community airports, as amended by EEC Regulation No. 793/2004, and the Austrian Slot Coordination Regulation 2008 (last amended by EC Regulation No. 545/2009, with respect to the current economic and financial crisis). These rules differentiate between scheduled facilitated airports and coordinated airports.

For co-ordinated airports, slots are allocated by (SCA). For scheduled facilitated airports SCA only acts in a supervisory and coordinative manner without authority to actively allocate slots.

In general, the SCA allocates series of slots to applying carriers as requested. Preference is given to new entrants. In certain cases slots that historically have been used by one airline can primarily be allocated to that airline (grandfather rights).

- 22** Are there any laws or rules specifically relating to ground handling?

Ground handling is regulated by the Austrian Airport Ground Handling Act (FBG), which implemented EC Council Directive No. 96/67 on access to the ground handling market of Community airports. Based on the traffic figures, the provisions of the FBG for ground handling services apply only for Vienna airport. Access to ground handling services on the other Austrian airports is not liberalised.

- 23** Who provides air traffic control services? And how are they regulated?

The relevant rules are found in article 119 of the Austrian Aviation Act (LFG) and in EU legislation, in particular EC Regulations No. 549/2004 laying down the framework for the creation of the single European sky (the Framework Regulation), No. 550/2004 on the provision of air navigation services in the single European sky (the Service Provision Regulation), No. 551/2004 on the organisation and use of airspace in the single European sky) and No. 552/2004 the interoperability of the European Air Traffic Management network (the Interoperability Regulation), as last amended by EC Regulation No. 1070/2009 (as part of the SES II Regulatory Package).

Air traffic control services are provided by the Austro Control GmbH under the control of the federal minister of transport, innovation and technology (BMVIT). For airfields, the BMVIT may license other service providers to provide air traffic services. The Austro Control GmbH or such licensed service provider may establish branch offices, if necessary, for the safe and efficient handling of air traffic. Anyone providing air traffic control services must satisfy the safety regulatory requirements (ESARRs) of Eurocontrol, the European Organisation for air traffic control services, whose main objective is to develop a seamless, pan-European air traffic management (ATM) system. The Austro Control GmbH may levy cost-effective service charges, according to EC Regulation No. 1794/2006 laying down a common charging scheme for air navigation services.

Liability and accidents

- 24** Are there any special rules in respect of death of, or injury to, passengers or loss or damage to baggage or cargo in respect of domestic carriage?

Special rules in respect of death of, or injury to, passengers or loss of or damage to baggage or cargo are provided in article 146 of the Austrian Aviation Act (LFG). Article 146 of the LFG explicitly states that the liability provisions of the LFG are subsidiary to international conventions (in particular the Montreal and Warsaw Conventions) and European law (see EC Regulations No. 2027/97 and No. 889/2002). EC Regulation No. 2027/97 is applicable not only to international but also to domestic carriage of Community air carriers, that is, carriers with a valid operating licence granted by a member state in accordance with the provisions of EC Regulation No. 1008/2008 on common rules for the operation of air services in the Community. The scope of application of the Austrian national liability provisions is therefore very limited. In the course of a revision of the LFG in 2006, the national liability provisions of the LFG were adapted to the international and European standards, so that now a uniform liability regime is applicable.

- 25** Are there any special rules about the liability of aircraft operators for surface damage?

The LFG provides for strict liability for aircraft operators, if death of or bodily injury to persons or damage to property results from an accident during the operation of an aircraft. In case the aircraft is operated by someone other than the aircraft operator without his permission, that person is liable instead of the aircraft operator. In

case a default action on the part of the aircraft operator has enabled that person to operate the aircraft, the aircraft operator remains liable along with that person. The LFG provides limits of liability, which vary based on the maximum take-off mass (MTOM) of the aircraft (from 750,000 special drawing rights (SDRs) to 700 million SDRs). One-third of the applicable maximum liability limit is reserved for damage to property and two-thirds are allocated for death or bodily injury to persons. In case the provided limit in either category of damages is not reached, the remaining amount may be used for compensating damages of the other category. Claims for surface damages must be made within three months from the date the claimant has learned of the damage and the responsible aircraft operator.

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

Aircraft accidents are investigated in an administrative procedure by the Federal Accident Investigation Agency, which is subordinate to the federal minister of transport, innovation and technology (BMVIT). Although organised as part of the BMVIT, the Federal Accident Investigation Agency may act independently and is not bound to any instructions of the BMVIT.

The system and procedure of investigation of aircraft accidents is set out in the Austrian Accident Investigation Act (Unfalluntersuchungsgesetz), which implemented EC Council Directive No. 56/94, establishing the fundamental principles governing the investigation of civil aviation accidents and incidents and Regulation (EU) No 996/2010 on the investigation and prevention of accidents and incidents in civil aviation and repealing Directive 94/56/EC.

The exclusive duty of the Federal Accident Investigation Agency is to determine the cause of the accident, in order to elaborate safety recommendations to avoid similar accidents in the future. It is not entitled to comment on liability issues, which are determined by Austrian civil courts. The investigation procedure is not public and must be initiated without delay. Accident premises may be accessed, any documents and evidence necessary to complete the agency's duty may be viewed, witnesses and other persons may be questioned and experts may be assigned. The aircraft operator, manufacturer, crew, maintenance companies and relevant authorities must be granted the opportunity to submit a written statement before the agency's investigation report is finalised. The final investigation report must be made public, if possible, not later than 12 months after the accident.

Air accidents causing bodily injury or death to persons are regularly subject to criminal investigation proceedings of the Federal Prosecution Authority. In such cases, the simultaneous investigation of the Federal Accident Investigation Agency is subject to the consent of and collaboration with the Federal Prosecution Authority. Details of this cooperative approach are set out in two public decrees of the Austrian Ministry of Justice of 2 August 2006 and 26 March 2008.

27 Is there a mandatory accident and incident reporting system, and if so, how does it operate?

According to article 136 of the Austrian Aviation Act (LFG) the aircraft operator, the responsible pilots and other concerned persons are obliged to report aircraft accidents, failures and other incidents that occur on Austrian territory to the Austro Control GmbH without delay. In case of accidents, failures or incidents outside Austrian territory relating to aircraft registered in the Austrian Aircraft Registry or operated by an Austrian carrier, the report must be made immediately upon return to Austria. Details of the reporting system and the reportable incidents (including bird strikes) are set out in the Civil Aviation Reporting Regulation (ZMV), which entered into force on 1 December 2007 and implemented EC Council Directive No. 42/2003 on occurrence reporting in civil aviation.

The Austro Control GmbH must forward all received reports to the Federal Accident Investigation Authority, which shall then decide

– depending on the kind of reported incident – whether or not investigation proceedings shall be initiated.

Article 11 of the AOCV 2008 provides mandatory reports of negative proficiency checks. Part 145 and part M of EC Regulation No. 2042/2003 also provide provisions on mandatory reports.

Competition law

28 Do sector-specific competition rules apply to aviation? If not, do the general competition law rules apply?

In principle, the general competition rules apply to the aviation sector. Austrian Competition law is mainly set out in the Austrian Act Against Unfair Competition (UWG) and the Austrian Cartel Act 2005.

In addition to these national competition rules, European competition law is applicable. The basis of the European competition rules (as far as procedural aspects are concerned) is EC Regulation No. 1/2003 on the implementation of the rules on competition laid down in articles 81 and 82 of the EC Treaty and EC Regulation No. 139/2004 on merger control (now articles 101 and 102 TFEU).

EC Regulation No. 411/2004 relates explicitly to the aviation sector, extending the applicability of European competition law to air transport between the EU and third countries.

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

There is no sector-specific regulator. The applicable competition rules are applied by the regular national and European competition authorities. The main national competition authority in Austria is the independent Federal Competition Agency (BWB). Its duty is to ensure efficient competition in Austria by detecting and investigating alleged violations. The BWB is also responsible for merger control. Next to the BWB, there is the federal cartel prosecutor who is directly controlled by the federal minister of justice. He represents the public interest in competition matters, does not have any investigative power, but may request from the BWB any information to fulfil his obligations. Both the BWB and the federal cartel prosecutor have the right to address the Austrian Cartel Court and request prosecution of any violation of the respective competition rules. Any binding decisions in competition matters (eg, clearance of a concentration, penalty on an undertaking for violation of competition rules) may exclusively be taken by the Cartel Court.

The European competition authority is the European Commission, supplemented by the European Court of Justice.

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

The main principles for defining the relevant market have in substance been developed by the European Commission. For air transport services, the definition of the relevant geographic market is based on the origin and destination city pair, including direct and indirect flights, if substitutable. Indirect flights are not only defined as flights originating from one city but also flights originating from competing airports (eg, Vienna and Bratislava airports, which are only 60km apart). In certain cases the relevant market may include other competing means of transport. In other cases, a distinction between time-sensitive and non-time sensitive passengers is made. The relevant product market differentiates between line, charter and cargo services.

As concerns airports, the relevant geographic market usually comprises an ambit of about 100km for regional and 300km for international airports. The relevant product market may be split into airport infrastructure services, ground handling services and non-aviation services (parking, restaurants, etc).

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

In order to determine whether or not a transaction has an effect on competition, the respective relevant markets (flight routes) are compared. The actual effect does not have to be determined; it might suffice to determine whether or not the transaction has the capacity to have an effect on competition. Certain effects of a transaction, for example, consumer benefits or positive welfare effects, may justify a competitive effect.

Overlapping markets (routes) are generally considered to have an effect on the relevant market; non-overlapping markets are eligible to have such an effect. In its European Night Services decision, the European Court of First Instance determined a more economic aspect for the determination of a competitive effect on a respective route. Thus, an airline shall only be regarded as a competitor on a certain route, if a hub-to-hub route or a route of similar passenger volume is concerned.

In the aviation sector, airlines tend to form strategic alliances, particularly to provide broader services at cheaper prices. The European Commission generally has a very positive approach to the formation of strategic alliances, and tends to approve of such concentrations, if positive effects – for example, for consumers – can be expected and access to the relevant market is not restricted. The European Commission may impose conditions on the parties to avoid market restrictions.

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

The competition authorities, in particular the European Commission, mostly define remedies with the objective of abolishing any restrictions to the market access of other competitors. In this sense, several types of remedies have been imposed, such as:

- the abandonment of slots;
- the reduction or freezing of frequencies;
- obligations to conclude interlining agreements with competitors;
- obligations to open access to frequent flyer programmes and ‘blocked space’ agreements to other competitors; and
- other regulatory conditions.

Financial support and state aid

33 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? If not, do general state aid rules apply?

The relevant regulatory system is based on the rules of the European Union. The basis of this financial support and state aid system is to be found in article 107 and following of the TFEU. The core of these general rules is that any kind of financial support to individual companies by the government or government-controlled agencies or companies is forbidden, if such financial support causes distortion of competition by advantaging one company over the other. These general rules also apply to the aviation sector.

In addition, the EU has issued sector-specific guidelines for the aviation sector on financing of airports and start-up aid to airlines departing from regional airports (OJ 2005 C 312) supplementing the Aviation Guidelines of 1994 (OJ 1994 C 350). These guidelines reflect the main case law principles elaborated by the European courts. Although they are not formally binding, they are taken into consideration by the relevant European institutions and national authorities.

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

In principle, any state aid is forbidden. In order to determine what kind of state aid or financial support constitutes a forbidden kind of state aid, the European Commission applies certain rules (eg, the ‘market economy investor principle’, whereby aid will be permissible only if a private investor would also have granted the aid).

Another important principle is the ‘one-time-last-time’ principle, according to which restructuring aid to an airline which has already received such aid before will only be allowed under exceptional circumstances. Other exemptions in the aviation sector are granted, if the supported undertaking is of general interest.

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

Articles 107(2) and (3) of the TFEU determine several state aids that are considered compatible with the general state aid rules. EC Regulation No. 1998/2006 on the application of articles 87 and 88 of the EC Treaty (now articles 107 and 108 TFEU) to de minimis aid exempts state aid not exceeding €200,000 over a period of three fiscal years.

In addition, the Aviation Guidelines (OJ 1994 C 350) provide certain exemptions, such as for restructuring measures.

The Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ 2005 C 312) provide exemptions from the general state aid rules. According to these guidelines, financial aid to airports is justified if it meets an objective of general interest, for example, regional development or accessibility. The respective airport’s size may also cause an aid to be justified. The European Commission has decided that state aid granted to airports with fewer than one million passengers per year, entrusted with a mission of general economic interest, should be exempted from the notification obligation and declared compatible.

As concerns start-up aid to airlines at regional airports, the European Commission identifies a general interest in increasing mobility by attracting new airlines to regional airports and introducing new destinations. According to these guidelines, state aid for the operation of new routes (in form of marketing support) should be allowed for a maximum of three years (five years in the case of the outermost regions).

36 Must clearance from the competition authorities be obtained before state aid may be granted?

Before state aid – in the sense of the EU provisions – may be granted, the member state must notify its intention to grant such financial support to the European Commission. According to the ‘standstill clause’, no state aid may be put into effect, before the European Commission has cleared the notified measure (article 108 TFEU and EC Council Regulation No. 659/1999). Any state aid which is granted without clearance of the European Commission is automatically considered unlawful.

37 If so, what are the main procedural steps to obtain clearance?

The procedure to obtain clearance is laid out in EC Council Regulation No. 659/1999, laying down detailed rules for the application of article 88 (now article 108 TFEU).

Thus, a member state planning to grant state aid must notify the European Commission of this plan in sufficient time by providing all the necessary information and documentation needed to determine the lawfulness of such state aid. The European Commission provides standardised notification forms which shall be submitted electronically. The European Commission will then make a preliminary decision within two months whether or not the notified measure

Update and trends

The main aviation law issue currently discussed in Austria is the implementation of the Council Directive 2009/12/EC on airport charges, which provides a legal framework for setting airport charges and reflects current commercial practices. Once implemented, the new legislation will promote better dialogue between airlines and airports and ensure transparency, non-discrimination and appropriate consultation between airlines and airports under an independent regulator in each member state. Necessary national legislative changes, which were to have been enacted by 15 March 2011, have not yet been made. It is expected that the competent ministry will distribute a draft of the new law in the course of August 2011 and that the legislator will pass the new law in September/October 2011. It is expected that the new law will not change the currently applicable regime substantially.

At the end of 2010, two controversial aviation laws were enacted. First, Austria has followed Germany and has also introduced a new environmental tax on air passengers. Airlines heavily objected to this tax, since it will affect the competitiveness of Austria and will have negative social and economic consequences, since the total travelling costs will rise.

Second, the responsibilities for the provision of security services at airports were changed. While in the past the Republic of Austria was responsible for security issues, these responsibilities were shifted at the beginning of 2011 to the airport operators. As a consequence, the security fee is no longer determined by the law, but has to be calculated by the airport operators based upon the costs associated with the provision of the services. Starting from 1 January 2011, the security fees on each Austrian airport vary substantially.

A further important issue in Austria is currently the application of Regulation (EU) No. 691/2010 of 29 July 2010 laying down a performance scheme for air navigation services and network functions which entered into force in August 2010. Under discussion at the moment is the elaboration of the performance plans and targets.

constitutes state aid under the relevant provisions. If the European Commission doubts the compatibility of the notified measure with the applicable rules, it will initiate formal investigation proceedings (in which other member states and concerned parties may be heard). If the European Commission does not take any further steps within the period of two months, the notified measure may be considered to have been authorised.

A simplified procedure is provided for certain alterations of existing state aid.

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

The procedure to recover unlawfully granted state aid is set out in article 14 of EC Council Regulation No. 659/1999. In such case, the European Commission may render a 'recovery decision', obliging the respective member state to take all necessary measures to recover the unlawfully granted state aid. In addition, the beneficiary of an unlawful state aid is required to pay interest until the date of the recovery. The recovery measures are determined by national law. In Austria, the applicable recovery procedure (civil or administrative procedure) and the competent authority (civil court or administrative authority) depend on whether the financial aid was granted by a private or public act. Also, competitors may contest such unlawfully granted state aid as an unfair competition measure before the civil courts.

Miscellaneous

39 Is there any aviation-specific passenger protection legislation?

To name the most relevant provisions, EC Regulation No. 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, is of great relevance in Austria. Carriers are obliged to pay a predefined compensation sum or provide assistance in certain cases of denied boarding, cancellation and delay.

The EC Regulation No. 80/2009 on a Code of Conduct for computerised reservation systems and repealing Council Regulation (EEC) No. 2299/89, provides a code of conduct for computerised reservation systems (CRS).

EEC Directive No. 90/314 on package travel, package holidays and package tours was also implemented in Austria (article 30b and following of the Austrian Consumer Protection Act (KSchG)).

As concerns disabled passengers, EC Regulation No. 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, provides certain obligations for carriers and other companies engaged in aviation to grant access to facilities and aircraft, is applicable.

According to EC Regulation No. 1008/2008 on common rules for the operation of air services in the Community the published price for the service (including publishing on the internet) has to include the fare and all applicable taxes, charges, surcharges and fees which are unavoidable and foreseeable at the time of publication. In addition, details must be given of the different components of the price (fares, taxes, airport charges and other costs). Discrimination in access to fares between passengers or between users of the cargo service on the basis of their place of residence or their nationality within the Community is prohibited.

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In addition to the EC Regulation, the Austrian Pricing Act requires airlines for transparency reasons to mark the total (gross) airfare payable for their services in advertisements and other public announcements (see also question 12).

40 Are there mandatory insurance requirements for the operators of aircraft?

Article 164 of the Austrian Aviation Act (LFG) regulates minimum insurance requirements for carriers in respect of passengers, baggage, cargo and third-party claims. This article is subsidiary to the minimum insurance requirement rules set out in EC Regulation No. 785/2004 on insurance requirements for air carriers and aircraft operators (but based on the EU regulatory system).

41 What legal requirements are there with regard to aviation security?

Aviation security is regulated in the Austrian Aviation Security Act 2011 (LSG 2011). This law implements Regulation (EC) No. 300/2008, the successor regulation of Regulation (EC) No. 2320/2002 establishing common rules in the field of civil aviation security and certain other regulations, complying in particular with the requirement to

adopt a national civil aviation security programme. According to the LSG 2011, airport operator and air carrier have to establish security programmes which have to be approved by the minister of interior affairs and the minister of transport, innovation and technology.

Based on section 5 of the LSG 2011, the airport operators have to ensure that access to airside is only granted to persons if they fulfil the security requirements stipulated in the applicable regulations.

42 What serious crimes exist with regard to aviation?

Austria has ratified the Tokyo Convention of 1963 on offences and certain other acts committed onboard aircraft and the Hague Convention of 1970 for the suppression of unlawful seizure of aircraft. In this sense, the Austrian Criminal Code contains aviation-specific serious crimes, namely, aircraft hijacking (article 185) and wilful threat to aviation safety (article 186).

Such crimes may, under certain circumstances, be regarded as acts of terrorism (in particular if the act was meant to intimidate the public or destroy the basic structures of international and public authorities) and subject to higher penalties (article 278c). Financing such acts of terrorism is also subject to penalty (article 278d).

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