

THE AVIATION LAW  
REVIEW

FIFTH EDITION

Editor  
Sean Gates

THE LAWREVIEWS

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REVIEW

The Aviation Law Review

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# AUSTRIA

*Dieter Altenburger and Georg Schwarzmann<sup>1</sup>*

## I INTRODUCTION

Austria is a central European landlocked country with a population of around 8.7 million inhabitants and it has been a member of the European Community, the predecessor of the European Union, since 1995. Following the enlargement of the European Union in 2004 and 2007, Austria is now situated in the centre of the Union and constitutes the link to the neighbouring countries in the east. Germany is the most important trading partner by far; there are close economic, legal and social connections, not least because of the common language. However, it must be considered that there are substantial differences in the judicial practice, especially regarding the jurisdiction in aviation law, despite the partial applicability of the European law.

Although only a small part of the domestic passenger and goods transport apportionments to the aviation sector, it is of particular significance because of the close connection to the neighbouring countries and other countries of the European Union. Furthermore, Vienna International Airport serves as an important hub to the Middle East. Austria has six commercial airports with steadily increasing traffic figures, which are located in Vienna, Salzburg, Innsbruck, Graz, Linz and Klagenfurt. The largest and most important airport by far is the Vienna International Airport, with 23.4 million passengers and 203,033 tonnes of air freight in 2016. It is situated 16km southeast of the Viennese city centre and can be reached in 16 minutes by the City Airport Train, which was put into service in 2003. Also, the Slovakian capital Bratislava is only 49km away and can be reached by public transport. Finally, according to various statistics, the Vienna International Airport is one of the most punctual airports in Europe and part of the leading group worldwide.<sup>2</sup>

The largest airline in Austria is Austrian Airlines, which has a fleet of 85 aircrafts. It is a member of Star Alliance and was taken over by the German Lufthansa AG. The second-largest domestic airline, Niki Luftfahrt GmbH, is a subsidiary of Air Berlin PLC and Etihad Airways and a member of Oneworld Alliance.

The Austrian Aviation Act<sup>3</sup> (LFG) is the central statutory provision at national level. This legal regime is supplemented by numerous other statutes and ordinances. In addition, Austria signed all principal international agreements in the aviation sector, such as the Chicago Convention (ratified on 26 September 1948), Tokyo Convention (ratified on 8 May 1974) and the Montreal Convention (ratified on 28 June 2004). Austria is not a

---

1 Dieter Altenburger is a partner and Georg Schwarzmann is an associate at Jarolim Flitsch Rechtsanwälte GmbH.

2 OAG Punctuality League 2016.

3 Luftfahrtgesetz of 2 December 1957 – LFG.

party to the Rome Convention, the Geneva Convention or the Cape Town Convention. Of course, all European legal provisions are applicable because Austria is a member of the European Union. These take primacy of application over national law. However, it must be considered that directives, in contrast to regulations, must be implemented by national law and, therefore, are not self-executing.

## II LEGAL FRAMEWORK FOR LIABILITY

In terms of liability in the aviation sector, international agreements and European provisions assume considerable importance in practice because of the primacy of application of these provisions and their extensive harmonization of the applicable law. Nonetheless, decisive differences in the jurisdiction of the contracting states are not uncommon. The reasons for this are, on the one hand, the different interpretation of the law and on the other hand the specific procedural provisions. Also, it should not be overlooked that national statutes such as the LFG or the Aviation Security Act<sup>4</sup> also provide liability and penal provisions. Furthermore, the general damages provisions of the Austrian Civil Code<sup>5</sup> are subsidiarily applicable. Other important laws regulating aviation matters are the Airport Charges Act,<sup>6</sup> the Act on Airport Ground Handling,<sup>7</sup> the Federal Act on International Air Services<sup>8</sup> and the Air Transport Levy Act.<sup>9</sup> In addition, there are several national regulations, such as the Civil Aviation Personnel Licensing Regulation,<sup>10</sup> the Rules of the Air<sup>11</sup> and the Air Operator Certificate Regulation.<sup>12</sup>

The supreme civil aviation authority in Austria is the Ministry for Transport, Innovation and Technology (BMVIT). The competent authority for operational, technical and licensing matters is the Austro Control GmbH, a wholly state-owned entity.

### i International carriage

As already pointed out, Austria is party to numerous bi- and multilateral agreements on the aviation sector. In terms of liability, the Montreal Convention is of significant importance. It only applies to international transport, which is why the national liability provisions remain applicable, albeit their legal scope is severely restricted. The national Austrian provisions simulate or refer to those of the Montreal Convention (see subsection ii, *infra*). In compliance with the limits of liability, the obligation of timely notice of complaints and other restrictions, the Montreal Convention provides liability in respect of damage to passengers and baggage. It replaced the Warsaw Convention, which is only applicable when one of the parties did not ratify the Montreal Convention. In addition, the Regulation (EC) 2027/97 is applicable, which integrates the Montreal Convention into European law and provides partially

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4 Luftfahrtsicherheitsgesetz of 2011 – LSG.

5 Allgemeines bürgerliches Gesetzbuch – ABGB.

6 Flughafenentgeltgesetz – FEG.

7 Flughafen-Bodenabfertigungsgesetz – FBG.

8 Bundesgesetz über den zwischenstaatlichen Luftverkehr – BGzLV.

9 Flugabgabengesetz – FlugAbgG.

10 Zivilluftfahrt-Personalverordnung – ZLPV.

11 Luftverkehrsregeln – LVR.

12 Luftverkehrsbetreiberzeugnis-Verordnung – AOCV.

supplementary provisions. Austria is also party to the Chicago and Tokyo Convention. In case of delays, denied boarding and cancellation the Regulation (EC) 261/2004 lays down claims for liquidated damages.

## **ii Internal and other non-convention carriage**

The provisions on liability and its extent in Chapter 10 LFG largely resemble those of the Montreal Convention. For example, the liability of the owner for damaged baggage and cargo or in case of death or injury of the passenger or third parties caused by an accident is regulated in Section 148 ff LFG. When there are several owners of an aircraft, all of them have joint liability, but the limits of Section 151 LFG, which are staggered in accordance to the maximum take-off mass still apply. Also in accordance with the Montreal Convention, the liability of the carrier is limited to 1,131 SDR in case of damaged baggage. Furthermore, the general damages provisions of the Austrian Civil Code are subsidiarily applicable. Several provisions of the ABGB were explicitly integrated into the LFG. For example, Section 161 LFG about the liability in case of contributory negligence refers to Section 1304 ABGB. However, in accordance with the reservation contained in Section 146/1 LFG, the LFG is only applicable where neither European nor international law is.

## **iii General aviation regulation**

Gratuitous carriage of passengers or goods that are not performed by a licensed carrier is not subject to the liability provisions of the Montreal Convention or European Law. However, the provisions of the LFG on liability, as shown in subsection ii, *supra*, are applied in these cases because they establish liability of the owner regardless of whether the carriage was gratuitous or performed by a licensed carrier.

## **iv Passenger rights**

Passenger rights in Austria are mainly regulated by European law. In particular, the Montreal Convention and the Regulation (EC) 261/2004 on Passenger Rights are of decisive importance. This regulation under certain circumstances entitles to claim compensation in case of cancellation or delays. In these procedures, special attention must be paid to the local jurisdiction. In numerous cases, the plaintiff refers to the consumer jurisdiction of Article 17 ff of the Regulation (EU) 1215/2012, but according to Article 17/3, this Regulation does not apply to transport contracts other than package travel contracts. Concerning claims for compensation the place of jurisdiction is usually not determined by the consumer's residence, because the carrier is usually only obliged to transport services. In accordance with the Package Travel Directive, Austrian courts explicitly found that a flight may not be qualified as package travel, even when it takes place during night hours and includes catering.<sup>13</sup> Because of the stated reasons, the place of jurisdiction is usually the place of performance of the obligation in question, provided the carrier does not have an establishment that is registered in the Austrian commercial register. Therefore, the legal venue for all these disputes is the court of the district where the airport of arrival or departure is situated. Those provisions on international jurisdiction result in the consequence that almost all claims that are based on the Regulation on Passenger Rights are concentrated with only a few courts. The competent court of first instance for the Vienna International Airport is the District Court Schwechat,

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13 District Court Salzburg 13 April 2017, 31 C 39/17a.

if the value of dispute does not exceed €15,000. This centralisation offers the advantage that the deciding judges are highly experienced in passenger rights. The Austrian courts developed clear judicial practices for most of the legal questions.

For instance, the courts pay particular attention to the measures that could reasonably be required. This tendency results from one of the few rulings of the Supreme Court (short OGH; court of last instance) OGH 17 December 2012, 4 OB 164/12 about the Passenger Rights Regulation. Article 5/3 Regulation (EC) 261/2004 explicitly provides that the obligation to prove that all reasonable measures had been taken refers solely to the extraordinary circumstances that caused the cancellation. Thus, the operating air carrier must only take those reasonable measures that are appropriate to avoid those extraordinary circumstances. This approach was, for instance, followed by the German Federal Court of Justice.<sup>14</sup> Nevertheless, in Austria this question of law is answered to the contrary and to the disadvantage of the air carrier. The carrier must prove that all reasonable measures had been taken to minimise the delay as much as possible. Hence, the proof of all reasonable measures taken is also required when there is no possibility of influencing the extraordinary circumstances, for example, in case of closures of the airspace. In these cases, carriers must offer reasonable rerouting, substitute transportation or prove why this was not reasonable or possible in this particular case.

Article 7/2 Regulation (EC) 261/2004 provides the reduction of compensation by 50 per cent, when the delay does not exceed a distance-related time limit. The District Court of Schwechat – in whose jurisdiction the Vienna International Airport is situated, as mentioned above – ruled that this reduction does not apply *eo ipso*, but must be claimed explicitly by the carrier.<sup>15</sup> This means that the initially claimed full sum may adversely affect process costs. For this reason, carriers and their legal representatives should examine the potential reduction under Article 7/2 of the Passenger Rights Regulation first and in eventum object immediately, even when the claim itself is contested.

Provided the proof of extraordinary circumstances succeeds and probable cause is shown that the delay or cancellation could not have been avoided, even if all reasonable measures had been taken, the claim for compensation principally will be denied. In particular, the proof of regulatory airspace restrictions and capacity limitations usually lead to a relief of liability. Furthermore, there are several procedural particularities that should be noted. Unlike in other European countries, oral proceedings are held in each case. Both the plaintiff and the defendant must attend the hearing and submit all decision-supporting information by the end of the oral procedures before the court of first instance to avoid adverse procedural consequences. Supplements at a later stage are only allowed in specific cases and only to a limited extent. In practice, a credible and conclusive witness testimony is majorly significant. Written statements of witnesses, however, are not allowed. Usually, the amount in dispute based on the Regulation (EC) 261/2004 is comparatively small, which means that an appeal against the ruling of the first instance is strictly limited and the focus should be on the proceedings at first instance. Court orders possibly may not be separately challenged.

Article 5 of the Passenger Rights Regulation not only provides that there is no compensation in case of extraordinary circumstances, but also in case of timely information and offer of re-routing. The relevant time frames are regulated in Article 5/1 lit c Regulation (EC) 261/2004. It should be noted that according to the Austrian, but also the German

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14 BGH 24 September 2013, XZR 129/12.

15 District Court Schwechat 1 March 2017, 4 C 744/16v.

jurisdiction, solely the operating carrier is accountable for informing the passengers on time. The information of a travel agency or the contracting carrier only justifies a relief of liability when the information was transmitted to the passengers within the statutory time frames. In general, the affected passengers should be informed by the operating carrier directly to avoid defaults.

Another significant ruling of the Austrian Supreme Court of 17 December 2012, 4 OB 164/12i deals with the sequential use of flight coupons by a passenger. This legal dispute is based on the circumstance that carriers sometimes offer a flight connection that consists of several flight stages for a cheaper price than the individual flights. The General Terms and Conditions of Carriage of the defending carrier contained a clause which provided an obligation of the consumer to pay an extra charge in case the consumer only uses one of the flight stages and this flight itself would have been more expensive than the booked flight travel. The Austrian Supreme Court considered that such a clause may only be permitted in the General Terms and Conditions of Carriage when it is only applicable to cases where the consumer originally intends to use only one of the several flights of a combined offer and, therefore, consciously tries to circumvent the tariff system. Clauses that also burden consumers who initially want to use the actual combined offer, but decide otherwise later – for example, because of delay of a feeder flight or a change in the itinerary – are grossly discriminatory and, therefore, void.

In this context, it should be mentioned that clauses of general terms and conditions of carriage are void in accordance to Section 879/3 ABGB, when they grossly discriminate against one party. The Supreme Court clarified the standards by which the clauses are measured in numerous rulings.<sup>16</sup>

Another particularity of the Austrian legal system is the frequent claim for damages as a result of loss of holiday enjoyment. Loss of holiday enjoyment is a non-material damage, which means that no direct pecuniary damage occurs in the sphere of the aggrieved party. According to Austrian tort law, compensation for non-material damages may only be granted in explicitly statutory exceptions. With regard to the loss of holiday enjoyment, Section 31e/3 Consumer Protection Act<sup>17</sup> explicitly entitles compensation. According to the legal text and court decisions,<sup>18</sup> this entitlement may only be applicable to package tours that were organised by a travel agency. Therefore, air carriers are not liable for loss of holiday enjoyment according to Section 31/3 KSchG.

## **v Other legislation**

In general, there are not any provisions of the Competition Law or Environmental Law that are specifically applicable to corporations of the aviation sector. Both the Austrian Cartel Act<sup>19</sup> and the provisions about economic crime comply with the European prerequisites. The Act on Airport Ground Handling, which regulates the market, should also be considered. Potential ground-handling services must fulfil a variety of requirements and complete an extensive detailed statutory selection procedure. The number of ground-handling services per airport is restricted to two in each of the essential areas, such as baggage handling, ramp handling, mail and freight-handling services. Regarding the noise emissions of the

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16 OGH 13 April 1983, 1 Ob 581/83; 20 July 2016, 6 Ob 120/15p; 23 February 2017, 2 Ob 29/16b.

17 Konsumentenschutzgesetz – KSchG.

18 OGH 10 October 2002, 6 Ob 11/02i.

19 Kartellgesetz 2005 – KartG.

airport, the Protection Against Environmental Noise Act<sup>20</sup> must be considered. The statutory provisions are regularly specified by binding national regulations such as the Regulation on Civil Airports<sup>21</sup> and the Civil Aircraft and Aeronautical Equipment Regulation.<sup>22</sup>

### **III LICENSING OF OPERATIONS**

#### **i Licensed activities**

The LFG stipulates that any carrier requires a licence. The Act defines an air carrier as any undertaking transporting passengers or goods by aircrafts for commercial purposes and explicitly refers to the Regulation (EC) 2407/92 on licensing of air carriers and the Regulation (EC) 1008/2008 on common rules for the operation of air services in the Community. For example, a licence is also required for commercial circular flights. Provided an equivalent licence of another Member State of the European Union is available, a separate licence application must not be submitted. In general, there are two kinds of licensing procedures. In case of passenger, mail or freight transport by a sailplane, free balloon or an ultralight aeroplane, an application for a licence according to Section 104 ff LFG must be submitted to the Austrian Ministry for Transport, Innovation and Technology. In all other cases of commercial services in the aviation sector, an application for a licence according to the Regulation (EC) 1008/2008 must be submitted to the Ministry for Transport, Innovation and Technology. The Austro Control GmbH is responsible for issuing the Air Operator Certificate, and thereby implementing the Ordinance on Air Operator Certificate 2008. The Austria Control GmbH is a public, commercial enterprise that performs sovereign tasks and is subject to instructions of the Minister for Transport, Innovation and Technology.

#### **ii Ownership rules**

The legal framework on ownership is largely orientated to the Regulation (EC) 1008/2008. In addition, Section 16 LFG states that an aircraft register is kept by the Austro Control GmbH. Further implementations are provided by the Civil Aircraft and Aeronautical Equipment Regulation. However, the register only records the operator; the ownership is irrelevant in this context.

#### **iii Foreign carriers**

As described earlier, the air operator certificate (AOC) of a Member State of the European Union also entitles the operation of aircrafts on Austrian territory. Numerous bilateral agreements have been concluded with third countries, resulting in the recognition of their AOCs. The Act on international air services provides the requirements under which operation and overfly rights are granted to air carriers from third countries.

### **IV SAFETY**

In Austria, safety requirements are usually standardised by legal instruments of the European Union. Nevertheless, the LFG must be mentioned in this context. In addition to numerous

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20 Bundes-Umgebungslärmschutzgesetz.

21 Zivilflugplatz-Verordnung 1972 – ZFV.

22 Zivilluftfahrzeug- und Luftfahrtgerät-Verordnung 2010 – ZLLV.

references to European provisions, it contains regulations on the implementation and organisation of security measures. The aim is to prevent offences against the safety of civil aircraft. Special safety measures are directly stated in the LFG.

In addition, Section 136 LFG sets out the obligation to report accidents and incidents to Austro Control GmbH. In this way, accidents and incidents are to be recorded and investigated in order to increase safety in air traffic. The following persons are obliged to report such incidents:

- a* operators of civil aircrafts;
- b* civil aerodrome operators;
- c* organs of the public security service;
- d* responsible pilots;
- e* persons who develop manufacture, maintain or modify civil aircraft or their equipment construction or components;
- f* persons who sign a re-examination certificate or a release certificate for a civil aircraft or its equipment, construction or components;
- g* persons entrusted with the performance of the duties of the air traffic service;
- h* persons performing a function related to the installation, modification, maintenance, repair, overhaul, flight inspection or control of air traffic; and
- i* persons performing aerodrome operations on an aerodrome, including refuelling, service, preparation of mass and gravity, and loading, de-icing and towing of the aircraft.

Austro Control GmbH is obliged to forward the notifications received without delay to the federal security investigation office. In addition to accidents, incidents that did not result in an accident are subject to the reporting obligation. In the Civil Aviation Notification Regulation,<sup>23</sup> the notifiable events are determined and the reporting procedures are specified. Other reporting requirements, such as the Civil Aircraft and Aeronautical Equipment Regulation or the Air Operator Certificate Regulation,<sup>24</sup> may also be subject to reporting requirements. These shall remain unaffected by the obligation to report stated in the LFG.

## V INSURANCE

In the area of insurance law, European standards are of central importance. In principle, the insurance level is based on Regulation (EC) 785/2004. The LFG provides specific provisions and insurance amounts for airlines, which are not subject to the regulation. These vary depending on the aircraft operated. Austro Control GmbH is the competent authority in insurance matters. Terminations or interruptions of the insurance shall be immediately notified to the authority by the insurer or the insured. An insurance certificate must be issued by the insurer and must be carried in the aircraft.

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23 Zivilluftfahrt-Meldeverordnung – ZMV.

24 Luftverkehrsbetreiberzeugnis- und Flugbetriebs-Verordnung 2008 – AOCV.

## VI COMPETITION

Competition between air carriers is regulated by competition law. Austrian national competition law is mainly set out in the Austrian Act Against Unfair Competition<sup>25</sup> and the Austrian Cartel Act. In addition to the national legal framework, European competition law is applicable. The Regulations (EC) 1/2003 and 139/2004 are relevant to this matter. Regulation (EC) 411/2004 relates explicitly to the aviation sector and extends the applicability of European Competition law to air transport between the European Union and third countries.

The applicable competition rules are applied by the regular national and European competition authorities. In Austria, the independent Federal Competition Agency<sup>26</sup> is the competent authority. Besides the competition provisions, this authority is also responsible for merger control. In addition to the BWB, there is the federal antitrust prosecutor who is directly controlled by the federal minister of justice.

Concerning all types of merger transactions, the Austrian Cartel Act is applicable. The respective relevant markets are the flight routes. In order to determine whether or not a transaction has an effect on competition, the relevant markets are compared.

In the context of competition and commercial law, the protection of intellectual property is also very important. In Austria, trademarks can be registered under the Austrian Trademark Act<sup>27</sup> in the Austrian Trademark Register. However, there is also protection for unregistered marks and labels, if the existence and use is proven. Patents can be registered in the Austrian Patent Register. The Austrian Patent Act<sup>28</sup> and the Model Protection Act<sup>29</sup> are applicable.

## VII WRONGFUL DEATH

The provisions of the Montreal Convention standardise the provisions for the loss of physical integrity or the death of passengers. Insofar as the claims for damages are fulfilled, the conduct attributable to the air carrier was unlawful and culpable and was causally responsible for the death, liability is independent of other claims under national regulations. Damages compensating for shock and grief in connection with the death of close relatives are generally only awarded if the impairment is causing a disease. Such damages are attributed by the Supreme Court only in the case of gross negligence on the part of the injuring party.<sup>30</sup> However, damage to property occurring in the sphere of the surviving dependants must be replaced, for example, funeral expenses and possible maintenance obligations.

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25 Gesetz gegen den Unlauteren Wettbewerb – UWG.

26 Bundeswettbewerbsbehörde – BWB.

27 Markenschutzgesetz – MSchG.

28 Patentgesetz – PatG.

29 Musterschutzgesetz – MuSchG.

30 Welser, Bürgerliches Recht page 340.

## **VIII ESTABLISHING LIABILITY AND SETTLEMENT**

### **i Procedure**

In the air transport sector, most policy holders and insurers prefer an extrajudicial resolution of disputes. According to the applicable legislation in Austria, there are no restrictions, and the involved have the freedom to choose the methods they prefer.

Especially in case of long-term contractual agreements, there will be a possibility to conclude an arbitration clause. Merely contract components or agreements that are results of an imbalance of power or that violate statutory provisions or public morality rights for other reasons are not permitted.

Even though dispute settlement proceedings do not have the same importance in central Europe as in the Anglo-Saxon legal system, there have been some major improvements in this area in recent years.

In the entrepreneurial area especially, many actors recognised the benefits of an extrajudicial or even consensual dispute resolution. This increasing acceptance can also be seen in the private domain.

In 2003, a legal framework for mediation procedures concerning civil claims was implemented through the Civil Law Mediation Act.<sup>31</sup> These amenities are hardly regulated in the public sector.

The jurisdiction of the Austrian courts is determined by the value of the dispute. Up to a value of €15,000 the district courts are jurisdictional competent in the first instance (first chamber). In the case of an amount in dispute beyond this threshold, the regional courts, which otherwise act as an instance of appeal, decide in the first instance. The judges are encouraged to support the parties to reach an amicable solution.

The Agency for Passenger Rights<sup>32</sup> has been established for the extrajudicial enforcement of passenger rights. It is a conciliation and enforcement agency for rail, bus, air and ship traffic. Under Section 139a LFG, air carriers are obliged to participate in a conciliation procedure and provide all the necessary information documents for reviewing the situation. The deadlines laid down in the procedural guidelines of the APF must be complied. If a carrier fails to meet its obligations towards the arbitration body, administrative penalties are to be expected. However, the air carrier is under no circumstances obliged to accept a solution proposed by the conciliation body. If conciliation cannot be reached in the APF conciliation procedure, the passenger is entitled to appeal.

### **ii Carriers' liability towards passengers and third parties**

The liability of the air carrier is primarily regulated by the provisions of the Montreal Convention, which provides maximum liability limits. The air carrier is primarily held accountable. This does not mean, however, that the air carrier has to bear the damage definitively. The Montreal Convention does not affect a potential claim for recourse by the airline against third parties and is in principle governed by Austrian law. A recourse claim may be considered, for example, if the damage is caused by several injuring persons who are liable in solidarity to the injured party. If the injured party only takes action against the airline, the airline has to pay the full amount, but may recover the corresponding shares of damage from the other injuring parties.

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31 Zivilrechts-Mediations-Gesetz – ZivMediatG.

32 Agentur für Passagier- und Fahrgastrechte – APF.

Special legal conditions exist for the recourse of the air carrier as an employer to its employees as direct victims. The Employee Liability Act<sup>33</sup> provides compensation for damages inflicted by an employer to the employer or a third party in the performance of the work. Compared to the provisions of the ABGB, the liability of the employer for the added damages is substantially restricted. In the case of excusable mistakes (the slightest degree of negligence), the liability of the employer is completely omitted. In other cases of negligence, the right of recourse may be reduced by the court according to the Employee Liability Act. In the opposite case of injury to the employer in the performance of his or her work, the employer is liable for impairment of the physical integrity only in case of intent (employer's liability privilege<sup>34</sup>).

As far as no applicability of European or international law provisions exists, the national liability rules can be used. Liability against third parties is regulated in Sections 148 ff LFG, whereby the maximum liability amounts of Section 151 LFG have to be observed. These provisions are broadly similar to those of the Montreal Convention. In addition, the injured party is obliged to make a notification. He or she will lose his or her claims if he or she fails to notify of the accident within three months of becoming aware of the damage and of the injured person. Other conditions shall apply if the notice is not given by the injured party for reasons that are beyond the control of the injured party, or if the injured person is otherwise aware of the accident.

In addition, the general provisions of the ABGB are to be taken into account.

### **iii Product liability**

The European Product Liability Directive<sup>35</sup> was implemented in Austrian national law by the Product Liability Act.<sup>36</sup> It establishes that if a person is killed or injured as a result of the defect of a product, the manufacturer or importer must be obliged to replace such damages. The manufacturer or importer is only liable for damages caused by defective products. A product is to be qualified as faulty if it does not offer the security that one is entitled to expect under all circumstances. The Product Liability Act establishes a fault-independent liability. In the case of material damage, liability is excluded, provided the damage occurs in the property of an entrepreneur and is caused by a product that has been used predominantly in the company. In addition, the liability provisions of the ABGB apply.

### **iv Compensation**

As already discussed, claims for damages can be claimed under national law. Immaterial damages can only be replaced if this is explicitly stipulated in the law. This is the case, for example, with the compensation for pain, which is stated in Section 1325 ABGB. According to prevailing jurisprudence, both physical and mental pain is substitutable, with higher demands being placed on the replacement of mental damage. In practice, the pain is calculated according to the daily dose of pain, differentiating between mild, moderate and severe pain. For a day of light pain, approximately €100 will be awarded; legal practice varies with different courts. For a day with severe pain, up to approximately €350 will be

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33 Dienstnehmerhaftpflichtgesetz.

34 Dienstgeberhaftungsprivileg.

35 Council Directive on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC).

36 Produkthaftungsgesetz.

awarded according to current jurisdiction. According to recent jurisprudence, more claims for damages are also increasingly attributed to psychological damage, such as damage caused by shock or grief. A liability for such damages exists only in cases of gross negligence or intent, according to the case law of the Supreme Court. In contrast, the cost of healing and the loss of earnings are already substitutable for slight negligence.

The Austrian law on compensation for damages is complex and includes numerous special provisions. For example, for contractual claims, a reversal of evidence for negligence is foreseen. According to Section 1298 ABGB, the injured party must prove that he did not act culpably. In the Consumer Protection Act, special provisions for the liability claims of consumers against companies are standardised.

## IX VOLUNTARY REPORTING

There is no institution for voluntary reporting in Austria. However, air carriers and other persons and companies active in the aviation sector are legally obliged to report. Section 136 of the LFG provides a reporting obligation to Austro Control GmbH for accidents as well as for incidents that have not resulted in an accident. For details, see Section IV, *supra*.

## X THE YEAR IN REVIEW

The Vienna International Airport planned the construction of a third runway to cope with the future increasing traffic volume. After a lengthy lead time, actively involving the local residents, the project was submitted to the state government of Lower Austria in March 2007, who conducted an environmental impact assessment. In 2012, the authorities granted approval according to the Environmental Impact Assessment Act.<sup>37</sup> A complaint against this decision was filed with the Federal Administrative Court. Its ruling, which received a great deal of media attention, refused the approval according to the UVP. The Federal Administrative Court deduced an obligation to consider the balance of interests from Section 71/1 LFG, which has been subject to extensive criticism by parts of the academic research. The Federal Administrative Court ultimately concluded that in this concrete case, the public interest in protection from the negative consequences of the climate change, especially because of the high CO<sub>2</sub> impact, is of greater value than the positive public interests. Especially remarkable in this context is the reference to the great importance of environmental protection, particularly in terms of sustainable development, that is laid down in the federal and state constitution as well as in Article 37 Union's Charter of Fundamental Rights. The compensatory measures that were proposed by the project applicants were assessed as insufficient.<sup>38</sup> This ruling is remarkable, not only because of the exceptional importance of the project in question and the enormous expenditures made, but also because the Federal Administrative Court for the first time rejected a project subject to EIA with reference to the public interests in protection against the negative consequences of the climate change. The project applicants already appealed to the Austrian Constitutional Court and the Administrative Court of Appeal.

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37 Umweltverträglichkeitsprüfungsgesetz 2000 - UVP-G.

38 BVwG 02.02.2017, W109 2000179-1/291E.

## **XI OUTLOOK**

Within the scope of the Regulation (EC) 261/2004, there is a lack of clarity regarding some questions of interpretation that have not been picked up by the ECJ, but have, in part, been controversially responded to by the Austrian courts. It is to be hoped that the ECJ, or at least the Austrian instance courts, bring some clarity. An example of such a controversial question of interpretation is the addition of flight stages, a matter on which several procedures are pending. Determining the distance is of significance, because the assessment of the compensation granted by the Passenger Rights Regulation is based on the distance of the flight route. It is undisputed that the entire distance is relevant when the trip consists of several flights. However, doctrines and jurisdictions are controversial on the method of measuring the distance. On the one hand, some hold the view that all sections must be added up. This may result in a vastly longer distance and, therefore, higher compensation. For example, according to this legal opinion, if a flight is booked from Vienna to Madrid via Berlin, the distances between Vienna and Berlin and Berlin and Madrid have to be added. On the other hand, some hold the view that only the direct distance between departure and final destination is relevant for assessing the amount of compensation (Vienna to Madrid).

Another essential legislative amendment to be introduced within the next year, with consequences for almost all companies, is the Regulation (EU) 2016/679 on the protection of data. Even if this regulation is directly applicable, there still will be space for specific national provisions. This regulation will come into force in May 2018. Besides the Austria Data Privacy Act,<sup>39</sup> the Passenger Data Agreement EU-USA and the Passenger Data Agreement EU-Canada are also relevant. According to Austrian Law, personal data may principally only be collected and used for distinct and lawful purposes. Special focus is set on the transfer and retention of personal data.

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39     Datenschutzgesetz 2000 – DSG.

## **DIETER ALTENBURGER**

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Dr Dieter Altenburger, MSc is partner of the law firm Jarolim Flitsch Rechtsanwälte GmbH. He graduated from the University of Vienna in 2000 and obtained his law doctorate in 2004. In addition, he acquired a master of science degree in environmental management in 2006.

Dr Dieter Altenburger has been intensively engaged with aviation law for many years and is considered as an established expert in this area. His expertise has been highlighted by numerous awards and top rankings. He counsels and represents numerous airlines in all affairs.

Dr Dieter Altenburger has also been devoted to public law for many years, and published numerous reference books and articles. He is not only well acquainted with civil litigation, but also with administrative proceedings. This constitutes a crucial advantage, in terms of the numerous administrative challenges that an air carrier has to face and the close linkage of both fields of law in the aviation sector.

With Dr Hannes Jarolim and Mag Martina Flitsch, the team of Jarolim Flitsch Rechtsanwälte GmbH has additional experts in the field of aviation law and, therefore, offers an optimal and comprehensive representation of your legal interests.

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Mag Georg Schwarzmann is associate at Jarolim Flitsch Rechtsanwälte GmbH. He graduated from the University of Vienna in 2016 and obtained an additional qualification in mediation and alternative dispute resolution.

Mag Georg Schwarzmann could already acquire juridical working experience during his studies. He specialises in the field of aviation law, especially air passenger rights, and public law.

With Dr Hannes Jarolim and Mag Martina Flitsch, the team of Jarolim Flitsch Rechtsanwälte GmbH has additional experts in the field of aviation law and, therefore, offers an optimal and comprehensive representation of your legal interests.

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