

# Air Transport 2021

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# Air Transport 2021

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Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Air Transport*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

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

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

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

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Tom van der Wijngaart and Inês Afonso Mousinho of Clyde & Co LLP, for their continued assistance with this volume.



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# Contents

<b>Global overview</b>	<b>5</b>	<b>Luxembourg</b>	<b>120</b>
Tom van der Wijngaart and Inês Afonso Mousinho Clyde & Co LLP		Isabelle Chartier Wildgen	
<b>Argentina</b>	<b>9</b>	<b>Malaysia</b>	<b>128</b>
Elizabeth Mireya Freidenberg Freidenberg Freidenberg & Lifsic		Lai Wai Fong Shearn Delamore & Co	
<b>Bahamas</b>	<b>18</b>	<b>Malta</b>	<b>136</b>
Michael F L Allen and Keith O Major Jr Higgs & Johnson Counsel & Attorneys at Law		Tonio Grech Dingli & Dingli Law Firm	
<b>Belgium</b>	<b>25</b>	<b>Netherlands</b>	<b>144</b>
Birgitta Van Itterbeek Monard Law		Jeroen Timmermans, Laetitia Kunst-den Teuling and Ruben Elkerbout Stek	
<b>Brazil</b>	<b>34</b>	<b>Nigeria</b>	<b>152</b>
Renata Iezzi Basch & Rameh		Etigwe Uwa, Chinasa Unaegbunam, Omolayo Tolu-Latunji and Dan Whisky Streamsowers & Köhn	
<b>Canada</b>	<b>44</b>	<b>Panama</b>	<b>161</b>
Laura Safran and Prasad Taksal DLA Piper		Felipe Escalona Delvalle, Escalona, Levy & Corró	
<b>Chile</b>	<b>53</b>	<b>Philippines</b>	<b>168</b>
Francisco Prat and Isidora Casas del Valle Prat & Cía		Imelda A Manguiat, Carina C Laforteza, Bhong Paulo A Macasaet, Mark Xavier D Oyales and Javierose M Ramirez SyCip Salazar Hernandez & Gatmaitan	
<b>European Union</b>	<b>60</b>	<b>Poland</b>	<b>175</b>
Geert Goeteyn Reed Smith LLP		Krystyna Marut, Edyta Michalak and Anna Burchacińska-Mańko MMMLegal Counsels	
<b>France</b>	<b>77</b>	<b>Portugal</b>	<b>183</b>
Vonnick Le Guillou, Edouard Sarrazin, Sophie Cochery, Alexis André and Audrey Lemniaï DLA Piper		Pedro Simões Coelho and Marília Frias VdA	
<b>India</b>	<b>85</b>	<b>Russia</b>	<b>192</b>
Amir Singh Pasrich and Kshitij Paliwal International Law Affiliates Pasrich & Co		Mikhail Sokolov and Sergey Seliverstov Sokolov Maslov & Partners	
<b>Ireland</b>	<b>103</b>	<b>Spain</b>	<b>201</b>
Rory McPhillips, Stuart Kennedy and Stephen Gardiner Matheson		Sergi Giménez Binder Augusta Abogados	
<b>Italy</b>	<b>110</b>	<b>Sweden</b>	<b>209</b>
Laura Pierallini Studio Pierallini		Stephan Eriksson Astra law	

**United Kingdom** **215**

Tom van der Wijngaart and Inês Afonso Mousinho

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**United States** **223**

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## REGULATORY FRAMEWORK

### Regulators and primary legislation

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

In addition to the authorities granted by European Union legislation to the European Commission, Parliament, Council and the European Aviation Safety Authority, the main bodies that regulate aviation in Spain are the Directorate General of Civil Aviation and the State Agency for Aviation Safety (AESA), both under the umbrella of the Ministry for Development. The DGAC is governed mainly by Royal Decree 953/2018 and is responsible for the preparation of industrial and strategic policies and proposals for the aviation sector, the representation and coordination with other public administrations and with the European Union in matters of air transport policy, and the approval of aeronautical circulars. The AESA was created following the mandate of Act 28/2006, whereby state agencies were created with the aim of modernising Spanish administration, and is mainly regulated by Royal Decree 184/2008. This has responsibility for inspecting and penalising authorities in civil aviation matters and it takes the initiative to approve provisions in matters of aviation safety and passenger protection, among other topics.

## AVIATION OPERATIONS

### Safety regulations

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

Spain is a state party to the 1944 Chicago Convention and of the International Civil Aviation Organisation (ICAO); it must therefore comply with the international safety standards that ICAO periodically dictates. As a member of the EU, Spain is bound by all regulations, directives, legal provisions and jurisprudence approved by the EU's legislative bodies and courts. Thus, all security standards contained in European legislation and international treaties such as the Chicago Convention are applicable in Spain, chiefly under Regulation (EC) No. 300/2008 on common rules in the field of civil aviation security. To take care of changing developments, the government publishes a National Programme for Aviation Security in Civil Aviation, which is updated on a regular basis, the last time in January 2020. From a domestic perspective, the main provisions are embodied in the Air Safety Act 21/2003 (LSA), although – as with EU legislation – there are detailed regulations for many specific aspects of aviation operations. Air safety is essentially under the control of the State Agency for Aviation Safety (AESA), although other governmental agencies (such as police bodies) cooperate with AESA as well.

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

The LSA imposes a number of rules that apply to all parties that are involved in some way in aviation: personnel, flight schools, aeroclubs, designers, manufacturers, maintenance and service providers, air operators, commercial airlines, aerial works, air navigation service providers, handling agents, airport and aerodrome managers – including passengers. In addition to the general provisions, the LSA sets out rules that specifically apply to specific participants or categories of participants. The ICAO definition, whereby general aviation is deemed to be 'all civil aviation operations other than scheduled air services and non-scheduled air transport operations for remuneration or hire', is also applicable in Spain and is used to distinguish general aviation from commercial and public transport.

### Market access

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

As in other EU member states, the provisions of Regulation (EC) No. 1008/2008 (as amended) on common rules for the operation of air services (along with all related rules and regulations) apply in Spain. Although the provisions of this Regulation are directly applicable, some follow-up and detailed provisions were approved in Spain through the Ministerial Order of 12 March 1998, which was recently replaced by the Order TMA/105/2020. Thus, to the extent that interested parties comply with the requirements of Regulation (EC) No. 1008/2008 (as amended), access to the Spanish market – and thereby to the EU market – will be granted. The procedure to obtain the air operator's certificate and the operating licence are conducted before the Directorate General of Civil Aviation (DGAC) and AESA.

### Ownership and control

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

Shortly after Spain's entry into the European Community in 1986, nationality, ownership and control requirements were interpreted as referring to European citizens rather than only Spanish nationals, despite domestic legislation to the contrary. This topic is nowadays covered by the provisions of Regulation 1008/2008, on common rules for the operation of air services. Given the direct applicability of Regulation 1008/2008 in Spain, the requirements are identical to those of other EU member states. Although the provisions of this Regulation are directly applicable, some follow-up and detailed provisions were approved in Spain, initially through the Ministerial Order of 12 March 1998, which was recently replaced by Order TMA/105/2020.

- Financial fitness is regulated under article 5 of the Regulation, and basically requires that applicants provide evidence that they can meet their financial obligations for a period of 24 months from the start of operations and their fixed and operational costs for a period of three months from the start of operations, without taking into account any income. Lower thresholds apply to operators with aircraft of less than 10 tonnes maximum takeoff mass (MTOW) or with fewer than 20 seats. AESA closely analyses and monitors the business plans submitted by interested parties to ensure that they are realistic and in line with the Regulation. AESA has particular regard to past experience where financial troubles led to the demise of a number of Spanish airlines.
- Article 4 states of Regulation 1008/2008 that, as a general rule, only member states or nationals of member states that own more than 50 per cent of the airline and effectively control it, whether directly or indirectly, can obtain a Community carrier licence, and then only if the airline's principal place of business is established inside the EU. These provisions have become the subject matter of intense scrutiny within the context of the United Kingdom's exit from the EU. In June 2016, AESA published certain interpretative criteria relating to the term 'ownership and control', which must, however, be read in connection with the Interpretative Guidelines published by the European Commission in June 2017 and the Notice to Stakeholders of January 2019.

## Licensing

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

Intra-EU routes are, in general terms, automatically authorised pursuant to Regulation (EC) No. 1008/2008, so that no specific commercial licences need to be obtained. As an exception, certain routes that are classified as being of public interest, as well as operations between the Canary Islands and Gibraltar, are subject to certain restrictions.

To commercially operate extra-EU routes community carriers must ask AESA to issue the relevant air traffic licence. Normally, this will require the existence of an air transport agreement between Spain or the EU and the country in question. Most of these agreements demand that the airlines chosen to operate the air services have been formally designated by the Spanish aeronautical authority. Airlines from third countries will also need to be designated by their respective aviation authority and, before performing any scheduled flights, become accredited by AESA in accordance with the requirements set forth in Royal Decree 1392/2007.

Non-scheduled commercial operations are subject to different rules under the Chicago Convention 1944. Generally speaking, the Spanish authorities allow such operations to air carriers belonging to signatory states of the Chicago Convention if the state concerned applies a reciprocal treatment to Spanish air carriers.

AESA has published the various procedures and forms of documents (in Spanish and English) online.

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

All government decisions are subject to judicial control in Spain. The Common Administrative Procedure Act 39/2015 regulates the various instances that allow the filing of recourses and appeals during administrative proceedings. Once the administration has made a final decision, the interested parties can file claims in the contentious-administrative court in accordance with Act 29/1998 on Contentious-Administrative Proceedings.

## Competition policy

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

There is no specific policy in Spain concerning airline access or competition, since all these matters are handled in line with EU policies and rules.

## Requirements for foreign carriers

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

EU carriers do not need any specific authorisation pursuant to Regulation 1008/2008. Non-Community carriers must obtain accreditation from AESA before they are allowed to start commercial operations to or from Spanish airports. The main provisions to secure such accreditation are to be found in Royal Decree 1392/2007, and the procedure aims to ensure that:

- the operations will be performed safely;
- passengers' rights will be protected; and
- the environment will be protected as well.

In general terms, applicants will have to provide evidence of the following points.

- The airline must be under the supervision of an aeronautical authority that pertains to a state party to the Chicago Convention.
- The airline must hold an operator's licence that proves its ability to carry out the intended operations.
- The fleet to be used for the Spanish operations must be registered at a state party to the Chicago Convention, comply with the requirements of the Chicago Convention in matters of airworthiness and noise, and also comply with Spanish and EU requirements relating to noise, navigation and communications equipment, etc.
- The airline must have insurance coverage that complies with the terms of Regulation (EC) No. 785/2004 on insurance requirements for air carriers and aircraft operators.
- The airline must have a security programme against illicit interference actions that has been approved by its supervisory authority.
- The airline must be compliant with any specific requirements contemplated in the applicable air services agreement.

Upon receipt of the application and all required documents, AESA must issue a decision within 40 days. If no decision is made within the said period, the application is deemed rejected. All decisions can be appealed with the Secretary General of Transportation and, as indicated above, with the contentious administrative courts.

## Public service obligations

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

In accordance with article 16 of Regulation (EC) No. 1008/2008, public service obligations are contemplated in Spain. Those obligations relate mostly to certain islands which form part of the Spanish territory, such as the Balearic Islands and the Canary Islands, as well as to the Spanish cities in North Africa (Ceuta and Melilla). However, due to the substantial reduction of domestic flights caused by the covid-19 crisis, the government has dictated temporary public service obligations in respect of airports in mainland Spain, such as Almería or Badajoz. The Spanish government regularly publishes updates about such routes, including pricing.

## Charter services

### 11 | How are charter services specifically regulated?

Charter services are regulated in accordance with the Chicago Convention and EU regulations and present no special characteristics in respect of those. We should point out, however, that AESA considers that all airlines that are interested in carrying out 'series of commercial air operations' within Spanish airspace must submit their programmes for review (Community carriers only in respect of their extra-EU flights). In this respect, AESA considers that charter flights that constitute an evident systematic series also fall under the category of 'series of commercial air operations', so that non-EU carriers should obtain the relevant licences before starting this type of operations. Where the charter operations only have an 'occasional character', AESA has created a specific procedure.

## Regulation of airfares

### 12 | How are airfares regulated?

After the entry into force of Regulation (EC) No. 1008/2008 (and its article 22), air fares became liberalised in Spain, as in all other EU member states.

## Drones

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

Until the entry into force of Regulation (EU) 2019/947, on the rules and procedures for the operation of unmanned aircraft (expected to happen by the end of 2020 after a recent extension), the legal framework applicable to drone operations in Spain is composed of international conventions and accords, European regulations and directives, and domestic legislation. At an international level, international conventions such as the Chicago Convention and ICAO Circulars set forth the main rules of how drones must be treated by states.

From the perspective of EU legislation, the main applicable pieces of legislation are:

- Regulation (EC) No. 216/2008, of the European Parliament and of the Council, of 20 February 2008;
- Regulation (EU) No. 2018/1139, of the European Parliament and of the Council of 4 July 2018, on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (EASA), amending, among others, the previous one;
- Regulation (EU) No. 2019/945, of 12 March 2019, on unmanned aircraft systems and on third-country operators of unmanned aircraft systems; and
- Regulation (EU) No. 2019/947, of 24 May 2019, on the rules and procedures for the operation of unmanned aircraft.

In addition to these rules, a great number of Acceptable Means of Compliance and Guidance Material has been also published to accommodate the high number of varieties on the use of drones and safety and security measures under cover of the EASA jurisdiction.

Spain also has its own domestic legislation for drones. However, only remotely piloted drones are allowed to fly, since completely autonomous unmanned aircraft systems (UAS) are not regulated. The core legal provision regulating the use of drones is Royal Decree 1036/2017, of 15 December, pursuant to which the use of civil remotely piloted aircraft is regulated (RD 1036/2017). This Royal Decree contains the main terms and obligations that an operator must comply with to lawfully use drones. AESA is the main governmental entity in charge of the control, surveillance and enforcement of RD 1036/2017, although the Ministry of Internal Affairs also has jurisdiction for authorisations of certain specific operations where public security issues arise.

In addition to RD 1036/2017, the legal framework governing drones is scattered across other different regulations and acts that are also applicable to the operation developed by these aircraft, such as Royal Decree 384/2015 on Regulations of the Spanish Civil Aircraft Registry, the 1960 Air Navigation Act, the 2003 Air Safety Act and others not directly related with the aviation industry, such as data protection (the General Data protection Regulation), protection of privacy and general telecommunications regulations (this last one in respect of the use of radioelectric spectrum).

## AIRCRAFT

### Aircraft register

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

Unlike other countries, in Spain there is a dual registration system for aircraft. Its main features can be summarised as follows.

- Aircraft Matriculation Registry: the Aircraft Matriculation Registry (RMA). The RMA falls under the jurisdiction of the Spanish State Agency for Air Safety (AESA), a body of the Ministry of Development. The RMA is an administrative registry of aircraft, but not a registry of title or ownership of aircraft. It is operator-based. The main effect of registration is that an aircraft is provided with a Spanish registration number (beginning with the letters EC, followed by a hyphen and a combination of three letters more, eg, EC-XXX) and thus becomes a Spanish aircraft.
- Central Movable Assets Registry: the Central Movable Assets Registry (RBM), under the jurisdiction of the Directorate General of Legal Safety and Public Faith, a body of the Ministry of Justice. The RBM is a register of title, ownership and encumbrances over movable assets, including aircraft. The main effect of registration is that evidence is provided in respect of the status of ownership and liens over assets.

Historically, the 1960 Air Navigation Act established that only Spanish individuals or companies were allowed to register their ownership title over aircraft. Since Spain's entry into the EEC in 1986, this provision began to be interpreted so as to include EU citizens. However, this has not yet been expressly stated in any legal provision relating to the RBM. Article 185 of the 1956 Commercial Registry Regulations (which is still in force pursuant to the 13th Additional Provision of Royal Decree 1784/1996), merely states that foreign legal entities may record their ownership title over aircraft at the Commercial Registry, subject to international treaties, the principle of reciprocity and legal provisions. For these purposes, the Commercial Registry has nowadays been replaced by the RBM. So far, no express legal provision, reciprocity plan or international treaty has been enacted or published whereby foreign owners would be allowed to register their ownership title in aircraft at the RBM. Nevertheless, Royal Decree 384/2015, which contains the RMA Regulations, is being interpreted in practice so as to allow (and actually oblige) non-Spanish aircraft owners (including non-EU citizens) to register their ownership title in all aircraft that are to bear Spanish registration marks. While this seems to be commonly accepted practice, some legal authors question this interpretation of the law and consider that such recordation of aircraft transactions at the RBM is not mandatory. In practice though, and but for a few exceptions, most transactions involving Spanish-registered aircraft must be recorded at both the RMA and the RBM.

## Mortgage register

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

The RBM is a registry of title and hence mortgages and charges over aircraft are to be recorded there. In accordance with the provisions of Regulation (EC) No. 593/2008, of 17 June 2008, on the Law Applicable to Contractual Obligations (the Rome I Regulation), Spanish law follows the principle of *lex rei sitae* (ie, place of location of an asset) to determine which law is applicable to securities and guarantees created over assets, such as mortgages and pledges. Thus, where the security relates to assets or rights located in Spain at the time of creating the assignment, Spanish material legal provisions on pledges over assets or mortgages would become applicable. Article 10.2 of the Spanish Civil Code states that mortgages over aircraft are governed by the law of the country of their registration. Thus, a non-Spanish law mortgage created over an aircraft while the aircraft is registered with the RMA would not be considered a valid mortgage by the Spanish courts.

Given the formalities and costs involved in setting up a Spanish law aircraft mortgage, these are created only occasionally. Such mortgages have to be set up in a public deed executed before a notary public, which has to include certain essential information (parties, detailed description of the charged assets, title of the mortgagor, secured amount, valuation of the assets, etc). This document must be executed in Spanish, although an English translation may be attached. The mortgage must be recorded at the RBM. Mortgages are subject to stamp duty tax, at a rate that varies between 1 and 1.5 per cent on the value of the charged asset. Further, the fees of the notary public and of the RBM should also be taken into account, since they also depend on the value of the charged asset. Finally, where there is an international element to the transaction, often translation costs are to be paid.

## Detention

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

In addition to secured debts ranking ahead of unsecured debts in an insolvency of the Spanish operator, article 133 of the 1960 Air Navigation Act states that the following debts shall qualify as preferred debts over the aircraft or over the amount of all compensations paid by the insurance company:

- all taxes due over the previous and current year (we understand these are limited to taxes over the aircraft, not the air carrier itself)
  - Spanish air navigation charges, airport charges and Eurocontrol charges may be included in this category;
- all salaries due to the crew over the last month;
- all premiums due to insurance companies over the past two years;
- all compensation established by the Air Navigation Act as damages for injury to person or property caused by the aircraft; and
- all costs and expenses incurred in giving assistance to, or rescuing, the aircraft.

The terms of article 133 of the Spanish Air Navigation Act are far from clear and should be read in conjunction with the declarations to article 39(1) to the Cape Town Convention made by Spain. In the absence of specific Supreme Court precedents, it is possible to argue that the described debts follow the relevant aircraft. In accordance with this argument, if any of such debts is not paid by the air carrier and the air carrier subsequently becomes insolvent, then the relevant creditors as holders of a sort of right in rem over the aircraft may require payment from the entity that takes possession of the aircraft (eg, the owner).

Furthermore, the preferential debts set out in article 133 of the Air Navigation Act must be interpreted in accordance with the order of

preference set out in articles 89 to 93 of the Insolvency Act. These provisions establish criteria for creditors' preferences in Spain in the event of bankruptcy. In this respect, it is noteworthy that credits for pending interest amounts (including interest for delayed payment) are considered as subordinated credits, with the exception of interest amounts secured with real securities (rights in rem).

Finally, aircraft can be detained and forfeited pursuant to court or administrative proceedings in any of the circumstances set out in the 1954 Expropriation Act and any orders or regulations issued pursuant thereto. Other than those set out in the 1954 Expropriation Act, the 1981 Organic Act on State of Alarm, Emergency and Siege and in related Spanish legislation.

## Maintenance

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

Like all other EU member states, Spain is bound by EU regulations relating to the maintenance of aircraft and components, such as those embodied in Regulation (EU) No. 1312/2014, on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations and personnel involved in these tasks.

## AIRPORTS

## Ownership

### 18 | Who owns the airports?

Most Spanish airports are state-owned, although following a privatisation process they are being managed by a private company, AENA, SA, in which the state has also a stake. Additionally, there are a small number of privately owned airports or owned by the Autonomous Regions.

## Licensing

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

Given Spain's membership of the EU, licensing of airports is governed mainly by Regulation (EU) No. 139/2014, laying down requirements and administrative procedures related to aerodromes. Domestically, the EU legislation has been developed in some detail, mainly by Royal Decree 862/2009, which contains the technical rules for the design and operation of public-use aerodromes and regulates the licensing of airports.

## Economic regulation

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

The economic regulation of Spanish airports is mainly contained in the Airport Regulation Document (DORA), which sets out the minimum conditions to secure the accessibility, sufficiency and adequacy of airport infrastructure and the proper rendering of the basic services at Spanish airports over a five-year period. The DORA presently in force runs for the period 2017–2021 and stems from the provisions of Act 18/2014.

## Access

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

Pursuant to Regulation (EC) No. 1008/2008, Community carriers have the right to provide air transport services throughout the EU. For this reason, they must be given access to Spanish airports to be able to exercise such right. Non-EU carriers, however, may access Spanish airports only as allowed under any applicable air services agreement with their



respective country of origin. Furthermore, like other EU member states, Spain is entitled to establish public service obligations in respect of scheduled air services to certain regions or on routes that are deemed vital for the economic development of certain regions. Further access restrictions may arise from operational requirements (eg, night flights, slot availability, etc).

### Slot allocation

#### 22 | How are slots allocated at congested airports?

Slots are allocated in Spain pursuant to the provisions of Regulation (EEC) No. 95/93 on common rules for the allocation of slots at Community airports. Domestically the EU provisions have been developed by Royal Decree 20/2014, which lays down the detailed rules for Spanish airports. By Order FOM/1050/2014, the Spanish Association for the Coordination and Facilitation of Time Slots (AECFA) was appointed as coordinator and facilitator of slots at 27 designated airports. The members of this association are AENA and a large number of Spanish and foreign airlines.

### Ground handling

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

Ground handling services are regulated in the EU by Directive 96/67/EC on access to the ground handling market at Community airports. This Directive has been implemented in Spain through Royal Decree 1161/1999, which follows the EU principles and lays down some detailed provisions for specific airports.

### Air traffic control

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

Air traffic control services are provided by Enaire, a state-owned company that manages air navigation in Spain. In the EU, these services are regulated by a series of EU provisions, generally known as the Single European Sky (SES). The SES initiative, based on four 2004 EU regulations, comprises a number of EU provisions that attempt to cover all fields of air traffic management and that have been implemented through a number of domestic pieces of legislation.

## LIABILITY AND ACCIDENTS

### Passengers, baggage and cargo

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

Spain is a party to the Warsaw Convention, the Montreal Convention and, as an EU member state, the provisions of Regulation (EC) No. 2027/97 on air carrier liability, which are directly applied by the Spanish courts. Specifically, the EU provisions also apply to domestic air transport when it is performed by Community carriers. Therefore, the domestic regulation contemplated under articles 92 to 125 of the 1960 Air Navigation Act only come into play on a residual basis.

### Surface damage

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

Spain is a signatory state of the 1952 Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, and it came into force in 1958. The Convention's aim is to ensure adequate

compensation for persons who suffer damage caused on the surface by foreign aircraft, while limiting in a reasonable manner the extent of liabilities incurred for such damage in order not to hinder the development of international civil air transport. The 1952 Convention embraced the principles of the 1933 Convention but raised the liability limits.

From a domestic perspective, the 1960 Air Navigation Act also includes provisions to regulate carriers' liability for surface damage and basically follows the principles of the 1952 Rome Convention, although over the years the liability limits have been raised as well. Furthermore, in line with EU legislation, the Air Navigation Act expressly prevents carriers from using Spanish airspace if they cannot prove that they have insurance coverage for this specific type of damage.

### Accident investigation

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

In line with International Civil Aviation Organization guidelines and EU legislation (mainly embodied in Regulation (EU) No. 996/2010 on the investigation and prevention of accidents and incidents in civil aviation), Spain has created the Commission for the Investigation of Accidents and Incidents in Civil Aviation (CIAIAC). Domestic legislation has developed in some detail the international provisions through Royal Decree 389/1998, the 2003 Air Safety Act, Royal Decree 1334/2005 and certain other Royal Decrees, which periodically publish the State Programme of Operational Safety for Civil Aviation. In line with the legislative framework, the CIAIAC's investigations are exclusively technical in nature, with the ultimate aim to prevent future accidents and incidents, and are not directed towards allocating any kind of liability.

### Accident reporting

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

Pursuant to the 2003 Air Safety Act and Royal Decree 389/1998, any person who becomes aware of an accident or incident of civil aviation must immediately report it to the nearest authorities, who then must urgently contact the CIAIAC. Special reporting obligations are imposed upon pilots, operators, aircraft owners, aviation authorities, airport directors, air traffic controllers and all other related services and bodies.

The detailed reporting system is set forth in Royal Decree 1334/2005, which applies to all events occurred in Spanish territory or where Spanish-registered aircraft or operated by Spanish citizens are involved. All reports are directed to the Directorate General of Civil Aviation, which then coordinates its activities with the CIAIAC and other relevant agencies.

## COMPETITION LAW

### Competition law

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

No domestic sector-specific competition rules have been published, but given Spain's membership of the EU, Spanish competition authorities are bound by and follow the legislation and guidelines that emanate from the EU. These are abundant as far as the aviation industry is concerned and focus mostly on state subsidies, concentrations of undertakings and fostering free competition. The domestic competition provisions are embodied mainly in the 2007 Competition Defence Act.

## Regulator

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

The main body in charge of supervising competition rules in Spain is the National Commission for Markets and Competition (CNMC), which has jurisdiction over all economic areas. However, the CNMC is organised internally into various directorates, one of which is specifically in charge of transport matters.

## Market definition

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

The CNMC follows in general terms the definitions, methods and criteria established by the EU competition authorities, including the European Court of Justice, to define the relevant market. Since most of the transactions of the aviation industry have an EU dimension, they are ordinarily assessed by the European Commission rather than the Spanish authority.

## Code-sharing and joint ventures

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

The CNMC uses the same criteria as the EU competition authorities. However, since most aviation industry transactions have an EU dimension, they are ordinarily assessed by the European Commission rather than the Spanish authority.

## Assessing competitive effect

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

It is difficult to provide a general rule in this connection, because the criteria depend on the type of transaction under analysis. When it comes to the review of potential state subsidies or actions against free competition, the criteria are fixed and assessed on a case-by-case basis, taking into account existing precedents and guidelines.

When it comes to concentrations of undertakings, such as mergers between enterprises and company acquisitions, Spanish domestic competition legislation provides more detailed thresholds. Economic concentrations are governed by the 2007 Competition Defence Act when they fall outside the thresholds of the EU Merger Control Regulation 139/2004. Mergers are defined broadly and include the actual merger of two or more previously independent companies, the acquisition of control over an undertaking by another, the creation of a joint venture or the acquisition of joint control over an undertaking. As a general rule, concentrations of undertakings must be notified to the CNMC, to obtain approval when, as a consequence of the transaction, a share of 30 per cent or more is acquired in the 'relevant market'. This market can be either the entire territory of Spain or a smaller, geographically defined market (eg, a certain region). The communication is also mandatory when the turnover of the participants in Spain exceeds €240 million and at least one of them has a turnover of more than €60 million. However, no notification is needed if the turnover of the acquired company is less than €10 million, unless a market share of 50 per cent or more is achieved (*de minimis* exception).

In merger transactions, the CNMC has a period of one month from receipt of the notice to decide whether or not it wishes to pursue the investigations any further ('first phase'). If no decision is made within this time period, the transaction is deemed to be approved. If the CNMC decides to deepen the analysis, it opens the 'second phase' and then has

an additional period of two months to issue a decision. This timing is often extended to take into account delays arising from the receipt of any information requested additionally. A final decision is then taken by the Council of Ministers within one more month.

## Remedies

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

Spanish domestic legislation essentially mirrors EU legislation as regards the remedies that the CNMC or the courts can impose upon participants in transactions that are perceived to be in breach of competition rules.

## FINANCIAL SUPPORT AND STATE AID

## Rules and principles

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

As indicated above, no domestic sector-specific state aid rules have been published, but EU legislation is fully applicable in Spain. The most recent piece of legislation is Regulation (EU) No. 2019/712, which aims at leveling the playing field between EU carriers and non-EU carriers in certain areas such as subsidies and the provision of air services into non-EU countries.

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

The principles embodied in EU legislation and case law apply in Spain as well.

## Exemptions

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

Since its entry into the then EEC in 1986, Spain has attempted to comply with EU legislation on state aid and implemented policies to make existing aid compliant with the rules. Presently, Spain complies with EU legislation as regards exemptions and exonerations. Nevertheless, the exceptional situation created by the covid-19 pandemic has caused some of the strict rules prohibiting state aid to be relaxed or suspended throughout Europe. In this regard, on 20 March 2020, the European Commission issued its Communication 2020/C 91 I/01 (as amended) setting out a temporary framework for state aid measures to support the economy. Spain has approved a number of such measures, including guarantee schemes for companies and self-employed, as well as umbrella schemes providing direct grants, repayable advances, tax and payment advantages, public guarantees on loans and loans at favourable terms. Some of this aid has been channelled to the aviation industry.

## Clearance of state aid

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

In fact, the CNMC acts only *ex post* where state aid is concerned, either by launching investigations into specific persons or industries or by publishing studies on certain types of aid. Given the large variety of potential aid that may be deemed unlawful and the large number of

potential producers of such aid (including regional governments, municipalities, public enterprises, etc) an ex ante control is not foreseen. However, interested parties have the possibility of liaising with the CNMC to garner its opinion before adopting any steps in this regard.

### Recovery of unlawful state aid

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

Where a subsidy has been declared unlawful, the courts can be engaged to recover any amounts payable if the affected parties do not return the monies voluntarily. A system of fines is also in place to incentivise early recovery.

## CONSUMER PROTECTION

### Passengers

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

As part of the EU, Spain applies the entire set of EU legislation, directives and guidelines relating to the protection of passengers, along with the provisions contained in international treaties such as the Montreal Convention, where applicable. The provisions of Regulation (EC) 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, are fully applicable in Spain, and the State Air Safety Agency and the Spanish courts regularly enforce this body of law.

### Package holidays

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

Directive 2015/2302/EU on package travel and linked travel arrangements has been fully implemented in Spain through Royal Decree 23/2018, which amended the 2007 General Consumers and Users Protection Act.

### Other consumer legislation

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

As indicated, Spain applies the entire set of EU legislation, directives and guidelines relating to the protection of passengers, including those relating to disabled passengers, etc. Additionally, the domestic consumer protection rules are generally applied and interpreted by the courts so as to award the widest protection to air passengers.

## INSURANCE AND SECURITY

### Insurance for operators

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

The insurance requirements set forth under Regulation (EC) No. 785/2004 on insurance requirements for air carriers and aircraft operators are fully applicable in Spain.

### Aviation security

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

All security standards contained in EU legislation and international treaties are applicable in Spain, chiefly under Regulation (EC) No. 300/2008 on common rules in the field of civil aviation security. To take account

of changing developments, the government publishes a National Programme for Aviation Security in Civil Aviation, which is updated on a regular basis, most recently in January 2020.

### Serious crimes

45 | What serious crimes exist with regard to aviation?

In addition to the general criminal offences contained in the Spanish Criminal Code, specific offences relating to aviation are regulated under the 1964 Air Navigation Criminal and Procedural Act. Certain conducts are described in detail over its 75 articles, all of which would constitute criminal offences specifically related to aviation and thus subject to increased penalties. Activities such as causing damage to an aircraft, not providing flight information requested by an aircraft, flying without an approved flight plan, departing with excess weight, on-board rebellions or non-compliance with the pilot's instructions, flying an aircraft under the influence of certain substances, transporting dangerous goods without authorisation, kidnapping of aircraft, are all catalogued as criminal offences.

## UPDATE AND TRENDS

### Emerging trends

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

Over the past year, the main topics of concern have been those related with the exit of the United Kingdom from the European Union, which directly affects some major Spanish carriers (Iberia, Vueling, Level) due to their being part of the IAG Group. In accordance with the EU Commission's guidelines, both companies have submitted plans to show that they will continue being owned and controlled by EU citizens after Brexit.

In this context, in December 2019, a merger between Iberia and Air Europa was announced, with the aim of strengthening their position in the routes to Latin America and South America. This transaction is under review by the merger control authorities and, if approved, it is expected that both airlines will have to release a number of the slots that they presently hold. The covid-19 crisis has now put this merger into question marks.

Carriers operating in Spain have also been devoting a great deal of attention to the challenges arising from the increasing number of passenger claims under Regulation 261/2004 and the implementation of the General Data Protection Regulation.

However, at the time of writing, this report the uncertainties arising from the economic crisis created by covid-19 overshadow all other concerns. The aviation industry has been among those most severely hit by the events, and it is difficult to predict when the situation will revert to something resembling normality. Tourism being one of Spain's largest industries, the country is highly dependent on air traffic. The government has published temporary legislation imposing restrictions on movement, enhanced health controls for travellers from abroad and other measures to control the virus spread, and it attempts to take coordinated action with other EU countries.

To assist the Spanish carriers with their cash flow impasse, the government has granted some state-backed loans to Iberia, Vueling, Air Europa and Air Nostrum for a total amount of more than €1,000 million. It remains to be seen if this financial support will be enough to save the airlines from failure, because in addition to the operational issues and substantial loss of income, carriers all over Europe are facing massive claims for refund of the tickets paid by their customers.

The government has also announced that in the next months it will impose a mandatory system of consumer arbitration, whereby all

passenger claims will have to be settled by arbitration under the control of AESA. The system is presently being set up, and airlines have voiced their concerns about a mechanism that might take their right – and the consumer's right – of access to justice.

### Coronavirus

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

In addition to providing a certain level of state aid to Spanish airlines through government-backed loans and other measures, during the covid-19 pandemic the government has issued a large number of laws and regulations in an attempt to control the spread of the disease and the adverse economic impact of the situation.

Under the authority afforded by articles 116.2 of the Constitution and 4.b) of the Organic Act 4/1981 for sanitary crises, on 14 March 2020, the Spanish government declared a state of emergency throughout the entire Spanish territory. Although it was initially contemplated for a period of 15 days, it was later extended until 21 June 2020. Even before the state of emergency was declared, on 10 March all flights from Italian airports to Spanish airports were forbidden. When declaring the state of emergency, the government ordered all air carriers to reduce their operations by at least 50 per cent, with some exceptions for the transport between mainland Spain and the islands (Balearics, Canaries, Ceuta and Melilla). Subsequently, this reduction was increased to 70 per cent. Also, purely domestic flights were stopped. On 17 March, all helicopter flights between the Spanish mainland and the cities of Ceuta and Melilla (both at the Mediterranean coast of Africa) were forbidden. Similar decisions were taken in respect of the routes between the Spanish mainland and the Canary Islands and the Balearic Islands. In these cases, however, to ensure the connection with these regions the government approved a maximum number of maximum flights between Madrid, Barcelona and several airports on those islands, as well as among the islands themselves. Finally, on 23 March 2020, the government restricted the entry into Spain of all non-EU and non-Schengen citizens, with a few exceptions, such as diplomatic personnel, cross-border workers and the like. This meant in practice that international flights had to be stopped as well. This measure essentially forced all Spanish carriers to ground most of their fleets, as only state aircraft, non-commercial stopovers, cargo flights, positioning flights, as well as humanitarian, medical, emergency and repatriation services were exempted. The local authorities were given the power to issue special permits for exceptional circumstances.

As a consequence of the above, when selling airline tickets online, the offeror is nowadays obliged to insert a clearly visible message where it advises against travel save for unavoidable circumstances. On 15 March 2020, the Ministry of Transport issued an Order providing the official template of such announcement, which is mandatory since 17 March. Users must expressly understand and agree with the message by clicking on a button styled 'I understand the warning'. The message must stay on the sellers' websites until the state of alarm is lifted or until ordered otherwise. In a later legislation package, the government awarded consumers the right to terminate consumer contracts (whether purchase agreements or services agreements) within 14 days if they cannot comply with them. This affects particularly air tickets, package travel holidays and similar products acquired in advance by consumers, who are in a position to cancel them. Although a good faith negotiation among the parties is contemplated, companies are obliged to return the monies received from consumers if no agreement is reached. Combined



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with similar provisions set out in Regulation 261/2004, this is one of the points which the aviation industry is trying to amend given the devastating effects that it might have on their accounts.

From the perspective of labour laws, on 17 March 2020, the government approved a package to loosen the mechanisms for temporary layoffs or reduction of working hours directly based on the loss of activity caused by covid-19, but only for so long as the state of emergency is in force. All Spanish airlines made use of these mechanisms, but the timing limitation raises questions about the decisions that the aviation industry will face once the state of alarm is lifted, because all forecasts seem to indicate that recovery will only be gradual.

In the judicial field, but for a few exceptions, all ongoing legal proceedings, administrative proceedings, procedural time periods and deadlines were suspended between 17 March and 7 June 2020. This has created an enormous backlog in the courts. Also, with a view to protecting companies from potential insolvency requests, debtors are exempted for a certain period of time from their obligation to apply for voluntary insolvency even if the objective conditions set out in the Insolvency Act are given. Creditors are not allowed to request a forced insolvency. This provides airlines with a protective shield, at least for the immediate times to come.

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