

# International Comparative Legal Guides



Practical cross-border insights into aviation law

## Aviation Law 2022

10<sup>th</sup> Edition

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# Portugal

PLMJ Advogados, SP, RL



Saul Fonseca



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## 1 General

**1.1 Please list and briefly describe the principal legislation and regulatory bodies which apply to and/or regulate aviation in your jurisdiction.**

The three main layers of legislation regulating aviation are:

- (i) International – International conventions ratified by Portugal and rules enacted by the bodies of international institutions of which Portugal is a member.
- (ii) EU – Portugal is bound by EU treaties and legal instruments and nowadays, these are perhaps the most important civil aviation rules.
- (iii) Domestic – Domestic legislation mainly has a residual role. It includes these Decree-Laws: 19/82 of 28 January 1982, on non-scheduled air transport; 321/89 of 25 September 1989 on mandatory insurance for air transport, including provisions on carrier liability; and 116/2012 of 29 May 2012, on access to and exercise of traffic rights for scheduled flights outside the EU.

The most important regulatory body in Portugal is the National Civil Aviation Authority (“ANAC”). ANAC regulates and monitors the civil aviation sector and has broad powers, including to enact regulations.

Other bodies, with authority limited to specific aspects of civil aviation, are:

- Cabinet for Investigation of Maritime Accidents and Authority for Aeronautics Meteorology (“GAMA”) – national supervising authority for civil aeronautics meteorology.
- Cabinet for Prevention and Investigation of Accidents with Aircraft and Rail Accidents (“GPIAAF”) – in charge of the investigation of accidents.
- Navegação Aérea de Portugal – NAV Portugal, E.P.E. (“NAV”) – responsible for air navigation services and coordinator of the process for granting slots at coordinated airports.

**1.2 What are the steps which air carriers need to take in order to obtain an operating licence?**

ANAC is the authority that grants operating licences. The main requirements for carriers are in Regulation (EC) 1008/2008 of 24 September 2008, and include:

- a. The main activity of the applicant must be the operation of air services.
- b. EU Member States or their nationals must, directly or indirectly, hold more than 50% of the share capital of the applicant and exercise effective control over the applicant.
- c. Compliance with financial, insurance and reputational requirements.

- d. The carrier must hold a valid air operator certificate (“AOC”).

The licence must be applied for in Portugal whenever the applicant has its head office/registered office in Portugal. Upon obtaining an operating licence, a carrier becomes authorised to exploit air services within the EU and Member States may not subject the provision of these services to additional licensing requirements.

**1.3 What are the principal pieces of legislation in your jurisdiction which govern air safety, and who administers air safety?**

The main pieces of legislation on air safety are EU legal instruments, such as Regulation (EU) 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 EASA. ANAC is responsible for its implementation, with the assistance of other entities, such as GPIAAF or police bodies.

**1.4 Is air safety regulated separately for commercial, cargo and private carriers?**

Safety requirements generally apply equally to commercial, cargo and private carriers.

**1.5 Are air charters regulated separately for commercial, cargo and private carriers?**

Air charters are generally subject to the rules of the Chicago Convention and EU Regulations and not subject to a different treatment.

**1.6 As regards international air carriers operating in your jurisdiction, are there any particular limitations to be aware of, in particular when compared with ‘domestic’ or local operators? By way of example only, restrictions and taxes which apply to international but not domestic carriers.**

There are no relevant distinctions between domestic and foreign operators applicable to the different types of air operations.

*Domestic air transport* – Regulation (EC) 1008/2008 is directly applicable in Portugal to the operation of air services in the EU. Domestic routes are considered intra-EU air services.

*Scheduled air transport outside the EU* – Entities that meet the following requirements can apply to ANAC for this under Decree-Law 116/2012 of 29 May 2012:

- a. A valid operating licence under Regulation (EC) 1008/2008.
- b. Adequate technical, economic and financial capacity for the air services in question.
- c. Compliance with the designation requirements in the applicable air transport agreement(s).
- d. Adequate insurance policy.
- e. Non-existence of debts to the Portuguese social security and tax authorities.

*Non-scheduled air transport* – This is subject to prior licensing by the ministry responsible for the transport sector (Decree-Law 19/82 of 28 January 1982). Licences may only be granted to companies that meet certain commercial, technical, and financial requirements. Non-scheduled flights are subject to prior notification to ANAC. International non-scheduled air transport by foreign carriers is subject to the conventions and agreements to which Portugal is party, or if none apply, to the rules resulting from *ad hoc* authorisation.

### 1.7 Are airports state or privately owned?

As a rule, airports are state-owned and part of the airport public domain. However, the management and commercial operation of almost every airport has been the object of concession agreements:

ANA – Aeroportos de Portugal, S.A. (“ANA”) is the concessionaire tasked with the operation and management of 10 airports in Portugal (Lisbon, Porto, Faro, Beja, Madeira, Porto Santo, Ponta Delgada, Horta, Santa Maria, Flores). SATA – Gestão de Aeródromos, S.A. is the concessionaire of the public service of airport support to civil aviation at the airfields of Pico, Graciosa, Corvo, São Jorge and Flores (terminal). The civil terminal of Lajes (Terceira Island) is managed directly by the Azores Regional Government.

### 1.8 Do the airports impose requirements on carriers flying to and from the airports in your jurisdiction?

The main requirements imposed by airports on carriers flying to Portugal, other than EU and international rules on operational and licensing requirements, are those enacted by each airport management authority (including payment of landing and take-off fees). Carriers may only operate in certain airports if slots are available.

### 1.9 What legislative and/or regulatory regime applies to air accidents? For example, are there any particular rules, regulations, systems and procedures in place which need to be adhered to?

The main statutes on air accidents are the following:

- a. Article 26 of the Chicago Convention (and its Annex 13, which is not legally binding in Portugal).
- b. Regulation (EU) 996/2010 of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation.
- c. Decree-Law 318/99, which sets the principles governing the investigation of air accidents and incidents.
- d. Decree-Law 36/2017 of 28 March 2017, on the GPIAAF.

The GPIAAF is the authority that carries out the investigations contemplated in Regulation (EU) 996/2010 and in Article 26 of the Chicago Convention and that drafts the technical reports referred to in Article 25 of the Chicago Convention.

Under Decree-Law 318/99, a technical investigation must take place whenever a serious accident or incident occurs, and these must be notified within six hours, and other accidents and incidents within 48 hours.

### 1.10 Have there been any recent cases of note or other notable developments in your jurisdiction involving air operators and/or airports?

The following three developments have been notable in Portugal:

1. The COVID-19 pandemic – the most significant measures have been the prohibition of flights to certain countries/regions, and the requirement for passengers to take RT-PCR tests before flights and to fill in a passenger locator card to travel to Portugal. Some measures have been repealed or alleviated, but the resurgence of the pandemic may reverse this.
2. Carbon Tax – adoption of a “Carbon Tax” of €2 per passenger from 1 July 2021.
3. New Lisbon Airport – the plan to transform a military air base into a civil airport is now at a standstill. In March 2021, ANAC rejected an evaluation request as some concerned municipalities vetoed the project. A strategic environmental assessment is ongoing, but it seems that a new airport in Lisbon is not likely to be completed before 2029.

### 1.11 Are there any specifically environment-related obligations or risks for aircraft owners, airlines, financiers, or airports in your jurisdiction, and to what extent is your jurisdiction a participant in (a) the EU Emissions Trading System (EU ETS) or a national equivalent, and (b) ICAO’s Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA)?

Portugal is an International Civil Aviation Organization (“ICAO”) Member State and a CORSIA state (Chapter 3 State Pairs). As from 1 January 2022, a Portuguese carrier with annual CO<sub>2</sub> emissions arising from international flights with aircraft having a maximum take-off weight (“MTOW”) of more than 5700 kg above 10,000 metric tons must participate in CORSIA.

The Directive to include aviation activities in the European Greenhouse Gas Emissions Trading System (“ETS”) established that airlines operating routes to and from the European Union would be required to obtain CO<sub>2</sub> emissions licences. However, most EEA countries are also ICAO Member States. The risk of inconsistencies and overlap between the two instruments appears not to have been entirely mitigated by the European Commission’s Proposal, dated 14 July 2021, for an amendment to Directive 2003/87/EC. A concern subsists that, if ETS is maintained for intra-European flights, CORSIA’s offsetting requirements should be only accounted once to avoid requiring an airline to comply with both CORSIA and the EU ETS for the same tonne of CO<sub>2</sub>.

Portugal has created its own domestic charge on air travel in the form of a Carbon Tax, pursuant to Order 38/2021, of 16 February 2021, of €2 per passenger, which is generally levied on passengers departing on commercial flights from Portugal.

Under Regulation (EU) 598/2014, noise restrictions enacted prior to 13 June 2016 remain in force until the authorities decide to review them. Thus, there are significant noise restrictions at Lisbon, Porto, Madeira, Porto Santo and Ponta Delgada airports.



## 2 Aircraft Trading, Finance and Leasing

### 2.1 Does registration of ownership in the aircraft register constitute proof of ownership?

Portugal is a single registry state. The registration of ownership with the National Aircraft Registry (“RAN”), controlled by ANAC, constitutes proof of title and renders ownership effective against third parties.

### 2.2 Is there a register of aircraft mortgages and charges? Broadly speaking, what are the rules around the operation of this register?

Mortgages and charges must be registered with the RAN, which is not subject to a consolidated legal framework. The applicable provisions are scattered among several statutes, including the Chicago Convention and its Annex VII, the outdated Air Navigation Regulations of 1931, the Land Registry Code and the Civil Code. Specific rules on mortgages over an aircraft or autonomous equipment (engine, motor, propeller, auxiliary power unit (“APU”), etc.) are:

- The creation and assignment of interests (including mortgages) over aircraft registered in Portugal must be subject to Portuguese law (but the agreement may be in English).
- The mortgage agreement must indicate the total amount secured by the mortgage.
- Registration of a mortgage granted under Portuguese law:
  - is mandatory and a requirement to perfect the mortgage and for the effectiveness of the mortgage against the parties and third parties; and
  - does not entail transfer of ownership and does not grant any possession right over the aircraft to the lessor, but a preferential right to be paid out of the proceeds of sale of aircraft in court proceedings.
- Registration of a mortgage entails the payment of fees (set at 1/100,000 of the amount of the mortgage, subject to a minimum of €72.33 and a maximum of approximately €947.71.)

### 2.3 Are there any particular regulatory requirements which a lessor or a financier needs to be aware of as regards aircraft operation?

A lease agreement is generally subject to ANAC’s approval and subject to registration with the RAN, but the approval is dependent on the existence of specific grounds for the lease. Specific requirements apply to different types of lease: “wet leases-in” and “wet leases-out”; and “dry leases-in” and “dry leases-out”. During the term of the lease, the operator is liable to operate the aircraft and no liability is transferred to the lessor/financier.

### 2.4 As a matter of local law, is there any concept of title annexation, whereby ownership or security interests in a single engine are at risk of automatic transfer or other prejudice when installed ‘on-wing’ on an aircraft owned by another party? If so, what are the conditions to such title annexation and can owners and financiers of engines take pre-emptive steps to mitigate the risks?

It is possible to register rights over engines with the RAN. However, unlike registration of an aircraft, registration of engines (or other components) is not mandatory. The

registration certificate of the aircraft will not show data on the engines, which will only appear in the engine booklet, prepared by ANAC’s technical services. To avoid risks arising from the installation of an engine “on-wing”, three steps must be taken: (i) to confirm registration of ownership/mortgage of the engine with ANAC; (ii) request issuance of an engine registration certificate; and (iii) confirm, after the installation “on-wing”, that the serial numbers in the engine booklet of the aircraft and in the engine registration certificate match.

### 2.5 What (if any) are the tax implications in your jurisdiction for aircraft trading as regards a) value-added tax (VAT) and/or goods and services tax (GST), and b) documentary taxes such as stamp duty; and (to the extent applicable) do exemptions exist as regards non-domestic purchasers and sellers of aircraft and/or particular aircraft types or operations?

As a rule, VAT will be due on the domestic sale or lease of an aircraft or parts thereof (23%). However, a VAT exemption is applicable on (i) the transfer, transformation, repair and maintenance operations, freight and lease of aircraft that are operated for international traffic, and on transfers, repairs, maintenance operations and lease of objects incorporated in the aircraft or used for its operation, and on (ii) the importation of aircraft by airline companies principally engaged in international traffic, and objects incorporated in or used to operate the aircraft. No stamp duty or GST apply.

### 2.6 Is your jurisdiction a signatory to the main international Conventions (Montreal, Geneva and Cape Town)?

Portugal is a party to the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention) and the Convention on the International Recognition of Rights in Aircraft (Geneva Convention). The Cape Town Convention is not in force in Portugal.

### 2.7 How are the Conventions applied in your jurisdiction?

International conventions ratified or approved by Portugal, and rules enacted by the bodies of international institutions of which Portugal is a member, are applicable here. Portuguese courts would consider valid and enforce any provisions resulting from any convention which validly binds the Portuguese State.

### 2.8 Does your jurisdiction make use of any taxation benefits which enhance aircraft trading and leasing (either in-bound or out-bound leasing), for example access to an extensive network of Double Tax Treaties or similar, or favourable tax treatment on the disposal of aircraft?

As a rule, a 25% withholding tax will be levied over the aviation-related lease payments whenever the lessee is a Portuguese tax resident and the lessor is a non-Portuguese tax resident (without a permanent establishment in Portugal to which the rental income is attributable), except if a double tax treaty entered by Portugal applies (there is an extensive double tax treaty network to be considered). However, a tax benefit may apply, and outbound rent and interest payments may be exempt

from this withholding tax if the debtor is the Portuguese State (or a public body, broadly speaking) or public-service companies – subject to a request to the Ministry of Finance.

**2.9 To what extent is there a risk from the perspective of an owner or financier that a lessee of aircraft or other aviation assets in your jurisdiction may acquire an economic interest in the aircraft merely by payment of rent and thereby potentially frustrate any rights to possession or legal ownership or security?**

The payment of rent would not grant the lessee an economic interest in the aircraft. Portuguese law recognises the institute of *usucapio*, whereby the possession of an object over a period may grant to its possessor a right over the asset. However, the lessee of an aircraft would not qualify as a possessor, but rather as a mere custodian (“*detentor*”) of the aircraft. To be able to claim title over the aircraft, the lessee would have to challenge the lessor/owner’s right by, for example, refusing to pay the rent and claiming that it is the legitimate owner of the aircraft. This would be difficult as the lease agreement is registered with ANAC. We are not aware of any precedent of the sort and the lessor/owner would be afforded instruments to react against such a claim.

### 3 Litigation and Dispute Resolution

**3.1 What rights of detention are available in relation to aircraft and unpaid debts?**

- Portuguese law grants a privilege (“*privilegio creditório*”) to certain creditors (depending on the nature of the credit) corresponding to a right of preferential payment with priority over other creditors. This type of privilege is the strongest form of guarantee under Portuguese law as it is not dependent on registration and prevails over *in rem* guarantees, even if registered before. Consequently, it ranks higher than mortgages, revenue consignment and retention rights. We highlight the following privileges with relevance to the aviation sector:
  - Airport authorities are granted a privilege over the assets of the debtors located within the area of the airport and may seize them until full payment of outstanding amounts or until a judicial decision is obtained. In the case of perishable goods or goods that constitute a risk for health and physical integrity, airport authorities can destroy or sell them, in which case the outstanding debt is deducted from the sale proceeds.
  - Credits for salvage and extraordinary expenses – Under the Geneva Convention, credits corresponding to compensation for salvage of the aircraft, or extraordinary expenses indispensable to preserving the aircraft give rise to a right conferring a charge against the aircraft which takes priority over all other rights over the aircraft.
- Retention rights – A creditor may retain an object if certain requirements are met, particularly the existence of a direct and material link between the credit of the possessor and the object itself. Retention rights are also not dependent on registration.

**3.2 Is there a regime of self-help available to a lessor or a financier of an aircraft if it needs to reacquire possession of the aircraft or enforce any of its rights under the lease/finance agreement?**

Self-help is, as a rule, not allowed in Portugal. If the operator refuses to cooperate, court intervention would be required. However, it is usually outlined in lease agreements with Portuguese air operators that the lessor/financier may take repossession of the aircraft in case of default along with the granting of an irrevocable de-registration power of attorney in favour of the lessor/financier. In practical terms, though, it may be difficult to retake possession of the aircraft without the lessee’s cooperation, as there are material acts where cooperation may be pivotal (obtaining airport access/access to the aircraft/access to technical books).

**3.3 Which courts are appropriate for aviation disputes? Does this depend on the value of the dispute? For example, is there a distinction in your jurisdiction regarding the courts in which civil and criminal cases are brought?**

As a rule, the jurisdiction of Portuguese courts is based on the nature and value of the dispute and there are no specific courts for aviation disputes. Civil aviation disputes must be brought before the Civil Courts when conflicts arise between private individuals. Recently, Law 63/2019 of 16 August 2019 changed the Consumer Protection Law and provides that if a consumer files a claim of less than €5,000 before an arbitration court, the dispute must be heard by that tribunal. If public authorities are involved, the contentious-administrative courts must decide the dispute. Criminal offences are subject to the jurisdiction of criminal courts whereas administrative offences are decided by the Court of Competition, Regulation, and Supervision.

**3.4 What service requirements apply for the service of court proceedings, and do these differ for domestic airlines/parties and non-domestic airlines/parties?**

The standard procedure to serve legal proceedings on the defendant is by a personal summons, which requires acceptance by the defendant (or a third party on its behalf). Failing this, service is made by an enforcement officer in person. If both procedures fail, the judge orders service by public notice and the deadline to file the defence is extended by 30 days.

If the defendant resides abroad, Portuguese courts respect the applicable international treaties and, if there are none, the above procedure applies. If this fails, the court orders service through the nearest Portuguese consulate, if the defendant is Portuguese, or by letter rogatory, if the defendant is a foreigner, upon hearing the claimant. When the defendant is served abroad, the deadline to file the defence is extended by 30 days. If the defendant’s whereabouts are unknown, the court orders the service by public notice and the deadline for the defence is extended by 30 days.

**3.5 What types of remedy are available from the courts or arbitral tribunals in your jurisdiction, both on i) an interim basis, and ii) a final basis?**

On an interim basis, Portuguese procedural law provides for a common interlocutory injunction that protects the position of

anyone who has a well-founded fear that another person will cause serious harm to their right that is hard to repair. The claimant must prove the existence of its right, but the law only requires proof of appearance of that right. The claimant can apply for specific and adequate measures to protect the threatened right through an interlocutory injunction, with no exhaustive catalogue of measures. On a final basis, judicial proceedings may be brought to:

- (i) ask for the recognition of existence/inexistence of a right/fact;
- (ii) demand the restitution of an asset or the carrying out of an action; or
- (iii) authorise an exchange in the existing legal framework.

All court decisions are enforceable through enforcement proceedings.

### 3.6 Are there any rights of appeal to the courts from the decision of a court or arbitral tribunal and, if so, in what circumstances do these rights arise?

The Portuguese system has three degrees of jurisdiction: (i) first instance courts; (ii) courts of appeal; and (iii) Supreme Court of Justice.

The cases decided by first instance courts can be appealed if the action's value exceeds €5,000 and the difference between the claim and the award exceeds more than half of that value. The courts of appeal can overturn the decision and review questions of fact and law.

Court of appeal decisions can only be appealed if the action's value is above €30,000 and the difference between the claim and the award exceeds more than half of that value, and if the decision does not confirm the first instance decision on the same grounds. The Supreme Court only rules on matters of law.

Arbitral awards cannot be appealed, except if the parties agree differently. However, an arbitral award may be reviewed before a judicial court in limited circumstances.

### 3.7 What rights exist generally in law in relation to unforeseen events which might enable a party to an agreement to suspend or even terminate contractual obligations (in particular payment) to its contract counterparties due to *force majeure* or frustration or any similar doctrine or concept?

Article 437 of the Portuguese Civil Code (“PCC”) provides that when there is an abnormal change in the circumstances on which the parties based their will to contract, the injured party may terminate or modify the agreement under fairness criteria if the maintenance of the contractual obligations would seriously offend good faith principles and if the change in the circumstances is not included in the risk matrix usually associated with the agreement.

## 4 Commercial and Regulatory

### 4.1 How does your jurisdiction approach and regulate joint ventures between airline competitors?

There are no sector-specific competition rules that apply to the aviation sector. Joint ventures between airline competitors must observe general competition and anti-trust laws and regulations, both at the national and European level. The general competition rules are applied by the regular competition authority at the

national level, namely *Autoridade da Concorrência* (“Portuguese Competition Authority” or “PCA”).

Joint ventures can be considered as agreements that are incompatible with the market, under Article 9 of the Competition Law, or as a concentration, under Article 36 of the same Law. Under Portuguese law, joint ventures can only be considered concentrations if they “will be performing on a lasting basis all the functions of an autonomous economic entity”.

### 4.2 How do the competition authorities in your jurisdiction determine the ‘relevant market’ for the purposes of mergers and acquisitions?

The relevant market to assess a given competition issue is established by the combination of the product and geographic markets, under Commission Notice 97/C 372/03. The “relevant product market” comprises all the products and services regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, prices and intended use. The “relevant geographic market” comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, where the conditions of competition are sufficiently homogeneous and can be distinguished from neighbouring areas because the conditions of competition are appreciably different there.

### 4.3 Does your jurisdiction have a notification system whereby parties to an agreement can obtain regulatory clearance/anti-trust immunity from regulatory agencies?

Yes. The parties to a concentration must notify the project to the PCA, under Article 37 of the Competition Law, which requires mandatory pre-merger notification to the PCA of concentrations meeting certain conditions.

### 4.4 How does your jurisdiction approach mergers, acquisition mergers and full-function joint ventures?

Mergers, acquisition mergers and full-function joint ventures are subject to compulsory notification if certain conditions are met, under Article 37 of the Competition Act.

A concentration that does not have an EU dimension under Article 1 of the EU Merger Regulation must be filed with the PCA when any of the following conditions are met:

- a. A market share of 50% or more is acquired, created, or strengthened in the domestic market of a certain good or service, or in a substantial part of it.
- b. A market share of 30% or more and less than 50% is acquired, created, or strengthened in the domestic market of a certain good or service, or a substantial part of it, provided the turnover achieved individually in Portugal in the last financial year by at least two of the undertakings involved in the concentration is greater than €5 million.
- c. All the undertakings involved in the concentration have generated in Portugal, in the last financial year, a turnover exceeding €100 million, provided the turnover achieved individually in Portugal by at least two of those undertakings exceeds €5 million.

The notification must be submitted after the parties have agreed on the essential aspects of the agreement and before the transaction is concluded. For acquisitions of control of an undertaking, the requirement to file before the transaction takes



place is considered fulfilled if implementation of the agreement is conditional upon the PCA's approval. The operation cannot be carried out before the PCA's notification and approval.

The PCA then has to grant clearance of the specific operation, assessing whether it is likely to create significant impediments to effective competition in the domestic market, or in a substantial part of it.

**4.5 Please provide details of the procedure, including time frames for clearance and any costs of notifications.**

The notification must comply with PCA Regulation 60/2013 of 14/02 and is subject to payment of a fee.

The discovery phase must be completed within 30 days of notification and the notifying party can withdraw the procedure at any time. Until the end of that period, the PCA decides whether:

- a. The operation falls within the scope of the merger control procedure and is covered by the prior notification obligation.
- b. It opposes the concentration, either in the form of its notification or following modifications or the submission of undertakings by the notifying party, in which case the decision includes conditions and obligations to secure compliance with the notifying party's undertaking.
- c. To begin an in-depth investigation if the transaction raises serious doubts in light of the evidence.

If no decision is taken by the deadline, the operation is tacitly approved, under Article 50(4). If the PCA decides to begin an in-depth investigation, it has a further 60 working days to conclude the investigation and issue a decision (Articles 52 and 53). This timing can be extended.

**4.6 Are there any sector-specific rules which govern the aviation sector in relation to financial support for air operators and airports, including (without limitation) state aid?**

As an EU Member State, Articles 107 to 109 of the Treaty on the Functioning of the European Union apply to the aviation sector. Under Article 107, unless otherwise provided in the Treaties, any aid granted by a Member State or through state resources in any form that distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, to the extent it affects trade between Member States, is incompatible with the internal market. The guidelines issued by the European Commission on state aid in the aviation sector (Guidelines on State aid to airports and airlines 2014/C 99/03 OJ C 99, 4.4.2014) should also be considered, as should the European Commission's Working Paper on the interpretation of State aid and public service obligations in the aviation sector, dated 14 May 2020, which extends the interpretation of the existing (and unchanged) legal framework and lists the legal options available for public financing of airports and air routes. There are no internal sector-specific state aid rules in Portugal.

**4.7 Are state subsidies available in respect of particular routes? What criteria apply to obtaining these subsidies?**

The following scheduled air services are currently subject to public service obligations pursuant to Article 16(4) of Regulation (EC) 1008/2008:

- Lisbon – Horta – Lisbon;

- Lisbon – Santa Maria – Lisbon;
- Lisbon – Pico – Lisbon;
- Funchal – Ponta Delgada – Funchal;
- Lisboa – Terceira – Ponta Delgada – Lisboa;
- Lisboa – Ponta Delgada – Terceira – Lisboa;
- Porto Santo – Funchal – Porto Santo.

Mobility subsidies for passengers are available on certain routes and subject to compliance with certain requirements:

- Beneficiaries – passengers resident in the Azores and Madeira (or equivalent) and students (provided they meet the legal eligibility requirements).
- Routes:

Type of passenger	Route		
	Between Azores and Mainland	Between Madeira and Mainland	Between Azores and Madeira
Student	€99.00	€65.00	€89.00
Resident	€134.00	€86.00	€119.00

**4.8 What are the main regulatory instruments governing the acquisition, retention and use of passenger data, and what rights do passengers have in respect of their data which is held by airlines and airports?**

The key statute to be considered is Regulation (EU) 2016/679 (“GDPR”). The GDPR is supplemented by Law 58/2019 of 8 August 2019 which ensures the GDPR's implementation in Portugal.

**4.9 In the event of a data loss by a carrier, what obligations are there on the airline which has lost the data and are there any applicable sanctions?**

The data controller must notify any personal data breach to the supervisory authority (“CNPD”) without undue delay and, where feasible, not later than 72 hours after learning of it, unless the controller can demonstrate it is unlikely to result in a risk to the rights and freedoms of natural persons. Where notification cannot be achieved within 72 hours, the reasons for the delay must accompany the notification, which must, at least:

- a) describe the nature of the personal data breach including, where possible, the categories and approximate number of data subjects concerned and the categories and approximate number of personal data records;
- b) communicate the name and contacts of the data protection officer or another contact point where more information can be obtained;
- c) describe the likely consequences of the breach;
- d) describe the measures taken or proposed by the controller to address the breach, including, where appropriate, measures to mitigate its possible adverse effects.

When the personal data breach is likely to result in a high risk to the rights and freedoms of natural persons, the controller must communicate the personal data breach to the data subject without undue delay.

Failure to comply with any of the above communications constitutes a serious administrative offence which may trigger the assessment of fines between €2,500 and €10,000,000 or 2% of the carrier's worldwide turnover, whichever is higher, for large companies, or between €1,000 and €1,000,000 or 2% of the carrier's worldwide turnover, whichever is higher, for small and medium companies. Any person suffering material or

non-material damage because of an infringement of the GDPR is entitled to compensation from the controller or processor.

**4.10 What are the mechanisms available for the protection of intellectual property (e.g. trademarks) and other assets and data of a proprietary nature?**

Intellectual property rights are statutory rights granted and protected under the: (i) Industrial Property Code (industrial property rights, i.e. patents, utility models, topographies of semiconductor products, designs, trademarks, awards, logotypes, appellations of origin and geographical indications, and also trade secrets); (ii) Code of Copyright and Related Rights; (iii) Decree Law 122/2000 (Database Rights); and (iv) Decree Law 252/94 (Computer Programs).

The Portuguese Institute of Industrial Property (“INPI”) is responsible for granting industrial property rights in Portugal. Trade secrets – information that has been subject to reasonable diligence to keep it secret and has commercial value – are also protected. Copyright and related rights are entitled to protection without a formal application/registration procedure. Databases are covered by copyright if considered “intellectual creations”, and computer programs can get the same level of protection.

The Intellectual Property Court is the specialist court with exclusive jurisdiction to hear civil proceedings where the action is related to industrial property, copyright and related rights, trade secrets and acts of unlawful competition in industrial property matters. Criminal cases based on the infringement of IP rights can be brought before the criminal courts.

**4.11 Is there any legislation governing the denial of boarding rights and/or cancelled flights?**

Regulation (EC) 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding or cancellation or long delays and the Montreal Convention (approved by EU Council Decision of 5 April 2001) apply.

Decree-Law 17/2018 of 8 March 2018 specifically addresses package travel and is influenced by Directive (EU) 2015/2302 on package travel and linked travel arrangements. It provides rules addressing breach of the package travel contract and lists the passengers’ rights arising from any non-conformity in providing the services. The potential application of this legislation does not affect any passenger’s rights under Regulation (EC) 261/2004 or the Montreal Convention, whenever the air transport agreement is breached.

**4.12 What powers do the relevant authorities have in relation to the late arrival and departure of flights?**

ANAC is responsible for determining whether the violation of a time slot is justified or whether it constitutes an administrative offence. For example, the landing/take-off of an aircraft at coordinated airports in violation of the specific date of the allocated slot constitutes a very serious administrative offence, except when due to *force majeure* or operational reasons.

**4.13 Are the airport authorities governed by particular legislation? If so, what obligations, broadly speaking, are imposed on the airport authorities?**

As mentioned, almost every airport is under a concession regime. ANA is the concessionaire of 10 airports in Portugal, under a

concession agreement executed under Decree-Law 254/2012 of 28 November 2012, which imposes the following main obligations on ANA:

- Its operations and services must be provided regularly, continuously and efficiently, with the adoption of public sector parameters and in accordance with the quality, availability and safety standards of the applicable laws/regulations and in the concession agreement for each airport.
- The concessionaire may not discriminate against airport users and may only refuse access and use of airport infrastructures to: i) entities and individuals that do not meet the requirements in the applicable laws/regulations; and ii) additional users in case of lack of capacity of available infrastructures.
- Fees charged at airports open for commercial traffic with over five million passengers per year and at airport networks with an aggregate volume over five million passengers per year are subject to an economic regulation regime, supervised by ANAC.

**4.14 To what extent does general consumer protection legislation apply to the relationship between the airport operator and the passenger?**

A consumer is an individual who acquires goods or services for private use from a professional carrying out an economic activity. If the relationship between the airport operator and the passenger meets the above criteria, the General Consumer Protection Law applies. The typical relationship between airport authorities and passengers is not a consumer relationship, but it is conceivable that in specific situations, such as airport parking, a “consumer relationship” exists.

**4.15 What global distribution suppliers (GDSs) operate in your jurisdiction?**

The three main GDSs (Amadeus, Sabre and Travelport) operate in Portugal.

**4.16 Are there any ownership requirements pertaining to GDSs operating in your jurisdiction?**

Regulation (EC) 80/2009 of the European Parliament and of the Council of 14 January 2009 applies to the operation of GDSs in Portugal, but imposes no ownership requirements on GDSs.

**4.17 Is vertical integration permitted between air operators and airports (and, if so, under what conditions)?**

There is no express prohibition, but general competition rules would have to be considered to check whether vertical integration is possible in a specific situation.

**4.18 Are there any nationality requirements for entities applying for an Air Operator’s Certificate in your jurisdiction or operators of aircraft generally into and out of your jurisdiction?**

Regulation (EC) 1008/2008 requires that EEA states or their nationals must own more than 50% of the carrier and effectively control it, directly or indirectly, except as provided for in an agreement with a third country to which the EU is a party.

Moreover, the carrier's principal place of business must be in the EU.

## 5 In Future

**5.1 In your opinion, which pending legislative or regulatory changes (if any), or potential developments affecting the aviation industry more generally in your jurisdiction, are likely to feature or be worthy of attention in the next two years or so?**

- The progressive lifting of travel restrictions/requirements relating to the COVID-19 pandemic. There are currently only a few major restrictions applying in Portugal, but there still may be restrictions applying in countries with flights departing from Portugal which need to be complied with. However, the resurgence of the pandemic in Europe since November 2021 may lead to the imposition of more restrictions.
- Potential harmonisation of the CORSIA and ETS regimes in terms of CO<sub>2</sub> emissions (see question 1.11 above).
- Flight and Duty Time limitations – A proposal for an amendment to Decree-Law 139/2004 of 5 June 2004, on flight and duty time limitations, was subject to public consultation until 8 July 2021. The aim of this proposal was to adjust its provisions to sub-part FTL of Annex III to Commission Regulation (EU) 965/2012 of 5 October 2012. The proposal has met strong opposition from SNPVAC, the trade union representing crew members.
- A revision of the Air Services Regulation – Regulation (EC) 1008/2008 is expected in the last quarter of 2022. It is currently being adjusted to include the experience gained during the COVID-19 crisis and its impact on the industry, and the policy objectives of the European Green Deal and the Sustainable and Smart Mobility Strategy.



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bridge the traditional gap between legal work carried out in this sector by law firms, and highly specific regulatory and contractual work which most law firms are not able to assist with.

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