

# Air Transport

*Contributing editors*  
John Balfour and Mark Bisset



2017

GETTING THE  
DEAL THROUGH 

GETTING THE  
DEAL THROUGH 

# Air Transport 2017

*Contributing editors*  
**John Balfour and Mark Bisset**  
**Clyde & Co LLP**

Publisher  
Gideon Robertson  
gideon.roberton@lbresearch.com

Subscriptions  
Sophie Pallier  
subscriptions@gettingthedealthrough.com

Senior business development managers  
Alan Lee  
alan.lee@gettingthedealthrough.com

Adam Sargent  
adam.sargent@gettingthedealthrough.com

Dan White  
dan.white@gettingthedealthrough.com



Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 3708 4199  
Fax: +44 20 7229 6910

© Law Business Research Ltd 2016  
No photocopying without a CLA licence.  
First published 2006  
Eleventh edition  
ISSN 1751-9098

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between August and September 2016. Be advised that this is a developing area.

Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



# United States

Bartholomew J Banino and Nicole M Smith

Condon & Forsyth LLP

## General

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

Aviation in the US is primarily regulated by the Department of Transportation (DOT), the Federal Aviation Administration (FAA), which is an agency of the DOT, the Department of Homeland Security's Transportation Security Administration (TSA) and Customs and Border Protection (CBP) and the National Transportation Safety Board (NTSB), which is an independent agency charged by Congress with investigating civil aviation accidents and accidents involving other modes of transportation in the US.

The primary aviation laws are organised under Title 49 of the US Code (USC), section 40101 et seq (the Transportation Code). The primary aviation regulations are organised under Title 14 of the Code of Federal Regulations (CFR).

Each state within the US also has aviation laws and regulations that may apply to the extent that such regulations and laws are not preempted by federal laws.

## Regulation of aviation operations

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

Safety of air transport is primarily regulated by the FAA and the DOT.

The FAA sets minimum standards for manufacturing, operating and maintaining aircraft, and also regulates air traffic control and the certification and registration of airports and aircraft. However, the TSA, CBP and NTSB assist the FAA in regulating safety. The TSA provides airport security in the form of screening passengers, baggage and cargo. The CBP works to secure US borders and assist the TSA with screening travellers. The NTSB investigates aviation accidents to determine the probable cause of the accident and issue a safety recommendation to prevent similar accidents from occurring in the future, as well as to provide assistance to accident victims and their families.

In order for an air carrier to obtain an operating licence, the air carrier must first obtain safety authority by filing an application with the FAA, whereby the FAA determines if the air carrier meets certain safety standards. If the FAA is satisfied, it issues US air carriers an Air Carrier Certification and Operations Specifications (14 CFR 121 and 135) and foreign air carriers Operations Specifications only (14 CFR 129).

Additionally, 49 USC 44701-44735 provide various rules regarding aviation safety. For example, 49 USC 44705 grants the FAA authority to issue an air carrier operating certificate if, after investigation, the FAA determines that the person is equipped and able to operate an aircraft safely.

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

General operating rules applicable to all aircraft operations are provided by 14 CFR 91. The principal provisions regulating air safety for common carriers are 14 CFR 121 and 135 (for US air carriers) and 14 CFR 129 (for foreign air carriers). Common carriers are those that hold themselves out to the public as willing to transport passengers or property for compensation.

Air safety for private carriers is regulated by 14 CFR 125. Private carriers are carriers both 'for hire' and 'not for hire' that do not hold themselves out to the public.

Additionally, 14 CFR 135 and 298 regulate safety for on-demand air charters for smaller aircraft, 14 CFR 212 regulates safety for air charters for larger aircraft and 14 CFR 380 regulates safety for public air charters for both small and large aircraft.

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

In order for a US air carrier to obtain an operating licence, the carrier must obtain safety authority from the FAA (see question 2) and economic authority from the DOT (see question 9 regarding foreign air carriers).

To obtain economic authority, the US air carrier must file an application with the DOT (14 CFR 204). The DOT then conducts the following three-part test to determine if the carrier is fit, willing, and able to conduct operations:

- it examines the managerial competence of the applicant to ensure the applicant has sufficient experience to conduct operations;
- it examines the applicant's operating and financial plans to ensure the applicant understands the cost of starting the operation and that the applicant has access to the necessary capital; and
- it examines the applicant's safety history to ensure it would not pose a risk to the travelling public.

Additionally, the applicant must provide third-party verification that it possesses enough capital to cover pre-operating costs and operating costs for three months of operations (14 CFR 204) and must prove it is owned by and under the actual control of a US citizen (14 CFR 204.2(c) and 49 USC 40102(a)(15)).

Once the DOT determines that the application is complete and there are no issues, the DOT issues a show-cause order that tentatively finds the applicant fit for operation and proposes issuing a certificate of authority. The DOT then publishes a summary of the order and interested persons may object. If no objections are made, or if the DOT nevertheless finds the applicant fit for operation, the DOT issues a final order.

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

The financial fitness information that a US air carrier must submit to the DOT in order to obtain economic authority for an air carrier operating certificate is provided by 14 CFR 204 (see question 4).

This regulation also establishes the requirements for ownership of US air carriers, as the carrier must be owned by and be under the actual control of a US citizen: 14 CFR 204.2(c) and 49 USC 40102(a)(15) define US citizenship. For US citizens to be in 'actual control,' a foreign individual or entity may own no more than 25 per cent of voting stock, and no more than 49 per cent of total equity (ie, stock and debt) (14 CFR 204(k)). Notably, the US and EU entered into an agreement in 2007 that states that an EU national's ownership of 50 per cent or more of a US air carrier does not automatically constitute actual control of the carrier. Rather, actual control is determined on a case-by-case basis. See question 9 regarding foreign carriers.

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

Air carriers with valid operating certificates, who are conducting domestic or flag operations, are subject to the provisions of 14 CFR 121. Under 14 CFR 121, the carrier must show that it can 'conduct satisfactorily scheduled operations between each regular, provisional and refuelling airport' over its proposed route, and that the proposed route has adequate airport facilities and services (14 CFR 121.97–121.107).

The right to operate a particular international route is governed by bilateral or multilateral agreements whereby the DOT issues authority to carriers in competitive proceedings and with presidential approval.

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

The procedures for hearing or deciding contested applications for licences or other rights to operate particular routes are set forth in 14 CFR 302 sub-part B. Typically, air carrier certificate and permit applications are decided on the basis of the written submissions. However, the designated DOT decision maker (as defined in 14 CFR 302.2), on petition or on his or her own initiative, may determine that an oral presentation or an administrative law judge's (ALJ) decision is required (14 CFR 302.307). If an ALJ decision is required, the ALJ will preside over an oral evidentiary hearing and issue a recommendation to the DOT decision maker, who may accept or reject the ALJ's recommendation (14 CFR 302.216).

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

The enactment of the Airline Deregulation Act of 1978 transformed the once heavily regulated air transportation industry into an industry that promotes competition. Nevertheless, in order to promote fair competition, air carriers are subject to federal and state statutes that regulate behaviour. The primary federal statutes are the Sherman Antitrust Act (15 USC sections 1–7) and the Clayton Act (15 USC sections 12–27 and 29 USC sections 52–53). Sector-specific laws via the Transportation Code (49 USC 40101–50105) and the Airline Deregulation Act also apply to air carriers. Specifically, the DOT is authorised to investigate and determine the fairness of proposed transactions pursuant to 49 USC 41712.

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

For economic authority, a foreign air carrier must file an application with the DOT to obtain a foreign air carrier permit (49 USC 41301 et seq) or an exemption (49 USC 40109). Procedures for filing the application for a permit or exemption are provided in 14 CFR 211 and 302. Not only must the application contain information regarding the applicant's ownership, managerial competence, financial fitness, operating plan and legal compliance, which is required of US air carriers, but it must also contain evidence that the applicant is covered by a bilateral agreement between the US and the applicant's homeland government, or that sufficient reciprocity or comity exists to grant the requested authority (14 CFR 211). A copy of the application must be provided to US air carriers authorised to serve the applicant's homeland.

The DOT contacts the FAA to assess the air carrier's likelihood of obtaining safety authority and the ability of the air carrier's country to adhere to international aviation safety standards. The DOT publishes a notice of the application for interested parties to comment. If no objections are made, or if the DOT nevertheless finds that granting the permit or exemption will serve the public interest, the DOT then grants the permit or exemption.

For safety authority, a foreign air carrier must file an application with the FAA to obtain operation specifications (14 CFR 129).

Procedures for applicants from EU member states, Iceland and Norway are abbreviated as a result of the US-EU Joint Committee adopting procedures for the reciprocal recognition of regulatory determinations with regard to airline fitness and citizenship. For example, EU air carriers who are licensed by their homelands to serve the US are relieved from complying with the requirements of 14 CFR 211 and need only provide the information contained in the US-EU Reciprocal Recognition Procedures.

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

Prior to 1979, air carriers were required to provide daily round-trip travel to remote destinations. The passage of the Airline Deregulation Act in 1978 gave air carriers the freedom to choose markets and routes. To ensure that smaller communities would continue to be served, Congress added section 419 to the Federal Aviation Act, which established the Essential Air Service (EAS) programme. The EAS is currently run by the DOT in accordance with the guidelines set out in 49 USC 41732 and 14 CFR 398. The DOT determines the minimum level of service required for eligible communities and subsidises air carrier service to those communities under two-year contracts. Typically, the minimum level of service includes two daily round trips, six days a week with not more than one stop on each flight; reasonable flight times and prices; aircraft with at least 15 passenger seats; aircraft with at least two engines and pilots; and service must be provided by pressurised aircraft. The DOT considers, among other things, the reliability of the applicant, the contractual, marketing and interline arrangements the applicant has with a larger carrier and the preferences of actual and potential users of air transportation at the eligible community.

Despite the foregoing, Congress and the DOT have worked to limit the scope of the programme by adopting enhanced eligibility requirements. In 2012, the Federal Aviation Modernization and Reform Act added a required number of daily enplanements and capped the number of communities that are eligible to participate.

## **11 Are charter services specially regulated?**

A charter service must obtain an air carrier certificate or an exemption (14 CFR 119 and 298). Once the charter service has obtained a certificate, 14 CFR 135 and 298 regulate on-demand air charters for smaller aircraft, 14 CFR 212 regulates air charters for larger aircraft and 14 CFR 380 regulates public air charters for both small and large aircraft.

Additionally, to the extent required by public interest, 49 USC 41104 permits the DOT to restrict the 'marketability, flexibility, accessibility or variety of charter air transportation'. A charter service is also prohibited from providing regularly scheduled transportation in aircraft designed to seat more than nine passengers, unless such transportation is to and from airports with 14 CFR 139 operating certificates (49 USC 41104).

## **12 Are airfares regulated, and if so, how?**

Prior to 1979, the federal Civil Aeronautics Board regulated the price of airfares for interstate domestic air transport. The passage of the Airline Deregulation Act in 1978 stripped the government's control over these airfares and other aircraft operations, including routes and schedules.

Foreign airfares are somewhat regulated by 49 USC chapter 415 and 14 CFR 302. Chapter 415 requires air carriers involved in foreign air transportation to establish rates that are reasonable and to file tariffs with the DOT, which state the price of transportation. A fare cannot be deemed unreasonable for being too low or too high if the fare is neither 5 per cent higher nor 50 per cent lower than the 'standard foreign fare level' defined in 49 USC 41509(e).

The requirements for filing a petition or complaint to initiate proceedings to determine the lawfulness of rates, fares or charges for foreign air transportation is provided by 14 CFR 302.

## **13 Are there any rules regulating the operation of unmanned aircraft systems (drones)?**

Recreational use of unmanned aircraft systems (UAS) is governed by Public Law 112-95, section 336, Special Rule for Model Aircraft, which states the following:

- the UAS need only be registered if over 55lb;
- a remote pilot is not required;
- the UAS must be operated at least five miles from airports, or air traffic control must be notified before a UAS flies within five miles of an airport;
- the UAS must follow Community safety guidelines; and
- the UAS must always yield to manned aircraft.

Commercial use of UAS has largely been prohibited in the past as the FAA has considered UAS to be 'aircraft' subject to FAA and DOT regulations, including registration and certification requirements. Commercial use has been permitted, however, on a case-by-case basis where the operator obtained an exemption, certificate of waiver or authorisation, or special airworthiness certificate. The FAA has recently finalised 14 CFR 107, a regulation that will now permit the use of commercial UAS subject to certain limitations (see Update and trends).

## Aircraft

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

Regulation 14 CFR 47 provides that an aircraft is eligible for registration if it is not registered in another country and it is owned by either:

- an individual who is a US citizen or permanent resident of the US;
- a partnership, provided each member thereof is a US citizen;
- a corporation or association that is organised under the laws of the US and which is comprised of a president who is a US citizen, at least two-thirds of the board of directors and other managing officers are US citizens and at least 75 per cent of the voting interest is owned or controlled by US citizens;
- a non-US citizen corporation that is organised under the laws of the US, where the aircraft is based and primarily used in the US;
- a non-US citizen corporation that has an established voting trust; or
- a US government unit or subdivision.

An aircraft may only be registered in the name of the owner. Thus, foreign citizens, limited partnerships and other entities that cannot register an aircraft in their own name often form trusts. The trustee (a US citizen or resident alien) owns the aircraft on behalf of the individual or entity (the beneficiary), but the beneficiary owns a beneficial interest in the trust and may dissolve the trust in accordance with the terms of the trust agreement.

Aircraft registrations must be renewed every three years.

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

The FAA is responsible for establishing and maintaining a system for recording conveyances that affect title to, or interest in, an aircraft and specific types of engines, propellers and spare parts. The rules for the registry are set forth in 14 CFR 47 and 49 and 49 USC chapter 441.

Additionally, the US has ratified the International Registry of Mobile Assets pursuant to the Cape Town Convention and related Protocol on Aircraft Equipment, which provides for the registration of 'international interests'. The process for registering and specifying which items may be registered are provided in 14 CFR 49. Failure to record conveyances with both the FAA and the International Registry may result in a party's loss of the aircraft, as the party's rights are not perfected and priority is not established.

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

The right to seize an aircraft is subject to state law and depends on the type of debt, the priority of any lien and whether the lien has been perfected (ie, proper procedures have been filed). Generally, when an aircraft owner or operator has unpaid debts, a creditor may seek to obtain an enforceable court judgment and to foreclose upon a lien and seize the aircraft when the operator defaults. However, if the debtor has already filed for bankruptcy, the rights of a creditor are limited by applicable federal bankruptcy laws.

Additionally, where an aircraft is subject to a lien as a result of unpaid civil penalties, the aircraft may be seized by the federal government pursuant to 49 USC 46304.

### 17 Do specific rules regulate the maintenance of aircraft?

The maintenance, preventive maintenance, rebuilding and alteration of aircraft is governed by 14 CFR 43, which also governs who may perform maintenance on the aircraft, as well as who may authorise the aircraft's return to service and the circumstances under which the aircraft can be returned to service.

## Airports

### 18 Who owns the airports?

Airports in the US may be publicly or privately owned (49 USC 47102). While most airports serving commercial operators are owned by public entities (ie, municipalities or states), there are small general aviation airports that are privately owned. A privately owned airport must be a 'public-use airport', in that the airport must be used or intended to be used for public purposes, and it must be either a 'reliever airport' or a 'commercial service' airport (49 USC 47102).

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

Regulation 14 CFR 139 requires airport operators to obtain an airport operating certificate if the airport serves scheduled passenger aircraft with more than nine passenger seats and unscheduled passenger aircraft with more than 30 passenger seats.

Typically, an airport operator first contacts a local FAA representative who, in turn, requests information about the airport and the air carrier operations to determine if an airport operating certificate is necessary. If it is, the airport operator then submits an application for certification and guidance materials, including two copies of a proposed airport certification manual. If the application and other required materials meet the requirements in 14 CFR 139, the FAA issues an airport operating certificate.

Additionally, airports may be subject to certain state or other local municipal regulations.

### 20 Is there a system of economic regulation of airports, and, if so, how does it function?

State and local governments are permitted to levy or collect 'reasonable rental charges, landing fees and other service charges from aircraft operators using airport facilities owned or operated by the state' (49 USC 40116). The DOT is charged with determining whether the fees imposed upon air carriers are reasonable (49 USC 47129).

Additionally, revenue generated by public airports that receive federal funding must be used for capital and operating costs of the airport or other local facilities that are owned or operated by the airport owner or operator and directly related to the air transportation (49 USC 47107 and 47133).

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

Because of finite capacity, access to airports may be restricted to reduce congestion and delay and to ensure the safety of all aircraft and passengers.

One method of restricting access to airports is the use of airport slots or specific time periods allotted for aircraft to take-off and land at an airport (49 USC 41714). Another method is establishing perimeter rules, which provide the maximum permissible distance for non-stop flights into and out of certain airports, including New York's LaGuardia Airport and Washington's Reagan National Airport. The DOT has recently relaxed perimeter rules by granting exemptions and allowing certain restrictions to expire at certain airports.

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

The FAA implemented a 'high density rule', limiting the number of arrivals and departures that are permitted at certain congested airports, including New York's LaGuardia Airport and John F Kennedy International Airport, New Jersey's Newark Liberty International Airport, Washington's Reagan National Airport and Chicago's O'Hare International Airport. The number of available slots are allocated based upon an airport's operating capacity. The number of take-offs and landings that are available at the congested airports is provided by 14 CFR 93.

Slots may be bought, sold or leased by air carriers currently holding the slot, or, in the case of lapsed or newly available slots, distributed by the FAA. The FAA also may revoke an air carrier's right to a slot, and may recall or redistribute a slot that is not used at least 80 per cent of the time in a fixed time period (eg, a two-month reporting period at Washington's Reagan National Airport).



### 23 Are there any laws or rules specifically relating to ground handling?

Regulations 49 USC 40103 and 47107 prohibit service providers, including ground handling companies, from having an exclusive right to use airports that are funded by the federal government. However, the mere fact that only one enterprise is providing services at an airport would not violate the exclusive rights prohibition 'if it is unreasonably costly, burdensome or impractical' for more than one service provider to provide the services, and if allowing more than one service provider would require 'a reduction in space leased' under the agreement between the service provider and the airport (49 USC 40103 and 47107).

Regulation 49 USC 47107 also establishes, among other things, that service providers at the same airport can only be subject to the same charges and an air carrier using an airport is permitted to either service itself or use an airport-approved service provider (49 USC 47107).

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

The Air Traffic Organization of the FAA manages aircraft operations across the US and is comprised of service units that, among other things, monitor safety, observe weather patterns and train workforce. With respect to air traffic controllers, they are employed by the FAA and must undergo an FAA-approved training programme. The eligibility requirements for being an air traffic control operator are defined by 14 CFR 65, which also establishes certification requirements and operating rules and provides that all air traffic control operators act in accordance with applicable FAA air traffic control manuals. The standards that must be met for an airport to qualify for an air traffic control tower are established by 14 CFR 170.

## Liability and accidents

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

The US is a signatory of the Montreal Convention, the Warsaw Convention and the Warsaw Convention as amended by the Montreal Protocol No. 4 and the Hague Protocol. These treaties exclusively govern the rights and liabilities of passengers and carriers in international air transportation.

To the extent that the Conventions do not apply, the rights and liabilities of passengers and carriers are governed by common tort laws of the relevant jurisdiction and certain federal laws.

Courts in the US have held that common carriers owe passengers the highest degree of care, not simply the ordinary negligence duty of reasonable care. Additionally, while states have recently enacted laws that attempt to impose liability on passive owners and lessors of aircraft (ie, owners and lessors who are not actually operating the aircraft), these parties have historically been insulated from exposure to liability by federal law, contractual provisions and common law tort principles, which impose liability on the operator of the aircraft.

The US may be liable to passengers for injury or loss of property pursuant to the Federal Tort Claims Act, where the injury or loss of property was caused by the negligence or other wrongful act of an employee of the federal government who was acting within the scope of his or her employment (28 USC 1346).

Regulation 14 CFR 254 provides that air carriers may not limit liability for lost, damaged or delayed baggage to less than US\$3,500 for each passenger (14 CFR 254.4).

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

Liability of aircraft operators for surface damage is governed by either strict liability or common law negligence principles, depending on applicable state law.

The US is not a party to the Rome Convention of 1952, the Convention on Compensation for Damage Caused by Aircraft to Third Parties, or the Convention on Compensation for Damage to Third Parties Resulting from Acts of Unlawful Interference Involving Aircraft, all of which address compensation for damage caused to third parties by aircraft.

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

Pursuant to 49 USC sections 1131-1139 and 49 CFR 831 and 845, the NTSB conducts independent investigations into all major transportation accidents in the US, including civil aircraft accidents, that do not involve criminal conduct. Investigations into transportation accidents involving criminal conduct are passed to the Federal Bureau of Investigation and the Department of Justice (DOJ).

The purpose of an NTSB investigation is to determine what caused an accident so that the necessary steps can be taken to guard against a similar accident in the future. Typically, when an accident occurs, an NTSB team is dispatched to the accident site to conduct a field investigation and gather evidence. The NTSB investigators may rely upon third parties with specialised knowledge or expertise to assist with the investigation. Upon completion of the on-site investigation, the NTSB prepares a report of factual findings and the report is placed on the public docket for comment at one or more public hearings. Thereafter, the NTSB prepares a final accident report containing a list of factual findings, an analysis of those findings, a determination of the probable cause of the accident and recommendations to prevent a similar accident from occurring in the future.

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

The reporting of aircraft accidents and serious incidents is made directly to the NTSB, pursuant to 14 CFR 830. The aircraft operator also must, to the extent possible, preserve any wreckage, including records relating to the operation and maintenance of the aircraft, for use by the NTSB (14 CFR 830.10). In addition, the aircraft operator must file a report with the NTSB within 10 days of the accident and attach statements from crew members who were involved (14 CFR 830.15).

In an effort to improve safety, the FAA also maintains an Aviation Safety Reporting System that allows pilots and other crew members to voluntarily and confidentially report near misses and close calls.

## Competition law

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

Both general and sector-specific competition rules apply to aviation. The general competition rules that apply to aviation include the Sherman Act (15 USC sections 1-7) and the Clayton Act (15 USC sections 12-27 and 29 USC sections 52-53). The sector-specific competition rules that apply to aviation are codified in the Transportation Code (49 USC 40101-50105).

The Sherman Act renders the following illegal:

- all contracts, combinations and conspiracies that unreasonably restrain trade in the relevant market; and
- all monopolies, attempts to monopolise or conspiracies to monopolise the relevant market (15 USC sections 1 and 2).

The Clayton Act strengthens the Sherman Act by prohibiting mergers and acquisitions (agreements that are not specifically addressed under the Sherman Act) where the effect of such agreements may be to substantially lessen competition or create a monopoly (15 USC section 18). The DOT is permitted, under 49 USC 41712, if in the public interest, to investigate and decide if an air carrier is using unfair methods of competition or unfair or deceptive acts in air transportation or the sale of air transportation. Regulation 49 USC 41720 requires US carriers to submit joint venture agreements to the DOT for competition assessment. Additionally, 49 USC 41308 and 41309 allow the DOT to grant antitrust immunity to air carriers entering into agreements if the DOT determines that the agreements are in the public interest.

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

The DOJ and DOT are the primary regulators of competition in the aviation industry. Air carriers are exempt from the jurisdiction of the Federal Trade Commission (FTC) (15 USC sections 45-46) and from the enforcement of state antitrust laws (49 USC 41713).

The DOJ Antitrust Division is responsible for enforcing federal antitrust laws, including the Sherman Act and the Clayton Act, and reviewing mergers, acquisitions, joint ventures and other agreements

to determine whether they negatively impact the relevant market by reducing competition. The DOT has the authority to evaluate whether an air carrier has 'engaged in an unfair or deceptive practice or an unfair method of competition (49 USC 41712)', approve and immunise air transportation agreements from US antitrust laws (49 USC 41308 and 41309), and oversee joint venture agreements (49 USC 41720).

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

The 'relevant market' is defined by examining the relevant product market (eg, scheduled passenger or cargo transportation) and relevant geographic market (eg, routes or city-pairs where the companies involved compete) to assess whether the agreement will reduce competition, and whether consumers can readily find a suitable alternative.

Horizontal Merger Guidelines, developed by the DOJ and FTC, explain how a competition assessment is conducted.

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

The main standards for assessing the competitive effect of a transaction vary depending on the law or regulation being enforced (see question 29).

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

The DOJ maintains authority to enforce antitrust laws in the US. The DOJ may seek civil penalties under both the Clayton Act (15 USC sections 21 and 26) and Sherman Act (15 USC sections 1-3), but may seek criminal penalties only under the Sherman Act (15 USC section 103). The DOJ only seeks criminal penalties under the Sherman Act for the most serious violations, including price fixing, bid rigging and market allocation, and fines can be as high as US\$100 million for corporations and US\$1 million for individuals (15 USC sections 1-3 and 18 USC section 3571). The DOJ is solely responsible for prosecuting violations of the Sherman Act.

In addition to the DOJ, the DOT, state attorneys general and private individuals and businesses may seek remedies for violations of antitrust laws. Specifically, the DOT may investigate and decide whether an air carrier has engaged in an unfair method of competition, or used an unfair or deceptive practice, and after notice and a hearing, may stop the practice or method (49 USC 41712). State attorneys general may bring suits to enforce state antitrust laws, as well as suits to enforce federal antitrust laws on behalf of the state as a purchaser or on behalf of individuals residing within their states. Private individuals and business may bring suits to enforce certain federal and state antitrust laws (15 USC section 15).

**Financial support and state aid**

**34 Are there sector-specific rules regulating direct or indirect financial support to companies by the government or government-controlled agencies or companies (state aid) in the aviation sector? If not, do general state aid rules apply?**

The federal government does not provide direct financial assistance to air carriers, but is permitted to provide subsidies under certain circumstances. For example, the federal government subsidises air carriers under the EAS programme to ensure that smaller communities continue to be served (see question 10). Additionally, the DOT has authority to exempt air carriers from certain economic regulations when the exemption is consistent with public interest and to provide air carriers with war-risk insurance.

The US does not offer a general state aid programme like that of the EU under the TFEU.

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

As the US does not offer a general state aid programme like that of the EU, the principles behind the subsidies, economic regulation exemptions and war-risk insurance differ from programme to programme.

See question 10 regarding the principles behind the EAS programme.

The DOT may, to the extent necessary, exempt air carriers from certain economic regulations (eg, 49 USC chapters 411, 413 and 415) when the DOT decides that the exemption is consistent with public interest (49 USC 40109).

The DOT provides non-premium insurance through an FAA insurance programme, which was designed to address insufficient insurance options in the commercial market. In order to receive non-premium insurance, the US government must agree to indemnify the carrier against all losses covered by the insurance. Additionally, the president must determine that the continued operation of the aircraft is necessary in the interest of air commerce or national security, or to carry out the foreign policy of the US. The FAA is not currently accepting new applications for premium insurance, as the programme has expired and such insurance is available in the commercial market.

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

There are no exemptions from state aid rules. Whether an air carrier will receive a subsidy or insurance, or will be exempt from economic regulations, depends on whether the air carrier satisfies the requirements set forth in the applicable regulations (see question 35).

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

Clearance is not required before state aid may be granted. See question 35.

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

Not applicable.

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

Not applicable.

**Miscellaneous**

**40 Is there any aviation-specific passenger protection legislation?**

Regulation 14 CFR 250 establishes the rights of passengers for denied boarding in the event of an oversold flight. Before the carrier begins to deny boarding passengers, the carrier must request volunteers to give up their seats in exchange for compensation from the carrier (14 CFR 250.2b). The carrier may determine the amount of compensation, but must inform the passengers of material restrictions and blackout dates if the carrier offers free or reduced transportation (14 CFR 250.2b). The carrier must also inform the passenger if he or she is in danger of being involuntarily denied boarding and, if so, the compensation the carrier is obliged to pay the passenger for involuntarily denied boarding (14 CFR 250.2b). If there are not enough volunteers, the carrier may deny boarding to passengers in accordance with the carrier's boarding priority rules (14 CFR 250.3). Boarding priority factors may include, but are not limited to, when the passenger checked-in, the fare the passenger paid, the passenger's frequent-flyer status, whether the passenger has a seat assignment and a passenger's disability (14 CFR 250.3). The amount of compensation for involuntarily denied boarding is set forth in 14 CFR 250.5. The air carrier must notify the DOT of all passengers who were involuntarily denied boarding.

The rights of passengers with respect to late arrivals and departures of flights is established by 14 CFR 259. Air carriers must establish a customer service plan that discusses certain air carrier obligations, including but not limited to, disclosure of the lowest fare offered by the carrier, the right to cancel a reservation within 24 hours if it is made one week or more prior to the flight's departure, ticket refunds and notification to consumers of delays, cancellations and diversions (14 CFR 259.5). Regulation 14 CFR 259 also provides that a carrier must have a contingency plan for lengthy tarmac delays and may not remain on the tarmac without disembarking passengers for more than three hours for domestic flights or more than four hours for international flights, except for circumstances involving safety and air traffic control requests (14 CFR 259.4). The air carrier must provide adequate food and potable water no later than two hours after the aircraft leaves the gate or touches down (14 CFR 259.4).

**Update and trends**

The FAA and the federal government have been working to integrate UAS into the US airspace system. The long-awaited rule governing the commercial use of UAS weighing 55lb or less, 14 CFR 107, became effective in August 2016.

Prior to 14 CFR 107, the FAA permitted non-recreational use of UAS through limited mechanisms, including exemptions, special airworthiness certificates and certificates of waiver or authorisation. For example, under section 333 of the FAA Modernization and Reform Act of 2012 (Public Law No. 112/95), exemptions could be obtained to operate UAS for non-recreational purposes where the operation posed the least amount of public risk and no threat to national security.

Regulation 14 CFR 107 will now allow the routine civil operation of UAS for non-recreational purposes, subject to certain limitations.

This regulation requires, among other things, the following:

- that the UAS weigh less than 55lb;

- that the UAS adhere to confined areas of operation and visual line-of-sight operations;
- the operator of a UAS must hold a ‘remote pilot’ airman certificate;
- the UAS must fly under 400 feet, during the day, at or below 100mph, not fly over people or from a moving vehicle;
- that the UAS yield to manned aircraft; and
- accidents resulting in serious injury or damage to property be reported within 10 days of their occurrence.

Operators holding an exemption under section 333 prior to the execution of 14 CFR 107 will not need to immediately comply with the new regulation. Rather, the operators may continue operating under the terms and conditions of their current exemption until expiry, at which point the FAA will consider whether renewal under section 333 is necessary.

Regulation 49 USC 41705 provides that an air carrier may not discriminate against passengers with disabilities.

The DOT may impose civil penalties against air carriers who do not comply with the aforementioned rules (49 USC chapters 461 and 463). Additionally, 49 USC 41712 protects consumers by allowing the DOT to investigate and decide whether an air carrier ‘is engaged in an unfair or deceptive practice or an unfair method of competition (see questions 29 and 30)’.

**41 Are there mandatory insurance requirements for the operators of aircraft?**

Pursuant to 14 CFR 205, US and foreign direct air carriers, including commuter air carriers but excluding air taxi operators, must obtain the following accident liability insurance to operate in interstate or foreign air transportation: third-party aircraft accident liability coverage of at least US\$300,000 for bodily injury to, or death of, persons and for damage to property, with at least US\$20 million per involved aircraft for each occurrence. An exception to this requirement exists with respect to aircraft containing 60 or fewer seats or aircraft with a maximum payload of 18,000lb or less, as these aircraft need only maintain coverage of US\$2 million per involved aircraft for each occurrence (14 CFR 205.5). Additionally, carriers providing passenger transportation must obtain accident liability insurance for bodily injury to, or death of, aircraft passengers of at least US\$300,000 for any one

passenger and US\$300,000 times 75 per cent of the number of aircraft passenger seats, for involved aircraft in each occurrence (14 CFR 205.5).

**42 What legal requirements are there with regard to aviation security?**

As part of the Department of Homeland Security, the TSA provides airport security in the form of screening passengers, baggage and cargo and the CBP works to secure US borders and assist the TSA with screening travellers.

Regulation 49 USC chapter 449 sets forth rules for ensuring aviation security, including but not limited to, screening passengers and property (49 USC 44901), agreements on aircraft sabotage, aircraft hijacking and airport security (49 USC 44910) and explosive detection (49 USC 44913).

**43 What serious crimes exist with regard to aviation?**

Regulation 49 USC chapters 463 and 465 list various aviation-specific crimes for passengers that are either felonies or misdemeanours, including carrying a weapon (49 USC 46303), violations of national defence airspace (49 USC 46307), interference with air navigation (49 USC 46308), aircraft piracy (49 USC 46502), interference with security screening personnel (49 USC 46503) and interference with flight crew members and attendants (49 USC 46504).



**Bartholomew J Banino**  
**Nicole M Smith**

**bbanino@condonlaw.com**  
**nsmith@condonlaw.com**

7 Times Square  
New York  
NY 10036  
USA

Tel: +1 212 490 9100  
Fax: +1 212 370 4453  
www.condonlaw.com