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The International Comparative Legal Guide to:

## Aviation Law 2018

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**Group Consulting Editor**

Alan Falach

**Publisher**

Rory Smith

**Published by**

Global Legal Group Ltd.  
59 Tanner Street  
London SE1 3PL, UK  
Tel: +44 20 7367 0720  
Fax: +44 20 7407 5255  
Email: info@glgroup.co.uk  
URL: www.glgroup.co.uk

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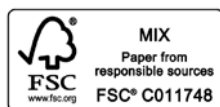
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# Spain



Alfonso López-Ibor Aliño



Pablo Stöger Pérez

Ventura Garcés & López-Ibor Abogados

## 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 civil aviation regulatory bodies in Spain are the Directorate General of Civil Aviation, an agency of the Ministry of Development, and the Spanish Air Safety Agency (“*Agencia Estatal de Seguridad Aérea* – AESA”), created by Royal Decree No. 184/2008, of 8 February 2008, which also depends on the Ministry of Development. The Directorate General of Civil Aviation deals with strategic and political issues related to aviation, and AESA is in charge of licensing, operations, airworthiness and operator certificates, and it is the entity in which sanctioning powers are vested.

Article 149.20 of the Spanish Constitution states that all matters relating to airports, general interest, control of, and circulation through, the airspace, air transportation, meteorological services and aircraft registration are under the authority of the central state (Spain being organised as follows: central state; autonomous communities; provinces; and municipalities). Apart from the constitutional rules, the basic civil aviation rules are:

- the Air Navigation Act 1960 (Act No. 48/1960 of 21 July 1960);
- the Aviation Safety Act 2003 (Act No. 21/2003 of 7 July 2003);
- the Air Navigation Penal and Procedural Act 1964 (Act No. 209/1964 of 24 December 1964);
- the Chicago Convention 1944 (ratified in 1969);
- the Warsaw Convention 1929 (ratified in 1930);
- the Geneva Convention 1949 (ratified in 1952);
- the Hague Protocol 1955 (ratified in 1965);
- the Montreal Protocol Nos. 1, 2 and 4 (all three ratified in 1984);
- the Rome Convention 1952 (ratified in 1957);
- the Tokyo Convention 1963 (ratified in 1969);
- the Hague Convention 1970 (ratified in 1972);
- the Montreal Convention and Protocol 1971 (ratified in 1974 and in 1992 respectively);
- the Montreal Convention 1999 (ratified in 2004);
- the Cape Town Convention 2001 (ratified in 2013);
- the Aircraft Protocol (ratified in 2016);
- European Union regulations; and
- several domestic rulings.

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

An application, accompanied by the necessary documents, has to be filed with the Directorate General of Civil Aviation, under the Ministry of Development, pursuant to the Ministerial Order of 12 March 1998 on the granting and maintenance of operating licences to carriers. The Directorate analyses and evaluates the application and its attachments. It is required to make a decision within three months of the date of the application. This decision is a formal administrative decision.

If there is no decision from the Directorate within three months from the date of application, this will mean that the application has been denied. The applicant can then apply for remedies as provided by the law, namely to take the matter to the administrative courts that are part of the Spanish judiciary. In the event that the application is expressly denied, the same remedies are available for the reversal of the decision, including the possibility of asking the European Commission to review the case.

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

Air transport is regulated by several rules. These include European Union and domestic rules. The key EU rules include:

- Regulation (EEC) No. 3922/1991 of 16 December 1991;
- Regulation (EC) No. 216/2008 of 20 February 2008;
- Regulation (EC) No. 69/2014 of 27 January 2014;
- Regulation (EC) No. 748/2012 of 3 August 2012;
- Regulation (EC) No. 965/2012 of 5 October 2012;
- Regulation (EC) No. 1321/2014 of 26 November 2014;
- Regulation (EC) No. 1178/2011 of 3 November 2011;
- Regulation (EC) No. 70/2014 of 27 January 2014;
- Regulation (EU) No. 2015/640 of 23 April 2015;
- Regulation (EU) No. 452/2014 of 29 April 2014;
- Regulation (EU) No. 391/2013 of 3 May 2013;
- Regulation (EU) No. 2016/1377 of 4 August 2016;
- Regulation (EC) No. 1033/2006 of 4 July 2006;
- Regulation (EU) No. 2015/340 of 20 February 2015;
- Regulation (EU) No. 1332/2011 of 16 December 2011;
- Regulation (EU) No. 923/2012 of 26 September 2012;
- Regulation (EC) No. 300/2008 of 11 March 2008;

- Regulation (EC) No. 272/2009 of 2 April 2009;
- Regulation (EU) No. 2015/1998 of 5 November 2015; and
- Regulation (EC) No. 1079/2012 of 16 November 2012.

The domestic rules include:

- Air Navigation Act No. 48 of 21 July 1960;
- Royal Decree No. 57/2002 of 18 January 2002, which enforced the Rules on Air Navigation and the Air Safety Act No. 21 of 7 July 2003;
- Royal Decree No. 547/2006 of 5 May 2006, concerning third-country aircraft utilising Spanish airports;
- Royal Decree No. 550/2006 of 5 May 2006, regarding the National Programme for the Safety of Civil Aviation and the National Committee of Civil Aviation Safety;
- Royal Decree No. 184/2008 of 8 October 2008, approving the legal statute of the Spanish Air Safety Agency (AESA);
- Royal Decree-Law No. 13/2010 of 3 December 2010, approving performances in tax, labour and liberalisation matters in order to promote investment and job creation;
- Spanish Law No. 1/2011 of 4 March 2011, which established the State Safety Operational Programme for Civil Aviation and amended Spanish Law No. 21/2003 of 7 July 2003, on Aviation Safety;
- Royal Decree-Law No. 11/2011 of 26 August 2011, which created the Airport Economic Regulation Commission (“*Comisión de Regulación Económica Aeroportuaria*”);
- Spanish Law No. 2/2012 of 29 June 2012, approving the State Budget Law, which established an increase in Spanish airport charges (in force until 1 January 2016);
- Resolution of 16 July 2012 of the General Secretariat of Transport, which approved the National Safety Programme for Civil Aviation (“*Programa Nacional de Seguridad para la Aviación Civil – (PNS)*”); and
- Ministerial Order of 12 March 1998 on the granting and maintenance of operating licences to carriers.

The Ministry of Development, through the Spanish Air Safety Agency (“*Agencia Estatal de Seguridad Aérea – (AESA)*”), is the Government department which governs air safety.

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

No, the same domestic rules as mentioned above regulate all air operations, irrespective of their nature, with the exception of military carriers.

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

No, they are not.

#### 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.

A distinction is made between air transport services within the European Union and those covering the rest of the world.

Air transport services within the European Union are regulated in accordance with the packages of 1987, 1989 and 1992, complemented by the rules regarding the allocation of slots. As far as domestic legislation is concerned, air transport services are

regulated in accordance with the Ministerial Orders of 27 November 1997 and 12 March 1998.

Air transport services covering the rest of the world are subject to bilateral agreements. Spain has recently ratified the “open skies” treaty with the US.

In relation to airport charges such as landing fees, parking fees, handling fees, etc., they have undergone an increase, set forth in the Spanish State Budget Act for 2012, and they apply to all carriers using Spanish airports.

#### 1.7 Are airports state or privately owned?

Almost all 54 Spanish airports are State-owned and operated by a State-owned corporation named “Aena SME, S.A.”, formerly named “Aena Aeropuertos, S.A.” and thereafter “Aena, S.A.”, except the airport of Murcia-Corvera (under construction), the airport of Ciudad Real, the airport of Castellón, the airport of Lérida-Alguaire, the airport of Teruel and the airport of Andorra-La Seu.

There are many private aerodromes. They are mainly devoted to activities such as general aviation, firefighting, flying schools, etc.

The following airports are operated by Aena SME, S.A.: A Coruña; Adolfo Suárez Madrid-Barajas; Albacete; Algecira; Alicante-Elche; Almería; Asturias; Badajoz; Barcelona-El Prat; Bilbao; Burgos; Ceuta; Córdoba; El Hierro; Fuerteventura; Girona-Costa Brava; Gran Canaria; Granada-Jaén F.G.L.; Huesca-Pirineos; Ibiza; Jerez; La Gomera; La Palma; Lanzarote; León; Logroño-Agoncillo; Madrid-Cuatro Vientos; Málaga-Costa del Sol; Melilla; Menorca; Murcia-San Javier; Palma de Mallorca; Pamplona; Reus; Sabadell; Salamanca; San Sebastián; Santiago; Seve Ballesteros-Santander; Sevilla; Son Bonet; Tenerife Norte; Tenerife Sur; Valencia; Valladolid; Vigo; Vitoria; and Zaragoza.

Royal Decree-Law No. 13/2010, of 3 December 2010, created the company “Aena Aeropuertos, S.A.” (today, “Aena SME, S.A.”) which took over the management of airports which were previously managed by the public entity AENA. The intention of this is the gradual privatisation of Aena Aeropuertos, S.A.

Royal Decree-Law No. 8/2014, of 8 July 2014, started the privatisation process of Aena Aeropuertos, S.A., which went into the stock market in February 2015. Among the performed changes, the company “Aena Aeropuertos, S.A.” changed its name to “Aena, S.A.” and thereafter to “Aena SME, S.A.”; the name of the public entity “*Entidad Pública Empresarial Aeropuertos Españoles y Navegación Aérea (AENA)*” changed its name to “ENAIRE”; both shall maintain their legal nature and functions.

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

Yes. Spanish carriers need to have an operating licence in Spain and a valid air operator certificate (AOC). Foreign carriers need to have the same documents issued by their state of origin. Carriers which are included in the list of airlines banned within the EU (“blacklist” of dangerous airlines of the European Commission) are not allowed to operate in Spain.

#### 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 Air Navigation Act 1960 refers briefly to aviation accidents in article 134 where it is stated that the investigation of accidents shall be dealt with by the civil aviation authorities. Following ICAO’s



annex XIII, and the incorporation into domestic law of Directive 94/56/EC of 21 November 1994 and Royal Decree No. 389/1998 of 13 March 1998, the investigation procedures were updated and the duties and responsibilities of the Spanish Aviation Accident Investigation Bureau (“*Comisión de Investigación de Accidentes e Incidentes de Aviación Civil*”) defined. Later on, articles 11 *et seq.* of the Aviation Security Act No. 21/2003 of 7 July 2003 set up more appropriate rules, maintaining the bureau as a body independent from the Directorate General of Civil Aviation (although under the jurisdiction of the Ministry of Development) and emphasising that the only purpose of the investigation of accidents and incidents is to prevent future accidents and incidents, and not to apportion blame or liability.

Article 9 of Regulation (EU) No. 996/2010 of the European Parliament and of the Council of 20 October 2010 on the investigation and prevention of accidents and incidents in Civil Aviation and repealing Directive 94/56/EC, states that aviation authorities, persons responsible for facilities and services relating to air navigation, owners, operators and crew members of aircraft, and any person or entity involved with, or related to, an aviation incident or accident, must report the event to the Aviation Accident Investigation Authority of the Member State involved in the accident, which in Spain is the Spanish Aviation Accident Investigation Bureau (“*Comisión de Investigación de Accidentes e Incidentes de Aviación Civil*”), as soon as it becomes known to them. Such report is to be made using the fastest and most efficient means available.

Spain has introduced the aforesaid EU Regulation No. 996/2010 into domestic legislation by means of Royal Decree No. 632/2013 of 2 August, which regulates assistance to victims of civil aviation accidents and their relatives and amends the previous regulations on investigation of air accidents.

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

- Ciudad Real Airport: in April 2016, Ciudad Real Airport was sold to Ciudad Real International Airport, S.L. (CRIA) for a total of EUR 56.2 million as the result of the tendering process with creditors initiated in 2009. CRIA is currently waiting on the decision of the Spanish Air Safety Agency (AESA) for the granting of the requisite authorisations and licences. Meanwhile, the negotiations with the institutions and companies of both private and public sectors are under way for the provision of the airport facilities.
- New Spanish Aircraft Registry Regulations since 1 December 2015: on 1 December 2015, the new Regulations which regulate the procedures for the recordation of aircraft in the Spanish Aircraft Registry entered into force. These new regulations abolished the previous regulations, which had been in force since 1969.

## 2 Aircraft Trading, Finance and Leasing

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

No. In Spain, there are two registries: the Spanish Aircraft Registry; and the Register of Goods and Chattels.

The Spanish Aircraft Registry will register a foreign-owned aircraft leased by a Spanish operator. However, the Spanish Aircraft Registry has no jurisdiction over the recognition of ownership rights and priority interests. It may note the name of the party that

is the owner of the aircraft. This notation is purely informative; that is, it does not create a right that is opposable (effective) *vis-à-vis* third parties. In order to register the aircraft, a form needs to be completed, which can be obtained from the Spanish Aircraft Registry (“*Registro de Aeronaves*”).

As a result of Royal Decree No. 1709/1996 of 12 July 1996, an aircraft owner having the nationality of a Member State of the European Union may also register its title in the Spanish Aircraft Registry, but he/she has to appoint a representative in Spain for this purpose.

The Register of Goods and Chattels only records ownership titles and mortgages. Said Register requires prior recording of title before recording a mortgage over the aircraft.

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

Yes. See question 2.1 above (final paragraph).

In addition, the recordation of ownership title or a mortgage in the Register of Goods and Chattels may take around two to four weeks; the creation of a Spanish mortgage would require the payment of Spanish stamp duty at the rate of 0.5% (in certain regions this rate may be higher) over the amount of the secured obligation (the principal of the loan plus an amount of interest which cannot exceed the interest accruing during a period of five years).

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

Yes. Under Spanish law, unpaid airport landing and parking charges would not create a lien over the aircraft. However, the owner of an aircraft leased to a Spanish operator may be prevented by local airports from flying the aircraft away if there are outstanding airport fees and if there has been a change in the operator.

In this respect, the applicable regulations would be the statute whereby AENA, the Spanish airport authority, was created and is regulated, as described under question 4.13.

Furthermore, any commercial transaction and operation executed in Spain requires the involved individual of non-Spanish nationality to obtain a N.I.E. (Foreign Identity Number), for the consideration of security and registration.

### 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?

In Spain, the rule of accession does not apply to engines installed on-wing, as they are considered to be separate from the airframe. However, it is presumed that the mortgage over an aircraft also includes its engines unless otherwise agreed between the mortgagor and the mortgagee. The only measure the aircraft engine owner can take to mitigate this risk is to enter into an agreement with the mortgagor, confirming that it does not have legal title over the engine(s) installed on-wing.

**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?**

Sales of an aircraft are subject to VAT if they are put at the disposal of, i.e. delivered to, the buyer while in the territory of Spain (including Spanish air space and territorial waters). The sale of an aircraft will be exempted from transfer and documentary taxes, as it would be treated as a transaction carried out between two business operators. A bill of sale is not subject to Spanish stamp duty.

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

Please see question 1.1 where the main international conventions signed by Spain are listed. Spain is a member country of the Convention on Interests in Mobile Equipment made in Cape Town on 16 November 2001, by way of the accession instrument dated 20 June 2013 and published in the State Gazette on 4 October 2013. Spain's accession to the Aircraft Protocol of the Cape Town Convention was published in the State Gazette on 1 February 2016 and the Aircraft Protocol came into force on 1 March 2016.

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

They are directly applied by the Spanish courts in case of any dispute.

### 3 Litigation and Dispute Resolution

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

A creditor of the owner of the aircraft may seize the aircraft for unpaid debts except if the route operated by the aircraft is considered to be the provision of a public service. The creditor needs to apply to court, which will issue a court order seizing the aircraft. In order to release the detention, evidence of payment of the debt needs to be provided to the court, which will, in said case, issue an order to annul the seizure.

Under Spanish law, unpaid airport landing and parking charges would not create a lien over the aircraft. However, it has to be taken into account that the owner of the aircraft might be prevented by local airports from flying the aircraft away if there are outstanding airport fees and if there has been a change in the operator.

Strictly speaking, air navigation, landing and parking charges are Spanish taxes ("*tasas*" – users' fees), so their collection can be enforced through tax procedures, which include seizure of the aircraft and its sale through a public auction, but the aircraft owner may obtain the repossession of the aircraft through court action, taking into account that liability for landing and parking fees generally lies with the operator.

**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?**

Under Spanish law, the legal rights of a party can only be enforced through court action, because Spanish courts have the monopoly of coercive power. Self-help measures are less developed than would be the case under English or New York law. Moreover, Spanish law would not treat the obligations of the Lessor/Lender as absolute and unconditional, since rights and obligations must be exercised reasonably, and abuse of law is not permitted (article 7 of the Civil Code).

If the Lessor is seeking to repossess the aircraft following the occurrence of an event of default, it is required to pursue its claim through judicial proceedings. In such a case, the Lessor would have to formally declare an event of default by serving an official notice to the Lessee, and if the Lessee fails to redeliver the aircraft, the Lessor would have to start a declaratory action and at the same time apply for interim relief: the Lessor would be required to post a substantial bank guarantee with the Spanish court to indemnify any damage caused to the Lessee. In our experience, it may take three months to obtain an injunction from a Spanish court, although there is no definitive time period.

A Spanish court would base an injunction or an interim order regarding the repossession of the aircraft on two requirements: (a) the Lessor must submit to the Court a document evidencing the existence of its claim against the Lessee. In other words, it must show that it has good legal right to take action against the Lessee ("*fumus boni iuris*"); and (b) there is a risk of considerable court delay ("*periculum in mora*"): for instance, the Lessee may have dissipated all or a large part of its assets before the Lessor is able to obtain a final judgment on its claim. This risk is difficult to prove and it depends very much on the subjective criteria of the relevant court. An *ex parte* order would be granted by a Spanish court only in exceptional situations. In most cases, the Spanish court will hold a hearing which the defendant will have the possibility to attend, before granting an injunction.

**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?**

The courts where a dispute is held depend on the matter, and not on the value of the dispute.

Consequently, for cases of insolvency and passenger rights, the competent courts are the Commercial Courts ("*Juzgados de lo Mercantil*").

In relation to any civil claim (claims for owed amounts, damages, etc.), the Civil Courts of First Instance ("*Juzgados de Primera Instancia*") are competent.

Criminal cases are brought in front of the Criminal Courts of Examination ("*Juzgados de Instrucción*"), and civil responsibility arising from criminal offences can also be claimed together with the criminal complaint.

Finally, resolutions of the Governmental or Regulatory Bodies can be challenged in front of the Administrative Courts of Justice ("*Juzgados de lo contencioso-administrativo*").

### 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?

For the purposes of proceedings before a Spanish Court, a notarised and apostilled power for litigation needs to be granted by the Plaintiff to a Spanish court agent (“*Procurador de los Tribunales*”), any document in English or in another foreign language must be filed with a Spanish translation, and Plaintiffs are subject to an *ad valorem* user’s fee (“*Tasa por el ejercicio de la potestad jurisdiccional*”).

These service requirements do not differ for domestic airlines/parties and non-domestic airlines/parties, i.e. the same requirements are applicable for everybody.

### 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?

(i) Interim remedies: a plaintiff is entitled to ask for an injunction (“*medida cautelar*”) from the courts within a court proceeding and an arbitral proceeding. The party requesting the injunction needs to justify (a) that there is an appearance, an indication or a token that he has a good legal right in relation to the claim (“*fumus boni iuris*”), and (b) that there is a great risk of loss of the object of the claim in case the injunction is not granted (“*periculum in mora*”). The injunction can consist in the attachment of goods or monies, the recordation of the claim with a public registry, a court order to cease an activity, the deposit of goods, the suspension of shareholder agreements or any other measure to protect the rights of the party requesting the injunction. The party asking for the injunction has to post a bond as a guarantee to protect the rights of the defendant.

It may take around three months to obtain a resolution granting an interim measure.

(ii) Remedies on a final basis from a court are essentially judgments which can be enforced in front of the courts of justice. The likely time it will take to obtain a judgment in the first instance depends on the relevant backlog of work of the court and may be between six months and one-and-a-half years. The further enforcement of the judgment also depends on the court, and may take between one and three months.

Remedies on a final basis from an arbitral tribunal are essentially awards which can be enforced in front of the courts of justice. The likely time it will take to obtain an arbitral award depends on the arbitrators and may take between three months and one year. The further enforcement of the award depends on the court where it is enforced and may take between one and three months.

### 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?

(a) Right of appeal to the courts from the decision of a court

The judgments issued by a Court of First Instance can be challenged in front of the Court of Appeals (“*Audiencia Provincial*”), except in case of judgments issued in a verbal proceeding (“*juicio verbal*”) where the claimed amount is EUR 3,000 or lower.

The judgments issued by the Court of Appeals can only be challenged in front of the Supreme Court (“*Tribunal Supremo*”) under very restricted circumstances.

(b) Right of appeal to the courts from the decision of an arbitral tribunal

The reasons for annulment of an award are very restricted under Spanish law. The applicant must argue and prove that: a) the arbitration clause does not exist or is invalid; b) the appointment of an arbitrator and/or the arbitration proceedings have not been properly notified or a party has been unable for any reason to exercise its right of defence; c) the appointment of the arbitrators or the arbitration proceedings have not been carried out in accordance with the agreement between the parties (unless such agreement was contrary to mandatory law) or, in the absence of such an agreement, in accordance with the arbitration law; d) the arbitrator has decided about matters which cannot be arbitrated; or e) the award is contrary to Spanish public policy. The motion of annulment has to be filed not later than two months from the date of the award in the High Court of Justice (“*Tribunal Superior de Justicia*”) of the relevant Spanish region. Its decision is final.

Spain has ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

## 4 Commercial and Regulatory

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

There is no specific law on joint ventures between airline competitors. The applicable law is the Spanish Act No. 15/2007 of 3 July 2007, on Defence of Competition, further developed by Royal Decree No. 261/2008 dated 22 February, in order to adapt it to EU Competition regulations.

In terms of concentration, the Law focuses its definition on the existence of a stable change in the control structure, *de iure* or *de facto*, of all or part of one or more undertakings as a result of: (i) the merger of two or more previously independent undertakings; (ii) the acquisition by a company of control over all or part of one or more companies; or (iii) the creation of a joint venture and, in general, the acquisition of control over one or more companies, when they permanently perform functions of an autonomous economic entity.

The Law establishes the market share threshold restriction at 30% of the relevant market, and foresees a mechanism for the update of turnover (if the overall turnover in Spain of all the undertakings involved in the concentration in the last financial year exceeds the amount of EUR 240 million, provided that at least two of the undertakings reached a turnover exceeding EUR 60 million individually in Spain).

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

As a general rule, the relevant market must be defined according to the specific circumstances of the relevant situation.

In the context of “concentration” control, for scheduled flights, the definition of the relevant market in air transport is generally made on the basis of a route or a bundle of routes. More specifically, in the KLM/Alitalia decision (see case M/JV-19-KLM/Alitalia), the European Commission concluded that each point-of-origin/point-of-destination pair constitutes a relevant market, and that such market includes a route or a bundle of routes.

In Spain, the competition authority is the National Competition and Markets Commission (“*Comisión Nacional de los Mercados y de la Competencia* – (CNMC)”) and the competent courts of justice

for competition matters are the Administrative Courts of Justice (“*Juzgados de lo contencioso-administrativo*”).

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

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The Spanish Act No. 15/2007 of 3 July 2007, on Defence of Competition, sets forth a leniency procedure, similar to the one in effect in the EU, whereby undertakings that, having been part of a cartel, report the existence of the cartel and provide substantial evidence for the investigation, shall be exonerated from payment of the fine, provided they cease their conduct of infringement and have not been the instigators of the prohibited agreement. Likewise, the amount of the fine may be reduced for undertakings that collaborate but do not meet the requirements for complete exemption.

The leniency procedure in Spain has been developed from European Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings and by all related Commission decisions finally granting immunity or reduction of fines or rejecting immunity and leniency applications (1996, 2002 and 2007 Leniency Notices), which state the confidentiality of the procedure and the obligation of the requestor of leniency to cooperate with the Antitrust Authorities throughout the procedure. According to the Regulation, only the first requestor of leniency will be given full immunity, provided that it supplies the Antitrust Authorities with information allowing them to carry out an investigation that it would not have been able to start by itself, and which proves the existence of a cartel.

Companies that have already received the statement of objections from the European Commission and ring-leaders cannot claim immunity. They can, however, request a reduced fine if they provide evidence that significantly helps the investigation.

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

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Please see question 4.1.

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

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The Spanish Act No. 15/2007 of 13 July, on Defence of Competition, foresees a system of mandatory notification of concentrations. With regard to merger control procedure, the Law establishes two phases of the procedure and allocates the competence for its handling and resolution to the National Competition and Markets Commission. In the first phase, which shall have a maximum duration of one month, operations that do not raise competition problems will be analysed and approved. In the second phase, which has a maximum duration of two months, a more detailed analysis of the operation will be made, with the participation of interested third parties, in order for the National Competition Commission’s Council to adopt a final resolution.

The procedure before the National Competition and Markets Commission foresees the imposition of conditions, the presentation of commitments by the notifying parties to solve the possible problems of competition derived from the concentration, and the possible consultation of interested third parties.

In the case that the Council issues a resolution prohibiting or subordinating the authorisation to commitments or conditions, the Minister of Economy, Industry and Competition will have a 15-day period to raise the matter of the concentration with the Council of Ministers for its intervention. The final decision of the Council of

Ministers, duly justified, that may authorise the concentration with or without conditions, must be adopted within one month from the moment that the proceedings were raised to the Council of Ministers, and a report may be requested from the National Competition and Markets Commission.

The Regulation develops the merger notification procedure, including two notification forms: one regular and the other abridged.

The new regular notification is closer to the European Commission’s form used for concentrations with EU dimensions. The abridged form relieves the parties of the need to submit a substantial amount of information, thus considerably simplifying the notification process for operations that do not contain elements capable of affecting competition, which is understood to occur in the following scenarios: (i) when none of the parties to the concentration operates in the same geographic and product market, or in related upstream, downstream or neighbouring markets in which any of the other parties to the operation is active; or (ii) when the presence of the parties in the market, due to its reduced importance, is not capable of significantly affecting competition.

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#### **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?**

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- Communication from the Commission 94/C350/07 regarding the application of articles 92 and 93 (not 87 and 88) of the EC Treaty and article 61 of the EEA Agreement to State Aid in the aviation sector;
- Council Regulation (EEC) No. 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes; and
- Communication from the Commission C 2005 (312): Community guidelines on financing of airports and start-up aid to airlines departing from regional airports.

The general Spanish provisions on State aid are contained in Act No. 38/2003 of 17 November 2003 on subsidies.

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

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Yes. The criteria which apply are those contained in the Communication from the Commission C 2005 (312). The essential criteria contained in said guidelines is the “principle of the private investor” in a market economy, following which it has to be examined whether, under normal conditions, a private partner would have invested capital, based only on the foreseeable possibilities of profit, regardless of any consideration of a social, regional policy or sectorial nature.

In addition, in particular, in Spain, residents of the Canary Islands and Balearic Islands, and the towns of Ceuta and Melilla benefit from lower airfares subsidised by the central and the relevant regional governments. Spanish law also provides for an obligation of public services in respect of routes to certain cities and islands establishing frequencies of flights and maximum price levels.

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#### **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?**

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The EC Directive 1995/46 of 24 October 1995, on Personal Data Protection, was implemented in Spain by the Spanish Data Protection



Act No. 15/1999 of 13 December 1999 (LOPD). In addition, in April 2008 an enabling regulation of the LOPD (Royal Decree No. 1720/2007) developed this legislation. Therefore, the LOPD and Royal Decree No. 1720/2007 constitute the legal framework for the privacy rights of individuals in connection with the processing of their personal data, and they apply to both private and public entities. The processing of personal data is, in general terms, subject to the prior consent of the data subject, which may be provided expressly or tacitly (with 30 days' prior notice). Notwithstanding this general rule, tacit consent may be deemed to have been given in situations where the processing of personal data takes place and relates to the parties to a commercial agreement (such as the agreement which would exist between an airline and its passengers).

In general terms, the information that must be provided to individuals when collecting personal data from the data subject is the following:

- Existence of a database, its purpose and end-users, including any assignees, where applicable.
- Voluntary or mandatory nature of the information requested.
- Consequences of the provision of, or refusal to provide, personal information.
- The data subjects' right to have access to, correct and cancel any personal data relating to them, as well as their right to oppose the processing activities performed by the data controller.
- Name and address of the data controller and name and address of those responsible for the database in Spain, if the data controller is located outside the EU.

#### 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?

Following the infringement of any provision of the Spanish Data Protection Act No. 15/1999 of 13 December 13, 1999 (LOPD) or of Royal Decree No. 1720/2007, investigation proceedings may be opened, whether by a claim filed by the data subjects or a legitimate third party (e.g. a consumer association or other organisation representing the interests of affected individuals), or *ex officio* by the Spanish Data Protection Agency. The LOPD determines 19 potential violations. They are divided into three categories: minor; serious; and very serious. These violations are subject to penalties depending on the nature of the personal rights affected, the volume of data concerned, the profits obtained, the intent, the continued nature of the infringement, etc., ranging from:

- Minor infringements: fine from EUR 900 to EUR 40,000.
- Serious infringements: fine from EUR 40,001 to EUR 300,000.
- Very serious infringements: fine from EUR 300,001 to EUR 600,000.

Airlines can challenge the imposition of fines by the Spanish Data Protection Agency in front of the Administrative Courts of Justice ("*Juzgados de lo contencioso-administrativo*"). Passengers in respect of whom data has been lost, are able to seek damages against the airline through court action.

#### 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?

In Spain, there is an intellectual property office which depends on the Ministry of Culture ("*Registro General de la Propiedad Intelectual*").

There is also a Register of Patents and Trademarks which depends on the Ministry of Industry ("*Oficina Española de Patentes y Marcas*").

Requests for patents are filed with the Register of Patents and Trademarks and, following an internal review 18 months after the filing, the register publishes in its official gazette ("*Boletín Oficial de la Propiedad Industrial*") a proposal for a patent, which is subject to challenges from third parties. Thereafter, the register grants the requested patent and this decision is again published in the register's official gazette. Any third party is entitled to challenge the decision of the register in front of the Administrative Courts of Justice ("*Juzgados de lo contencioso-administrativo*"). The patent is granted for a non-extendable period of 20 years. The person whose patent right is violated is entitled to seek protection of his rights from the courts of justice. The person whose patent right is violated is also entitled to seek from the courts of justice an interim remedy (injunction), in order to protect his patent rights.

Trademarks are protected by means of their registration in the aforementioned Register of Patents and Trademarks, and the claimant can file civil and criminal actions to protect its rights, including claiming for damages.

The courts which deal with issues relating to intellectual and industrial property are the Commercial Courts ("*Juzgados de lo Mercantil*"). With respect to the resolutions issued by the Register of Patents and Trademarks in relation to the registration of trademarks and patents with said register, the Administrative Courts of Justice are the competent courts. Criminal courts deal with criminal offences.

#### 4.11 Is there any legislation governing the denial of boarding rights?

The applicable legislation is Regulation (EC) No. 261/2004 of 11 February 2004, establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. The competent courts where passengers are entitled to file their claims in relation to denial of boarding rights are the Commercial Courts ("*Juzgados de lo Mercantil*").

The Ministry of Transport can impose sanctions foreseen in the Aviation Security Act 2003 (Act No. 21/2003 of 7 July 2003) which can be challenged in front of the Administrative Courts of Justice.

There are many judgments and case law whereby Spanish courts of justice have ruled in favour of consumers (passengers).

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

Following the provisions of the Aviation Security Act 2003 (Act No. 21/2003 of 7 July 2003), the Ministry of Transport, through the Spanish Air Safety Agency ("*AESA*"), is entitled to impose sanctions of up to EUR 250,000 against carriers as a consequence of these infringements, which can be challenged in front of the Administrative Courts of Justice.

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

The State-owned corporation AENA (currently named "*ENAI*") is the Spanish airport authority in respect of air navigation and air traffic control, which was incorporated by article 82 of Law No. 4/1990 of the State Budget for 1990 and is regulated by Royal Decree No. 905/91 of 14 June, as amended by Royal Decree No.

1993/1996 of 6 September, by Royal Decree No. 1711/1997 of 14 November, by Royal Decree No. 2825/1998 of 23 December, and by Royal Decree No. 8/2014 of 8 July 2014, whereby it changed its name to ENAIRE. It performs its duties as if it were a private company with respect to its contracting and ownership relationships. With respect to its public decisions, these are subject to the public law regulations.

As a consequence of the privatisation process of AENA (now “ENAIRE”), Royal Decree-Law No. 13/2010 of 3 December incorporated the State-owned company Aena Aeropuertos, S.A. (currently named Aena SME, S.A.), which is currently in charge of the management of the 48 State-owned airports, while ENAIRE remains in charge of the supervision and management of the air navigation and air traffic control. The Government has authorised the sale of a stake of up to 49% of Aena SME, S.A., which went into the stock market in February 2015. The shares were issued at EUR 58 per share and traded at EUR 129,650 as of the end of the year 2016. Currently, ENAIRE owns 51% of the capital of Aena SME, S.A. Royal Decree-Law No. 13/2010 of 3 December also foresees the incorporation of subsidiaries of Aena SME, S.A. for the management of one or more particular airports.

Besides the Aena SME, S.A. airports network (48 airports), there are also the airports listed under question 1.7 above (first paragraph). While the air navigation and air traffic control duties remain with ENAIRE, the management of privately owned airports is carried out by its owners subject to an operating licence being granted by the Ministry of Transport. Before a licence is approved, several requirements have to be fulfilled (environmental impact, structure of the air space, terminal facilities, airport operations handbook, etc.). A building permit granted by the local municipality is also necessary, except for ENAIRE.

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

In Spain, consumer protection is mainly regulated by the General Law for the Protection of Consumers and Users approved by Royal Legislative Decree No. 1/2007 of 16 November, but there are two other pieces of legislation that refer to the protection of passengers in air navigation:

- Law No. 48/1960 of 21 July, on Air Navigation: articles 92 to 101 refer to the transport of passengers and their protection in different situations that may arise as a result of, for example, flight delays or loss of luggage, and the corresponding obligations of the carrier.
- Regulation (EC) No. 261/2004 of 11 February 2004, establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

Consumer protection legislation focuses more on the prevention of abusive practices and the provision of information to consumers, while the two latter pieces of legislation described above focus more on the rights of passengers in case of denied boarding, cancellations, long delay of flights and compensation for lost luggage.

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

The GDSs that operate in Spain are: Amadeus (which is the most important one in Spain and Europe); Sabre; and Galileo.

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

No; in Spain there are not any ownership requirements for GDSs to operate in Spain, but there are some restrictions at European level.

Article 8 of the Regulation (EEC) No. 2299/89 of 24 July 1989 establishes that: (i) a parent or participating carrier shall not link the use of any specific Central Reservation System (CRS) by a subscriber with the receipt of any commission or other incentive for the sale or issue of tickets for any of its air transport products; and (ii) a parent or participating carrier shall not require the use of any specific CRS by a subscriber for any sale or issue of tickets for any air transport products provided either directly or indirectly by itself. The European Commission may, by decision, impose fines on system vendors, parent carriers, participating carriers and/or subscribers for infringements of this Regulation, up to a maximum of 10% of the annual turnover for the relevant activity of the undertaking concerned.

In fixing the amount of the fine, regard shall be had to both the seriousness and the duration of the infringement.

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

Yes, as long as the threshold foreseen in the Spanish Act 15/2007 on Defence of Competition (“*Ley de Defensa de la Competencia*”) of 30% of the relevant market is not exceeded. Air operators and airports, like any other player, are subject to the general provisions which apply to competition matters. Please see questions 4.1 to 4.5.

## 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 Spanish Government approved, through Royal Decree No. 384/2015 of 22 May 2015, the Spanish Aircraft Registry Regulations which came into force on 1 December 2015, which include light-structure aircraft and private aircraft for commercial use, which previously had a specific system. These regulations substituted the former registration system. The regulations determine which aircraft are excluded from registration and incorporate an adjustment on the list of checks for new aircraft that need to carry out test flights.

The new regulations introduce a “register reserve” for those who intend to register an aircraft in Spain, while carrying out the registration procedure. They also regulate the possibility of temporarily cancelling the registration of an aircraft (for a time period of less than five years) when said aircraft is expected to be temporarily recorded abroad.

The purpose of the regulations is to modernise the Spanish Aircraft Registry, through a more agile, effective and efficient recordation system, adapting it to the present requirements, permitting the application of the Cape Town Convention and the Aircraft Protocol in Spain and guaranteeing an adequate complementarity between the Spanish Aircraft Registry and the Register of Goods and Chattels (“*Registro de Bienes Muebles*”). As a consequence of these regulations, documents to be filed in the Spanish Aircraft Registry need to have been filed previously with the Registry of Goods and Chattels, and there is an electronic communication system between both registries.

Furthermore, it is worth noting that Spain became a member of the Aircraft Protocol to the Cape Town Convention on 1 March 2016. Under the new rules, in order to deregister an aircraft, the consent of the lessee is required, except when an Irrevocable Deregistration and Export Request Authorisation (IDERA) is put in place and annotated in the Spanish Registry of Goods and Chattels and, thereafter, recorded in the Spanish Aircraft Registry. There is a risk that the IDERA may be recharacterised in an insolvency proceeding as a power of attorney, in which case it will lapse by operation of

general law. However, no precedent has been set by the Spanish courts to clarify their understanding on the nature of IDERA; nor is there, for the time being, any precedent of the enforcement of an IDERA before the Spanish Aircraft Registry in order to deregister an aircraft and export it unilaterally from Spain.

Finally, the regulation of drones (pilotless aircraft) will probably be modified and developed in the following years as a consequence of the growth of this industry.



#### Alfonso López-Ibor Aliño

Ventura Garcés & López-Ibor Abogados  
Calle López de Hoyos, 35, 3º A  
E-28002 Madrid  
Spain

Tel: +34 91 521 7818  
Email: [alfonso.lopezibor@vg-li.com](mailto:alfonso.lopezibor@vg-li.com)  
URL: [www.venturagarcestheslopezibor.com](http://www.venturagarcestheslopezibor.com)

Mr. López-Ibor holds a degree in Law from Universidad Complutense, Madrid, and additional degrees from the London School of Economics and Political Sciences and The Hague Academy of International Law. He is a former member of the Spanish Diplomatic Service.

Mr. López-Ibor is widely recognised for his expertise on aviation matters, in terms of the regulation, asset financing and insolvency of Spanish airlines. He also has broad experience in aviation, construction and related litigation, corporate/M&A, banking and finance, restructuring and insolvency, dispute resolution and insurance.

He is Managing Partner of the firm's Madrid office. Before joining the firm in 2001, he was Managing Partner of Allen & Overy's Madrid office.

He has been a member of the Madrid Bar Association since 1980, and of the Civil and Commercial Court of Arbitration (CIMA) since 2003.

He speaks Spanish, English and French.



#### Pablo Stöger Pérez

Ventura Garcés & López-Ibor Abogados  
Calle López de Hoyos, 35, 3º A  
E-28002 Madrid  
Spain

Tel: +34 91 521 7818  
Fax: +34 91 524 00 93  
Email: [pablo.stoger@vg-li.com](mailto:pablo.stoger@vg-li.com)  
URL: [www.venturagarcestheslopezibor.com](http://www.venturagarcestheslopezibor.com)

Mr. Stöger holds a degree in Law (specialisation: EU Law) from Colegio Universitario San Pablo C.E.U., Universidad Complutense, Madrid (1996), a diploma in EU Legal Studies and Economics from the University of Paris I – Panthéon-Sorbonne and a Specialist Diploma in European Studies from Universidad Complutense, Madrid (1999), and studied Law at the University of Vienna. He is a native German speaker and also speaks French, English, Spanish and Catalan.

His experience in the aviation industry comprises advising clients in: the purchase, sale and financing of aircraft; aircraft lease and maintenance agreements; mortgages and other charges and guarantees on aircraft and engines; aircraft registration; repossession of leased aircraft and engines; permits and licences for operating in the air transport sector, including environmental issues; insurance and passenger claims; consumer issues; and related judicial and arbitration proceedings.

Mr. Stöger is a member of the Madrid Bar Association.

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59 Tanner Street, London SE1 3PL, United Kingdom  
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255  
Email: [info@glgroup.co.uk](mailto:info@glgroup.co.uk)

[www.iclg.com](http://www.iclg.com)