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# THE AVIATION LAW REVIEW

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FOURTH EDITION

EDITOR  
SEAN GATES

LAW BUSINESS RESEARCH

# THE AVIATION LAW REVIEW

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# EDITOR'S PREFACE

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The reach of *The Aviation Law Review* continues to expand and I welcome contributions from Felsberg in Brazil, Conyers Dill and Pearman in Bermuda, The Air Law Firm for Spain and the Chambers of Robert Lawson QC, who now takes up the cudgels for the UK. My thanks to you all for volunteering and to our seasoned contributors for their continued support in what I believe is becoming acknowledged as a 'go-to' publication in our field.

In litigation and regulatory terms the themes of previous years continue to predominate. The Court of Justice of the European Union (ECJ) (i.e., the alternative legislature for Europe) continues to bear down on operators, and indirectly passengers, with judicial activism in the sphere of Regulation (EC) No. 261/2004. All rational defences on the basis of exceptional measures have been dismissed by the court in favour of what seems to be the theory that if it happens it was not exceptional! Ultimately passengers will bear the cost of this through increasing fares but this will be a bullet easily dodged by the judges, who, of course, have no electorate and no accountability.

Unmanned aerial vehicles also continue to be a hot topic, with regulation barely keeping up with their proliferation. The need for regulation is highlighted by ever more frequent near-miss reports; though the latest may have been in respect of an unmanned aerial plastic bag rather than one that was under control. Privacy regulations are also coming into force but the difficulty of identifying the particular operator of any unlicensed drone still poses difficulties that are likely to lead to registers created at the point of sale or by transferors to new users.

We have introduced a couple of new topics in this year's *Review* that I hope will be of interest and value to readers. The first of these concerns compensation levels for personal injury and fatal accidents in the various jurisdictions of the contributors. I first attempted an international review of comparative compensation more than 20 years ago, and looking back on it can be depressing from an inflationary prospective! The product then was greatly appreciated in various quarters of our industry and I am hopeful that we will provide a useful service with this edition.

'Just culture' remains a subject of warm debate in various quarters. The tension between confidential reporting and criminal prosecutions post-accident has in no way diminished and the International Civil Aviation Organisation and Flight Safety Foundation, among others,

are working hard in the interests of flight safety to develop the practice. As a guide to the issues I have invited contributions on issues of discoverability of reports from contributors to this edition and the responses will usefully inform the debate. The task of convincing prosecutors of the desirability of affording the greatest possible respect to the confidentiality of voluntary reporting is a considerable challenge to those of us interested in advancing safe flying and anything that assists the cause should be embraced.

This preface would not be complete without a brief mention of 'Brexit', which will continue to provide the substance of much speculation in the coming years. The precise terms of the ongoing relationship between the UK and the EU in this sphere will be the subject of prolonged negotiation. In the interests of safety and security it is clearly desirable for the UK to continue to play an important role in the oversight and regulation of aviation in the region. If Brexit means that the influence of the ECJ will be diminished for those operators in the UK, that will at least be a silver lining for them.

Finally, I would like to express my gratitude to Tom Thornton from Florida for his contribution on *forum non conveniens* in the United States. As many readers will know, after any accident, plaintiffs will seek out the jurisdiction for resolution of their claims that will afford them a combination of the highest level of compensation with the lowest upfront cost, and with a reasonably predictable outcome. These considerations lead many plaintiffs to the courts in the United States, notwithstanding the tenuous links some accidents have with that jurisdiction, where they are ably assisted by some of the most inventive plaintiff lawyers worldwide. Tom has spent a lifetime resisting those efforts on behalf of airlines and others and is an acknowledged expert as is clear from his contribution to this area in the current edition.

Again, many thanks to our contributors and I hope that our readers will derive great benefit from the fourth edition as they have from its predecessors.

**Sean Gates**

Gates Aviation Limited

London

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## Chapter 30

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# UKRAINE

*Anna Tsirat<sup>1</sup>*

### I INTRODUCTION

Although Ukraine has 26 airports, 98 per cent of passengers and 93 per cent of cargo and mail transportation go through eight main airports, two of which (Borispol and Zhulyany) are located in the capital, Kiev. Borispol International Airport is treated as the main gateway to Ukraine, through which 7.9 million passenger transportations (52 per cent of the total) were made in 2013. The rest of the airports, including Simferopol, which is temporarily occupied by the Russian Federation, had smaller shares of the total, varying from 3 per cent in Kharkiv to 8 per cent in Simferopol.

The Civil Aircraft Registry lists more than 1,000 different models of aircraft used by legal and natural persons in Ukraine. Ukrainian legislation sets no limitation on foreign ownership or participation in air transportation, general aviation, civil airports and air transport-related projects.

There was a considerable reduction in Ukrainian aviation activity in 2014. This was a result of the military and political situation in the country, the creation of a military lodgement in Crimea and flight safety recommendations made by a range of international organisations and EU bodies to avoid Ukrainian air space by taking alternative routes. Passenger and cargo traffic, therefore, dropped by 20 per cent.<sup>2</sup> Passengers are served by 28 local airlines of which Ukraine International Airlines, Wizz Air Ukraine, UTair Ukraine, Dniproavia, Windrose and Kharkiv Airlines in general had 96 per cent of the market in the first quarter of 2015. Parity in passenger transportation between foreign and local airlines, reached in 2012, was broken in 2013 in favour of foreign airlines. Only seven Ukrainian airlines had regular international routes in the first quarter of 2015 compared with 30 foreign

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1 Anna Tsirat is a partner at Jurvneshservice International Legal Services.

2 Ukraine State Aviation Service, 'Operational Results of the Aviation Field of Ukraine in 2014'.

airlines active on the Ukrainian market. Regular local routes were flown by three airlines. The number of passengers transported decreased by 18.4 per cent in 2015 in comparison with a similar period in 2014, and cargo transportation decreased by almost the same amount.<sup>3</sup>

Ukraine inherited from the former Soviet Union almost all the chains of aviation production<sup>4</sup> that were nearly destroyed at the time of independence, but all state subsidies were spent on ‘research’. The research included efforts to manufacture serially such aircraft as An-39 (1994), which was modernised and replaced by An-28 10 years later. The An-70 trial programme has remained unfinished since 1994. The development of An-140 began in 1987 but only 15 units were produced. The An-72, initiated in 1977, was modified and became the An-74. The An-180, An-218, An-88 and An-148 were never produced serially.<sup>5</sup>

Ukraine is a party to the Chicago Convention of 1944 but not a party to the Geneva Convention of 1948, or the Rome Convention of 1933.

Ukraine has ratified the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation signed at Montreal on 23 September 1971.

Ukraine is a party to the Cape Town Convention of 2001 and the Aircraft Protocol, which have both been ratified by the Ukrainian parliament and have been effective and enforceable in Ukraine since 1 November 2012. The State Aviation Service of Ukraine has approved internal regulations to implement the Convention and the Protocol, allowing it to issue authorisation codes to register aviation equipment in the International Registry.

The European Union and Ukraine initiated a comprehensive air services agreement at the end of 2013, though neither Ukrainian airlines nor airports are ready to implement it.<sup>6</sup> The agreement opens the way towards a ‘common aviation area’ between the EU and Ukraine, based on common and reliable standards in aviation safety and air traffic management.

The issues of slots usage and management are dealt with in several regulations. Before obtaining slots approval from the State Aviation Service’s Department of Aviation Transportation and Licensing, an operator has to have them approved by the relevant airports for two seasons every year.<sup>7</sup>

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3 Ukraine State Aviation Service, ‘Operational Results of the Aviation Field of Ukraine in the First Quarter of 2015’.

4 At the beginning of 2014 Ukraine had 37 certified designers of aircraft and engines ([www.avia.gov.ua/uploads/documents/9228.pdf](http://www.avia.gov.ua/uploads/documents/9228.pdf)) and 31 certified serial manufacturers of aircraft, engines and equipment ([www.avia.gov.ua/uploads/documents/9227.pdf](http://www.avia.gov.ua/uploads/documents/9227.pdf)).

5 Preyer Dmitro, ‘Current state and development problems in the aviation sector in Ukraine’; [me.kmu.gov.ua/file/link/135368/file/Ukr](http://me.kmu.gov.ua/file/link/135368/file/Ukr).

6 The Institute for Economic Research and Policy Consulting, ‘Europeanisation of Ukrainian airspace: advantages and problems connected with the execution of the agreement on the Common Aviation Area’; <http://eu.prostir.ua/files/1322828931580/2811ukrfinal.pdf>.

7 Rules on Issuance to Operators of Authority To Depart from and Land at the Airports of Ukraine Approved by An Order of the Ukraine State Service for Aviation Safety (a predecessor to the State Aviation Service of Ukraine) and by the Ministry of Defence of Ukraine, No. 897/703 dated 28 November 2005, as amended.

## **II      LEGAL FRAMEWORK FOR LIABILITY**

Although the Air Code of Ukraine (the Air Code) is the main regulatory act for civil aviation it is silent as to carrier responsibility for injuries caused in the course of air transportation, either local or international. There is no Ukrainian legislation providing for operator liability for damage caused to third persons on the ground. In the case of such damage, the injured party, or his or her successor, should be guided by the general rules of the Civil Code on damage compensation.

Ukraine is a party to the Warsaw Convention, which took effect for Ukraine at the end of 1959. In August 1963 the Hague Protocol modifying the Warsaw Convention became effective. The Guadalajara Convention of 1961, supplementary to the Warsaw Convention, although signed in 1961 by Ukraine, took effect only at the beginning of 1984.

The Montreal Convention became obligatory for Ukraine as of 6 May 2009 under Law No. 685-VI dated 17 December 2008.

### **i      International carriage**

As Ukraine is a party to the Warsaw Convention and the Montreal Convention, and subject to the regulations of the Constitution and the Law on International Treaties, No. 1906-IV dated 29 June 2004, active international treaties ratified by the Ukrainian Parliament are a part of national law, to be enforced under an order providing for local legislation and overriding existing local acts.

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

Non-convention carriage should be performed under the rules of an appropriate agreement concluded between a carrier and a person to be transported.

Responsibility for internal carriage is provided in the Rules on Passengers and Their Luggage Air Transportation (the Transportation Rules).<sup>8</sup> The Rules mainly reflect the Warsaw Convention requirements as to passenger transportation, including the requirement for a ticket, while the amount of responsibility for accidents corresponds to that in the rules provided by the Montreal Convention.

### **iii     General aviation regulation**

There is no single document that regulates liability of aircraft operation. The Ukrainian law does not define such types of aircraft as helicopters and microlights, and correspondingly general rules are applied to them.

The rules that concern the safe operation of any aircraft may be found under the following legislation:

- a*      Law No. 545-IV dated 20 February 2003 on the State Programme of Civil Aviation Safety;
- b*      Rule No. 430 dated 5 July 2010 as amended on the Certification of Operators That Operate Civil Aircraft with the Purpose of Carrying Out Commercial Transportation under OPS 1 (Rule 430);

---

<sup>8</sup> The Transportation Rules were adopted by Order No. 735 of the Ministry of Infrastructure of Ukraine dated 30 November 2012, which took effect on 25 January 2013.

- c Instruction No. 199 dated 18 March 2005 on Procedure to Transport Weapons and Ammunition on Passenger Flights by Air Transport;
- d Rule No. 684 dated 20 September 2005 on Certification of Operators (Non-Commercial Operators);
- e Rule No. 293 dated 16 April 2003 on Flying Civil Aircraft To Serve Air Transportation in Classified Ukraine Airspace; and
- f Rule No. 486 dated 7 December 1998 on the Issue of Certificates to Aviation Personnel in Ukraine, etc.

**iv Passenger rights**

Passenger rights for scheduled and charter flights are regulated by Articles 103 to 107 of the Air Code, and are repeated in the Transportation Rules. In general these regulations almost fully correspond to Regulation (EC) No. 261/2004. The differences are as follows:

- a services provided by a carrier in cases of flight cancellation are not defined as 'right to care';
- b there is no concrete procedure or time limit for payment of benefits in cases of denied boarding. Thus, it shall be agreed by the passenger himself or herself; and in the event of the carrier's failure to perform the agreement, the passenger may sue the carrier; and
- c the carrier is discharged from liability to compensate for flight cancellation if the cancellation was caused by an act of force majeure or an extraordinary situation that could not have been avoided even if all measures had been taken. The concept of force majeure is not defined by Ukrainian law. The Air Code defines extraordinary circumstances as those that cause long delay or cancellation of one or more flights even if a carrier has taken all reasonable measures to prevent delay or cancellations. Extraordinary circumstances are, *inter alia*, military actions, mass disorders, sabotage, embargo, fire, flood and other natural calamities, explosions, acts or inaction of state bodies, strikes and technical obstacles arising because of breakdowns, shortcomings and disrepair of electric systems, communication, connection, equipment and software (without any reference to the source of the obstacle). Such a definition will always give the carrier the possibility of justifying a cancellation.

**v Other legislation**

The Law on the Protection of Economic Competition (the Competition Law)<sup>9</sup> defines the legal basis for the maintenance and protection of competition, and the limitation of monopolistic practices in commercial activities, and is directed to provide the efficient functioning of the Ukrainian economy on the grounds of fair competition in any field, including aviation.

The Law on Principles to Prevent and Counteract Corruption<sup>10</sup> covers the public and private sectors and regulates the compensation of damage because of corruption, and the restoration of violated rights of natural and legal persons.

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9 Law No. 2210-III dated 11 January 2001 as amended.

10 Law No. 3206-VI dated 7 April 2011 as amended.

### **III LICENSING OF OPERATIONS**

#### **i Licensed activities**

Passenger and cargo transportation by air is subject to a special licence under the Law on Licensing of Certain Kinds of Business Activities.<sup>11</sup> Such a licence may be issued only to an operator (i.e., an air carrier with an active air operator certificate (AOC)). The Air Code states that a licence may be issued to an operator that possesses at least one aircraft. The aircraft may be owned or dry-leased by the operator, who should provide air transportation within the terms and conditions stated in the AOC.

Certification of the operator is provided under the Rules of Operators' Certification.<sup>12</sup> The Rules provide for a special procedure to monitor an operator's ability to provide aviation services safely according to stated requirements. Certification has three different stages: (1) nominal certification, which accompanies issuance of the AOC; (2) permanent control over the operator's activities; and (3) regular operational inspections that are made periodically (every six or 12 months) depending on the subject of the inspection.

#### **ii Ownership rules**

Ukrainian law, reflecting modern trends, does not limit the participation of foreign capital in Ukrainian carriers or operators.

The question of foreign capital participation arose upon the appointment by Ukraine of a carrier to operate certain international routes under bilateral air services agreements; under some of these treaties Ukraine required that the appointed carrier was established in Ukraine by citizens of Ukraine, with a controlling share in the carrier and a current licence for air transportation. Effective control over the carrier was established and maintained by Ukraine, which was responsible for the issuance of the AOC.

The current Procedure for Granting and Cancelling of Air Traffic Rights in Ukraine<sup>13</sup> does not contain any ownership limitation.

The Ukrainian aircraft registry is owner-based and there is no limitation on aircraft ownership (i.e., any natural or legal person of any residence may be the owner of the aircraft).

#### **iii Foreign carriers**

The operation of international routes is distinct from the operation of domestic routes. Operations to and from third countries are subject to traffic rights stated in the relevant international treaties. Ukraine recognises AOCs and other licences issued by foreign states to their carriers.

To operate regular and chartered flights on international routes to and from Ukraine, the foreign carrier must apply to a special commission comprised of the representatives of the aviation authority and the Ministry of Infrastructure, and submit a set of documents including copies of licences and an AOC; a list of aircraft (type, quantity, seating capacity and state marks) to be used for the route, their airworthiness certificates and insurance policies

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11 Law No. 1775-III dated 1 June 2000 as amended.

12 Approved by the Ukraine State Service for Aviation Safety, Order No. 684 dated 20 September 2005 as amended.

13 Adopted by the Ministry of Infrastructure of Ukraine, Order No. 245 dated 23 April 2013.

(hull, passengers and their luggage liabilities, third-party liability and crew members); a programme of aviation safety; documents on the carrier's financial position; and a business plan for 36 months.

To operate domestic routes, the carrier is required to have its permanent location in Ukraine.<sup>14</sup>

#### **IV      SAFETY**

Any commercial or non-commercial operator shall follow the requirements of the 'Provision on management systems of flight safety in air transportation, No. 895'.<sup>15</sup>

Ukraine has established a state programme to adapt its laws to those of the EU;<sup>16</sup> therefore, the Ukrainian Rules on Airworthiness Maintenance (Part-M), No. 85<sup>17</sup> are made in accordance with Regulation (EC) No. 2042/2003 dated 20 November 2003; No. 707/2006 of 8 May 2006; No. 376/2007 of 30 March 2007; No. 1056/2008 of 27 October 2008; No. 127/2010 of 5 February 2010; No. 962/2010 of 26 October 2010; No. 1149/2011 of 21 October 2011; and No. 593/2012 of 5 July 2012.

Accident reporting is done under the Rules on Investigation of Accidents and Incidents with Civil Aircraft in Ukraine, No. 943 (Rule 943),<sup>18</sup> which among other things, take into consideration the requirements of Annex 13 to the Chicago Convention, Directive 94/56/EC of 21 November 1994 establishing the fundamental principles governing the investigation of civil aviation accidents and incidents, and International Civil Aviation Organization Doc 9756 AN/965, Doc 9156 and Doc 9422. In the event of an aviation incident, a Ukrainian company is required to notify a civil aviation search-and-rescue coordination centre or traffic control body that will take action under Rule 943.

#### **V      INSURANCE**

Types and levels of insurance are stipulated by the Regulation of the Cabinet of Ministers No. 1535 of 12 October 2002 (Regulation 1535). This states that Ukrainian air operators are required to take insurance with a Ukrainian insurance company that is registered with the State Aviation Service of Ukraine. There is, however, no limitation on taking reinsurance with a foreign reinsurer.

Regulation 1535 list types of obligatory insurance including carrier's liability for damage to passengers, baggage, mail and cargo; third-party liability; aviation hull; insurance of crew members and technical services personnel. The levels of insurance fixed in Regulation 1535 are outdated and contradictory in relation to other active rules that regulate aviation transportation.

The level of carrier liability towards passengers, their baggage, mail and cargo under Regulation 1535 corresponds to Warsaw Convention requirements (i.e., damage to a

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14      Paragraph 6.1 of Rule 430.

15      Approved by the Ukraine State Service for Aviation Safety on 25 November 2005.

16      Adopted by Law No. 1629-IV dated 18 March 2004 as amended.

17      Approved by the Ministry of Infrastructure dated 10 February 2012.

18      Approved by the Ukraine State Service for Aviation Safety on 13 December 2005.

passenger's life and health is evaluated at \$20,000, to baggage, mail and cargo at \$20 per kilogram and to personal baggage at \$400). At the same time the Transportation Rules, which are applied to both international and domestic flights, state that a carrier may not limit its liability for damage caused by passenger death or injury to 113,100 special drawing rights (SDR). In the case of an accident, the carrier is liable to make immediately (but within 15 days), after passenger identification, an advance payment of 16,000 SDR.

In the case of international flights, the EU levels provided by Regulation (EC) No. 785/2004 levels are applied.

The level of minimum liability towards third parties depends on the maximum take-off weight of the aircraft. It is 100 times lower than that provided by Regulation (EC) No. 785/2004. To receive even such a small amount the air operator must provide the insurer experts' statements and court judgments that confirm the amount of damages. The requirement to provide these documents makes the prospect of compensation unlikely. Article 1194 of the Civil Code of Ukraine states that the operator has to cover the difference between the factual damage and the received insurance payment, but this amount may be so significant that the operator may not have sufficient assets to settle the difference and damage to third parties will not be covered.

The minimum level of crew member insurance is €3,700.

The Transportation Rules require insurance certificates to be on board the aircraft during its operation.

## VI COMPETITION

The Competition Law is modelled on statutes adopted in European competition law regimes and reflects Ukraine's interest in integrating with Western markets<sup>19</sup> and has the same substantive and procedural features found in most competition law today.<sup>20</sup>

The Competition Law defines five categories of prohibited actions: anticompetitive concerted actions; abuse of dominance; concentrations; anticompetitive actions of governmental bodies; and restricting and discriminating activities of entrepreneurs and their unions.

Anticompetitive concerted actions are defined as those that lead or may lead to denial, elimination or restriction of competition and include setting prices or other conditions in respect of the purchase or sale of products; restriction of production, product markets, technical and technological development, investments or the establishment of control over them; separation of markets or supply sources under certain principles (territorial, subjective or objective, etc.); distortion of auctions, tenders or competition results; removal or limitation of access to other entrepreneurs; application of different terms and conditions to similar agreements with some entrepreneurs that put them in an unfavourable competitive position; tying arrangements; and limitation of competitiveness of other entrepreneurs.

The exemption to anticompetitive concerted actions is given, *inter alia*, to small and medium-sized enterprises (SMEs) whose sales or assets in the previous fiscal year do

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19 'Competition Law and Policy in Ukraine: An OECD Peer Review', 2008; [www.oecd.org/reform/sectors/41165857.pdf](http://www.oecd.org/reform/sectors/41165857.pdf).

20 'Voluntary Peer Review of Competition Law and Policy: Ukraine'; UNCTAD/DITC/CLP/2013/3 (Overview), Pt. III.

not exceed €500,000. Besides, such actions may be allowed if the parties can prove that their actions will improve production, purchases or sales; technical or technological and economical development; development of SMEs; optimisation of exports or imports of goods; or development and enforcement of unified technical terms and standards for goods.

An undertaking is deemed to hold a dominant position on the market if its market share exceeds 35 per cent, unless it proves that it is exposed to substantial competition. A market share equal to or less than 35 per cent may be considered dominant if the economic entity does not face substantial competition, particularly because of the relatively small market shares of its competitors.

Concentration is defined as:

- a the merger of economic entities or the affiliation of an economic entity to another entity;
- b the acquisition of control directly or through other persons over one or several economic entities or over parts of economic entities by one or several economic entities, in particular by means of:
  - the direct or indirect purchase or acquisition (by other means) of assets in the form of an integrated property complex of, or a structural subdivision of, an economic entity; the receipt (for further management), lease (leasing), concession or acquisition (by other means) of the right to use assets in the form of an integrated property complex of, or a structural subdivision of, an economic entity, in particular the purchase of assets of a liquidated economic entity;
  - the appointment or election of a person – occupying one or several positions of the head or deputy head of the supervisory board or the board of directors, or these positions at other supervisory or executive boards of other economic entities – as the head or deputy head of the supervisory board, the board of directors or other supervisory or executive boards of the economic entity, or the creation of a situation where there is the coincidence of more than half of the members of the supervisory board or the board of directors, or more than half of the members of other supervisory or executive boards of two or more economic entities; and
  - the establishment of such an economic entity by two or more economic entities that will independently perform economic activities for a long period, where such formation does not result in the coordination of competitive behaviour between the economic entities that established the economic entity or between them and the newly established economic entity; and
- c such direct or indirect purchase, acquisition (by other means) or receipt (for management) of shares (stocks) that ensures attaining or exceeding 25 or 50 per cent of the votes at the higher board of management of the relevant economic entity.

Under the Competition Law the concentration may be carried out only on condition that prior approval for it is granted by the Antimonopoly Committee of Ukraine:

- a if the total cost of assets or the total product sales of the participants in the concentration, with relations of control being taken into account, in the previous financial year, including those abroad, exceed a sum equivalent to €12 million while:
  - the assets (total assets) or the sales (total sales) of products, including those abroad, of at least two participants in the concentration, with relations of control being taken into account, exceed a sum equivalent to €1 million; and

- the assets (total assets) or the sales (total sales) of products, in Ukraine only, of at least one participant in the concentration, with relations of control being taken into account, exceed a sum equivalent to €1 million; or
- b* irrespective of the total value of the assets or the total product sales of the participants if a share of any participant or joint share of the participants on a market exceeds 35 per cent providing that the concentration is made on the same or adjacent market.

Approval if given, is granted after consideration of a prescribed set of documents in 30 days.

As cooperation (code-sharing) agreements may be treated as anticompetitive concerted actions, some operators received preliminary approval<sup>21</sup> from the Antimonopoly Committee of Ukraine.

At present, the Criminal Code of Ukraine does not foresee any liability for infringements of competition law.

## **VII    WRONGFUL DEATH**

A lawsuit based on a wrongful death claim seeks compensation for the survivor's loss, such as lost wages (previously provided by the deceased), lost companionship and funeral expenses. A right for a wrongful death claim is vested in unemployable persons, financial dependants and the child of a deceased person born after his or her death. The Civil Code provides a scope of financial dependants and the terms within which appropriate compensation shall be paid to them. They are:

- a* a child up to 18 years or, if he or she is a student, up to graduation but not past the age of 23 years;
- b* spouse;
- c* parents if they have reached pension age and until their death;
- d* disabled persons supported by the victim, within the whole term of his or her disability;
- e* spouse or other family member, irrespective of their age and capacity to earn a living, if he or she does not work and looks after the deceased's children, brothers, sisters or grandchildren, until said dependants reach 14 years of age; and
- f* other unemployed persons that were supported by the deceased, for a term of five years after the victim's death.

The persons listed above have the right to damage compensation amounting to the average monthly gross income of the deceased minus his or her personal expenses. In addition, the named persons have the right to intangible damage owing to the breadwinner's death, excluding survival actions. The descendants of the deceased are prohibited from making personal injury claims in Ukraine. The levels of compensation for intangible damage usually do not exceed €4,000.

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21      Decision N 307-p as of 12 May 2012.

## VIII ESTABLISHING LIABILITY AND SETTLEMENT

### i Procedure

Receipt of checked baggage by the person who has a right on its receipt, without raising of claims, provides, until the contrary is proved, that baggage was delivered in proper condition and according to the traffic document or record, which is kept by other means of information storage. A passenger shall confirm the contrary by drawing up a 'property irregularity report' about carelessness during the transportation of the baggage. In cases of improper transportation of checked baggage the passenger shall submit a written claim to the airline immediately upon the damage being revealed (lack of baggage contents, damage of things, etc.), but not later than seven days from the date of receipt of the checked baggage. In cases of delay in transportation of baggage a claim shall be raised by the passenger no later than 21 calendar days from the date that the baggage was delivered to the passenger. Claims related to loss of baggage are raised against the airline after the baggage is acknowledged as lost. Baggage is to be considered lost if it has not been found following a search within 21 calendar days from the date that the baggage was supposed to arrive at the destination point.

In the case of any claims against an operator, such claims may be submitted either to the operator or its agent to be settled voluntarily out of court. The claim shall be considered within three months from its receipt if the claimed transportation was made by one carrier. If the transportation was made by several carriers, the period of consideration may be prolonged by up to six months. Having received a claim, the operator shall notify the applicant of receipt of the claim within 15 days and request additional documents if necessary, as well as inform the applicant of the term of the claim settlement. A passenger or the passenger's successor may initiate the action without making a claim submission.

Where the operator and applicant fail to settle amicably, and depending on the grounds for the claim, the Civil Code of Ukraine provides general jurisdiction rules. The applicant (i.e., the passenger or his or her successor) may apply to a court:

- a* at the carrier's place of registration, as a general rule;
- b* before the court at the place of destination;
- c* in the case of damage to life and health, at the applicant's own location; or
- d* in the case of damage to the applicant's property (baggage or cargo), at the place where the damage occurred.

The Transportation Rules provide special jurisdiction rules for 'undue' passenger and baggage transportation without defining which transportation is undue. It can be assumed, therefore, that 'undue' means in violation or contradiction of the transportation contract.

An action for damages must be brought, at the plaintiff's request, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract was made, within three years from the date of the plaintiff's arrival at the destination point; from the date when the aircraft should have arrived at the destination point; or from the date on which the transportation was stopped. The right to damages is lost if the claim is not submitted within these limits.

Under the Civil Code, the limitation period for bringing claims for cargo and mail transportation is one year.

The law does not define which parties (owners, pilots, manufacturers, etc.) in addition to operators and passengers may be joined in actions for compensation or how liability is allocated among the defendants. All these issues shall be decided by the court.

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

As to the damages to third parties on the ground, the operator is liable unless it proves that the damage has been caused by an act of God or the wrongful act of the third party. The operator's liability is strict. The operator is liable to compensate third parties fully for damage, without any limitations.

The carrier's liability towards passengers is strict as well. The carrier is liable within limits stated in the Montreal Convention for international transportation and limits stated in the Transportation Rules for domestic flights.

## **iii Product liability**

Ukraine has no special regime governing the liability of manufacturers and owners towards passengers and operators, but the general rules of the Civil Code apply. The manufacturer is obliged to compensate for injury or damage arising from a defective product.

## **iv Compensation**

The Civil Code provides an injured person with the right to claim compensatory damages. Compensable damage includes:

- a* losses incurred by a person as a result of destruction or damage of goods as well as expenses that the person has incurred or must incur to restore its violated rights (real losses); and
- b* income that the person or entity would have received under ordinary circumstances if his, her or its right had not been violated (the lost profit).

Damage shall be indemnified in full unless any other extent of indemnification is provided by the agreement or the law. As a result, damage arising out of passenger transportation shall be compensated within limits provided by the Montreal Convention and the Transportation Rules. Upon the request of the injured person and according to the circumstances of the case, property damage may be indemnified in another way, in particular, in kind (by transferring an item of the same type and quality, repairing the damaged item, etc.).

The injured person or entity has a right to indemnification for the moral damage resulting from the violation of his, her or its right. Moral damage is defined as:

- a* physical pain and misery suffered by a natural person in connection with his or her disability or other health impairment;
- b* mental suffering incurred by a natural person in connection with the illegal conduct towards him or her, or his or her family;
- c* mental suffering incurred by a natural person in connection with the destruction of or damage to his or her property; and
- d* the abasement of human dignity, honour and business standing of a natural person or a legal entity.

The amount of moral damages shall be specified by the court depending on the nature of the infringement; the extent of the physical and moral suffering, and of the degradation of a sufferer's capabilities or deprivation of his or her possibility of realising them; the degree of guilt of the person inflicting moral damage if this guilt is grounds for the indemnification; as well as the court having regard to other circumstances of material significance.

Moral damage shall be indemnified regardless of the property damage (which is subject to indemnification) and is not connected with the amount of the indemnification for the property damage.

The state-funded social security fund covers expenses for funerals only in the case of a passenger death.

## **IX VOLUNTARY REPORTING**

The concept of ‘just culture’ is not used in Ukraine as its regulations provide for obligatory reporting of incidents in the aviation community to third-party bodies.

## **X THE YEAR IN REVIEW**

Under the State Aviation Service’s Flight Safety Programme for 2014–2016<sup>22</sup> there were only 108 incidents from 2006 to 2013; in one accident out of these incidents, five persons died and eight were injured. The terms of settlement with the injured persons have not been disclosed.

The past two years have been difficult for Ukrainian aviation for various reasons, including the political instability in the country and a decrease in citizens’ income, neither of which have been good for air transportation.

## **XI OUTLOOK**

On 28 November 2013 at the Eastern Partnership Summit in Vilnius, Lithuania, the European Union and Ukraine initialled a comprehensive air services agreement. This agreement opens the way towards a ‘Common Aviation Area’ between the EU and Ukraine, based on common and reliable standards in important areas such as aviation safety and air traffic management. The agreement aims to gradually open the parties’ respective aviation markets and integrate Ukraine into a wider European Common Aviation Area. The fact that the agreement has been initialled means only that the diplomats affixed their signature to every page of the treaty to confirm that the present version is the agreed-upon text (i.e., it does not make the treaty binding). Despite expectations, the agreement has not yet been ratified.

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22 Approved by Order No. 18 of 15 January 2014 of the Ministry of Infrastructure of Ukraine.

## Appendix 1

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# ABOUT THE AUTHORS

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Dr A Tsirat graduated from Taras Shevchenko National University of Kyiv specialising in commercial law and the from the Romano-Germanic philology department specialising in English literature and language. She also attended study courses at the Institute of International Law Development in Rome. A Tsirat presented her thesis on franchise agreements in 2003. She is fluent in English, Ukrainian and Russian.

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Dr A Tsirat specialises in the areas of aircraft financing (purchase, sale, lease and mortgage of aircraft and engines); international trade (agency, distribution and franchising agreements); litigation and dispute resolution; protection of foreign investments; corporate law; and tax planning and tax disputes.

Dr A Tsirat is active in academic work, lectures at the Institute of Modern Knowledge and is the author of a series of research papers in different fields of law.

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