

# International Comparative Legal Guides



Practical cross-border insights into aviation law

## Aviation Law 2022

10<sup>th</sup> Edition

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# Switzerland

VISCHER AG



Urs Haegi



Dr. Thomas Weibel

## 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 Swiss Federal Office of Civil Aviation (FOCA) is the supervision authority responsible for safety (aircraft, flight operations, and infrastructure) and for aviation policy and strategy issues.

Civil aviation is regulated by two sources: domestic law; and international treaties.

### Domestic law

The main enactments are:

- The Federal Civil Aviation Act (FCAA). The FCAA is the “basic law” concerning civil aviation in Switzerland. Based on the FCAA, many Ordinances have been enacted by the government, i.e., the Swiss Federal Council, and the Department of the Environment, Transport, Energy and Communication (DETEC).
- The Federal Act on the Aircraft Records Register. See question 2.2 below.

### International law

There are about 180 bilateral and multilateral treaties. The main sources are:

- The Convention on International Civil Aviation (Chicago Convention).
- The Agreement between the European Community and the Swiss Confederation on Air Transport (EU-CH Agreement), which entered into force on 1 June 2002.

Based on the EU-CH Agreement, Switzerland has adopted the relevant civil aviation regulation of the European Union.

Federal legislative texts are freely available in German, French, and Italian on [www.admin.ch](http://www.admin.ch) (Federal law/Classified compilation).

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

The prerequisites for obtaining an operating licence for the commercial transport of people and goods are, in particular, a Swiss Air Operator’s Certificate (AOC) and proof of sufficient economic viability. Applications must be sent in written form to the FOCA. Initially, FOCA Form 44.20 and EASA Form 4 are the main documents to be filed with the FOCA. Following the application, an application meeting with the FOCA takes place, the documents provided by the applicant are evaluated and

inspections are carried out. In practice, the application for an operating licence often fails because the aforementioned proof of sufficient economic viability is not provided as required. An air carrier applying for an operating licence must, in particular, provide credible evidence that (i) the current and potential obligations determined under realistic assumptions will be met at all times during a period of 24 months after the start of operations, and (ii) the fixed and variable costs determined under realistic assumptions can be covered in accordance with the budget for a period of three months after the start of operations without taking operating income into account. Furthermore, several documents must be filed by the applicant for the examination of the economic viability. These include, among others, the most recent balance sheet and profit and loss account and, if available, the audited accounts for the previous financial year and information on existing and planned financing sources.

EU/EFTA air carriers (i.e., foreign air carriers based in the EU or the EFTA) do not need a permit for flights between the European Economic Area (EEA) and Switzerland. Therefore, a separate application or notification is not necessary.

Non-EU/EFTA carriers (see Form 49.07) are subject to further disclosure duties as set out in Form 49.12 (Operating Permit Questionnaire).

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

Switzerland has adopted Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (EASA). It is the main source of Swiss aviation safety legislation. EASA Rules on Air Operations (OPS) and Implementing Rules (IR) will be applicable in Switzerland. Furthermore, Switzerland has implemented safety management systems as provided for in International Civil Aviation Organization (ICAO) Annexes 6, 11, 14 and 19.

The FOCA administers air safety in Switzerland.

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

No, it is not.

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

No. The Swiss Federal Administrative Court has, however,

accepted that the operational regulation of Zurich Airport stipulates a departure prohibition after 10 p.m., solely applicable to air charters (DFAC 2011/19).

**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.**

No. Airport concession holders are obliged to grant access to all national and international airlines entitled to fly to Switzerland (Art. 36a FCCAA). Any restrictions must be detailed in the operational regulation of the airport and must not be discriminatory. The operational regulation is subject to FOCA approval.

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

Both models exist. Zurich Airport is owned by a publicly traded company (the canton of Zurich is legally bound to hold more than 1/3 of the voting capital), whereas EuroAirport Basel-Mulhouse-Freiburg and Geneva Airport are owned by public corporations.

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

Yes. The most notable requirement is the payment of airport charges (Art. 39 FCCAA). In addition, every airport has its own operational regulation, which can contain certain requirements regarding safety, environmental issues, noise protection, slots, etc.

**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 Swiss Transportation Safety Investigation Board (STSB) is the state authority of the Swiss Confederation having a mandate to investigate accidents and serious incidents involving, *inter alia*, aircraft. The sole objective of such safety investigation is to gain insight by means of which future accidents and hazardous situations can be prevented. The results of such investigation, however, are not intended to clarify questions of blame and liability.

The principal legislation relating to the investigation of air accidents includes:

- Art. 26 and Annex 13 of the Chicago Convention;
- 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;
- Regulation (EU) No 376/2014 of the European Parliament and of the Council of 3 April 2014 on the reporting, analysis and follow-up of occurrences in civil aviation;
- Art. 22 *et seq.* FCCAA; and
- Ordinance on Aviation Accidents and Serious Incidents.

Any accident or serious incident must be reported to the STSB reporting office (i.e., the Swiss Air Rescue (REGA)) immediately.

Accidents and serious incidents falling under Art. 4 of Regulation (EU) No 376/2014 must be reported via the reporting portal to the FOCA within 72 hours of becoming aware of the occurrence.

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

Recently, Switzerland has seen several cases of air carriers once again being temporarily or permanently relieved of their operating licence, due to their inability to show sufficient economic viability.

In late August 2018, SkyWork Airlines Ltd (SkyWork) announced its bankruptcy and ceased its operations. Insolvency proceedings were initiated on 6 September 2018. The liquidation proceedings are currently pending. The FOCA had already declared in October 2017 that the operating licence of SkyWork would only remain valid until the end of October 2017, as SkyWork had not been able to guarantee the financing for its winter flight plan for 2017/2018.

The second case concerned the air carrier Darwin Airline Ltd (Darwin) that – after takeover by Slovenian carrier Adria Airways following Etihad’s exit in summer 2017 – operated under the name Adria Airways Switzerland. After Darwin had filed for a moratorium (*Nachlassstundung*) on 27 November 2017, the FOCA annulled Darwin’s operating licence on 28 November 2017. As the annulment only concerns the operating licence, Darwin was still permitted to operate flights on behalf of other air carriers (wet lease). However, on 12 December 2017, Darwin was declared bankrupt. The liquidation proceedings are still pending.

Further, at end of October 2017, Belair Airlines Ltd (Belair) followed its bankrupt parent company, Air Berlin, after the main shareholder, Etihad, had withdrawn financial support. Apparently, insolvency-related legal issues effectively prevented Belair from being sold to an investor. As it ceased operations and was finally put into liquidation, Belair had to return its operating licence to the FOCA.

On 20 August 2019, Pilatus, a Swiss aircraft manufacturer, filed an appeal against a ruling of the Federal Department of Foreign Affairs (FDFA) banning Pilatus from providing logistical support to the air forces of Saudi Arabia and the United Arab Emirates in relation to supplied PC-21 training aircraft and simulators. The FDFA based its ruling on the Federal Act on Private Security Services Provided Abroad (PSSA). On 7 January 2021, the Swiss Federal Administrative Court granted the appeal by Pilatus; it annulled the contested ruling on the grounds of violation of federal law and referred it back to the lower instance without making a decision on the merits.

On 6 November 2019, the FOCA issued a decree against Zurich Airport to reduce the airport charges due to violation of the cost-covering principle. Zurich Airport has appealed against this decree.

In September 2019, the FOCA announced that it was combining the following procedures and continuing them under the designation “Operating Regulations 2017”:

- the application for approval of the operating regulations of Zurich Airport (*Betriebsreglement 2017*);
- the new definition of permissible aircraft noise emissions at night; and
- the review of the report of Zurich Airport which identifies and assesses the operational feasibility, economic viability, and impact on noise exposure of bringing the last start and landing slots forward in the evening.

A number of objections were submitted during the public consultation period in autumn 2019. The parties involved will again be given the opportunity to review the files and submit their final comments by 15 October 2021. The decision of the FOCA on the approval of the 2017 operating regulations is planned for the end of 2021.



In addition, the operating regulations of Geneva Airport are also to be amended. The parties involved can still review the files and submit their final comments until 25 October 2021.

After years of fruitless discussions about the future use of the Dübendorf Air Base, the Swiss Federal Council decided in October 2020 to discontinue the sectoral plan procedure (*Sachplanverfahren*). At the same time, it instructed the DETEC and the Federal Department of Defence, Civil Protection and Sport (DDPS) to participate in the new planning process initiated by the canton of Zurich for the airfield site.

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

On 13 June 2021, the Swiss voters rejected the Federal Act on the Reduction of Greenhouse Gas Emissions (CO<sub>2</sub> Act) amendment proposed by the Federal Council and Parliament. The CO<sub>2</sub> Act amendment, among other things, envisaged a flight ticket levy of between CHF 30 and CHF 120 (depending on booking class and travel distance) for any passenger on a commercial passenger flight departing from Switzerland, as well as a flight ticket levy ranging between CHF 500 and CHF 3,000 for private jets with a maximum take-off mass of 5,700 kg. In contrast, a new climate law was passed on 22 August 2021 in France. The new bill provides, among other things, for a ban on domestic flights when there is train alternative of less than 2½ hours, except for a limited number of connections. It remains to be seen whether this new bill will also affect Basel Airport, as this bi-national Euro-Airport is located on French territory but has both a French and a Swiss terminal.

Swiss law provides for an emission trading system (Swiss ETS) based on the “cap-and-trade” principle which sets a maximum amount of emissions that can be emitted (cap). Companies that achieve greater reductions in their emissions can sell their unused emission allowances and companies that need more emission allowances can purchase them. A treaty aimed at linking the Swiss ETS and the EU ETS was ratified by Switzerland and the EU on 6 December 2019 and entered into force on 1 January 2020. Since the entry into force of the treaty, and as emissions generated by aviation will be included under the joint ETS system, the linkage offers Swiss aviation companies which operate flights from Switzerland to the EEA and/or within Switzerland the possibility to trade with the corresponding emissions throughout the EU ETS system. The linking of both emissions trading systems further required adjustments to the Swiss CO<sub>2</sub> Ordinance, which falls under the responsibility of the Swiss Federal Council. The public consultation of the amended Ordinance took place until July 2019. The proposed amendments – containing a “Swiss Finish” – were controversial since the administrative burden on Swiss aircraft operators is higher than in EU jurisdictions. The Swiss Federal Council finally amended the Swiss CO<sub>2</sub> Ordinance on 13 November 2019, enabling civil aviation and any fossil-thermal power plants to be included in the Swiss ETS. The amended Swiss CO<sub>2</sub> Ordinance and the partially revised Swiss CO<sub>2</sub> Act both entered into force on 1 January 2020.

Further, Switzerland has committed to implement CORSIA from the beginning of the pilot phase, which will last from 2021 to 2023.

## 2 Aircraft Trading, Finance and Leasing

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

No. The Swiss Aircraft Register (*Luftfahrzeugregister*) relates to the administrative registration of the aircraft (permit to fly, airworthiness certificate, noise-type certificate, nationality of ownership, call sign, etc.). Although the owner is registered in the Aircraft Register, the certificate of registration does not constitute proof of ownership. In addition, aircraft can be registered in the Swiss Aircraft Record (*Luftfahrzeugbuch*), which constitutes proof of ownership.

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

Yes; ownership and mortgages can be registered in the Aircraft Record. In respect of ownership, the registration is voluntary.

Registration of any right will only be made upon application by the owner and is only permissible for aircraft already registered in the Aircraft Register. Mortgages can only be set up, and will only become effective, upon registration in the Aircraft Record. Any entry will first be published in the Swiss Official Gazette of Commerce (SOGC) and is subject to an objection period of 30 days. This 30-day period has to be borne in mind in any aircraft financing project. The Swiss FOCA, which runs the Aircraft Record, is relatively swift in handling applications. Requests are usually handled within a few days.

Once a right is registered in the Aircraft Record, it can only be altered or deleted by amending the respective registration. In other words, once registered in the Aircraft Record, any transfer of ownership by necessity requires an amendment of the registration.

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

#### Mortgages

Certain claims are granted priority over a registered mortgage, although Swiss legislation is more restrictive than foreign law when it comes to accepting preferred security rights (see Art. 47 of the Federal Act on the Aircraft Records Register). There are no maintenance or mechanic's priority rights.

#### Leases

The lessee of an aircraft can be registered in the Aircraft Register, assuming that all the other requirements for a registration in the Aircraft Register (apart from legal ownership) are fulfilled. In the case of long-term lease agreements under which a Swiss lessee operates the aircraft, a non-Swiss owner may also be registered in the Aircraft Register. Furthermore, lease agreements with a period of validity of more than six months can be registered in the Aircraft Record. Such registration gives the lessor and the lessee priority over all rights and agreements recorded subsequently (except for statutory liens). However, the lessor may unilaterally allow the registration of a mortgage, unless this is explicitly excluded in the lease agreement.

**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?**

Pursuant to Art. 22 para. 1 of the Federal Act on the Aircraft Records Register, engines that are specifically designated as such and registered jointly with an aircraft in the Aircraft Record are deemed to be part of such aircraft, regardless of whether they are installed ‘on-wing’ or not. Furthermore, there is the possibility of specifically excluding an engine from a registration, which will render its fate independent from that of the aircraft. Consequently, if an engine is registered along with an aircraft in the Aircraft Record, a mortgage on the aircraft will also affect the engine. If this is not desired, the engine must be specifically excluded when registering the aircraft in the Aircraft Record.

**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?**

The key question with respect to VAT handling of aircraft transactions in Switzerland (sale/purchase/lease) is whether the aircraft in question is imported into Switzerland and, if so, whether an exemption based on Art. 23 para. 2 no. 8 and Art. 53 para. 1(e) of the Federal Law on Value Added Tax (VATL) applies. If a Swiss-registered aircraft is imported into Switzerland by a Swiss-domiciled international air-carrier who professionally operates transportation or chartered air traffic, and whose turnover from international flights exceeds that of domestic air traffic, the sale, purchase, or lease as well as a list of other services provided to such air-carrier may be exempt from VAT pursuant to Art. 53 para. 1(e) in connection with Art. 23 para. 2 no. 8 VATL. The Federal Tax Administration maintains a list of carriers domiciled in Switzerland who qualify for such exemptions. Foreign air-carriers who are able to demonstrate that they comply with the requirements of Art. 23 para. 2 no. 8 VATL may also, under certain circumstances, apply for VAT exemptions on certain services. If an aircraft is imported by any other person/company who is not exempted, VAT is applied to any sale, purchase, or lease transaction involving the aircraft. The same applies for any aircraft imported into Switzerland and sold, purchased, or leased to a party (other than a commercial carrier exempted from VAT pursuant to Art. 23 para. 2 no. 8 VATL), regardless of whether the parties involved in the transaction are foreign parties and the aircraft is situated outside of Switzerland. Aircraft that are not imported into Switzerland (e.g., when staying under customs supervision in connection with maintenance and repair) are generally not subject to Swiss VAT on imports. Due to various multilateral agreements (e.g., GATT or the Free Trade Agreement with the EU and EFTA), similar rules apply to customs duty; accordingly, the import of aircraft or of spare parts is exempted from customs duty if such an agreement is applicable.

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

#### **Chicago Convention 1944**

Switzerland ratified the Convention on 6 February 1947, prior to its effective date of 4 April 1947.

#### **Geneva Convention 1948**

Switzerland ratified the Convention on 3 October 1960, prior to its effective date of 1 January 1961.

#### **Montreal Convention 1999**

Switzerland ratified the Convention on 7 July 2005, prior to its effective date of 5 September 2005.

#### **Cape Town Convention 2001**

The Convention has so far not been ratified by Switzerland.

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

As Switzerland follows the so-called “monistic system”, international treaties are incorporated into the Swiss legal order without further legislation. A treaty can be directly applicable (“self-executing”) provided that its provisions are litigable, i.e., its content must be sufficiently precise and clear to constitute the basis for a decision in a specific case.

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

There is no specific benefit available to profits achieved by way of aircraft trading or leasing. Under the previous tax legislation, however, a company that trades in aircraft abroad, i.e., whose turnover is basically achieved abroad, could qualify for the mixed company privilege; as a result, the profits from aircraft trading were taxed at less than 10%, depending on the canton of domicile. This tax status has been abolished in the course of the termination of the existing ring-fencing schemes, as part of the Federal Act on Tax Reform and AHV Financing (TRAF) that entered into force on 1 January 2020. A company that currently benefits from a special tax status is eligible for a tax-neutral step-up on its assets in the difference between book value and fair market value. Any such hidden reserves will benefit from a preferred tax rate if realised within five years after the new law had entered into force. Whether or not an aircraft trading or leasing company will be eligible for such a step-up, i.e., whether or not it has such hidden reserves, has to be determined in any specific case, based on a state of the art valuation report.

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

Under Swiss law, there is no such risk.

### **3 Litigation and Dispute Resolution**

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

Pursuant to Art. 80 *et seq.* FCAA, a creditor, a mortgagee, or the owner (e.g., the lessor) of an aircraft can apply for seizure of the

aircraft even if the claimant cannot produce an enforceable title. However, the following aircraft shall not be subject to seizure:

1. governmental aircraft (which are designated or actually used by public authorities on an exclusive basis);
2. aircraft actually in service on scheduled flights of a public carrier (and its reserve aircraft); and
3. any other passenger or cargo aircraft ready to depart in such transportation, unless the debt for which the seizure is requested was incurred for, or has become due in the course of, that specific leg.

**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?**

No, this is not admissible under Swiss law (other than under the Cape Town Convention).

**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?**

There are no special courts (of any type) for aviation disputes.

#### Civil proceedings

Civil claims in relation to aviation disputes must be brought before the ordinary civil courts. Four cantons (Aargau, Bern, St. Gallen, and Zurich) have specialised commercial courts competent if (i) the dispute is to be considered a commercial dispute, and (ii) the value threshold of CHF 30,000 is exceeded, which will, in aviation disputes, almost invariably be the case.

#### Debt enforcement

Enforcement of mortgages is carried out by the competent Debt Enforcement and Bankruptcy Office (*Betriebsamt*). The same applies to the enforcement of financial claims if the creditor is in possession of an enforceable title. If he does not hold such title, he may still initiate the enforcement procedure; however, in such cases the debtor may raise an objection against the enforcement, and the creditor will then have to obtain a court order before being able to proceed with the enforcement procedure.

#### Criminal proceedings

Criminal charges are handled by the competent public prosecutors and criminal courts, respectively.

#### Administrative proceedings

Rulings (*Verfügungen*) by a federal authority (e.g., FOCA) can be challenged in administrative proceedings before the Swiss Federal Administrative Court.

**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?**

Service on domestic (Swiss) defendants is made via post (registered mail) or in person by court bailiffs. Defendants in jurisdictions with which Switzerland has concluded a treaty dealing with the service of documents (in particular, the Hague Conventions) are served according to the standards provided for in the respective treaty. Defendants in all other jurisdictions will be served with documents via consular or diplomatic channels.

However, only the document instituting the proceedings (or its equivalent) must be served upon foreign defendants via these channels (and, thus, usually in a translated version). Foreign defendants are invited, according to Art. 140 of the Civil Procedure Rules, to appoint a Swiss-domiciled recipient – usually a law firm – for all future communications. Defendants who fail to do so are served via publication in newspapers or the SOGC, which often results in default judgments. Communications from courts must therefore invariably be taken seriously.

**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?**

#### Interim basis

Seizure of aircraft pursuant to Art. 80 *et seq.* of the Civil Aviation Act (see question 3.1): even if the court is *ex officio* held to take all the necessary precautions to make sure that the seizure will have effect, it may still be advisable to explicitly request the court to deliver a notice of seizure to the Aircraft Register (FOCA), to Skyguide, to the airport where the aircraft is currently positioned, and to the owner of the aircraft (if the seizure was not directed against him, but, e.g., against a lessee). On the rare occasion that the rules on the seizure of aircraft are not applicable, a freezing injunction (“*arrest*”), as provided for in the Debt Enforcement and Bankruptcy Act, may be obtainable.

Arbitral tribunals: if a dispute is subject to arbitration, the creditor may choose to apply for seizure at the state court or at the arbitral tribunal. The arbitral tribunal is only competent to grant injunctions such as a seizure once it has been constituted; the Swiss Rules on International Arbitration therefore provide for the appointment of an Emergency Arbitrator.

#### Final basis

A court judgment or arbitral award can order specific performance of contractual or other duties, award compensation for damages, or can be a declaratory judgment.

**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?**

Yes, decisions from a court of first instance can be appealed. A brief overview (exceptions are not mentioned):

#### Civil proceedings

Decisions of state courts in civil proceedings can be challenged. The appeal has to be filed with the upper cantonal court, whose decision can then be appealed before the Swiss Federal Supreme Court. However, decisions of commercial courts (see above, question 3.3) are not subject to appeal before an upper cantonal court; they can only be appealed before the Swiss Federal Supreme Court.

#### Criminal proceedings

Decisions of state courts in criminal proceedings can be challenged. The appeal has to be filed with the upper cantonal court, whose decision can then be appealed before the Swiss Federal Supreme Court.

#### Administrative proceedings

Decisions rendered by the Federal Administrative Court can be appealed before the Swiss Federal Supreme Court.



### Arbitral proceedings

Arbitral awards can only be appealed on the basis of very limited grounds, e.g., if certain procedural rights such as the right to equal treatment, the right to be heard, or the Swiss *ordre public* have been violated.

Switzerland is a Member State of the New York Convention on the Enforcement of Arbitral Awards.

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

Under Swiss law, there is no general right of suspension or termination of contractual obligations due to *force majeure* or frustration (the parties are free to stipulate these concepts in their particular contract). Only in the case of impossibility does the obligation to perform lapse. In addition, as a rule, if the counterparty does not perform its obligations, the other party generally has the right to refuse its own performance, including payment, as well. Furthermore, a permanent contract can be terminated for good cause if, for example, its continuation has become unreasonable for one party.

The parties are free to stipulate, or alter, these concepts in their contractual agreement.

Absent a right to terminate, a party may still be entitled to a contract modification if the circumstances have changed fundamentally (doctrine of *clausula rebus sic stantibus*). The change must have occurred after the conclusion of the contract, it must not have been foreseeable or avoidable by the parties, and it must result in an obvious imbalance.

## 4 Commercial and Regulatory

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

All agreements between undertakings, decisions by associations of undertakings, and concerted practices, including joint ventures, which may affect trade between Switzerland and the EC and which are aimed at, or result in, the prevention, restriction or distortion of competition within the territory covered by the EU-CH Agreement are prohibited. Contravening decisions or agreements are null and void. Exemptions are possible under the conditions foreseen by the EU-CH Agreement.

This wording, as provided for in Art. 8 of the EU-CH Agreement, corresponds to the applicable EU competition law (Art. 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)). Switzerland has therefore, in fact, adopted the EU competition law.

On 1 December 2014, the Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws came into force. It facilitates and strengthens cooperation between European and Swiss authorities.

**4.2 How do the competition authorities in your jurisdiction determine the 'relevant market' for the purposes of mergers and acquisitions?**

According to the EU-CH Agreement, the European Union institutions and not the Swiss competition authorities are competent

to control concentration between undertakings (the "one-stop-shop principle"). The Swiss authorities only remain competent if the thresholds, as defined in the EC Merger Regulation, are not reached (i.e., generally, a combined aggregate worldwide turnover of EUR 5 billion and an aggregate EU-wide turnover of each of at least two of the undertakings concerned of more than EUR 250 million).

Therefore, in most cases, the relevant market is not to be determined by Swiss authorities but by the EU institutions.

In the rare cases that remain within the Swiss competence, the relevant market is determined based upon the "O&D" approach ("point of origin/point of destination") as applied by the EU Commission. This approach is applied both to charter and scheduled airlines (see LPC 2008/4, p. 677).

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

Again, in most cases the EC Merger Regulation will apply (see above, question 4.2). However, if Swiss law applies, the answer is yes, the Swiss Cartel Act provides for a notification system.

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

See above, question 4.1.

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

Notification of a planned concentration of undertakings must be made to the Swiss Competition Commission (COMCO). The Commission then has to decide within one month whether an examination is to be initiated. During that month, the concentration must not be implemented. After expiration of the one-month period, the applicant will receive either a clearance or the information that an investigation will be initiated. If no such notice is given within that time period, the concentration may be implemented without reservation.

In the event of an investigation being initiated, the COMCO must decide within a four-month period whether the concentration will be cleared.

The legal effect of a concentration that has to be notified is suspended.

For the preliminary investigation of one month, the Secretariat of the COMCO charges a flat fee of CHF 5,000. For the in-depth investigation, filing fees are charged on a time-spent basis. The hourly rates are between CHF 100 and CHF 400, depending on the urgency of the case and the level of seniority of the case-handlers.

**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?**

Yes. The EU-CH Agreement stipulates an aviation-specific aid scheme (Art. 13). This scheme corresponds almost literally to the regulation in the EU (Art. 107 TFEU).

As a general rule, the EU-CH Agreement prohibits state aid which distorts or threatens to distort competition. Exceptions are provided for in the EU-CH Agreement.

The decision as to whether state aid is permissible under the aforementioned regulations lies with the Swiss authorities, who are obliged to inform the EU authorities on such aid. Although not expressly provided for in the Agreement, the Swiss authorities are likely to follow the recent practice of the European Union (see the 2014 Aviation Guidelines of the EU Commission, OJ C 99, 4 April 2014, pp. 3 to 34).

The EU Commission adopted, in spring 2020, new temporary rules for state aid allowing the EU Member States to support the economy under pressure due to the COVID-19 pandemic. Under these new rules, the German Lufthansa Group received state aid, which was approved by the EU Commission. Amid the COVID-19 crisis and liquidity shortfalls, the Swiss Confederation provided financial support to Swiss and Edelweiss (which are members of the Lufthansa Group) by means of so-called “COVID-19 plus” credits secured by federal guarantees subject to certain conditions. The COMCO approved such rescue package for Swiss and Edelweiss and declared it compatible with the EU-CH Agreement.

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

The criteria are set out in Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, which is also applicable in Switzerland.

Subsidies for particular routes may be granted to an undertaking carrier operating a particular route under a public service obligation, as provided for in Art. 16 *et seq.* of the Regulation. Before deciding on such a public service obligation, the other Member States, the EU Commission, the airports concerned, and other air carriers operating on that particular route must be consulted.

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

##### General rules

The main regulatory instrument in Switzerland governing the acquisition, retention and use of (passenger and other) data is the Federal Act on Data Protection (FADP). The FADP embodies fundamental rules concerning the processing of personal data by both the public and the private sector. The revision of the FADP was completed in September 2020, and the new law is expected to come into force in 2022. The purpose of the revision was to adapt the FADP to a large extent to the level of protection provided by Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR), which entered into effect on 25 May 2018. The GDPR is not only directly applicable in the EU, but has extraterritorial application to any entity outside the EU that is either established within the EU or that targets data subjects in the EU. Furthermore, as of 1 March 2019, Switzerland has implemented the requirements of EU Directive 2016/680 of 27 April 2016, which regulates the specific protection of personal data in the prevention, investigation, detection, and prosecution of criminal offences as well as the enforcement of criminal penalties within the Schengen area. The new FADP does not go beyond the GDPR, but there are some practically relevant deviations which concern the

obligation to provide information, the rights of data subjects, the obligation to report data breaches, and the appointment of a data protection officer or representative.

Under these regulations, the data subject generally has the right to access and to correct false, incomplete, or erroneous data. Under certain circumstances, the data subject can also request deletion of his or her personal data. The collection of the data and the purpose for which it is processed must be readily identifiable by the person concerned and the data subject must be actively informed if particularly sensitive personal data is involved. With the new FADP, the rights of data subjects are somewhat extended, as it will become easier for them to request their own data from a company. However, companies are also able to reject abusive requests for access with new arguments. Violations of the FADP and the GDPR can lead to criminal proceedings and high fines. Furthermore, the data subject enjoys all remedies generally available under civil procedure rules (i.e., injunctions, right to restitution, or the right to claim damages).

##### Aviation-specific rules

Aviation-specific rules are, for one, incorporated in the Federal Act on Foreign Nationals and Integration (FNIA). According to the Schengen and Dublin Association Agreements, Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data is applicable in Switzerland. The Directive was implemented in the FNIA, which was significantly revised in 2014. The State Secretariat for Migration (SEM) determines the flights for which air carriers are required to transmit the personal data of the passengers (see Art. 104 FNIA). The affected carriers must transmit the Advance Passenger Information (API) of all passengers to the Swiss authorities. Details on how and where the data is to be delivered can be found under <https://www.sem.admin.ch/dam/data/sem/eu/schengen-dublin/api-schnittstellenspezi-e.pdf>.

Further, the Federal Customs Administration can oblige the carriers and airport operator to transmit personal data of the passengers for up to six months after the transport was carried out (see Art. 151 of the Customs Ordinance). The affected carriers or airport operators are obliged to transmit the name, first name, address, date of birth, passport number, places of origin, transit and final destination of the passengers as well as the name of the travel agency who booked the flights (if applicable).

Art. 21f FCAA stipulates that passenger data must be made available by carriers to the competent prosecution authorities, upon their request, for up to six months after the transport has been carried out. The personal data concerned encompasses the first name, last name, address, date of birth, nationality, travel document number, date, time and number of the flight, places of origin, transit and final destination of the passengers, data on any accompanying persons, information on the payment method used as well as the name of the travel agency who booked the flight (if applicable).

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

The FADP (see question 4.8 above) imposes the obligation on any entity which collects data to put in place adequate security measures against data loss. If the loss of data is caused by insufficient security measures, the carrier may become liable for damages.

Unauthorised access to sensitive data can be prosecuted.

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

Intellectual property rights are enforced by court action. Each of the 26 cantons of Switzerland has a single cantonal instance with overall jurisdiction for intellectual property and related disputes. In the cantons of Aargau, Bern, St. Gallen, and Zurich, competence lies with the commercial court.

A separate, exclusive jurisdiction has been granted to the Federal Patent Court, as the first instance for patent disputes, including action for infringement and claims concerning the existence or validity of a patent. For other civil actions related to patents, the cantonal courts have concurrent jurisdiction.

An important and effective tool to efficiently prevent acts of infringement under intellectual property law is injunctive relief. If certain conditions can be demonstrated, a court injunction can be obtained relatively quickly. The claimant must demonstrate a valid cause of action, an infringement, a resulting disadvantage that cannot be readily remedied, and urgency. Injunctive relief must be confirmed in the framework of subsequent ordinary court proceedings unless the parties settle.

Furthermore, intellectual property infringements may constitute a criminal offence.

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

Switzerland has adopted Regulation (EC) No 261/2004 regarding passenger rights in the event of denied boarding and of cancellation or long delay of flights.

In the event of overbooking, the carrier may first determine whether passengers are willing to offer their seat against an indemnification to be agreed upon. If no such volunteers can be found, the carrier must compensate those passengers denied boarding with a payment of up to EUR 600, depending on the distance of the flight. The Regulation requires airlines to offer the relevant passenger meals, refreshments, and hotel accommodation as appropriate whilst waiting for a rearranged flight. They must also cover any costs of transport between the hotel and the airport.

The passenger rights under Regulation (EC) No 261/2004 must be enforced before the ordinary civil courts.

In 2012, a civil court of first instance ruled that Regulation (EC) No 261/2004 does not apply to a flight from Zurich to a non-EU country.

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

It is possible to file a passenger report with the FOCA, which can initiate administrative fine proceedings and impose fines of up to CHF 20,000 (Art. 91 para. 4 FCAA).

The passenger report form is available under [www.bazl.admin.ch](http://www.bazl.admin.ch) (Air Passenger Rights).

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

Airports (*Flughäfen*), i.e., aerodromes serving public transport, can only be run based on a concession by the federal government. Such concessions are based on the FCAA and the Ordinance on

the Aviation Infrastructure. The airport operators are licensed either for 50 years in the case of national airports, or 30 years in the case of regional airports.

The concession entails the right to run an airport commercially and to raise fees. On the other hand, the airport operator is obliged to open the airport to all aircraft, as provided for in the operational regulation of the airport (see question 1.6 above), and to maintain an infrastructure guaranteeing safe operations.

The operation of the airport must be in line with the Sectoral Aviation Infrastructure Plan (SAIP), and the applicant must have the management skills, technical knowledge, and funds necessary for the operation of the airport, as provided for in the operational regulation.

For the operation of an airfield (*Flugfeld*), i.e., an aerodrome not serving public transport, an operating licence (*Betriebsbewilligung*) is required. It is issued by the FOCA.

All details regarding the operation of the aerodrome (i.e., the airport or airfield) are then to be specified in the operational regulation (*Betriebsreglement*), which is subject to FOCA approval. Typical contents of the operational regulation are the organisation of the aerodrome, operational hours, departure/arrival procedures, ground handling, slots coordination, further commercial and non-commercial use of the aerodrome, environmental issues, an aerodrome design and operational manual according to ICAO standards, and a safety management system.

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

There is no consumer protection legislation specifically governing the relationship between airport operators and passengers.

As regards the general consumer protection legislation (e.g., the Unfair Competition Act), it must be noted that there is typically no contractual relationship between passengers and airport operators.

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

All the major GDSs operate in Switzerland, e.g., Travelport, Amadeus, Sabre, etc. (not taking into account the many suppliers of “front-end tools”).

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

No. However, Switzerland has adopted Regulation (EC) No 80/2009 of the European Parliament and of the Council of 14 January 2009 on a Code of Conduct for computerised reservation systems. According to this Regulation, a system vendor shall publicly disclose, unless this is otherwise made public, the existence and extent of a direct or indirect capital holding of an air carrier or rail-transport operator in a system vendor, or of a system vendor in an air carrier or rail-transport operator.

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

This is not specifically regulated in Switzerland. As long as the competition rules are respected and all the conditions for the approval of the airport operational regulation are fulfilled

(especially, in this sphere, non-discrimination), integration between air operators and airports should be permissible.

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

In order for it to qualify as a commercial operator under Swiss law and to obtain a licence for commercial flights in Switzerland, a carrier must be registered in the Swiss commercial register with the purpose of operating commercial air traffic. Further, it must be controlled and majority-owned by Swiss citizens. Exceptions can be granted to foreigners or foreign companies that are treated as Swiss citizens or Swiss companies based on intergovernmental agreements (see Art. 27 FCAA and Art. 103 FCAO).

## 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?**

In July 2021, the Swiss-EU Joint Aviation Committee approved the adoption of certain EU decrees. The new rules came into force on 1 August 2021. In particular, in view of the COVID-19 pandemic, the requirements for air carriers regarding entitlement to slots have been eased. In general, the COVID-19 pandemic will continue to affect civil aviation.

As regards all fields of economy in trade in Europe and worldwide, the implications of Brexit remain to be seen, including with respect to civil aviation in Switzerland.

Switzerland is, and remains, at the forefront of the development of Unmanned Aerial Vehicles (UAVs), also known as (civil) drones, and as with many other fields, regulations in this field follow the fast-paced and dynamic technological developments of this topic. In principle, Swiss regulations in this domain are expected to follow the developments in the European Union, where the EASA created a comprehensive drone regulation framework for all EASA Member States. On 11 June 2019, the Commission Delegated Regulation (EU) 2019/945 on unmanned aircraft systems and on third-country operators of unmanned aircraft systems, and the Commission Implementing Regulation (EU) 2019/947 on the rules and procedures for the operation of unmanned aircraft, were published to ensure the safety and security of drone operations across Europe. The new EU regulations have been applicable since 31 December 2020. Since that date, users of drones – both professional pilots and those flying drones for leisure – are obliged to register. Switzerland was originally supposed to adopt this set of rules with effect from the beginning of 2021. However, a motion adopted by the Swiss Parliament in September and December 2020 instructed the Federal Council to exclude traditional model aircraft when adopting Regulation (EU) 2019/947 and to keep it governed by national law. Whether and when this regulation will be adopted by Switzerland therefore remains unclear and depends on the response of the EU Commission.

In addition to the abovementioned new rules for drone operations, a U-Space is currently being implemented in Switzerland. In simple terms, U-Space is a set of services and specific procedures enabling a safe and efficient integration of drones into airspace. These services rely on a high level of digitalisation and automation of functions, which enable complex operations with little human labour. Since the implementation of U-Space is also gaining momentum in the EU, and several EU regulations on this topic have been published recently, it is essential that Switzerland and its related legislation are EU-compatible, in particular because UAV operations will increasingly take place across borders in the future.





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VISCHER advises and represents airline companies in their core business and also in associated fields such as catering. We regularly advise on questions at a cantonal and federal level, handle damage and insurance cases of all types, and assist in contract negotiations with travel offices, air-traffic authorities, and airport operators. In addition, we advise on leasing, buying and selling aircraft and also have a wealth of experience in aircraft completion and all types of aviation-related dispute resolution. VISCHER received the *Finance Monthly* 2016 award for "Aviation Law Firm of the Year – Switzerland".

In the 2019 edition of *Bilanz*, VISCHER's Transport/Aviation team was honoured as one of the five top teams in the field of aviation law in Switzerland.

In 2021, VISCHER was again named in the new edition of *The Legal 500* as one of the leading Swiss law firms in the field of transport.

Various VISCHER Transport/Aviation team members (including Urs Haegi, Thomas Weibel, Christoph Niederer, and Peter Kühn) are regularly named in *The Legal 500* and/or *Who's Who Legal Switzerland* in the field of transport. Our offices are located in Zurich, Basel, and Geneva, the largest business centres in Switzerland.

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