

# Competition Law in the Transport Sector

Access to Facilities

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*Geert Goeteyn, Shearman & Sterling LLP*



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## Introduction



## Competition law remedies

- Remedies or "commitments" are used by the Commission to address competitive issues identified in mergers or cooperative ventures between two or more companies (e.g. revenue-sharing JVs or "alliances" within the aviation sector)
- These remedies can generally be categorised into two main types:
  - **Structural Remedies**, which involve a change in the structure of the merging undertakings (e.g. divestment of a fully viable and competitive subsidiary)
  - **Behavioural Remedies**, which govern the future conduct of the merging undertakings (e.g. a commitment not to raise prices in the future)
- While the Commission favours structural remedies, it nevertheless accepts that other types of remedy may be acceptable depending on the particular features of a case

## The 2008 Remedies Notice under the European Merger Regulation

- **The General Position**: *"According to the case law of the Court, the basic aim of commitments is to ensure competitive market structures. Accordingly, **commitments which are structural in nature, such as the commitment to sell a business unit, are, as a rule, preferable from the point of view of the Merger Regulation's objective**" (para. 15)*
  
- The availability of access remedies:
  - *"Commitments granting **access to infrastructure and networks** may be submitted in order to facilitate market entry by competitors. They may be acceptable to the Commission in circumstances where it is sufficiently clear that there will be **actual entry of new competitors** that would eliminate any significant impediment to effective competition" – para. 63*
  
  - *"Commitments granting non-discriminatory access to infrastructure or networks of the merging parties may also be submitted in order to ensure that competition is not significantly impeded as a result of foreclosure... The Commission will only accept such commitments if it can be concluded that these commitments will be effective and competitors will likely use them so that **foreclosure concerns will be eliminated**" – para. 64*

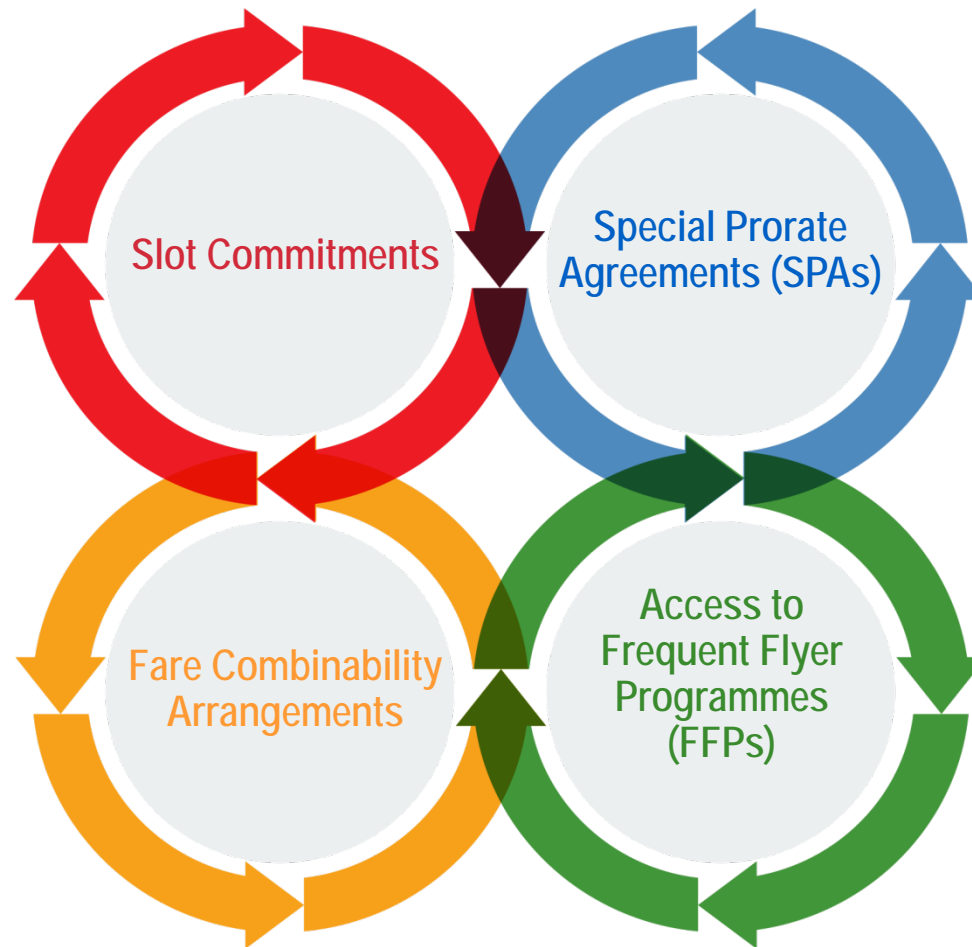
## Access remedies in the air transport industry

- Various features of the air transport industry undermine the effectiveness of normal structural remedies:
  - Numerous “problem markets” due to narrow market definition (i.e. the “O&D” route approach)
    - Unlikely that the divestment of a single business unit will remedy issues across all markets
  - Divestiture of market-specific assets difficult
    - Hard or impossible to identify market-specific assets
    - Suitable buyer not available
- Commission decisions show that in air transport cases (including both mergers and alliances) a **coherent package of remedies** designed to facilitate market access is often more appropriate than a pure divestiture remedy
- A typical access remedy package in the aviation sector aims to:
  - Grant third parties access to **key facilities** that drive competitiveness in the market (access remedies)
  - **Reduce barriers to entry** in the market
  - Replicate the **competitive conditions** in the market pre-merger
  - Eliminate concerns about possible **foreclosure**

## Access to Facilities in the Air Transport Sector



## Common remedy package in the air transport industry





## Key access remedy - slots

- A “quasi-structural” remedy: involves the release of landing and take-off slots by the parties to interested competitors
- Commission: Lack of slots at congested airports is the main barrier to entry in the air transport industry
- In the EU: access to slots at congested airports is regulated by the EU Slot Regulation (95/93)
- Slot remedies provide a competitor with access to this key facility and allow the launch or expansion of competing services
- Additional services replace the competitive pressure lost as a result of the airline consolidation
- Key terms:
  - Competitor must have already exhausted its attempt to secure the slot through the normal allocation procedure
  - Slots must be made available within a certain time window of the request submitted by the competitor (usually 60 minutes for long haul flights and 20 minutes for short haul flights)
  - Must be used to operate a service on one of the problematic routes (usually a hub-hub route) – more recently subject to grandfathering (see below)
  - If slots are traded on a secondary market, surrendering party entitled to consideration

## Failures of the slot remedy

- Slots not taken up
- Route unviable due to lack of feeder traffic
- Current procedure too cumbersome on entrant
- Threat of potential entry (recognised in CFI judgment *easyJet v. Commission*) not effective in practice
- Additional measures necessary

### Solutions to enhance effectiveness?

- Grandfathering rights
- Combination with other remedies e.g. SPAs, fare combinability arrangements

## Grandfathering rights

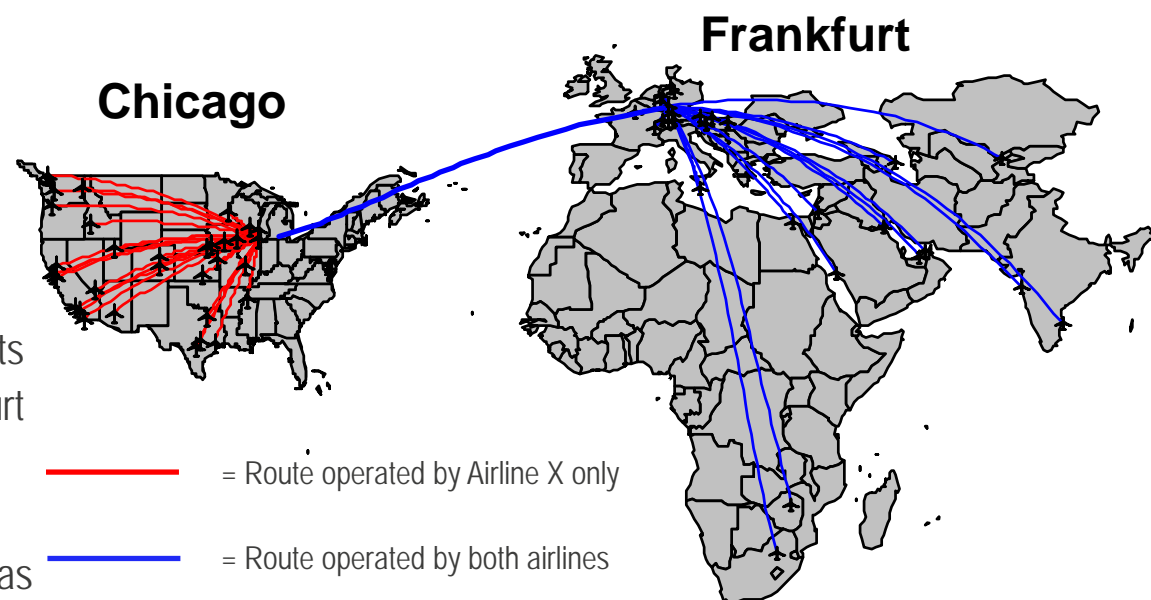
- One issue with the slot commitment = slots can only be used on routes that are the subject of competitive concerns
- Their value to other airlines may therefore be limited
- Aim of grandfathering rights = increase the attractiveness of the slots so that they are taken up by competitors
- Basic principle:
  - Competitive issues identified on route A-B
  - Slot purchased by prospective market entrant X
  - X must use to slot to operate a competing service on route A-B for at least five years
  - After a certain number of years have elapsed, X can cease operating a service on route A-B and offer a service on any route it likes (the “Grandfathering Right”)

## Special prorate agreements (SPAs)

- Allow interested airlines to obtain favourable terms from the parties to carry connecting passengers on connecting flights operated by them
- Access to sufficient connecting traffic is a barrier to entry – planes must be (substantially) filled in order for a route to be economically viable
- In this context, SPAs, which are common in the aviation industry, facilitate access to sufficient connecting traffic of the parties to make it viable for a competitor to commence a competing service on this route or increase its existing services
  - Increases likelihood of slots being taken up
- Key terms:
  - SPA normally restricted to traffic with an origin or destination in a named geographical area (e.g. Europe), and an origin or destination in another geographical area (e.g. North America, the Caribbean and Central America)
  - Interested airlines can select a number of feeder routes for which they would like access to the parties' connecting traffic (up to a maximum)
  - SPA cannot be concluded on terms which are less favourable than corresponding terms in any existing SPA between the parties and another airline

## SPAs in practice

- Chicago-Frankfurt is the hub-hub route and the source of competitive concerns
- Airline Y receives a slot from the merged entity X intending to operate a service on the Chicago-Frankfurt route
- Ordinarily, Airline Y would not be able to operate an economically viable service as it does not have access to connecting traffic from domestic U.S. flights
- The SPA allows Airline Y to feed its Chicago-Frankfurt service with domestic short-haul passengers carried by Airline X (red routes)
- It is now in an equivalent competitive position as it has access to feeder traffic at Frankfurt **and** (because of the SPA) Chicago



## Fare combinability arrangements

- Fare combinability arrangements are relatively common in the aviation industry
- Such arrangements allow a competitor to offer a return trip to passengers, with one leg being operated by the competitor and the other being operated by the parties
- **Aim** = reduce the parties' frequency advantage on a given route.
- This frequency advantage is a barrier to entry – premium (or time-sensitive) passengers, in particular, favour flexibility in their travel options and will therefore gravitate towards an airline that can provide this
- Fare combinability allows the competitor to offer an greater number of services on a given route, making its offering more attractive to (particularly premium) passengers

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## Fare combinability in practice

Airline X (Outbound)	Airline X (Return)	Airline Y (Outbound)	Airline Y (Return)
09:30	13:00	13:30	17:00
12:00	15:30	16:00	19:30
14:30	18:00		
17:00	20:30		

- Absent the combinability arrangements, the merged entity Airline X operates 4 services a day between a given city pair. Airline Y, a competitor on the same route, only offers two services each way
- Airline Y enters into a fare combinability agreement with Airline X
- Under the terms of this agreement, passengers of Airline Y can combine one of Airline Y's outbound or return services with an outbound or return service provided by Airline X
- This increases the frequencies that Airline Y can offer its passengers, and therefore the attractiveness of its offering
- Airline X's frequency advantage is diminished

# Case Studies

Access Remedies in Action



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## COMP/AT.39595 Continental/United/Lufthansa/Air Canada (A++ JV)

- Competitive issues were identified on the Frankfurt-New York route for “premium” passengers
- Prior to the joint venture:
  - Lufthansa (LH) and Continental (CO) operated a total of 4 services on this route
  - Combined market share for premium customers = 71%
- Commission was concerned that the A++ JV eliminated competition between the parties on key parameters such as price and capacity
- In light of the parties’ large traffic shares on this route, the Commission was concerned that the joint venture was likely to result in anti-competitive effects in the market
- According to the Commission, barriers to entry, such as slot constraints and the parties’ frequency advantage, meant that competitors would be unable to replace the loss of competition between LH and CO through expanding their services

## COMP/AT.39595 Continental/United/Lufthansa/Air Canada (A++ JV)

- The parties proposed a remedy package to alleviate the Commission's concerns
- The final commitments included the following:
  - **Slots:** Slots made available at Frankfurt and/or New York airports to allow up to one additional daily frequency on the Frankfurt-New York route. The number of slots made available will be increased if the parties' competitors reduced their frequencies on the route below two
  - **Fare Combinability:** Existing competitors can request an agreement that allows them to offer a return trip to **premium** passengers comprising of a non-stop service provided one way by one of the parties, and the other way by that competitor
  - **SPA:** Covers traffic with an origin or destination in geographic Europe and Israel on the one hand, and an origin or destination in North America, the Caribbean and Central America on the other. Competitor can select up to fifteen feeder routes on which the parties' connecting traffic can be transferred onto the competitor's transatlantic services
  - **Frequent Flyer Programme ("FFP") Commitment:** Competitors given access to the parties' frequent flyer programmes on the Frankfurt-New York route on the same terms as members of the Star Alliance

## COMP/M.6607 US Airways/American Airlines

- Competitive issues were identified on the London-Philadelphia route
- Prior to the merger:
  - US Airways operated a daily service and British Airways, American Airline's joint venture partner, operated a twice daily service – these were the only non-stop services available
  - Parties had a 90-100% traffic share if only non-stop services were considered\* and an 80-90% traffic share if one-stop services were also considered
- Commission noted that:
  - The merger would lead to a reduction in the number of non-stop carriers from 2 to 1
  - Large traffic shares indicated that the merged entity would have a quasi-monopolistic position post-merger
  - Heavy congestion and scarcity of slots at London Heathrow meant that entry opportunities on the route would be strongly limited
- Merger cleared subject to a conventional commitments package i.e. slot commitment (with grandfathering rights), SPAs, fare combinability arrangements and access to FFPs

\* Market share not quite 100% because Virgin was also active on this route, albeit as a marketing carrier only

## Access to Feeder Traffic

A vertical competitive issue in the air transport industry



## Usual basis for competitive assessment: horizontal concerns

- Remaining competition?
  - Non-stop/onestop (all onestop flights taken into account: no cut off UA/CO, DL/VS, US/AA)
  - Other modes of transport
  - Other airports serving the same metropolitan area
- Hub-to-hub routes are of particular concern (see e.g. AF/KL, AF/AZ, LH/LX, AA/US, A++, AF-KL/AZ/DL, IAG/Aer Lingus)
- Competition from other alliance members in the case of a merger?
  - To be considered on a case by case basis
- Network competition?

## Competitive assessment: possible vertical concerns (feed traffic issues)

- Airline industry is characterised by a number of practices whereby one carrier carries passengers of another carrier on its plane and thus provides access to its network to passengers of another carrier (feed traffic)
  - Interline, codeshare and block space agreements
- To the extent that carrier A relies in part on the service operated by carrier B to offer air transport between two location to its passengers, carrier B provides an input to carrier A
- A merger (or alliance between two carriers) could lead to competition concerns if (post transaction) the acquirer would deny or hamper access to its flights – or raise the price charged for such access – on routes currently operated by the target for passengers connecting at a hub airport onto flights operated by a competitor
- The Commission will assess whether the acquirer has (a) the ability and (b) incentive to foreclose
- This issue was examined in detail in the IAG/BMI and AIG/Aer Lingus cases

## Competitive assessment: feed traffic issues – the IAG/Aer Lingus case

- The theory of harm: IAG would (post merger) deny or hamper access to its short-haul flights – or raise the price charged for such access – on routes currently operated by Aer Lingus for passengers connecting at a hub airport onto flights operated by another carrier to a destination to which IAG also offers services from the same hub airport, or from its own hub airport.
  - e.g. deny Virgin access (or increase price charged for access) to Aer Lingus flights between Dublin and Heathrow for a service offered by Virgin between Dublin and San Francisco over London Heathrow
- Ability to foreclose: IAG has the ability foreclose
  - Contracts can be terminated or amended at (relatively) short notice
  - IAG controls the system to which the competing carriers book seats on its flights
  - Aer Lingus is the main / only provider of services between certain Irish cities (Dublin, Belfast, Cork, Shannon) and the connecting airports of Gatwick, Amsterdam, Manchester and Heathrow
- Incentive to foreclose
  - The incentive to foreclose depends on the degree to which foreclosure would be profitable. IAG would face a trade-off between the profit lost in the upstream market due to a reduction of input sales to rivals and the profit gain from expanding sales downstream or being able to raise prices to consumers.
  - The Commission concluded IAG would have the incentive to foreclose

## Competitive assessment: feed traffic issues – the IAG/Aer Lingus case

- **Remedy:** obligation to enter into SPA with competing carriers which operate a non-stop service between the airports of Heathrow, Gatwick, Manchester, Amsterdam, Shannon and/or Dublin and certain long haul destinations
- SPA applied to short-haul routes between certain airports in Ireland (Belfast, Cork, Dublin, Knock and/or Shannon) and London Heathrow, London Gatwick, Manchester and/or Amsterdam
- Allowed competitors currently accessing a significant volume of feed traffic from Aer Lingus to continue to do so post-transaction
- Duration = up to 5 years (at the choice of the competitor)
- Terms included in an SPA concluded between the merged entity and a competitor could not be less favourable than corresponding terms in any SPA which Aer Lingus already had in place




## Access Remedies in the Air Transport Sector: Summary



## Summary

- To a certain extent, the “child” of the narrow and debatable route-by-route approach to market definition
- Despite certain concerns about its relevance/effectiveness, it is unlikely that the slot remedy will disappear any time soon
- A “quasi-structural” remedy: slot commitments mimic the effects of a structural remedy (i.e. a divestiture) in the market
- Effectiveness may depend upon ancillary factors such as the terms of the availability commitment, and the availability of other remedies (such as SPAs) to ensure the slots are regarded as a sufficiently attractive facility by competitors
- Nevertheless, it is conceivable that alternative access remedies might be accepted in the future, for example in respect of airports where the availability of slots is not the relevant competitive constraint
  - *Olympic/Aegean (I)*: Availability of slots was not an issue at Greek airports and was not the main barrier to entry. Instead, airlines commented that there were two main requirements to market entry: (i) the ability of new entrants to set up a base at Athens International Airport (in order to cover Greek domestic market) and (ii) the need for a recognised brand capable of competing with that of the merged entity.



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