

C L I F F O R D
C H A N C E

COMPETITION LAW CHALLENGES RAISED BY THE AIR BERLIN SAGA
INFORMA CONFERENCE

MIGUEL ODRIOSOLA
MADRID
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INTRODUCTION



Challenges posed by insolvencies

- Airlines' insolvencies will trigger consolidation in the market but pose a particular challenge: the candidate purchaser that is willing to pay the highest price for a failing airline is not necessarily the preferred acquirer from a competition law perspective. Therefore, insolvency administrators should ask the question what competition concerns will be produced and whether these concerns can be mitigated (*e.g.*, *case M.8672, Lufthansa/Certain Air Berlin assets*)
- There will be increasing consolidation between EU airlines (comparison with the U.S., where 4 airlines hold 80% of the market)
- There will be a capacity deficit at the airports in the EU; by 2035, 20 major European airports are said to be at full capacity: competition for slots may matter more than O&D competition

THE NEW AIRPORT SLOT HOLDING TEST

CASE M.8672, *EASYJET/CERTAIN AIR BERLIN ASSETS*

The counterfactual

- Air Berlin was in insolvency
- No route by route analysis necessary!
Instead airport by airport slot holding test
- Theory of harm: input foreclosure
- (easyJet could only acquire slots, not the position on particular routes)



THE NEW AIRPORT SLOT HOLDING TEST

CASE M.8869, RYANAIR/LAUDA MOTION

The counterfactual



- Confirms airport slot holding test
- Will be applied to future cases in parallel to O&D analysis (Lauda Air (ex Nikki) not insolvent)

THE NEW AIRPORT SLOT HOLDING TEST

CASE M.8672, *EASYJET/CERTAIN AIR BERLIN ASSETS*

The counterfactual

Paragraph 9 Horizontal Merger Guidelines: "*in some circumstances, the Commission may take into account future changes to the market that can reasonably be predicted*"

Air Berlin was in insolvency. Two possibilities:

- Somebody acquires the slots
- Slots will return to the pool

Counterfactual is the net increment. If slots return to the pool, easyJet will also benefit absent the transaction – diminishing the net increment.

Commission opts for most conservative case scenario  all slots to competitors.

THE NEW AIRPORT SLOT HOLDING TEST

CASE M.6796, *AEGEAN/OLYMPIC II*

Insolvency precedents

Olympic Air met the failing firm criteria:

- Compelled to exit the market because of financial difficulties
- No less anticompetitive purchase
- Assets would inevitably exit the market if not acquired by Aegean Airlines

Counterfactual: effects similar to no transaction



THE NEW AIRPORT SLOT HOLDING TEST

CASE M.6796, *AEGEAN/OLYMPIC II*

Insolvency precedents

Case M.4141, *KLM/Martinair* (exit taken into account)



THE NEW AIRPORT SLOT HOLDING TEST

CASE M.6447, IAG/BMI

Insolvency precedents

- BMI had not filed for insolvency but Commission considered exit as most likely scenario
- Counterfactual: Most slots would return to the pool where IAG as incumbent could retain part of them. Commission estimates IAG would keep 40% of BMI slots, *i.e.*, 3% of Heathrow slots. Rest, the Net Increment, would be taken up by new entrants. **Net increment** of 3% did not significantly change IAG slot holding at Heathrow. Also no IAG history of hoarding or shuffling

THE NEW AIRPORT SLOT HOLDING TEST

CASE M.6447, IAG/BMI

Insolvency precedents



- Commission carries out route by route analysis, takes into account likely exit but demands remedies on seven routes because new entry more likely than without transaction. Slots not tied to specific routes

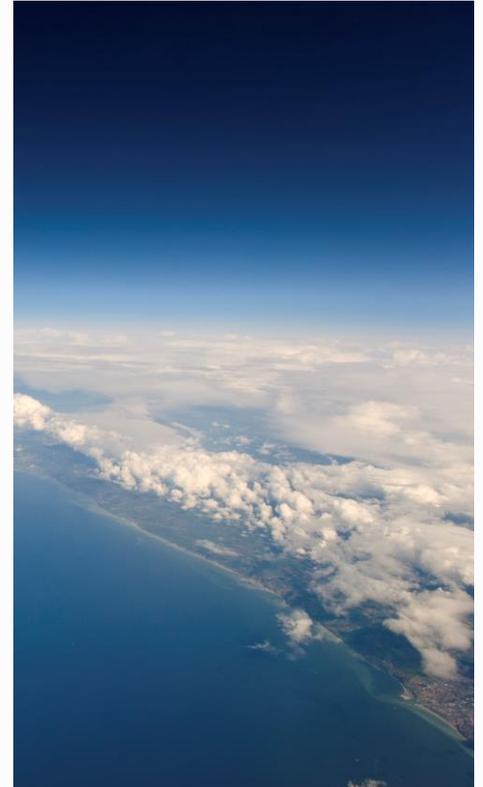
THE NEW AIRPORT SLOT HOLDING TEST

CASE M.8672, *EASYJET/CERTAIN AIR BERLIN ASSETS*

New slot holding test theory of harm: input foreclosure (Non horizontal guidelines)

Does slot holding at the relevant airports allow foreclosure of rivals?

- Ability to foreclose
- Incentive to foreclose
- Foreclosure impedes effective competition



THE NEW AIRPORT SLOT HOLDING TEST

CASE M.8672, *EASYJET/CERTAIN AIR BERLIN ASSETS*

Input foreclosure: ability



- Foreclosure only possible if:
 - Important input for the downstream product (Slots are an essential input to compete at congested airports)
 - Large portfolio of slots at an airport confers an advantage
 - Significant degree of market power in downstream market
 - Able to affect overall availability of the product

THE NEW AIRPORT SLOT HOLDING TEST

CASE M.8672, *EASYJET/CERTAIN AIR BERLIN ASSETS*

Input foreclosure: ability

Market power in upstream market (per airport, including destination airports)

- High **share** of the airport **capacity** at peak times
 - Average slot holding, e.g., slots/total capacity ratio, during opening hours (below 25%)
 - Average slot holding during peak hours (below 40%)
- Material **net increment** at peak times
 - Commission opts for gross increment, conservative approach, assumes no slots from pool. But does not include slots obtained in the pool unrelated to the transaction
- High **congestion**
 - Slots allocation/capacity calculated per week (54%) and per hour (max 73%)
 - 60% is not problematic

THE NEW AIRPORT SLOT HOLDING TEST

CASE M.8672, *EASYJET/CERTAIN AIR BERLIN ASSETS*

Input foreclosure: incentives

- Incentive to foreclose depends on the degree to which foreclosure is profitable
- **Relative capacity constraints:**
 - No incentive because only twice size of competitor in terms of capacity (e.g., twice LH at Tegel)
 - No incentive to foreclose because at Tegel nor at combined Tegel Schoenefeld first player max 35/40% and second player 33%
 - No history of exclusionary practices such as slot hoarding (operating through small aircrafts rather than losing) or shuffling (timing close to timing of new entrant)

THE SAGA CONTINUES

LH & LOT APPEALS

- Case T-1/18, *Deutsche Lufthansa/Commission*
- Case T-296/18, *LOT/Commission*
- Case T-240/18, *easyJet/Certain Air Berlin assets*



**ANY
QUESTIONS?**



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