



EU Competition Policy in Air Transport

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All views expressed in this presentation are personnel and cannot bind the European Commission



The EC Competition rules

- o **Article 81**
 - o **Article 82**
 - o **The Merger Regulation**
 - o **Article 86** (Services of general economic interest)
 - o **Articles 87 - 89 EC** (State aid rules)
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Article 81

- **The aim is to protect competition on the market with a view of promoting consumer welfare and efficient allocation of resources**
 - **Article 81(1) EC prohibits agreements between companies that restrict competition**
 - Trade between Member States must be affected
 - Appreciable effect
 - Negative effects on competition (market power)
 - **Article 81(3) EC provides an exemption from the prohibition if four cumulative conditions are fulfilled**
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Conditions of Article 81(3)

○ **Efficiency gains**

- Cost savings
- Improved services

○ **Fair share to consumers**

- Efficiencies must be passed on to the consumers
- Sliding scale: the greater the restriction of competition, the greater must be the efficiencies pass-on to consumers

○ **Indispensability**

- Agreement as such necessary to achieve efficiencies ?
- Are there less restrictive means to achieve the efficiency gains ?

○ **No elimination of competition**

- Degree of competition existing prior to the agreement
 - Impact of restrictive agreement on competition
 - Realistic analysis of the various sources of competition
 - Actual and potential competition must be considered
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Modernization of Article 81

- **EC Regulation 2003/1**
 - Legal exception system
 - Direct application of Article 81(3)
 - **Shift from a legalistic based approach to an economic based interpretation of the competition rules**
 - **Decentralization towards National Courts and Authorities/more application of Community law**
 - **Increased enforcement powers**
 - Applies to all air transport, including routes between the EU and third countries
 - **Main Commission decision types**
 - Commitments (Article 9)
 - Infringement (Article 7)
 - **Important set of Notices**
 - <http://europa.eu.int/comm/competition/antitrust/legislation/>
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Article 81 – Secondary/Soft Law



- **Implementing Commission Regulation 773/2004 relating to the conduct of proceedings**
 - **Commission Notice on**
 - **Cooperation within the network of competition authorities (ECN)**
 - **Cooperation between the Commission and the courts of the EU Member States**
 - **Handling of complaints by the Commission**
 - **Informal guidance relating to novel questions concerning Article 81 and 82**
 - **Guidelines on the**
 - **Effect on trade concept contained in Article 81 and 82**
 - **Application of Article 81(3)**
 - <http://europa.eu.int/comm/competition/antitrust/legislation/>
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Article 82



- Prohibits “any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it ... as incompatible with the common market in so far as it may affect trade between Member States”
 - Examples of prohibited abuses set out in Article 82 include the imposition of unfair prices, production or marketing restrictions, discrimination between customers and tying provisions in contracts
 - EC guidelines in preparation
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EU Merger Control



- Merger Regulation creates a system of merger control at the Community level
 - Commission has sole competence for concentrations which have Community dimension; otherwise national merger control may apply
 - The Commission investigates all concentrations to assess whether or not that will “*significantly impedes competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position*” (MergerReg)
 - Concentrations which are found not to meet these criteria are declared incompatible and must not be implemented
 - Commission may approve concentrations subject to enforceable commitments from the merging parties
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MergerReg: Secondary/Soft law



- **Merger Regulation (139/2004) contains the main rules for the assessment of concentrations**
 - **Implementing Regulation (802/2004) concerns procedural issues (notification, deadlines, right to be heard,...)**
 - **Notices and guidelines play an important role for the interpretation of the Merger Regulation**
 - **Horizontal Merger Guidelines,**
 - **Notices on ancillary restrictions, simplified procedure and case allocation**
 - **"Best Practice Guidelines" which concern the relationship between case team and parties/third parties during the procedure**
 - **<http://europa.eu.int/comm/competition/mergers/legislation/regulation/implemented>**
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Key air transport competition issues



- **Fight against hardcore restrictions**
 - Non-compete clauses
 - Market sharing arrangements
 - Commission decision in SAS/Maersk of July 2001 imposing fines
 - **Monitoring of market foreclosure and exclusionary practices**
 - Predatory practices
 - Travel agency incentive schemes (BA/Virgin)
 - Frequent flyer programs
 - Corporate agreements
 - **Assessment of alliances and mergers**
 - **Case-by-case analysis necessary**
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Assessment of airline alliances and mergers



○ Overall positive Commission approach

- Benefits resulting from combined networks, but may ...
- ... reduce competition and enhance market power on selected overlaps

○ Key assessment issues

- Definition of relevant markets and competitive overlap
- Competitive effects and barriers to entry
- Benefits must outweigh competition harm
- No elimination of competition
- Remedies are often necessary to avoid prohibition

○ EC Guidelines as assessment tools

- Provide transparency and predictability regarding the Commission's competitive analysis
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Market definition

- **City-pairs (O&D) vs. network markets**
 - **O&D as starting point**
 - Direct/indirect flights (long-haul/short haul)
 - Overlapping airport catchment areas
 - Scheduled/charter services
 - Intermodal competition (train/car)
 - **Time- vs. price-sensitive passengers**
 - **Corporate customers as a separate market ?**
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Competitive effects analysis

- **Negative effects on prices, output, innovation or quality of services ?**
 - **Parties have or obtain some degree of market power ?**
 - **Intensity of restriction and degree of competition that remains ?**
 - **Restriction of actual and/or potential competition ?**
 - **Use of economic assessment standards**
 - **Market shares and their stability over time**
 - **Concentration measures (HHI)**
 - **Entry barriers and likelihood of market entry**
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Entry barriers in air transport

- **Regulatory barriers**, such as government pricing restrictions for indirect flights or the unavailability of necessary traffic rights
 - **Slot shortages** at congested airports
 - **Increased frequencies** resulting from the co-operation
 - **Economies of scope, scale and density** enjoyed by hub-carriers
 - **Network effects** resulting from joint frequent flyer, travel agency or corporate customer incentive schemes or reduced third carrier access to transfer passengers
 - **Sunk costs** such as marketing and promotional expenditures
 - **"Behavioural"** barriers arising from possible predatory practices
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Entry barriers and remedies

Entry barrier	Applied remedy
Access to slots	Surrender of slots by parties
Structural link	Divestiture or termination of existing agreements
Frequency advantage	Frequency freeze or reduction
Network scope/ Access to feed traffic	Interlining agreements
	Block Space agreements
	Special prorate agreements
	Inter-modal agreement
FFP	Access to parties FFP program at favorable conditions
TACO/Corporate agreements	Limits on the operation of commissions schemes
Predatory pricing	Conditions pertaining to fares: Whenever the parties reduce the fares on a new entrant route they also apply an equivalent reduction on (up to 3) other routes on which they have currently no competition.
Regulatory	Governments grant missing traffic rights to new entrants
Other	No CRS disadvantages for new entrants

The Commission's past practice



Year	1996	1999	2001	2002	2003	2003	2004	2004
<i>Transaction</i>	LH/SAS	KLM/AZ	Bmi/LH/SAS	LH/AuA	SN/BA	BA/IB	AF/KLM	AF/AZ
<i>Legal basis</i>	Art 81	Merger	Art 81	Art 81	Art 81	Art 81	Merger	Art 81
Slots	x	x	x	x	x	x	x	x
Frequency freeze	x			x		x	x	x
Frequency reduction		x						
Interlining	x	x	x	x		x	x	x
Block space agreement		x		x			x	
Intermodal services				x			x	x
FFP Participation	x	x	x	x		x	x	x
Limits on travel agents/corporate customers		x						
Predatory practices				x			x	
Termination of other agreements	x							
Reporting obligation	x			x				



Questions & Answers
