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# Risk of abuse of dominance in airport slots for ‘better’ European airports?

Abuse of dominance in airport slots? (running title)

*Dr Steven Truxal\**

## ABSTRACT

The view in Europe is that excess demand for capacity at congested European airports necessitates regulation of airport slots so as to ensure the fullest and most efficient use of existing capacity at coordinated airports while maximising consumers’ benefits and promoting competition.

This article explores the development of the European Union (EU) framework on airport slot allocation and exchange over the past two decades. Council Regulation (EC) 95/93 laid down common rules for the allocation of slots at Union airports<sup>1</sup>, followed by four amendments (2002<sup>2</sup>, 2003<sup>3</sup>, 2004<sup>4</sup> and 2009<sup>5</sup>) that represent a gradual, comprehensive revision process towards developing a more flexible system of airport slot allocation.

First, this article considers key changes in the Parliament’s Amendments under two headings: ‘streamlining the regulation’ and ‘legalisation of slot exchange’. Next, with reference to relevant case law of the Court of Justice of the European Union (CJEU) and the adopted ‘essential facilities’ doctrine, this article discusses state-owned airports and possible ‘airport favouritism’, particularly relating to access, charges/fees and allocation of slots. Finally, this article examines the ‘legalisation’ of market-based measures in the slot allocation system vis-à-vis slot exchange to query whether it will generate the first cases of abuse of dominance in airport slots and ultimately risk thwarting the objective of ‘better’ European airports.

*JEL: K2, K21, K33, L41, L42, L43, L93, L13.*

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\* *The City Law School, City University London; Fellow, Humboldt-Universität zu Berlin – [Steven.Truxal.1@city.ac.uk](mailto:Steven.Truxal.1@city.ac.uk)*

<sup>1</sup> Council Regulation (EEC) 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports, [1993] OJ L14/1, 22.01.1993.

<sup>2</sup> Regulation (EC) 894/2002, of the European Parliament and of the Council of 27 May 2002 amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports, [2002] OJ L142/3, 31.05.2002.

<sup>3</sup> Regulation (EC) No 1554/2003 of the European Parliament and of the Council of 22 July 2003 amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports, [2003] OJ L221/1, 04.09.2003.

<sup>4</sup> Regulation (EC) No 793/2004 of the European Parliament and of the Council of 21 April 2004 amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports, [2004] OJ L138/50, 30.04.2004.

<sup>5</sup> Regulation (EC) No 545/2009 of the European Parliament and of the Council of 18 June 2009 amending Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports, [2009] OJ L167/24, 29.06.2009.

## I. INTRODUCTION

As global demand for air travel rises, so too does air traffic.<sup>6</sup> Demand for capacity at many already congested airports will also increase, necessitating substantial logistical planning<sup>7</sup> and often a commensurate level of regulation.

The ‘airport slot’, a permission given by a coordinator to use the full range of airport infrastructure necessary to operate an air service at a coordinated airport on a specific date and time for the purpose of landing or take-off, is an essential tool in the operation of the global airline industry.<sup>8</sup>

The primary objective of the European Union (EU) framework for the regulation of airport slots is to ensure the fullest and most efficient use of existing capacity at congested Union airports while maximising consumers’ benefits and promoting competition. There are two key airport categories that require regulation of landing and take-off slots where capacity is deemed insufficient in Europe: schedules facilitated airports<sup>9</sup> and coordinated airports.<sup>10</sup>

The allocation of slots has been regulated for schedules facilitated airports and coordinated airports in the EU since 1993. The first piece of EU legislation in this area, Council Regulation (EC) 95/93 laid down common rules for the allocation of slots at Union airports<sup>11</sup>, or Allocation of Airport Slots Regulation (‘Slots Regulation’). The legislation formed part of the third of three packages of liberalisation of the EU single market for air transport.<sup>12</sup>

A block exemption from the EU competition rules for scheduling and slot allocation consultations via the International Air Transport Association (IATA) was in place from 1988—2006.<sup>13</sup> A proposal by the European Commission (EC) led to modernisation and simplification of the legal framework for

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<sup>6</sup> According to Airports Council International (Europe), EU airports have experienced notable increases to passenger traffic from November 2013 to January 2014, available at [www.aci-europe.org/media-room.html](http://www.aci-europe.org/media-room.html), see also IATA website, available at [www.iata.org/pressroom/pr/Pages/2013-10-31-01.aspx](http://www.iata.org/pressroom/pr/Pages/2013-10-31-01.aspx).

<sup>7</sup> Air traffic management authorities may approve or reject a submitted flight plan.

<sup>8</sup> Whilst the author recognises that *airport* competition deserves further study, this article deals with *airport slot* competition in the main. For a discussion on overlapping catchment areas, see Starkie, D. ‘Airport Regulation and Competition’, 8 *Journal of Air Transport Management* 63—72 (2002); on airports as platforms, see Starkie (2002) and Gillen, D. ‘The Evolution of the Airport Business: Governance, Regulation and Two-sided Platforms’, Martin Kuntz Memorial Lecture, Hamburg Aviation Conference (2009) available at [www.hamburg-aviation-conference.de](http://www.hamburg-aviation-conference.de); and more generally, Rochet, J.-C. and Tirole, J. ‘Platform Competition in Two-Sided Markets’, 1 *Journal of the European Economic Association* 990—1029 (2003); Rochet, J.-C. and Tirole, J. ‘Two-Sided Markets: A Progress Report’, 37(3) *RAND Journal of Economics* 645—557 (2006); and M. Armstrong, ‘Competition in two-sided markets’, 37(3) *RAND Journal of Economics* 669-691 (2006). On vertical structure, see Barbot, C. ‘Airport and airlines competition: Incentives for vertical collusion’, 43 *Transportation Research Part B* 952—965 (2009).

<sup>9</sup> This is defined as ‘an airport with a potential for congestion at some periods and where a schedules facilitator has been appointed to facilitate the operations of air carriers operating or intending to operate at that airport’. (See Art.2(i), as amended, Regulation (EC) No 793/2004 of the European Parliament and of the Council of 21 April 2004, [2004] OJ L138/52).

<sup>10</sup> This is defined as ‘an airport with a high level of congestion where demand exceeds capacity during the relevant period and where, in order to land or take off, it is necessary for an air carrier to have a slot allocated by a coordinator’. (See Art.2(g), as amended, Regulation (EC) No 793/2004 of the European Parliament and of the Council of 21 April 2004, [2004] OJ L138/52).

<sup>11</sup> Council Regulation (EEC) 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports, [1993] OJ L14/1, 22.01.1993.

<sup>12</sup> The Slots Regulation is also relevant for European Economic Area and therefore extends to cover Iceland, Liechtenstein and Norway.

<sup>13</sup> See EC Press Release, ‘Competition: Commission revises Block Exemption for IATA passenger tariff conferences’, IP/06/1294, Brussels, 02.10.2006, available at: [http://europa.eu/rapid/press-release\\_IP-06-1294\\_en.htm](http://europa.eu/rapid/press-release_IP-06-1294_en.htm).

the internal air transport market in 2006. Since then, the EU competition rules apply to all players in the air transport sector, including airlines participating in IATA conferences.<sup>14</sup>

The aim of the Slots Regulation is ‘to ensure that where airport capacity is scarce, the available landing and take-off slots are used efficiently and distributed in an equitable, non-discriminatory and transparent way’.<sup>15</sup> It also requires Member States responsible for ‘schedules facilitated’<sup>16</sup> or ‘coordinated’<sup>17</sup> airports to appoint a coordinator or schedules facilitator, and set out the role of the coordinator<sup>18</sup> whose role is to distribute airport slots through equitable, non-discriminatory and transparent means.

The slot allocation rules were amended four times: in 2002<sup>19</sup>, 2003<sup>20</sup>, 2004<sup>21</sup> and 2009.<sup>22</sup> It can be said that the amendments represent a gradual, comprehensive revision process aimed at developing a more flexible system of airport slot allocation. For instance, in response to the economic crisis and its impact on EU air carriers, the so-called ‘use it or lose it’ rule<sup>23</sup> was suspended temporarily in 2008 and 2009, allowing air carriers to keep the same slots for the summer season of 2010 as attributed to them for the summer season of 2009.

Art. 8 of the 2004 Slots Regulation<sup>24</sup> sets out the current process of slot allocation, which includes provisions for ‘slot mobility’<sup>25</sup>, or slot trading. In short, ‘slots are allocated from the slot pool to applicant carriers as permissions to use the airport infrastructure for the purpose of landing or take-off for the scheduling period for which they are requested, at the expiry of which they have to be returned to the slot pool’.<sup>26</sup> Air carriers may continue to use a prior allocated series of slots in a subsequent season so long as the series ‘has been operated, as cleared by the coordinator, by that air carrier for at least 80 % of the time during the scheduling period for which it has been allocated’.<sup>27</sup>

Further requirements that air carriers must provide required information to the coordinator<sup>28</sup>, adhere to the rules governing slot mobility<sup>29</sup>, ensure all new slots are placed in the pool<sup>30</sup>, and not misuse allocated slots, which would otherwise amount to ‘slot abuse’.<sup>31</sup>

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<sup>14</sup> IATA slot conferences take place twice annually, in mid-November (summer slots) and mid-June (winter slots). IATA World Slot Guidelines are available at: <https://www.iata.org/policy/slots/Documents/wsg-5.pdf>.

<sup>15</sup> European Legislation Summaries, Summary of Regulation (EC) 95/93, available at: [http://europa.eu/legislation\\_summaries/transport/air\\_transport/l24085\\_en.htm](http://europa.eu/legislation_summaries/transport/air_transport/l24085_en.htm).

<sup>16</sup> Formerly ‘coordinated’.

<sup>17</sup> Formerly ‘fully coordinated’.

<sup>18</sup> Art.4, Council Regulation (EEC) 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports, [1993] OJ L14/1, 22.01.1993.

<sup>19</sup> Regulation (EC) 894/2002, of the European Parliament and of the Council of 27 May 2002 amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports, [2002] OJ L142/3, 31.05.2002.

<sup>20</sup> Regulation (EC) No 1554/2003 of the European Parliament and of the Council of 22 July 2003 amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports, [2003] OJ L221/1, 04.09.2003.

<sup>21</sup> Regulation (EC) No 793/2004 of the European Parliament and of the Council of 21 April 2004 amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports, [2004] OJ L138/50, 30.04.2004.

<sup>22</sup> Regulation (EC) No 545/2009 of the European Parliament and of the Council of 18 June 2009 amending Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports, [2009] OJ L167/24, 29.06.2009.

<sup>23</sup> The historical slots are held as ‘grandfather rights’. This point is discussed in further detail below.

<sup>24</sup> Regulation (EC) No 793/2004 of the European Parliament and of the Council of 21 April 2004, [2004] OJ L138/55, Art.8.

<sup>25</sup> Regulation (EC) No 793/2004, introduced slot mobility as a system of slot trading. After one year (two years for new entrant slots), the air carrier has grandfather rights to trade the slot under Art.8a.

<sup>26</sup> in accordance with the provisions of Art.10

<sup>27</sup> *Ibid*, Art.8(2), para.2.

<sup>28</sup> *Ibid*, Art.7.

<sup>29</sup> *Ibid*, Art.8a.

## II. STUDIES ON SLOT ALLOCATION

From 2004—2011, the EU commissioned the following three studies on European airport slot allocation:

- the 2004 NERA study to assess the effects of different slot allocation schemes<sup>32</sup>;
- the 2006 Mott MacDonald study on the impact of the introduction of secondary trading at Community airports<sup>33</sup>; and
- the 2011 Steer Davies Gleave study on the impact assessment of revisions to Regulation 95/93<sup>34</sup>.

The general conclusions offered by the comprehensive studies appear to suggest to varying degrees that the system is working although it still ‘prevents optimal use of the scarce capacity at busy airports’.<sup>35</sup> Points raised by the studies points that are most relevant to this article are discussed below.

NERA Economic Consulting, in conjunction with the Faculty of Law at the University of Leiden and Consultair Associates, completed a study in 2004 – ‘Study to Assess the Effects of Different Slot Allocation Schemes’ – which considered the introduction of market mechanisms for airport slots. The study considered how customers might be affected in the short term if air carriers are charged to access airport infrastructure, including landing fees.<sup>36</sup> Of particular relevance were those airports where demand exceeded supply (capacity).

The study also found that in the longer term

... there may be further effects stemming from changes in *competitive conditions* in airline markets provoked by the redistribution of slots between different carriers and market segments. In principle, the use of market mechanisms to allocate scarce airport capacity might affect conditions of competition in airline markets in two ways: first, through its effects on the level of concentration in the relevant markets; second, through its effects on market entry conditions in the relevant markets.<sup>37</sup>

In the main, the NERA report identified ‘the need for regulatory intervention in the markets for slots at congested airports over and above the powers already available under existing EU competition policy legislation’<sup>38</sup> and possible means of regulatory intervention that might be applied. The study

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<sup>30</sup> *Ibid*, Art.10(1)

<sup>31</sup> *Ibid*, Art.14

<sup>32</sup> Available at: [http://ec.europa.eu/transport/modes/air/studies/doc/airports/2004\\_01\\_slot\\_allocation\\_schemes.pdf](http://ec.europa.eu/transport/modes/air/studies/doc/airports/2004_01_slot_allocation_schemes.pdf).

<sup>33</sup> Available at: [http://ec.europa.eu/transport/modes/air/studies/doc/airports/2006\\_11\\_airports.zip](http://ec.europa.eu/transport/modes/air/studies/doc/airports/2006_11_airports.zip).

<sup>34</sup> Available at: <http://ec.europa.eu/transport/modes/air/studies/doc/airports/2011-03-impact-assessment-revisions-regulation-95-93.pdf>

<sup>35</sup> See [http://europa.eu/legislation\\_summaries/transport/air\\_transport/124085\\_en.htm](http://europa.eu/legislation_summaries/transport/air_transport/124085_en.htm).

<sup>36</sup> NERA, ‘Study to Assess the Effects of Different Slot Allocation Schemes’, January 2004, available at: [http://ec.europa.eu/transport/modes/air/airports/slots\\_en.htm](http://ec.europa.eu/transport/modes/air/airports/slots_en.htm), pp.101—102.

<sup>37</sup> *Ibid* (emphasis added).

<sup>38</sup> *Ibid*, p.102; Arts 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), and the EC Merger Regulation (Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, [2004] OJ L24/1, 29.01.2004).

also queried briefly the application of Art. 102 TFEU to the control of slots by an airport operator and an airline holding a dominant position at a Union airport.<sup>39</sup>

A subsequent study entitled ‘Study on the impact of the introduction of secondary trading at Union airports’ by Mott MacDonald and others was published in 2006.<sup>40</sup> In this study, whilst there is no reference made to Art. 102 TFEU<sup>41</sup>, there is good discussion, again, on speculative changes to *market conditions* following introduction of secondary trading at Union airports. In that regard, the study specifically finds a likely effect on market share, specifically around airline alliances.

One of the likely effects is an increase in the market share of existing dominant incumbent airlines, particularly if they have developed a strong interlining hub. Although this can possibly be viewed as a deterioration in competition at any one airport, a broader view can be taken whereby – for example – a strengthened oneworld Alliance (BA and partner airlines) at London-Heathrow will be competing with a strengthened Star Alliance (Lufthansa and partners) at Frankfurt, and a strengthened Skyteam Alliance at Paris-Charles de Gaulle and Amsterdam (Air France, KLM and partners). As a result, decreased levels of competition at each individual airport may be accompanied (even compensated) by increased levels of competition between alliances at different airports.<sup>42</sup>

Indeed, we have seen evidence of the effects on market share at EU airport hubs. Tactical and strategic alliance partners clearly align their schedules with one another to provide more seamless travel to customers wherever possible. The effect of this on hub-and-spoke networks is that, in this author’s view, six key airports in the EU emerge as ‘alliance hubs’: London Heathrow (LHR) and Madrid (MAD) for oneworld Alliance; Paris Charles de Gaulle (CDG) and Amsterdam (AMS) for Skyteam Alliance; and Frankfurt (FRA) and Munich (MUC) for Star Alliance (with a mini-hub at LHR). Owing to the focus on alliance traffic, it is likely that the most profitable routes sought by business and luxury travellers will be best delivered at each separate alliance hub, and therefore attract frequent flyers from the respective programmes. Taking the EU airports above as examples, one must agree that the global alliance frequent flyer networks and schedules has become of paramount importance to gaining market share in the EU.<sup>43</sup>

Steer Davies Gleave concluded an ‘Impact assessment of revisions to Regulation 95/93’ and report in 2011. The study provides an evaluation of the current operation of the Slots Regulation and an analysis of a sample of 15 airports, including all large EU hubs and other most congested airports, as well as a cross-section of other large airports. The report also contains an impact assessment of various options for revision to the Slots Regulation.

Of particular relevance to this article, the Steer Davies Gleave report provides a review of the Airport Charges Directive.<sup>44</sup> It finds that the Directive ‘imposes relatively *few obligations*, mostly relating to non-discrimination between users and requirements for consultation and provision of information. Even if a carrier tried to claim that it was unfairly discriminated against by a slot reservation fee,

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<sup>39</sup> This article endeavours to continue that discussion below.

<sup>40</sup> Mott MacDonald, ‘Study on the impact of the introduction of secondary trading at Union airports’, November 2006, available at: [http://ec.europa.eu/transport/modes/air/airports/slots\\_en.htm](http://ec.europa.eu/transport/modes/air/airports/slots_en.htm).

<sup>41</sup> Art.82 of the Treaty Establishing the European Community (TEC).

<sup>42</sup> *Ibid.*, p. 9-6.

<sup>43</sup> It has been argued elsewhere that the situation differs elsewhere, for instance at US hub airports.

<sup>44</sup> Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges, [2009] OJ L70/11, 14.03.2009.



Article 3 specifically allows modulation of charges for reasons of public and general interest, and therefore there should be no issue'.<sup>45</sup>

Also, in terms of incumbent airlines enjoying 'grandfather rights', the report concluded:

Despite significant new competition in the European air transport market, including the growth of low cost airlines such as easyJet and Ryanair, the system of historical preference means that it is very difficult for new entrants to challenge the dominant position of the traditional incumbent airlines at the most congested airports. At these airports, the mobility (turnover) of slots is very low. Incumbent carriers have little incentive to give up slots, even when other carriers could use them more effectively than they could.<sup>46</sup>

Interestingly, the report recognises a *Progress Report of the Air Traffic Working Group on Slot Trading* done by the European Competition Authorities in 2005<sup>47</sup>, which 'identified a potential problem of "slot hoarding" – airlines holding slots, even though they cannot use them profitably, with the primary objective of preventing other airlines from entering the market or from expanding'.<sup>48</sup> According to the report, '[t]his problem could be exacerbated by secondary trading, as it provides a means for dominant incumbents to acquire more slots. However, secondary trading also increases the opportunity cost of slot hoarding, so it is not clear whether it would make the problem better or worse'.<sup>49</sup>

Following publication of the three studies<sup>50</sup> and holding public consultation on the impact assessment for a possible revision of the Slots Regulation, the EC adopted a comprehensive set of measures vis-à-vis the 'Better Airports' Package in December 2011. The package consists of a policy summary document and three legislative measures on ground handling, noise and airport slots.<sup>51</sup> The EC also adopted a Communication on 'Airport policy in the European Union – addressing capacity and quality to promote growth, connectivity and sustainable mobility'.<sup>52</sup>

### III. LEGISLATIVE PROPOSALS

According to the Commission,

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<sup>45</sup> Steer Davies Gleave, 'Impact assessment of revisions to Regulation 95/93', March 2011, available at: [http://ec.europa.eu/transport/modes/air/airports/slots\\_en.htm](http://ec.europa.eu/transport/modes/air/airports/slots_en.htm) (emphasis added).

<sup>46</sup> *Ibid*, p.3.

<sup>47</sup> 'Progress Report of the air traffic working group on slot trading', European Competition Authorities, 17.06.2005; Competition issues associated with the trading of airport slots, A paper prepared for DG/TREN by UK Office for Fair Trading and Civil Aviation Authority, June 2005.

<sup>48</sup> Steer Davies Gleave, 'Impact assessment of revisions to Regulation 95/93', March 2011, p.91.

<sup>49</sup> *Ibid*; see also 'Commission Staff Working Paper, 'Impact Assessment, Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on common rules for the allocation of slots at European Union airports (Recast)', Brussels, 1.12.2011, SEC(2011) 1443, final.

<sup>50</sup> The Steer Davies Gleave report was published in March 2011, and in December 2011 the Commission adopted its Better Airports Package, including the EC Proposal. It is highly likely that feedback on the Slots Regulation and the Airport Charges Directive provided by Steer Davies Gleave was instrumental in highlighting these points to the Commission and contributory to the drafting of the EC Proposal. It is interesting, however, that 'slot hoarding' is not addressed in the text of the EC Proposal.

<sup>51</sup> It should be noted that before being adopted, the EC Proposal must be approved by the European Parliament and the Member States under the EU's legislative procedure.

<sup>52</sup> COM (2011) 823, final.

[it] has been estimated that by revising the current allocation system up to 24 million additional passengers would be accommodated each year at European airports meaning more than €5 billion in economic benefits and up to 62,000 jobs by 2025 thanks to a more resource efficient allocation system.<sup>53</sup>

At the centre of the Better Airports Package is the Commission's Proposed Recast Slots Regulation ('EC Proposal')<sup>54</sup>, which European Parliament has amended ('Parliament's Amendments')<sup>55</sup>. At first glance, it would seem that the Parliament's Amendments drive further liberalisation of the internal air transport market on the one hand, and re-regulation of it on the other.

The three key changes in the EC Proposal are:

- 1) integration of slot allocation with the reform of the European air traffic management system (Single European Sky);
- 2) amendment of the 80/20 'use it or lose it' rule and definition of a series of slots and resort to the airport charge system to discourage the late return of slots to the pool; and
- 3) introduction of the possibility for secondary trade in slots and increased competition

This article considers the first two changes above under the heading 'streamlining the regulation' and the third change as 'introduction of slot exchange'.

## **A. Streamlining the Regulation**

According to the EC's 2011 Airports Package Communication, the objective of the Slots Regulation is 'to ensure that access to congested airports is organised through a system of fair, non-discriminatory and transparent rules for the allocation of landing and take-off slots so as to ensure optimal utilisation of airport capacity and to allow for fair competition'.<sup>56</sup>

In 1993, when the first Slots Regulation was introduced, national/flag carriers still dominated the EU air transport market; most of these were also state-owned. The succeeding amendments to the Slots Regulation have moved in sync with progress in the sector towards a larger, more diverse and competitive market.

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<sup>53</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Airport policy in the European Union - addressing capacity and quality to promote growth, connectivity and sustainable mobility', Brussels, 1.12.2011, COM(2011) 823, final, para.19.

<sup>54</sup> 'Airport package Proposal for a Regulation of the European Parliament and of the Council on the common rules for the allocation of slots at European Union airports (Recast)', Brussels, 1.12.2011, COM(2011) 827, final, 2011/0391 (COD).

<sup>55</sup> The EC Proposal was voted in first reading by the Plenary of the European Parliament in December 2012 and the Council adopted a General Approach in October 2012. Further discussions between the two legislators are necessary before the final adoption, in second reading, of the Proposal. The timing for the Council's political agreement / common position depends on the negotiations between the Institutions and on the developments in the Groundhandling Proposal. *See* Proposal for a Regulation of the European Parliament and of the Council on groundhandling services at Union airports and repealing Council Directive 96/67/EC, COM(2011)0824 – 2011/0377 (COD); Proposal for a regulation of the European Parliament and of the Council on common rules for the allocation of slots at EU airports (Recast), COM(2011)0827 – C7-0458/2011 – 2011/0391 (COD).

<sup>56</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Airport policy in the European Union - addressing capacity and quality to promote growth, connectivity and sustainable mobility', Brussels, 1.12.2011, COM(2011) 823 final, p.2.



The EC appears to attribute some of the sector's 'success' in this regard in reflecting on whether 'such progress could have been achieved without a system to ensure that slots at busy airports are allocated free of any undue influence from government, national carriers or airports'.<sup>57</sup> The EC also questions then whether or not the introduction of market mechanisms for allocation and use, and transparency objectives would be the most helpful proposals.

In the context of growing airport congestion and the limited development of major new airport infrastructure, the slots are a rare resource. Access to such resources is of crucial importance for the provision of air transport services and for the maintenance of effective competition.<sup>58</sup>

Additionally, in terms of historical slots, the EC 'recognises the importance for airlines in terms of stability of schedules ... but questions whether market mechanisms could be introduced to withdraw or auction historical slots'.<sup>59</sup>

## **B. 'Legalisation' of slot exchange and introduction of MBMs**

Secondary trading, which is defined by the Commission as 'the exchange of slots for financial or other compensation'<sup>60</sup>, is presently 'legal' but not regulated.

The EC Proposal:

- adds Art. 106 TFEU<sup>61</sup>;
- removes the power to require transfers of slots by public authorities<sup>62</sup>;
- strengthens the coordinator role and independence, and requires Member States to ensure coordinators have necessary resources;
- increases the series of slots length from 5 to 15 slots;
- adds sanctions for the late handing back of slots; and
- changes the 'use it or lose it rule' to 85/15.<sup>63</sup>

Parliament's Amendments aim 'to allow for the introduction of market-based mechanisms [MBMs]<sup>64</sup> across the EU provided that safeguards to ensure transparency or undistorted competition are established, including greater independence for slot coordinators'.<sup>65</sup> The rationale is that this will help to ensure a more optimal allocation of airport slots by ensuring that slots go only to those air carriers able best to utilise them.

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<sup>57</sup> *Ibid*, p.3.

<sup>58</sup> *Ibid*, p.12.

<sup>59</sup> *Ibid*.

<sup>60</sup> 'Airport package Proposal for a Regulation of the European Parliament and of the Council on the common rules for the allocation of slots at European Union airports (Recast)', Brussels, 1.12.2011, COM(2011) 827 final, 2011/0391 (COD), p.13.

<sup>61</sup> EC Proposal, Recital 28. 'The application of the provisions of this Regulation should be without prejudice to the competition rules of the Treaty, in particular Arts 101, 102 and 106' (emphasis added).

<sup>62</sup> EC Proposal, Art.14. Art.14: 'This Regulation shall not affect the powers of public authorities to *approve* [formerly *require*] the transfer of slots between air carriers and to direct how these are allocated pursuant to national competition law or to Arts 101, 102 or 106 of the Treaty or Council Regulation (EC) No 139/2004.' The following sentence was deleted: 'These transfers can only take place without monetary compensation.' Thus, the power to require transfer of slots has been transferred to the Commission.

<sup>63</sup> EC Proposal, Art.14.

<sup>64</sup> This has been amended in the Parliament's Amendments (see below) to 'slot exchange'.

<sup>65</sup> See [http://europa.eu/legislation\\_summaries/transport/air\\_transport/124085\\_en.htm](http://europa.eu/legislation_summaries/transport/air_transport/124085_en.htm).

Whilst the 1993 Slots Regulation, as amended, is silent on the question of exchanges for *monetary and other consideration*, the EC adopted a Communication in 2008 that explained ‘how the rules with respect to the independence of the slot coordinator, new entry, local guidelines and exchange of slots for monetary and other consideration should be interpreted’.<sup>66</sup> Effectively, this Communication clarified that ‘for the first time that secondary trading is an acceptable way of allowing slots to be swapped among airlines’.<sup>67</sup> It is of interest to note that UK High Court ruled in 1999 that a slot exchange between British Airways (BA) and KLM was consistent with national and EU law.

The following are some more recent examples of buying and selling of slots within the UK, by year:

- Flybe sold six pairs of slots to and from London-Heathrow (LHR) for approximately £40 million<sup>68</sup> (2004);
- BA bought 102 Heathrow slots from British Midland (bmi) for approximately £30 million<sup>69</sup> (2007);
- the Bland Group sold four pairs of slots at LHR after it sold GB Airways to easyJet<sup>70</sup> (2007);
- it was confirmed that Lufthansa had bought BMI in a £223 million deal including 11 per cent share of LHR slot market, giving Lufthansa just over 16 per cent<sup>71</sup> (2009);
- BA (now IAG) acquired BMI from Lufthansa, including more than 40 pairs of slots at LHR<sup>72</sup>; IAG gave commitments to release 12 pairs of slots at LHR<sup>73</sup>, which Virgin Atlantic won as ‘remedy slots’, arguing all the slots should be given to one competitor to create more competitive markets<sup>74</sup> (2012); and
- Flybe, which is struggling financially, sold all of its slots at LGW to easyJet for approximately £20 million<sup>75</sup> (2013).

It is likely that the number of ‘successful’ swaps at London airports following the entry into force of the EU-US Open Skies Agreement<sup>76</sup> prompted the 2008 Communication<sup>77</sup>, which was the first step in creating a market to allocate scarce capacity at EU airports through the introduction of secondary trading in slots and increased competition. The EC Proposal aimed to adopt the current slot allocation system to development of market mechanisms, such as with the London experience.

<sup>66</sup> European Commission Press Release, ‘Airport slot allocation: The Commission clarifies the existing rules’, IP/08/672, 30.04.2008; *See also* COM (2008) 227, 30.04.2008, as amended.

<sup>67</sup> *Ibid.*

<sup>68</sup> O’Connell, D. ‘The sky-high demand for Heathrow slots’, *Sunday Times*, 22.02.2004.

<sup>69</sup> Parker, A. ‘BA buys extra slots at Heathrow’, *Financial Times*, 01.04.2007.

<sup>70</sup> Press reports in 2007 estimated that LHR slots could be fetch a price of between £5-12 million depending on the timing. *See* Done, K. ‘Takeoff jigsaw falling into place at Heathrow’, *Financial Times*, 26.10.2007.

<sup>71</sup> Arnott, S. ‘Lufthansa wins BMI sale battle with £115m to spare’, *The Independent*, 23.06.2009; and Wiesmann, G. ‘Germans eye long-haul routes from Heathrow’, *Financial Times*, 30.10.2008.

<sup>72</sup> ‘BA-owner IAG completes BMI takeover’, *BBC online*, 20.04.2012, available at: <http://www.bbc.co.uk/news/business-17786998>.

<sup>73</sup> Commission Press Release, ‘Mergers: Commission approves acquisition of British Midlands (bmi) by IAG subject to conditions’, IP/12/338, 30.03.2012

<sup>74</sup> Rivers, M. ‘Virgin Atlantic secures IAG’s 12 Heathrow remedy slots’, *Flight Global*, available at: [www.flightglobal.com/news/articles/virgin-atlantic-secures-iags-12-heathrow-remedy-slots-379181/](http://www.flightglobal.com/news/articles/virgin-atlantic-secures-iags-12-heathrow-remedy-slots-379181/).

<sup>75</sup> Strydom, M. ‘Flybe sells Gatwick slots to easyJet for 20m’, *The Telegraph*, 23 May 2013, available at: [www.telegraph.co.uk/finance/newsbysector/transport/10075367/Flybe-sells-Gatwick-slots-to-easyJet-for-20m.html](http://www.telegraph.co.uk/finance/newsbysector/transport/10075367/Flybe-sells-Gatwick-slots-to-easyJet-for-20m.html).

<sup>76</sup> It is possible this conclusion was reached only on the basis that the previous UK—US bilateral (Bermuda II) was extremely prescriptive and restrictive.

<sup>77</sup> European Commission Press Release, ‘Airport slot allocation: The Commission clarifies the existing rules’, IP/08/672, 30.Apr.2008), *See also* COM (2008) 227, 30.04.2008, as amended.

Revision of the existing legislation, however, is not only required for promoting competition. Discrimination could remain where a Member State favours its national carrier, or an airport favours a particular airline such as the one with the majority of customers. Additionally, the EC states that since secondary trading in airport slots ‘does not benefit from a uniform and consistent legislative framework, including guarantees of transparency and competitive safeguards. It is therefore necessary to regulate secondary trading in slots in the European Union’.<sup>78</sup>

#### IV. PARLIAMENT’S AMENDMENTS

In December 2012, the European Parliament voted on the ‘Better Airports’ Package, in particular the EC Proposal for the introduction of secondary trading in slots, ‘which goes to the heart of the slot proposals. It added additional measures to strengthen the EC Proposal on the independence of the slot coordinators across Europe and higher transparency of information regarding slot allocation’.<sup>79</sup>

Parliament’s Amendment’s have incorporated the following six key amendments to the text of the EC Proposal:

- 1) Rather than introducing ‘market mechanisms’ for the more efficient allocation and use of slots, the EU will introduce ‘slot exchange mechanisms’.<sup>80</sup>
- 2) A ‘series of slots’ will comprise 5 slots, which have been requested for the same time on the same day of the week regularly in the scheduling period, rather than the proposed 15.<sup>81</sup>
- 3) The following proposed paragraph has been deleted: ‘The determination of the coordination parameters shall not affect the neutral and nondiscriminatory character of the slot allocation.’<sup>82</sup>
- 4) The position on local rules has been clarified: ‘Local rules shall concern the allocation and monitoring of slots. Those rules may be applied only where it can be proved that an airport reaches an alarming level of congestion and that performance or throughput improvements can therefore be delivered through locally applied rules. Such local rules shall be transparent and non-discriminatory, and shall be agreed on in the coordination committee referred to in Article 8(3).’<sup>83</sup>
- 5) The provision in Art. 11 (EC Proposal) on slot reservation has been deleted.
- 6) The Commission’s proposed amendment of the 80/20 ‘use it or lose it’ rule to 85/15 has been reverted. The Parliament’s Amendments retains the 80/20 rule.<sup>84</sup>

Parliament’s Amendments incorporate the following point *inter alia* as new text:

The relevant theory and case law have not yet advanced sufficiently to produce an exhaustive legal definition of airport slots. As of now it is expedient to be able to work on the assumption that the use of slots in the public interest – hence not in any strict sense a public good - may

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<sup>78</sup> ‘Airport package Proposal for a Regulation of the European Parliament and of the Council on the common rules for the allocation of slots at European Union airports (Recast)’, Brussels, 01.12.2011, COM(2011) 827, final, 2011/0391 (COD), p.13.

<sup>79</sup> European Commission Press Release, ‘Aviation: MEPs vote on “better airports” package’, IP/12/1363, 12.12.2012.

<sup>80</sup> Parliament’s Amendments, recital 4.

<sup>81</sup> Parliament’s Amendments, Art.2, point 13.

<sup>82</sup> EC Proposal, Art.4, para.3.

<sup>83</sup> Parliament’s Amendments, Art.9, para.8.

<sup>84</sup> Parliament’s Amendments, Art.18, para.4(2).

serve as a guideline for a legal definition thereof. It is therefore appropriate to formulate a definition of slots which establishes that they may become subject to rights and governs the allocation thereof.<sup>85</sup>

Seemingly, this is a call for development of legal and relevant market definitions of slots. If we view airport slots as property rights – disregarding for a moment the fundamental question of ‘who are the owners?’ – a thought is whether we could use the EU competition rules as ‘can opener’ *ex post* – or whether that is prevented by Art. 345 TFEU, which provides: ‘The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership...’. But is there an interference with property rights? Parliament’s Amendments make the exchange of airport slots valid and promotes the ‘trade-able’ nature of these (property or contractual?) rights under EU law.

In a similar vein, we might consider the Strasbourg court on protection of contractual rights with respect to compensation payments following forced divestiture or transferring of slots, and in the EU following *International Fruit Company III*.<sup>86</sup> By way of comparison, it should be noted that US law does not recognise slots as property rights: ‘Slots do not represent a property right but represent an operating *privilege* subject to absolute FAA control...’.<sup>87</sup>

Returning to the question of airport slot ownership, Frankfurt Airport (Fraport) considers, unsurprisingly, that airports are owners of airport slots and that the DFS (German Navigation Services) is the owner of what they call ‘airway’ slots.<sup>88</sup> As early as May 2008, the leading international accountancy firm, Deloitte & Touche LLP, forecasted that ‘airlines would start to value landing slots as assets on balance sheets’.<sup>89</sup> Clearly everybody wants to claim ownership but there is a discernible lack of clarity on the legal definition and effect.

Parliament’s Amendments contain additional amendments signalling longer-term financing of the development of EU air transport infrastructure via proceeds from slot exchanges collected by each Member State.<sup>90</sup> This might take the form of future taxation on such exchanges.

## V. AIRPORT FAVOURITISM?

### A. Access

On control of slots and access to airport infrastructure, citing the special case of *Holyhead II*<sup>91</sup> following Sabena’s bankruptcy and applying three cases relating to access to seaports<sup>92</sup> *mutatis mutandis* to airports, the NERA report suggested that:

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<sup>85</sup> Parliament’s Amendments, recital 5a.

<sup>86</sup> Joint cases 21-24/72, [1972] ECR 1219.

<sup>87</sup> FAA Federal Aviation Regulations (FAR) Part § 93.223, 14 CFR.

<sup>88</sup> Fraport AG Policy Paper, 20.09.2002.

<sup>89</sup> Deloitte & Touche LLP, ‘Open Skies, open for business?’ (May 2008), available at [www.deloitte.com/assets/Dcom-UnitedKingdom/Local%20Assets/Documents/UK\\_THL\\_OpenforSkiesOpenForBusiness\\_May08\(2\)!!!.pdf](http://www.deloitte.com/assets/Dcom-UnitedKingdom/Local%20Assets/Documents/UK_THL_OpenforSkiesOpenForBusiness_May08(2)!!!.pdf)

<sup>90</sup> Parliament’s Amendments, Recital 26a and Art.13, para.3,

<sup>91</sup> [1994] OJ L 55/52; In this case, following Sabena’s bankruptcy in 2001, all of its slots were transferred to its subsidiary (100 per cent), DAT. In liquidation it was agreed that DAT could make full use of the slots. Whilst DAT did not sell the slots, the Commission approved the transaction but required DAT progressively to return some of the slots; *See also* Commission’s Report on Competition (1992), para.219.

<sup>92</sup> *Rødby-Puttgården*: OJ 1994, L 55/52; *Elsinore*: Commission Press Release, IP 96/205 of 6 March 1996; *Roscoff*: Commission Press Release, IP 95/492 of 16.05.1995

The abuse of a dominant position is liable to arise in cases where the operator of an airport seeks to alter slots to the benefit of its main customer-airline. Hence, the operator would infringe Article 82 EC [Article 102 TFEU]. The fact that the allocation of a slot to the airline would involve the reorganisation of other slots would not constitute a valid justification of such a refusal because the operator of the airport as the operator of an “essential facility” is expected to go to provide market access, that is, airport access, on a fair and non-discriminatory basis. The operator of the essential facility must carry the burden of proof that it provided equal *access* to all users of the facility. The operator of an essential facility is deemed to go far in order to accommodate the requests for access made by its users. The above flows from cases, which have been decided upon in the context of access to ports.

Other relevant cases relating to access to seaports are: *Rødby-Puttgården*<sup>93</sup>, *Elsinore*<sup>94</sup> and *Roscoff*.<sup>95</sup>

## B. Charges/fees and allocation of slots

Under EU law, the ‘essential facilities’ doctrine imposes on owners of ‘essential facilities’ a so-called “duty to deal” with competitors. Under Art. 102 TFEU, a refusal to deal can constitute an abuse of a dominant position.<sup>96</sup>

It is necessary to consider the ‘essential facilities’ doctrine in the light of the *Bronner*<sup>97</sup> case, which concerned the refusal of a media undertaking holding a dominant position in the territory of a Member State to include a rival daily newspaper of another undertaking in the same Member State in its newspaper home-delivery scheme. In that case, the question for the Court was whether a home-delivery scheme constituted a separate market or whether this was interchangeable with sales in shops and kiosks.<sup>98</sup>

<sup>93</sup> Commission Decision 94/119/EC, [1994] OJ L055/52 (concerning a refusal to grant access to the facilities of the Port of Rødby, Denmark).

<sup>94</sup> Cases COMP/A.36.568 and COMP/A.36.570. ‘These two parallel complaints related to alleged abuses within the meaning of Art.82 EC involving excessive port fees charged by the port of Helsingborg for services provided to ferry operators active on the Helsingborg–Elsinore route between Sweden and Denmark. After extensive investigation, the Commission came to the conclusion that the available evidence was insufficient to demonstrate to the requisite legal standard that the prices at issue were excessive. The decisions point to more general difficulties in applying Art.82 TEC to excessive pricing cases, particularly in cases where no useful benchmarks are available. Given that existing case-law on this issue is rather limited, the decisions may provide useful guidance when determining the economic value of a service and whether a price is excessive/unfair and thus constitutes an abuse of a dominant position within the meaning of Art.82 EC [Art.102 TFEU]’ (Source: European Commission, Report on Competition Policy, Volume 1, 2004, SEC(2005) 805, final).

<sup>95</sup> Commission Press Release, ‘Irish Ferries Access to the Port of Roscoff in Brittany: Commission Decides Interim Measures Against the Morlaix Chamber of Commerce’, IP 95/492 of 16.05.1995.

<sup>96</sup> It has been argued by Evrard that, following *Commercial Solvents* (Joined Cases 6/73 and 7/73, [1974] ECR 223, [1974] 1 CMLR 309), in which the CJEU first dealt with the ‘essential facilities’ in all but using that terminology, the Court’s decision in *Bronner* (Case C-7/97, [1998] ECR I-7791, [1999] 4 CMLR 112) was a catalyst for limiting the doctrine’s application to where the facility is indispensable and for imposing the application of a forward-looking test (Source: Evrard, SJ, ‘Essential Facilities in the European Union: *Bronner* and Beyond’, 10(3) *Columbia Journal of European Law* (Summer 2004), pp.491—526).

<sup>97</sup> Case C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*, [1998] ECR I-7791, [1999] 4 CMLR 112.

<sup>98</sup> Case C-7/97, [1998] ECR I-7791, [1999] 4 CMLR 112, para.34.

The Court, in deciding whether an undertaking in a dominant position has a duty to deal with its competitor, appears to impose a stricter test of the essential facilities doctrine *Bronner*. According to Evrard (2004):

It seems that if a facility is *indispensable* for the requesting undertaking, the refusal to grant access to it will inevitably prevent that undertaking from competing on the market and, thus, will eliminate it. Alternatively, if the refusal to use the facility is not likely to eliminate all competition of on the part of the requesting undertaking, it inevitably means that the facility is not essential.<sup>99</sup>

Thus, the effect on the ‘essential facilities doctrine’ in EU law post-*Bronner*<sup>100</sup> is that the fact that facility has dominant position is no longer sufficient; the facility must also be indispensable as well.

A scholarly review of key decisions by Evrard (2004)<sup>101</sup> reveals that the Court of Justice of the European Union (CJEU) has been consistent in its application of the *Bronner* doctrine in subsequent cases. By way of comparison, we consider the post-*Bronner* case of *Aéroport de Paris*.<sup>102</sup>

*Aéroport de Paris* (ADP) involved airline catering services and two competitors at Paris-Orly Airport. The CJEU confirmed Commission’s Decision that the legal monopoly running Paris airports, ADP, had abused its dominant position at Orly Airport by requiring one groundhandler (AFS) to pay a higher fee than another (OAT), which was discriminatory. The Court held that ‘the relevant market is that for the management of airport facilities, which are indispensable for the provision of groundhandling services and to which ADP provides access’.<sup>103</sup> With reference to the application by the Commission and Court of First Instance (now General Court) of *British Leyland*<sup>104</sup> to the situation in ADP, the CJEU agreed that the relevant market was both the management of and access to the airport facilities.

In this judgment, the CJEU strengthened that definition of the relevant market (product) in providing that ‘a licence from ADP is also a prerequisite for access to the market for the services offered by ADP and such access is *indispensable* for the supply of groundhandling services to airlines’.<sup>105</sup>

It follows that ADP’s authorisation to access the airport was indispensable to carry out the groundhandling services it requested. The Court confirmed that the owner of an essential facility may not impose discriminatory conditions on requesting undertakings.<sup>106</sup> It is also worth noting that ADP was not present on downstream market, but the Court found this was irrelevant. The *effect* on the downstream market was enough to constitute abuse.<sup>107</sup>

Whilst no infringement nor jurisprudence have been located on *abuse* of a dominant position in slots,

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<sup>99</sup> Evrard, S.J. ‘Essential Facilities in the European Union: *Bronner* and Beyond’, 10(3) *Columbia Journal of European Law* (Summer 2004), p.508.

<sup>100</sup> [1998] ECR I-7791.

<sup>101</sup> *Supra* note 99, pp.491—526.

<sup>102</sup> Case C-82/01 P, [2002] ECR I-9297.

<sup>103</sup> *Ibid*, para.92.

<sup>104</sup> Case 226/84, *British Leyland v Commission* [1986] ECR 3263.

<sup>105</sup> *Supra* note 102, para.93 (emphasis added).

<sup>106</sup> See Evrard, S.J., ‘Essential Facilities in the European Union: *Bronner* and Beyond’, 10(3) *Columbia Journal of European Law* (Summer 2004), pp.508—509.

<sup>107</sup> *Supra* note 102, paras 164—165.

the *Aéroport de Paris*<sup>108</sup> case and a few others such as *airport charges at Finnish airports*<sup>109</sup>, *landing fees at Brussels Airport*<sup>110</sup>, and *landing charges in use at Portuguese airports*<sup>111</sup> may be useful for contemplating the application of Art. 102 TFEU to the system of airport charges and landing fees to market regulation of secondary trade in slots.<sup>112</sup> Airports are indispensable to civil aviation, yes, but are airport slots also indispensable to airlines? If the answer is in the affirmative then by definition the airport slot must be an essential facility, too.

One of the foremost aims of the EC Proposal is transparency; this is also referred to nine times in the draft text. It is likely that greater transparency in the system of slot allocation and trading in the Union will result in less opportunity for airport, or even Member State, favouritism of airlines.

Also, on an airline holding or being led to acquire a dominant position at a Union airport, the NERA report referred *inter alia* to the case on *landing charges in use at Portuguese airports*.<sup>113</sup> In that case, the Commission found an infringement of Art. 101 TFEU in conjunction with Art. 106(2).<sup>114</sup> This is of particular interest where the airport in question is state-owned.<sup>115</sup>

## VI. ABUSES OF DOMINANCE IN SLOTS?

The application of Art. 101 TFEU to airport slot transactions (i.e. sales, transfers or exchanges) could present difficulties. Individual slot transactions may have only an appreciable effect on competition

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<sup>108</sup> *Ibid.*

<sup>109</sup> [1999] OJ L 69/24-30; Commission Decision 1999/198 of 10 February 1999, relating to a procedure pursuant to Art.8[2] of the EC Treaty, regarding airport charges at Finnish airports. ‘At Finnish airports, domestic flights benefited from a discount of 60 per cent as compared with intra-Community flights, for no objective reason. The Commission held that Art.8[2] EC applied to airport operations through Regulation 17/62/EEC rather than through Regulation 3975/87 as amended. There is no justification for the imposition of differentiated landing charges because that would result in applying dissimilar conditions for equivalent landing and take-off services. The Finnish system is therefore discriminatory and distorts competition on the relevant markets, contrary to Art.8[2] EC’ (Source: NERA, p.251).

<sup>110</sup> [1995] OJ L 216/8-14; Commission Decision 95/364/EC of 28 June 1995 regarding landing fees at Brussels airport. ‘This airport applied a system of stepped discounts, which increases with a high volume of traffic. The charging system at Brussels airport favours airlines with high volume of traffic at Brussels Airport, and places small airlines at a competitive disadvantage. Hence, Brussels Airport abused its dominant position in the relevant market by introducing the above system of stepped discounts’ (Source: NERA, p.251).

<sup>111</sup> [1999] OJ L 69/31-39; Commission Decision 1999/199/EC of 10 February 1999. This case ‘also related to a system of discounts on landing charges in use at Portuguese airports, and the differentiation of those charges according to the origin of flights. The Commission argued that the Portuguese charging system is incompatible with Art.[86](2) read in conjunction with Art.8[2] EC’ (Source: NERA, pp.251-252). It should also be noted that CJEU dismissed an action brought by Portugal for annulment of this decision (*See* Case C-163/99, [2001] ECR I-2613).

<sup>112</sup> It should be noted that, in a number of cases, the Commission has required airlines to give up (‘divest’) slots in the context of alliances (e.g. *Increase of frequencies on the route London (Heathrow) – Brussels*, Commission Decision 92/552 of 21 October 1992, [1992] OJ L 353/32 (1992); *Lufthansa/SAS*, Commission Decision 96/180 of 26 January 1996, [1996] OJ L 54/28-42; and *Austrian Airlines/Lufthansa*, *See* Commission notice concerning the alliance between British Airways and American Airlines, [1998] OJ C239/10, and also in respect of mergers or take-overs as well (e.g. Case IV/M.0019 – *KLM/Alitalia*, Case M.2041 – *United Airlines/US Airways*).

<sup>113</sup> *Supra* note 109.

<sup>114</sup> It may be significant to note that the CJEU dismissed an action brought by Portugal for annulment of this decision (*See* Case C-163/99, *Portuguese Republic v Commission of the European Communities*, [2001] ECR I 2613).

<sup>115</sup> Whilst it is beyond the scope of this article, it is worth querying here, with reference to the pending appeal to the Court of Justice in *Greek Lignite*, whether the rarely used Art.106 TFEU (read together with Art.102 TFEU) might offer the Commission yet more discretion to intervene in this area.



either on the upstream or downstream markets, and therefore be deemed *de minimis*.<sup>116</sup> Certainly, if a series of slot transactions are made together then a greater effect on competition is possible.<sup>117</sup>

Furthermore, non-compete clauses would likely lead to market sharing and constitute a violation of Arts 101 and 102 TFEU, and Arts 53 and 54 of the EEA Agreement.<sup>118</sup>

Turning to Art. 102 TFEU, we query if the introduction of MBMs to the slot allocation system vis-à-vis legalisation of ‘slot exchange’, which effectively enables the highest bidder to purchase slots, will generate the first case of abuse of dominance in slots? Or will an undertaking’s dominance in slots at EU airports simply lead to a strengthened competitive advantage for hub carriers? Efficient hub use is not in itself anti-competitive; in theory this would lead to benefits for consumers through increased capacities at better timings. What is unclear is whether the airfares on respective routes will increase as well. Fares will not necessarily increase merely if a hub carrier exercises market power in slots, and therefore at the airport in question, but perhaps an increased opportunity for abuse is present in such an environment.

With respect to access to slots, noting of course that air carriers are subject to the EU competition rules, including the Merger Regulation, it is likely that the acquisition by one carrier of another will continue to lead to Art. 9 commitments<sup>119</sup> such as divestiture of slots and/or return of some of the acquired slots to the pool.

On the one hand, we question whether these types of commitment decisions are changing the ‘regulatory nature’ of competition law. On the other hand, a novel situation has arisen insofar as air carriers now *buy* slots outright. In other words, in the absence of a requirement to report the resulting concentration in slots to the EC and no investigation<sup>120</sup> as such in cases where there is no merger or acquisition, or other joint venture, this *purchase* of slots seems to lack oversight. The Merger Regulation is useless in this instance as it cannot be used *ex ante*. Is this not then a ‘grey market’, which should be particularly concerning with reference to dominance and the theory of refusal to supply (slot hoarding) when applying the competition rules?

In terms of access to airport infrastructure, which it is now clear is *indispensable* to the operation of an air service; it is ‘very difficult for new entrants to challenge the dominant position of the traditional incumbent airlines at the most congested airports. At these airports, the mobility (turnover) of slots is very low’.<sup>121</sup> This is, it is submitted, almost entirely down to the current system of historical preference that is grandfather rights under the 80/20 ‘use it or lose it’ rule discussed above.

As the *Impact Assessment* that accompanies the EC Proposal explains:

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<sup>116</sup> Commission Notice on agreements of minor importance, which do not appreciably restrict competition under Art.81(1) TEC (*de minimis*), OJ C36/13, 22.12.2001; *See also supra note 8* on two-sided markets.

<sup>117</sup> UK Civil Aviation Authority and Office of Fair Trading, ‘Competition issues associated with the trading of airport slots’, OFT832 (June 2005), pp.15, 49.

<sup>118</sup> Art.101 TFEU applied to the non-compete clauses in *SAS—Maersk Air* [2001] OJ L265/15, [2001] 5 CMLR 1119.

<sup>119</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty, [2003] OJ L1/1, 04.01.2003, Art.9.

<sup>120</sup> Noting however that the coordinator must comply with EU law. *See* Article 8(5), Regulation (EC) No 793/2004 of the European Parliament and of the Council of 21 April 2004 amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports, [2004] OJ L138/56, 30.04.2004.

<sup>121</sup> ‘Commission Staff Working Paper, ‘Impact Assessment, Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on common rules for the allocation of slots at European Union airports (Recast)’, Brussels, 1.12.2011, SEC(2011) 1443 final, para.46.

Dominant carriers are reluctant to give up slots and they are impeding access to the market by hoarding or babysitting slots. The report by the European Competition Authorities on slot trading identified as a potential problem the fact that airlines are holding slots, even though they cannot use them profitably, with the primary objective of preventing other airlines from entering the market or from expanding (slot hoarding). These airlines could alternatively proceed to babysitting, by leasing slots to other airlines, but here also competition concerns could arise: the lessor could restrict the use of the slots by the lessee, it could choose to lease the slots only to airlines that are not considered to be strong competitors, it could ask for excessive prices etc.<sup>122</sup>

Whilst the issue is recognised, this area appears to lack adequate oversight.

A further hurdle perhaps, applying even a conservative theory of harm, is showing how reservation of slots, or ‘slot hoarding’, constitutes manipulation of the downstream market.<sup>123</sup> Arguing the airport slot as upstream is potentially problematic. What exactly is the downstream market? Whilst an airport may be pricing excessively, a good defence might be built citing issues with market definition and lack of legal certainty.

## VII. CONCLUSIONS

Art. 6 of the Parliament’s Amendments provides:

On an annual basis, the coordinator or schedules facilitator shall submit to the Member States concerned, to the Commission and to all parties involved in their financing at their request, an activity report describing the general slot allocation and/or schedules facilitation situation ... [which] shall also contain aggregate and individual data on financial compensation derived from the sale of slots ...<sup>124</sup>

Although the reporting will ensure some transparency of the process of slot allocation and exchange, it is unclear whether it will also lead to price control or price speculation. Exclusionary behaviour, overbidding and predatory pricing could ensue. The parties involved in the financing of the coordinator or scheduling facilitator will tend to include a relatively small group of airlines, which are likely to be the dominant carriers at the airport(s) concerned. It is questionable, therefore, whether limiting open access to the financial compensation data will create true liberalised, ‘open market’ conditions for the sale and exchange of airport slots. Indeed, the small group of airlines will become privileged to the market price for slots at the airport and may be in a position to influence this price to squeeze out competitors.

Furthermore, in the absence of a formal notification requirement on the sale or exchange of slot with respect to market share and the EU competition rules, there is a significant risk of only piecemeal economic scrutiny of those exchanges.

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<sup>122</sup> *Ibid*, para.49.

<sup>123</sup> For an assessment of the various theories of harm in EU competition law, see Zenger, H and Walker, M, ‘Theories of harm in European Competition law: A progress report’, (2009), available at <http://ssrn.com/abstract=2009296>.

<sup>124</sup> Parliament’s Amendments, Art.6, para.1.

One way to resolve this might be setting caps on slot holdings. In 2005, the UK Civil Aviation Authority (CAA) and Office of Fair Trading (OFT) considered ‘controls aimed at limiting the actions of specific airlines, for example a cap on slot holding’<sup>125</sup>, but were unclear on how this should be implemented. CAA/OFT contemplated whether applying a cap on slot holdings only at hub airports could be a way forward. In conclusion, however, CAA/OFT felt that ‘imposing caps across the board would seem too blunt an instrument, would risk adverse outcomes, and would be particularly onerous to implement effectively’.<sup>126</sup> Therefore, they did not recommend caps in the end.

In any case, it is quite probable that the spirit of liberalisation with a dash of re-regulation will continue to give way to a gradual introduction of market mechanisms in this area, such as the withdrawing and auctioning of historical slots. In the meantime, issues arising shall be taken on a case-by-case basis. So, Parliament’s Amendments appear to be just another step in the liberalisation of the internal air transport market with some decentralisation<sup>127</sup>, but it remains to be seen how the markets for slot exchange will react, and competition authorities will deal, with dominance and abuse in future.

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<sup>125</sup> UK Civil Aviation Authority and Office of Fair Trading, ‘Competition issues associated with the trading of airport slots’, OFT832 (June 2005), p.20.

<sup>126</sup> *Ibid*, p.25.

<sup>127</sup> Subject to the point raised above on EC discretion and possible joint application of Arts 106(1) and 102 TFEU to find infringement.