

## Slots at Congested Airports: The Limitations of Competition law

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### Introduction

Slots are a bundle of rights that allow airlines to take off, land and use other infrastructure at a given airport. They are a key input into the downstream provision of air travel services. Many major carriers therefore view slots as a particularly valuable “asset”, above all at congested airports like Heathrow. For example, British Airways (“BA”) has 3,800 slots a week at Heathrow (roughly 40% of those available at the airport) which are estimated to have a value well in excess of € 3 billion.<sup>1</sup>

However, the demand for slots at Europe’s congested airports vastly exceeds supply with the scarcity of slots seen as a major obstacle to full liberalisation of the transatlantic air transport market. The issue manifests itself most specifically at Heathrow in a severe shortage of airport slots available for potential new entrants, i.e. carriers who, in light of the recent Open Skies agreement, might otherwise look to challenge incumbent carriers by offering their own transatlantic services to and from Heathrow. Open Skies may have granted carriers the *legal right* to fly in and out of Heathrow but it has not facilitated *actual access* for potential new entrants.

In response to the problems caused by congestion and the illiquidity in slots, the European Commission (“Commission”), stakeholders and other regulatory bodies have been discussing the idea of formalising a market approach to slots in order to ensure that scarce airport capacity is allocated efficiently. In light of this possible development, it is important to ask what role competition law has in promoting the most efficient allocation of this scarce resource and whether competition law can deal with any anti-competitive behaviour that might arise out of the use of market mechanisms, however configured, for slot allocation and trading. In short, are the current competition law tools adequate in this respect or does a market-orientated approach to slots require some kind of *ex-ante* framework to ensure that competition is, in fact, facilitated and encouraged rather than distorted?

### Open Skies

The Open Skies agreement agreed recently between the United States (“US”) and the European Union (“EU”) will come into force on 31 March 2008.<sup>2</sup> The agreement will allow any EU-based airline to fly directly to any US destination and vice versa. In particular, European airlines will no longer be restricted from scheduling transatlantic flights to American cities solely from their home country as was required under previous bilateral arrangements.

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<sup>1</sup> International Herald Tribune (5 April 2007), *The Frequent Traveler: For travelers, ‘open skies’ means friendlier skies.*

<sup>2</sup> EU-US Open Sky Agreement also referred to the Open Aviation Area 2007. Draft agreement reached on 2 March 2007.

In terms of the UK and access to London Heathrow, Open Skies supersedes the 1977 “Bermuda II” bilateral agreement between the US and UK which permitted only BA, Virgin Atlantic, American Airlines and United Airlines to fly between the US and Heathrow. It should be noted that the Bermuda II agreement only covered Heathrow. Other airports in the UK were open to any US carriers. Nevertheless, Heathrow’s proximity to London and its financial centre meant that there has always been a particular premium on flying into this airport compared with nearby alternatives (e.g. Gatwick) and other large, international airports elsewhere in the country (e.g. Manchester).

In theory, the privileged position of this small group of UK and US carriers will be brought to an end by Open Skies: any US or EU carrier will be entitled to fly directly between Heathrow and US destinations. As a result, some commentators anticipate that Open Skies will liberalise the lucrative transatlantic passenger market (with estimates that it will reduce UK-to-US ticket prices by approximately 10% and increase overall transatlantic air travel by as much as 50% by 2013).<sup>3</sup>

### **Slot Allocation & Illiquidity**

Despite the optimism generated by Open Skies, the benefits of unrestricted transatlantic competition are unlikely to be fully realised given existing congestion, access and infrastructure issues at Europe’s busiest airports. Limited slot access and slot illiquidity at Heathrow and other congested European airports will continue to constitute significant barriers to entry to markets for the provision of transatlantic services on the most profitable routes. This is the result of both the historical manner in which slots have been allocated and the privileges of use (and re-use) that have been bestowed upon incumbent carriers under the allocation rules.

Currently, the allocation of slots in the EU is primarily an administrative procedure which has been governed for more than a decade by EC Council Regulation 95/93 (as amended by Regulation 894/2002, Regulation 1554/2003 and Regulation 793/2004).<sup>4</sup> These regulations define slot capacity available for allocation (a definition which, since the coming into force of Regulation 793/2004, has also included the use of airport infrastructure), the process of such allocation and the supervision and monitoring of how allocated slots are then used.

The rights to use the full range of airport infrastructure to operate services out of congested airports are allocated by a “slot coordinator” who is under a duty to act in a transparent, neutral and non-discriminatory manner. The coordinator allocates slots to applicants as permissions to use the airport infrastructure for the purposes of landing and/or take-off for the period for which they are requested. Once this period of use has elapsed, the carrier has a right of first refusal to continue using the slots allocated to it subject to a “use-it-or-lose-it” rule which requires that the carrier demonstrate that it has used the slots for at least 80% of time during the period in which the slots were allocated.

It is only when the carrier in question cannot demonstrate such required intensity of use (or elects voluntarily to give up the slots) that slots will be returned to the pool.

<sup>3</sup> The Guardian (6 April 2007), *Open skies deal leaves airline merger hopes lost in the clouds*.

<sup>4</sup> Council Regulation 95/93 (OJ 1993 L14/1) as amended by Regulation 894/2002 (OJ 2002 L142/3) and Regulation 1554/2003 (OJ 2003 L221/1) and Regulation 793/2004 (OJ 2004 L138/50).

Otherwise, the right to retain already held and employed slots remains with the incumbent carrier. These rights are known as “grandfather rights” and potentially enable incumbent carriers to hold allocated slots in perpetuity.

It is also important to note that the “use-it-or-lose-it” requirement is purely a quantitative concept and has no qualitative aspect in terms of evaluating how the allocated slots have been employed. Given the value of slots and the access they will provide in the future at congested airports, it is argued by critics of the current system that there is a strong incentive to use allocated slots at less than optimal efficiency (e.g. by operating half empty flights) rather than risking their reallocation from the pool to a competitor. This raises the question whether other carriers might make more effective use of the slots and, if so, how to construct a system which deters inefficient use and/or ensures allocation or transfer to those carriers likely to employ the slots most efficiently.

Incumbent carriers have historically benefited from more-or-less free use of slots: valuable rights to which their competitors have had only limited access. This position is a legacy from the days of state-run, flagship carriers that has not been addressed by privatisation or the deregulation of the European airline industry. As it stands, the principle of grandfather rights insulates and reinforces incumbents’ positions at congested hub airports and means that there is very little slot liquidity. Thus, at Heathrow, 97% of the slot capacity is allocated (and unlikely to become available) while the remaining unallocated slots are largely unsuitable or unattractive for transatlantic operations. Although new entrants do receive priority when slots become available,<sup>5</sup> the number of available slots each year is very limited: the loss rate for grandfathered slots is less than 0.5% annually while increases in runway capacity and the recovery and reallocation of slots during peak/prime periods have been very limited in the last decade.

Open Skies will not address the lack of slots or slot illiquidity that have resulted from capacity constraints and an allocation system that assigns slots primarily on the basis of historic use. Therefore, for new entrants, the process of building a meaningful number of slots at Heathrow and other congested airports will, under current conditions, be very difficult. Furthermore, those European airlines that currently have Heathrow slots (but who were unable to serve the transatlantic routes out of Heathrow) will have to sacrifice other services into Heathrow if they decide to employ (or transfer to US alliance members) any of their current slots at Heathrow for transatlantic services.

### **Slots as a Tradable Commodity**

The Commission and expert commentators like NERA<sup>6</sup> have concluded that available slots could be better allocated through market mechanisms, including alternative primary trading (e.g. auctions or higher posted prices) and secondary trading mechanisms rather than through allocation based purely on administrative criteria. Such an approach would correspond to the idea that the value of slots varies with the fluctuating strategies or fortunes of a given airline.

*Primary* trading mechanisms would be used to determine an initial allocation of slots with governments, airport co-ordinators or airport authorities in charge of selling (or

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<sup>5</sup> Council Regulation (EEC) No. 95/93 Article 2 (b) with reference to “new entrants” at Article 4.

<sup>6</sup> NERA Economic Consulting (2004), *Study to Assess the Effect of Different Slot Allocation Schemes: A Final Report for the European Commission, DG Tren.*

granting) the rights (or “permissions” to use). The objective of primary trading would be to improve the efficiency of allocation by ensuring that slots (whether they be new ones and/or those already subject to grandfather provisions) are allocated to airlines that value them most highly. *Secondary* trading, in turn, would be used once an initial allocation of slots has been made, allowing airlines to sell (or possibly lease) slots that they have been allocated. Such secondary trading would, therefore, further increase efficiency by allowing changes or corrections to be made via the market once the primary allocation has been established.

There appears to be strong support for secondary trading of slots as it would formalise and extend a practice that has been in existence for several years now, at least in the UK. Heathrow slots have been traded/exchanged along with (often) undisclosed sums of money. This practice was scrutinised in the 1999 English High Court’s judgment in *R v Airport Co-ordination Limited, ex parte The States of Guernsey Transport Board* in which the court held that airlines have the authority under the existing slot Regulation to exchange slots and for such exchanges to be accompanied by financial compensation.<sup>7</sup> Mr Justice Kay reached this decision based on what he believed to be “*the clear meaning of the relevant words in the Regulation*”.<sup>8</sup> Although different Member State may take alternative views on the matter (i.e. as to whether Regulation 95/93 actually permits such trading in exchange for compensation), slots as a tradable commodity is neither a novel idea nor a radical leap forward. Existing rights and obligations attached to the airport slot would simply transfer to the purchasing carrier, including any grandfather rights and use-it-or-lose-it obligations.

Less clear is how primary allocation would (or should) work. As noted above, slots are currently allocated by reference to administrative criteria. This applies only to “new” slots (i.e. the small number of unallocated slots and/or those returned to the pool under the use-it-or-lose-it principle) while there is no process of allocation (or re-allocation) for slots currently held (potentially in perpetuity) by incumbent carriers.

Many critics of the current system (including rivals of dominant hub-carriers) argue that the introduction of a primary market mechanism that deals only with available or new slots is unlikely to change the current dynamic and provide credible possibilities for new entrants.<sup>9</sup> In particular, the retention of the grandfather rights principle will continue to favour incumbents who have entrenched positions at congested hub airports and who would have very little reason or incentive to return slots to the pool for reallocation. In addition, any benefits from secondary slot trading would be reduced by a system that retains the current grandfather rights approach and restricts overall liquidity since only a small number of slots (and often those of lesser commercial value) would likely be subject to secondary trading.

In short, many argue that any form of primary allocation that does not address the potential distortion produced by the historical allocation (and continued possession) of slots will, in the end, make very little meaningful difference (and indeed might make matters worse). They suggest that only the reclamation of grandfathered slots and

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<sup>7</sup> *Regina v. Airport Co-ordination Ltd ex parte, The States of Guernsey Transport Board*, High Court of Justice, Queen’s Bench Division, 25 March 1999, p. 754.

<sup>8</sup> *Regina v. Airport Co-ordination Ltd ex parte, The States of Guernsey Transport Board*, High Court of Justice, Queen’s Bench Division, 25 March 1999.

<sup>9</sup> The Institute of Economic Affairs (March 2003), Bass, Boyfield, Humphreys, & Starkie: *A Market in Airport Slots*, p. 101-106.

primary allocation of time-limited rights through, for example, an auction, would result in the most efficient use of slots, increased competition and, in turn, the greatest overall benefit to consumers.<sup>10</sup>

Against this, others argue that slot mobility should not be a goal in itself and that a formalised secondary market would be beneficial, even without the introduction of a primary market mechanism.<sup>11</sup> In other words, there would still be benefits in establishing a secondary market as long as there are rules or measures in place to deal with instances of market power (as discussed below).<sup>12</sup> In any event, whatever new primary allocation mechanism might be chosen, it would need to be fair and defensible. This includes avoiding an arbitrary re-allocation of slots: one that creates liquidity simply for liquidity's sake without considering who, in fact, is best positioned to make most efficient use of these valuable rights.

## Slot Ownership

It has not been definitively established who owns slots but most commentators seem to agree that the airlines do not have ownership rights over slots. Airlines might claim that slots belong to them because slots are an integral part of the industry infrastructure enabling them to offer downstream services to their customers. This argument, however, is not recognised in law. Slots are allocated to airlines with a “permission” to make use of them (potentially for an indefinite period of time) but such rights are not synonymous with ownership. A review of the relevant text in Regulation 95/93 (as amended) appears to confirm this view:

- a “slot” is defined as a *permission* given to use a 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 as allocated by a coordinator, in accordance with the Regulation (Article 2(a));<sup>13</sup>
- slots are *allocated to* airlines (Article 10(3));
- slots may be exchanged between air carriers, or transferred from one air carrier to another (Article 8(4));
- slots must be returned to the slot pool when unused (Article 10(2)); and
- air carriers “hold” slots (Article 2(b)).

The better view is that airlines have rights to use defined infrastructure which is owned or operated under license by airport operators whose own rights might derive from national property law or national legislation. The position appears to be the same in the US where the aviation regulator (Federal Aviation Administration) notes that “*slots represent an operating privilege subject to absolute FAA control.*”<sup>14</sup> Finally, it should also

<sup>10</sup> The Institute of Economic Affairs (March 2003), Bass, Boyfield, Humphreys, & Starkie: *A Market in Airport Slots*, p. 101-106.

<sup>11</sup> UK Department of Transport, *UK Response to European Commission's Slot Allocation Consultation*.

<sup>12</sup> DotEcon (January 2001), *Auctioning Airport Slots: A Report for HM Treasury and the Department of the Environment, Transport and the Regions*.

<sup>13</sup> Whilst the term “permission” was introduced by regulation 793/20004; it has not been suggested that it changes the fundamental nature of the rights conferred under Regulation 95/93.

<sup>14</sup> NERA Economic Consulting (2004), *Study to Assess the Effect of Different Slot Allocation Schemes: A Final Report for the European Commission, DG Tren*, referring to 14 C.F.R. Code of Federal Regulations part 93, sub-part K (1968) as amended.

be noted that incumbent airlines have not, until relatively recently, listed slots as assets in their annual accounts (and, where they have, only in relation to purchased slots and not the vast majority of slots which were allocated to them free or charge in the past).

Nevertheless, even without a supportable claim to legal *ownership*, incumbents clearly have a form of property rights which, in addition to the right to use for the purpose of operating commercial flights, includes certain rights of transfer and exchange subject to the limitations laid down in Regulation 95/93 and, in the absence of any applicable jurisprudence of the European Court of Justice (“ECJ”), the case law of the national courts of the EU which, as noted above, may be contradictory. Those rights can be extended (or limited) either as a result of further Community legislation and/or national case-law and the interpretation of Community law by the ECJ. Such extension (or limitation) of an airline’s *right to use* would not interfere with the underlying property rights which derive from, for example, the ownership under national property law of, or statutorily granted rights to operate, a runway or terminal building. The fact that airlines have certain property rights in slots means that they may attribute value to those rights and, subject to the limitations and conditions laid down by EU and national law, transfer their rights for value. The proposals which envisage various forms of primary and secondary trading reflect this legal position: the transfer of property rights for valuable consideration does not depend on the transferor being the owner of the underlying property right.

In practice, the main challenge with respect to future efficient allocation - and, in turn, the ultimate efficacy of any follow-on (secondary) trading - is how to find the right balance between the legitimate interests and expectations of incumbent air carriers (which have invested significant resources, for example, at hub airports) and ensuring the possibility of meaningful new entry and competition at congested airports. The costs involved in disrupting the current distribution of slots (even if rooted in a historically inefficient system of allocation) might outweigh the benefits (if any) that might be gained by enhancing the position of current competitors or facilitating new entry by reallocating anew all or some slots. Incumbents might be best placed to reap economies of scale, the benefits of which are passed on to consumers in a manner and form that could not be offered by alternative users of the slots.

Accordingly, and as noted by the UK Civil Aviation Authority and other stakeholders, determining ownership of the underlying property rights for the purposes of the primary allocation of slots and providing compensation to the owners of those underlying rights (be they States or airport operators) should not undermine the concept of a tradable right in slots or, therefore, a secondary market in which slots move to carriers who value them most.<sup>15</sup>

## **The Role of Competition Law**

Dealing with slots strictly as a tradable commodity raises concerns as to whether a primary trading process (e.g. auction) and/or secondary trading might enable airlines to reinforce dominant positions, for example, at hub airports or on specific sets of commercial routes to/from a particular airport. Indeed, it has been suggested that a market-based system might lead to a consolidation rather than a reduction of

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<sup>15</sup> UK Civil Aviation Authority (November 2001), *The Implementation of Secondary Slot Trading*.

incumbents' slot holdings and that incumbents will, in turn, have the opportunity and incentive to abuse their market power.

*Ex-post Regulation*

It should be noted that the Commission's policy in recent years has been to remove, or reduce, the sector-specific protection from competition law that has been enjoyed by a number of industries. This has been seen, for example, in the motor industry - as witnessed in the reduction in the number and scope of the restrictive contractual terms covered by the block exemption for motor vehicle distribution systems since its adoption in 1985<sup>16</sup> and in the maritime sector where the Commission recently announced the repeal of the block exemption for liner conferences<sup>17</sup> whilst taking steps to bring "tramp vessel services" within the scope of its enforcement powers.<sup>18</sup> Equally, in the air transportation sector, the Commission has repealed a number of the sector-specific block exemptions and has, for example, recently announced that it will not renew Regulation 1459/2006, the block exemption regulation relating to IATA passenger tariff conferences for routes between the EU and non-EU countries.<sup>19</sup> Overall it indicates a general level of confidence on the Commission's part that Community substantive and procedural competition law is sufficient to address issues that might arise out of sector-specific behaviour and/or specificities and that any insulation from competition law's normal reach is not justified. In short, the Commission's (DG Comp) view is that, save in exceptional cases, the application of competition law through public enforcement or private actions, as opposed to *ex-ante* regulation, appears capable of addressing competition problems as and when they may occur.

But can competition law, rather than tailored slot allocation or trading provisions, deal satisfactorily with all of the competition issues peculiar to the sector and, in particular, which arise out of the acute illiquidity that has been detailed above? Indeed, in such circumstances, a system of allocation based purely on market mechanisms (and without any additional supply-side measures) may produce unintended outcomes. This can be seen from the US experience where some commentators point to the introduction of a pure pricing mechanism to slot transactions increasing the market power of a small number of carriers.<sup>20</sup>

Some authorities and commentators suggest that EC competition law does not provide adequate tools for addressing anti-competitive behaviour that might come about as a result of a pure market approach to primary slot allocation and secondary trading.<sup>21</sup> Such concerns reflect the assessment that certain activities may well "*fall between the*

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<sup>16</sup> The current BER is Commission Regulation 1400/2002/EC.

<sup>17</sup> Council Regulation 4056/1986/EC; Council Regulation 1419/2006/EC.

<sup>18</sup> Council Regulation 1419/2006/EC; Council Regulation 1/2003/EC.

<sup>19</sup> Announced on 29 June 2007. The block exemption thus expired on 30 June 2007 for routes between the EU and the US or Australia, and will expire on 31 October 2007 for routes between the EU and other third countries. This trend reflects a policy objective of the Commission, namely to subject all industry sectors to the application of the competition rules contained in Article 81 EC and Article 82 EC, save where there are clear justifications for special treatment. Equally, the trend indicates a general move towards the *ex-post* application of the competition rules as opposed to *ex-ante*, sector-specific regulation whenever deregulated markets are sufficiently robust to dispense with such regulation.

<sup>20</sup> The Institute of Economic Affairs (March 2003), Bass, Boyfield, Humphreys, & Starkie: *A Market in Airport Slots*, p. 101.

<sup>21</sup> European Competition Authorities (17 June 2005), *Progress Report of the Air Traffic Working Group on Slot Trading*, p. 10.

*main planks of competition rules*”, in particular unilateral exclusionary behaviour that exploits and/or protects an airline’s market power.<sup>22</sup>

### *Merger Control*

The EC Merger Regulation, or its national equivalents, is unlikely to apply to transactions involving the sale or leasing of slots since the acquisition of a number of slots, on their own, would not be viewed as the acquisition of control over an enterprise or “going concern” (even though the UK’s more flexible view of a “relevant merger situation” might in some circumstances catch the trading of slots). Similarly, it is difficult to envisage how a transaction involving only slots could entail a “change of control” of an undertaking as required under the ECMR.<sup>23</sup> Finally, even if it were possible to view slot transactions as a merger, it is unlikely that a sale of slots could be seen as “substantially lessening competition” or amount to a “significant impediment to effective competition” in a given downstream market (one that would, in any event, be difficult to identify given the fungible nature of slots). It is unlikely, therefore, that merger control would be a practical tool for dealing with any anti-competitive behaviour that might arise from applying market mechanisms to slot allocation or trading, save in exceptional circumstances.

### *Article 81 EC*

Article 81 EC (or its national equivalents) also appears limited in its application to the problems that might arise through the market allocation and trading of slots. Article 81 EC will generally apply only to restrictions or practices that have an *appreciable* effect on competition. Transactions involving only one or a relatively small number of slots are unlikely to be viewed as appreciable and therefore would fall outside of the scope of the Article 81(1) EC prohibition. Some restrictions, for example non-compete clauses, might in certain circumstances be viewed as having “as their object” the sharing or allocating of markets and would be considered illegal without the requirement to demonstrate appreciability. However, most of the restrictive provisions which might be attached to slot transactions are unlikely to be characterised as such. Potentially aggrieved parties would therefore still be confronted with the appreciability hurdle.

### *Article 82 EC*

Article 82 EC (or its national equivalents) governs unilateral behaviour by companies (or groups of unrelated companies) occupying a dominant (or collectively dominant) market position. Its provisions do not prohibit dominance itself or the manner in which such dominance is achieved: it prohibits the abuse of dominance as manifested in certain *exclusionary* or *exploitative* behaviour. Thus a dominant company might abuse its position when it conducts its business in a manner that restricts or distorts competition that remains in the market, whether that be through exploitation of its commercial partners or customers (exploitative abuse) or by excluding actual or potential competitors from the market (exclusionary abuse).

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<sup>22</sup> The Office of Fair Trading & Civil Aviation Authority (June 2005), *Competition issues associated with the trading of airport slots: A paper prepared for DG TREN by the UK Office of Fair Trading and Civil Aviation Authority*, OFT832, p. 17.

<sup>23</sup> Council Regulation 139/2004/EC of 20 January 2004 on the control of concentrations between undertakings.

However, the distinction between permissible and abusive competitive behaviour by a dominant company is not always clear-cut. Dominant players are allowed (and indeed expected) to compete actively on a given market, albeit that such behaviour should, according to the case law, reflect competition “on the merits;” i.e. competition reflecting the competitive advantages enjoyed by the dominant company rather than restrictive practices. In terms of dealing with slots as a tradable commodity, the incentive for an already strong or dominant carrier to increase its slot holdings at a congested airport may reflect a strategy to restrict competition by limiting access to a scarce resource. Equally, however, it may reflect a pro-competitive strategy to increase efficiency through the extension of existing complementary services at a hub airport.

Such concentration of slots in the hands of one incumbent carrier naturally gives rise to concerns that the incumbent will (or has the incentive to) engage in anti-competitive conduct amounting to abuse of a dominant position contrary to Article 82 EC. Abuse would, in this context, be characterised as exclusionary insofar as “slot hoarding”, refusal to supply, overbidding or what might be called “predatory purchasing”<sup>24</sup> denies other competitors (or potential competitors) access to an essential input that would otherwise allow them to compete and contest the incumbent’s market position. However, it is not clear whether Article 82 EC would catch allegedly exclusionary behaviour in relation to slots. These limitations are considered below.

In terms of exploitative abuse, this would exist, for example, where the dominant company indulges in “excessive” pricing. The possibility of exploitative abuse might occur in a market for slots at a particular airport (where the conduct might also be regarded as exclusionary vis-à-vis a rival seeking to purchase slots) or in a downstream market for the provision of air transport services where the victim would be the passenger, the consumer of such services. The first type of abuse might best be addressed through the rules applicable to a secondary trading system. The second type might be more appropriately addressed through an *ex-post* application of the rules under Article 82 EC or its national equivalents.

### *Market Definition*

In order for Article 82 EC to be capable of controlling the use (or misuse) of slots, one would first have to establish that a carrier (or carriers) holds a position of dominance. The mere holding of a high number of slots at an airport may not confer a position of dominance. The relevant market is likely to be defined in reference to certain air transport services rather than a market for slots.

Slots, it can be argued, are an upstream input into the downstream service market in which the airlines compete. If so, it is dominance on this latter market that must be established in order to found a claim. Market definition has the potential to handicap any potential claim based on an airline’s holding of slots at a particular airport since any relevant downstream transport (service) market might be contested by carriers operating out of different airports and/or by operators of other forms of transport. The fact that the congested nature of some key EU airports has stimulated competitors, and in particular budget airlines, to look elsewhere for slot capacity, suggests that different

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<sup>24</sup> Predatory purchasing has been described in US case law as the over-purchasing of an input of production or otherwise artificially increasing the price of the input so as to increase input costs of one’s competitors or to deny these competitors the input altogether - *Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co. Inc.* 411 F.3d 1030 (9th Cir. 2005).

airports (and therefore the slots available) may be regarded as falling within the same relevant geographic market. The finding that two or more airports fall within the same relevant market implies that operators at these different airports will exert competitive pressure on each other and that the right to use, for example, over 40% of the slots at one airport does not necessarily confer a position of dominance on that carrier.

### *Dominance and Abuse*

Even if a carrier were dominant in a relevant market or markets as a result of the right to use a high percentage of available slots, the acquisition of further slots does not imply abuse. Thus, where there is dominance in an upstream “market” for slots (something which, as stated above, might be difficult to prove), the claimant (or competition authority) still has hurdles to clear. Existing EU case law has established that exclusionary behaviour may not infringe Article 82 EC when the dominant company can demonstrate an objective justification for its actions.<sup>25</sup> Moreover, in line with the Commission’s initiative (still under discussion)<sup>26</sup> to introduce a more economics-based approach to the application of Article 82 EC, it would be necessary to demonstrate that the acquisition of more slots gives rise to a restriction of competition: this may depend on the number of slots acquired as well as the specific circumstances in which the carrier operates. If a restriction were established, the carrier would have the opportunity to demonstrate that the acquisition and use of the additional slots would give rise to efficiencies which would be passed on to consumers. As such, a dominant incumbent might justify its behaviour on the basis that its already established position makes it best placed to make the most efficient use of the acquired slots and that it is simply extending the benefits of the system it has in place.

Where an airline controls all or the vast majority of slots at a hub airport and refuses to sell slots to actual or potential competitors, one might construe this as an abuse of a dominant position contrary to Article 82 EC. Aggrieved third parties might argue that the airline owns and controls a facility to which competitors require access in order to provide services to customers. In short, slots at congested airports might be regarded as an “essential facility”, i.e. where reasonable access to a sufficient number of slots is indispensable, there are no suitable alternatives and it is not economically feasible (or technically possible) for competitors to reproduce the facility.<sup>27</sup>

It should be noted that the ECJ has never ruled on the issue of essential facilities in the air transport sector. However, based on other cases dealing with the issue, a refusal to supply slots would not be viewed as an abuse where the slots in question were not indispensable to relevant downstream service (i.e. other slots are available from other airlines at the airport in question and/or are available at other airports from which competing services might be offered) or where the refusal is objectively justified (i.e. that the dominant incumbent is better placed than any competing undertaking to use the slots most effectively by, for example, taking advantage of the hub network that it already has in place).

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<sup>25</sup> *Atlantic Container Line AB and Others v. Commission*, Joined cases T-191/98, T-212/98 to T-214/98, 30 September 2003.

<sup>26</sup> DG Competition Discussion Paper on the Application of Article 82 to Exclusionary Abuses, December 2005.

<sup>27</sup> *Oscar Bronner GmbH & Co KV v. Mediaprint Zeitungs und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co KV and Mediaprint Anzeigengesellschaft mbH & Co KG* Case C-7/97, 23 January, 1999.

### *Practical Issues*

Where an abuse has been proven in previous exclusionary cases, the time and effort involved has often been substantial, so much so that other potential complainants may be deterred or hesitant in bringing similar claims.

### *Market Investigations*

There has been discussion of the potential use that might be made (*ex-ante* and *ex-post*) of market investigations/sector inquiries to examine the conditions under which slots may be allocated and subsequently traded. The Air Traffic Working Group (“ATWG”) of the European Competition Authorities (“ECAs”) acknowledges that, with the exception of the UK, the main restricting factor for most ECAs would be the lack of any remedial powers.<sup>28</sup> In the UK, the Competition Commission has wide ranging remedial powers, including to order divestment of assets. Nevertheless, in its recommendations the ATWG includes the possibility of such investigations as both an *ex-ante* and an *ex-post* competition control whilst noting both pros and cons.

The question, however, is not so much whether such investigations could be used as appropriate procedural tools to review and (assuming the relevant powers are available) address the competition issues arising in connection with more market-based systems. Rather, it is to determine whether the use made of slots and the circumstances in which they are traded (or not traded, e.g. slot hoarding) by airlines constitutes an infringement of competition law or evidences other market failures which the competition rules are designed to address.

### **Private Enforcement**

The policy debate surrounding the initiative of the Commission to facilitate and encourage private actions for damages in cases where there has been an infringement of the competition rules deserves detailed consideration in its own right. For the purposes of this paper and the relevance of private “enforcement” as a potential tool to address competition law infringements related to the use and trading of slots, the following brief reflection may suffice.

Private enforcement contemplates both follow-on actions and stand-alone actions. The former are those in which the claimant relies on a decision of the Commission or an NCA to prove the infringement, leaving it with the tasks of demonstrating a causal link between the infringement and the damage alleged and quantifying the resulting loss. Stand-alone actions are those in which the claimant does not have such a decision available to it and therefore has to prove the infringement.

It is likely that, for the foreseeable future, actions based on Article 82 EC will, save in the most blatant of cases, be founded on a decision of a competition authority (follow-on actions). In the context of slot usage and trading, the complexities of establishing dominance and abuse (not least where conduct by a dominant entity, whilst restrictive of competition, can nonetheless be justified by reference to efficiencies) mean that private, stand-alone actions in national courts are likely to be the exception rather than the rule. On the other hand, recourse to private litigation to challenge the imposition

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<sup>28</sup> Progress report of the Air Traffic Working Group on Slot Trading, updated, 17 June 2005, para 3.10.

and enforceability of a contractual restriction (e.g. a non-compete clause inserted in a sale or lease agreement for slots) may be less rare.

To the extent that challenges to incumbents are from well-resourced and, hopefully, well-advised competitors, the tendency of the competition authorities may, nevertheless, be to refer them to the national courts given the administrative priorities which they have established in light of their own limited enforcement resources.

## **Conclusion**

This background paper is designed to provide some relevant context for the presentation to be given at the conference. Some tentative conclusions on the complex issues discussed are reserved for the presentation.