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On the teaching of air law…

- There are about 5,000 law faculties in the world; 4,476 do not teach air law as a specialised subject.

- In 2016, the Assembly of the International Civil Aviation Organisation invited the Council “to take all possible action to promote the teaching of air law”.

ICAO on the Teaching of Air Law – Assembly Resolution A39-11 - Appendix D

The Assembly, considering the undoubted importance for the Organization and the States of the specialized teaching of air law and the desirability of fostering knowledge of this important subject:

- *Invites* the Council to take all possible action **to promote the teaching of air law** in those States where it is not yet available;
- *Urges* the States to adopt appropriate measures which would further the achievement of the above objective.

https://www.icao.int/Meetings/a39/Documents/Resolutions/a39_res_prov_en.pdf

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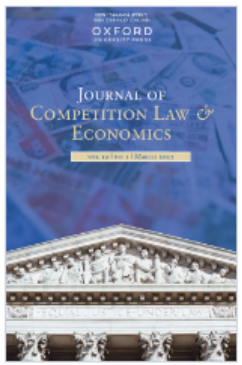

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JOURNAL ARTICLE

Regulatory Convergence Between U.S. Antitrust Law and Eu Competition Law in International Air Transport—Taking Stock

Antigoni Lykotrafiti Author Notes

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Areas of regulatory convergence

A. Definition of relevant market and out-of-market efficiencies

Market definition – US DOT approach

- ✈ Definition of the relevant market is hardly distinct from the efficiencies that the transaction is expected to generate. Indeed, the narrower the market becomes (e.g. city-pairs as opposed to country-pairs or regional markets), the broader the terrain of efficiencies gets.
- ✈ When considering nonstop hub-to-hub routes where competition will be eliminated upon implementation of the agreement, the DOT is open to out-of-market efficiencies:

- "efficiencies created by the transaction in other markets may be considered if a remedy is not available to address the loss in competition while still preserving the benefits of the transaction" (STAR alliance - Show Cause Order 2009-4-5);
- "the critical issue is whether the overall consumer benefits of antitrust immunity will outweigh the potential competitive harm in some markets" (STAR alliance - Show Cause Order 2009-4-5).

Criticism against the DOT

✈**American Antitrust Institute** (*Blue Skies case, Order 2019-11-14*):

the DOT's approach is asymmetric because it assesses competitive effects on nonstop routes, while assessing public benefits on all routes.

✈**DOT** (*Blue Skies case, Order 2019-11-14*):

- the Department "takes a holistic view of public benefits, crediting certain 'out-of-market' efficiencies in determining whether the public at-large will derive benefits from immunized alliances".
- "while a grant of ATI may effectively increase concentration on a nonstop route, the ensuing cooperation across a number of markets allows for more interline itineraries at lower fares, which result in overall net consumer benefits".

Market definition – EU approach

- The European Commission (EC) distinguishes between the definition of the relevant market and the competitive assessment as part of which efficiencies are considered.
- The relevant market for scheduled passenger air transport services is defined on the basis of the 'point of origin/point of destination' (O&D) city-pair approach, with each route being considered a separate market.
- This market definition corresponds to the demand-side perspective whereby customers consider possible alternatives of travelling from a city of origin to a city of destination, which they generally do not consider substitutable to a different city pair.

Market definition – EU approach converging with US approach

- Commission Guidelines on the application of Article 101(3) TFEU:

"Negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market. However, where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same".

- In STAR alliance, the EC established a "broadened" or "complementary" test on out-of-market efficiencies.
- Despite the fact that the group of consumers affected by the restriction and benefitting from the efficiency gains were not "substantially the same", the Commission was satisfied that there was "considerable commonality" between them and proceeded with crediting the out-of-market efficiencies only to the extent that they accrued to the relevant hub-to-hub market.
- Accepting out-of-market efficiencies, even to the limited extent that they spill over into the route of concern, in a way extends the boundaries of the relevant market.

Market definition – EU approach converging with US approach

- The evolution of the EU thinking on the definition of the relevant market crystallised in Regulation 2019/712 on fair competition in international air transport:

"the Commission should give consideration to the practices distorting competition in the relevant context. Given the variety of possible practices, the practice and its effects might, in some cases, be limited to air transport activities of a city-pair route while, in other cases, it might be relevant to consider the practice and its effects on the wider air transport network".

- The Commission has been criticised for overlooking network effects when defining the relevant market. Its decision in the STAR alliance case has brought it a step closer to the DOT. Moreover, Regulation 2019/712 may signal a switch towards a more holistic approach in the definition of the relevant market.

Areas of regulatory convergence

B. Remedies

Slot divestitures in the EU

- The most prominent remedy in the EU is slot divestments at hub airports.
- EU airlines have no property rights over slots (or gates) at EU airports, but they acquire grandfathering rights if they use the slots for 80% of the time during the period for which they have been allocated (use-it-or-lose-it principle).
- The scarcity of slots at hub airports is exacerbated by airport saturation and obstacles to expansion, and constitutes the main barrier to entry.
- Slot remedies are access remedies in that they grant access to take-off and landing runway capacity and to corresponding terminal capacity (e.g. gates, check-in desks and luggage belts).
- Given that their release to new entrants enables the latter to operate them for a guaranteed period of up to 10 years, which may be extended upon its expiration, the alliance partners are deprived of valuable assets for considerable periods, albeit without losing their historic precedents.

Slot divestitures in the EU

- To address the alliance partners frequency advantage at hub airports, the Commission often combines slot releases with fare combinability remedies, whereby existing competitors and new entrants can offer a return trip on a relevant city-pair market comprising a non-stop service provided one way by them and a non-stop service provided the other way by one of the alliance partners.

- Slot releases are also combined with special prorate agreements, whereby the alliance partners make available their feed traffic at both ends of a route to new entrants (and competitors with no presence at the relevant hub airports) on advantageous terms.

Carve-outs in the US

- US airports are not congested (slot controls are in place only in three US airports)
- Unlike the EU, where access to slots entails access to corresponding terminal capacity, in the US, gates are commonly leased to airlines under exclusive long-term leases.
- Slot divestitures may be ineffective at slot-constrained US airports where gates are dedicated →historical preference of the DOT for carve-outs.
- A carve-out is an arrangement whereby antitrust immunity does not extend to routes in which the alliance partners both offer non-stop services. It effectively prohibits carriers from commonly pricing their products and services for a defined group of passengers in city-pair markets where competition would be eliminated as a result of antitrust immunity.
- Carve-outs are anticipated to be temporary, lasting only until new entry introduces further competition, and are preferred for “two-to-one” markets, i.e. markets that would shift from two competitors to a single operator.

Waning popularity of carve-outs in the US and concurrence with the EU

- The DOT has recently found that where an integrated metal-neutral joint venture is present, carve-outs inhibit the realisation of efficiencies and thereby the consumer benefits resulting from those efficiencies. In such cases, existing carve-outs are retained until the metal-neutral joint venture is implemented, at which point they are revoked.
- Slot remedies ordered by the DOT in the oneworld (2010) and Delta/Aeromexico (2016) cases.

Areas of regulatory convergence

C. Duration of the antitrust immunity

Validity of antitrust immunity

EU

- DG COMP has always time-limited the approval of common bottom line international airline alliances in its commitment decisions.
- Article 9 of Regulation 1/2003 provides that a commitment decision "may be adopted for a specified period".
- Commitments binding on the parties for a period of 10 years.

US

- US law does not provide for a similar legal basis.
- 2009, Congressman Oberstar sponsored a bill to sunset an exemption from the antitrust laws in connection with an international alliance after three years. The bill was never enacted.
- The DOT's regulations afford it the power to "terminate or modify such immunity if the Assistant Secretary finds *after notice and hearing* that the previously conferred immunity is not consistent with the provisions of section 41308".

US DOT and antitrust immunity

- In the SkyTeam and STAR alliance cases, the DOT stated that “approval and grant of antitrust immunity will remain in effect indefinitely” on condition that the joint venture will be implemented within 18 months.
- The DOT has recently limited the implementation period to six months.
- Similar provisions were made in oneworld.
- Rationale: “to make the benefits of the alliance available to consumers as soon as possible” (public interest justification).
- In the 2016 Delta/Aeromexico case for the first time in its decisional practice the DOT attached a sunset clause to antitrust immunity, which was granted for five years effective from the date of execution of the slot remedies and implementation of the joint venture.

An area of legislative convergence

US International Air Transportation Fair Competitive Practices Act (1974)/International Air Transportation Competition Act (1979) and Regulation (EU) 2019/712 on safeguarding competition in air transport

Fair competition clauses in EU comprehensive air transport agreements

- ✈Fair competition clauses (discrimination or unfair practices, subsidies, financial reporting, antitrust and concentrations) with enforcement mechanisms.
- ✈They dovetail with Regulation (EU) 2019/712 on practices distorting competition, i.e. discrimination and subsidies.
- ✈ Regulation (EU) 2019/712 permits “financial duties” or “any operational measure of equivalent or lesser value such as suspension of concessions, of services owed or of other rights”.

On the interplay between fair competition clauses and Regulation (EU) 2019/712

What does Europe do about fair competition in international air transport? A critique of recent actions

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1974 US IATFCPA/1979 IATCA

- ✈1974 Act (retaliatory charges against third-country airlines when operating in the US)
- ✈1979 Act (“discriminatory, predatory, or anticompetitive practices against a US carrier” or “restrictions on access of a US carrier to foreign markets”).
- ✈US DOT empowered to suspend foreign air carrier permits and restrict operations
- ✈The Act has been used as a lever of pressure in aeropolitical relations leading to amicable dispute resolution.


Thank you!