

The Law on Competition in the Air Transport Industry [EU, USA & Beyond]

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Objectives & Structure

1. Understand aviation-specific competition issues
2. Compare regional enforcement models
3. Identify convergences and divergences
4. Pick out lessons for Africa from experiences of other regions

Why Competition Law Matters in Aviation

- High fixed costs and network effects
- Scarce airport capacity
- Historical state involvement
- Risk of market foreclosure

The Concept of Relevant Market

Relevant Market in Overall Market

- Product market
- Geographic market
- Functional market

Relevant Market in Aviation

- Product + geographic scope
- Aviation is usually distinct from other means of transport
 - Sometimes competes with rail (Europe and China)
- Economic and legal assessments: dual approach
 - City-pair analysis
 - Airport to specific market
 - Should be Hub-to-hub vs hub-to-spoke
- Key test is substitutability

Intersection between Competition Law & Aviation

- **General economic law is applied to aviation**
 - Aviation not traditionally regulated by competition law
 - Relevant in liberalised markets to maintain fairness and market economy
 - There is an intrinsic link between liberalisation and competition law
 - Importance of law preserving competition grows after liberalisation
- **Competition law is not universal across regions i.e., no international system**
 - ICAO mandate is limited to technical aspects of aviation
 - IATA (industry body not a interstate or intergovernmental body) hence limited mandate despite influence
 - Multilateral approaches are present mostly regional mechanisms (EU, Africa & ASEAN)

Competition vs Competition Law

- **Two dimensions of Competition**

- Competition = market condition
- Competition law = legal enforcement of market condition

- **Philosophies of the level playing field:**

- USA philosophy is Competition in the market = better conditions & interest for production *[pro-efficiency]*
 - USA- you must justify a potentially uncompetitive behaviour you must show that it is procompetitive. Liberalization is good for the industry and is good for the consumer in the end.
- EU philosophy is Competition in the market = better product *[pro-consumer]*
 - EU; pro consumer. Prove that it will give more options or benefits to the consumer. Liberalization is good for the consumer
- Africa? Leans towards better product but has signs of better market conditions

AFRICA- Lack of focus

- **Application approaches:**

- USA pre-existing applied to aviation market after deregulation “immediately”
- EU reversed sequence i.e. liberalization first then the law helped create competition (i.e. market condition)

Introduction

Competition rules are general rules applied to air transport (Not tailor made).

Liberalization and Competition law are inextricably linked

- Apply only in liberalized contexts
- USA & EU applied general competition law to aviation after liberalization

Difference between “competition ” and “competition law”

- Liberalize you foster competition, but competition law is when you regulate a liberalized market.
- Fair competition are broader than competition law (more restricted)

Role of competition law

- Don't alter competition in the liberalized regime
- Create conditions for competition

Importance of the notion of “relevant market ”

- Measurement is done on origin and destination not Hub and Spoke

Demystify liberalization

- **What is liberalization?**
 - More competitors
 - Less prices
 - Better services
 - More rules
 - Unfit competitors/ participants are taken out of the markets
- **Basic principles that a liberalized market depends on:**
 - Do not agree on prices
 - Do not exclude competitors
- **Role of government:**
 - Control market competition on basis of rules
 - Give Investors assurances that they will conduct business on a fair basis and rule-based approach

Why competition law?

- Mutually enforcing liberalization process and the market created
 - Other anti-competitive practices
- Government exceptions
 - Leniency on mergers: Save the National brand
- Novel Frontiers & Commission political deal
- States should move from Bermuda to EU (free market) or Commission will apply competition law
 - How would it affect aviation:
 - Pooling agreement
 - Interlining
 - CRS
 - National carrier controlling slots
 - State owned airlines
- Moratorium phase (market liberalized 1992, last restrictions 1997 6 years later EU regulation 1 2003).

Why focus on USA, EU and ASEAN?

- **USA, EU and ASEAN have relatable models for Africa:**
 - Federal or multilateral framework.
 - USA is an interstate system i.e. 50 states in the USA (47 contiguous states, 1 Federal District– Washington, D.C, but not a state, 2 non-contiguous states of Alaska and Hawaii and 5 major territories Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, & the Northern Mariana Islands).
 - European Union (EU) consists of 27 member states. These countries are highly integrated, sharing a common market, the Eurozone (20 countries), and the Schengen Area (25 countries)
- **Africa can perfect and adapt the models**
 - Some things are not covered well like foreign sovereign wealth investment into airlines
- **Africa is affected by the rules and regulations applicable in the EU and USA**
 - Antitrust, State Aid, Mergers*
 - EU traffic rights are based on the state of competition state

Conceptual underpinnings

Main purpose of competition law

- Prohibit collusion between competitors
- Prohibit monopolies
- Prevent abuse of dominant position
- Fight predatory practices

Protect the competitive market from distortion

Different forms of control:

- Antitrust
- Abuse of dominance
- Mergers
- Public subsidies

Prohibited

Subject to review and approval

Sources of competition law in aviation

- **North America**
 - US Federal law (*Sherman Antitrust Act of 1890* → *Clayton Act of 1914* → *Robinson-Patman Act of 1936* → *Federal Trade Commission Act of 1938*) **[Self enforcing]**
 - **Canada**
- **Europe**
 - EU: Treaty law & Regulations (*1957 Treaty of Rome*) **[Self enforcing]**
- **Africa**
 - Africa: Treaty Law (*Abuja Treaty* + *YD*, *AfCFTA*, *REC Treaties*, *National Law*) **[Domestication]**
- **Asia & Pacific**
 - ASEAN Multilateral Agreement on Air Services
- **Middle East**
 - Arab Civil Aviation Commission Agreement for the Liberalization of Air Transport

Africa

African Union (AU) Instruments

- Article 7 (competition clause) of the 1999 Yamoussoukro Decision (YD).
- Agenda 2063 in 2011
- African Civil Aviation Policy
- Institutional and regulatory texts of the YD
 - Annex 2: Duties and Responsibilities of the Monitoring Body of the Yamoussoukro Decision
 - Annex 3: Dispute Settlement Mechanism
 - Annex 4: Regulations on the powers, functions and operations of the Executing Agency
 - Annex 5: Regulations on Competition in Air Transport Services within Africa
 - Annex 6: Regulations on the protection of Consumer of Air Transport Services
 - Single African Air Transport Market (SAATM)

Regional Economic Communities (RECs)

- Treaties
- Protocols
- Regulations

Asia Pacific (ASEAN)

- The ASEAN Multilateral Agreement on Air Services (2009)
 - Art 12 on fair competition
 - Art 13 on safeguards against anti-competitive practices (predatory pricing, capacity dumping, abuse of dominant position and State aid).
- The ASEAN Economic Community Blueprint (2008)
- The ASEAN Regional Guidelines on Competition Policy
- National competition policies

Middle East region

- The Arab Civil Aviation Commission (ACAC)
- The ACAC Agreement for the Liberalization of Air Transport (2004)
 - Art 9 fair competition and non-discrimination
 - Annex 2 specific rules of competition in air transport

Europe

- Art 101 to 109 Treaty on the Functioning of the European Union (TFEU)
- Protocol No. 27 on the internal market and competition
- Regulation (EC) No 1008/2008 of the European Parliament and of the Council of EU on common rules for the operation of air services in the Community.

Enforcement:

The European Commission

Court of Justice

Antitrust (collusion)



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Antitrust: Core Prohibitions

Note on terminology:

- USA: Antitrust
- EU: Concerted efforts
- Africa (YD): Collision

Practices:

- Cartels
- Price fixing
- Market sharing
- Capacity coordination
- Information exchange

Assessment/Test:

- Per se analysis
- Effects-based analysis (Three-part test)

Take Away: Airlines historically engage in cartels (fuel surcharge)

Antitrust Enforcement – comparison USA, EU, ASEAN & AFRICA

Legal instrument	Test	Enforcement
US Federal law 👉 Sherman Antitrust Act 1890 👉 Clayton Act of 1914 👉 Robinson-Patman Act of 1936 👉 Federal Trade Commission Act 1938	<i>Per se</i> illegality	Self executing Federal law DOJ enforcement Private actions
EU Multilateral Treaty 👉 Article 101 TFEU 👉 Regulations 👉 National law	Effects-based analysis	Self executing regional law Exemptions

US vs EU: Key Differences in Antitrust

- **Antitrust (US)**
 - Per se rule
 - Criminal sanctions
 - Treatment of cooperation
- **Concerted efforts (EU)**
 - Per se vs effects-based analysis
 - Regulators then Courts
 - Exemptions: case by case treatment of cooperation
 - Administrative fines to entities and sanctions to states
- **Key Takeaway:** Main difference is in enforcement approach i.e., criminal liability in US

USA (Collision/Antitrust)

- Sherman Antitrust Act of 1890; Codified in 15 U.S.C. §§ 1-38; Amended by the Clayton Act in 1914
- **Collision is Criminalised (illegal & punishable for persons & companies)**
- §1: Every contract, combination in the form of trust or otherwise, or conspiracy, **in restraint of trade or commerce among the several States**, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. "

Tests for determining anti-competitive practices

“In determining whether a plaintiff has proved that a horizontal agreement violates Section 1, the Supreme Court in *Continental Airlines v. United Airlines*, 277 F.3d 499 (4th Cir. 2002) has authorized three methods of analysis:

- 1) *per se* analysis for obvious anticompetitive restraints
- 2) quick-look analysis for those with some procompetitive justification
- 3) Full "rule of reason" for restraints whose net impact on competition is particularly difficult to determine. [...]

In all cases, however, "the criterion to be used in judging the **validity of a restraint on trade is its impact on competition.**" *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984).”

Three-part test for “pro or anti” competitiveness

“Per se analysis” [*Blatant violations*]

- Some practices (price fixing, horizontal output restraints, & market allocation agreements) are illegal per se.
- "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se"
- No need to conduct a detailed study of the markets on which the restraints operate or the actual effect of those restraints on competition.

“Quick-look” [*Prove that it isn’t altering competition or exceptions*]

- Plausible procompetitive justifications,
- Full record may often be necessary hence evidentiary hearing before an administrative agency or in court.

“Rule of reason” [*Balance between competition alteration and benefits of restricting competition*]

- If reasonableness of a restraint cannot be determined without a thorough analysis of its net effects on competition in the relevant market, courts must apply a full rule-of-reason analysis.
- Proof that market was restrained, that the defendants played a significant role in the relevant market (market power) because restraint on trade created by defendant's action must bear an outcome.

EU- CASE

- EU Law Art 101 (ex Article 81 TEC) Prohibited practices on the basis that they are incompatible with the internal market
- Monopolies and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, i.e., those which:
 - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 - (b) limit or control production, markets, technical development, or investment;
 - (c) share markets or sources of supply;
 - (d) apply dissimilar conditions to equivalent transactions with other trading parties resulting in a competitive disadvantage;
 - (e) subject contracts to supplementary obligations which, by nature or according to commercial usage, have no connection with the subject of such contracts.
- Agreements or decisions prohibited pursuant are automatically void [Pre mafacie]
- But they can be excused if any agreement or category of agreements between undertakings, or any decision or category of decisions by associations of undertakings or any concerted practice or category of concerted practices which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives or afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

EU- CASE

- EU Law Art 101 TFEU
- Agreement: joint intention to behave in a certain way (Case T-305/94, Limburgse Vinyl)
- Vertical or horizontal agreements
 - Vertical:
 - Selective distribution
 - CRS
 - Horizontal:
 - Cartels: fixing of prices or trading conditions, quotas, sharing of market or customers
 - Collusive tendering
 - Collective boycott
 - Exchange of information

EU- CASE

- Horizontal agreements in air transport
 - Standards
 - Price conferences
 - Code-sharing
 - Blocked-space
 - Strategic alliances
- Concerted practice: loser form of cooperation
 - Coordination/alignment
 - Without formal agreement

EU- CASE

The airfreight cartel decisions (Case AT.39258)

- Pricing cartel with respect to fuel surcharge (FSC), security surcharge (SSC) and the payment of commission on surcharges
- Main components of the cartel
 - Collusion on the surcharge: airlines were still competing regarding the full price
 - Continuous contacts
 - Surcharge on a per kilogram basis, irrespective of the distance
 - Index mechanism: for e.g. 0,10\$ / kg for index between 135 and 165, 0,05\$/kg for index 120 (Lufthansa)
 - No automatic adjustment: the index served as the trigger for rate adjustment and coordination
 - Debate on the anticompetitive effect

EU- CASE

- Sanction: nullity of agreements + fine (10% of annual turnover)
- But exemptions can be granted
 - Either by category or on an individual basis
 - Problem of self-assessment following the adoption of Regulation 1/2003
- Conditions for exemption
 - Efficiency gains
 - Benefits for the consumers
 - Indispensability of the restriction
 - No elimination of competition

EU- CASE

- **The airfreight cartel decisions**
 - In the USD \$1.8 billion in criminal fines were imposed
 - See In Re Air Cargo Shipping Services Antitrust Litigation MDL No. 1775
 - 21 airline executive were prosecuted and eight were sent to prison.
 - Class action lawsuits were launched by purchasers of air cargo services.
 - Settled USD \$1.2 billion
- **The airfreight cartel decisions (Case AT.39258)**
 - New fines imposed on 17 March 2017
 - One single and continuous infringement
 - Full immunity granted to Lufthansa
 - Leniency: Reduced fine for Martinair (50%); Japan Airlines (25%); Air France and KLM (20 %); Cathay Pacific (20%); Latam (20 %); Air Canada (15 %); Cargolux (15 %); SAS (15 %) & British Airways (10 %).
 - Additional reduction for Air Canada, Latam and SAS

EU- CASE

Brussels Airlines and TAP Portugal codeshare agreement concluded in 2009

- October 2016, Statement of objections issued by the European Commission (AT.39860)
 - Parallel code sharing (both airlines run the service Lisbon-Brussels)
 - Each airline act as marketing carrier on the flight operated by the other
 - Sharing the capacity
 - Fares alignment?
 - Can it reduce competition?
- Investigation closed on 30 October 2018
- Could have an impact on interlining arrangements: “The Commission concluded that the evidence collected was not sufficient to confirm its initial concerns and has therefore decided to close its investigation. Throughout the investigation, the Commission emphasised that its concerns related to certain specific features of this particular codeshare, rather than to codeshares in general. However, today's closure decision does not mean that close forms of cooperation between competing airlines will not raise competition concerns.”

Abuse of dominant position



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Aviation-Specific Abuses

- Abuse of Dominant position is the practices of excluding competitors unfairly
- Slot hoarding
 - Retention of unused slots
 - Foreclosure effects
 - Regulatory overlap
- Capacity dumping
- Loyalty rebates
- Predatory pricing
- Computer Reservation System bias
- Exclusionary practices

Abuse of Dominant Position

- **Important conceptual distinction**
 - Dominance is permitted i.e., legal
 - Abuse of dominant position is prohibited
- **Defining Dominance**
 - Using market power to create artificial barriers to entry for others
 - Prohibiting market forces of demand and supply ('grandfather' rights on airport slots)
 - Same principle in US & EU
- **Assessment**
 - Market power threshold
 - Dominance Criteria: Market share, Barriers to entry & Buyer power
- **Key Takeaway:** Independence of the market is key test. Independence tested by ability for market actors to act independently, limited constraints, sustained power.

Challenges in assessing Dominance

Market definition

- Network vs route competition
- Group vs single firm
- Less obvious in liberalised markets

Enforcement

- Aviation complexity makes enforcement difficult

Mergers



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Mergers in Aviation

- **Structural change**
 - Focus on overlapping routes
- **Risk of dominance/ concentration**
 - Hub dominance
 - Reduce number of competitors
- **Merger Assessment:**
 - Market concentration
 - Entry barriers
 - Buyer power
 - Opportunity cost in case merger is denied e.g., loss of a carrier could eliminate competition on routes and weaken competition
- **Test:** is competition substantially lessened?

Merger Remedies

- **Note: overall principle is that remedies must be meaningful**
 - Slot divestiture/release
 - Route access/divestment
 - Behavioral remedies
 - Asset sales

US vs EU approach to Mergers

- **USA**
 - Economic analysis
- **EU**
 - Structured legal test
 - Strong remedies
 - EU is more interventionist

USA-Mergers: General rules

In the US, prior to 1985, mergers had to be approved by CAB

- Now section 7 of the Clayton Act / 15 USC 18: Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly. "

EU- Mergers/concentrations: General rules

In the EU, Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings

- A concentration has a Community dimension where (a) its worldwide turnover of all the undertakings is more than EUR 5000 million; and (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.
- A concentration that does not meet the thresholds above has a Community dimension where:
 - (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;
 - (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;
 - (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and
 - (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State."

EU- Mergers/concentrations:

EU, EC Regulation No. 139/2004 of 20 January 2004 [control of concentrations between undertakings]

- Concentrations are appraised to establish whether or not they are compatible with the common market.
 - The Commission's considerations:
 - Whether the concentration significantly impedes effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position
- (a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or without the Community;
- (b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

CASE STUDY: Mergers

Air Canada & Transat agreed to merge in 2019 (collapsed in 2021)

- On Feb 11, 2021, Gov of Canada approved the proposed purchase of Transat A.T. (Transat) by Air Canada, subject to strict terms & conditions to protect the interests of Canadians
- On 25 May 2020, the European Commission opened an in-depth investigation to assess the proposed acquisition
- The Commission was concerned that the proposed transaction could significantly reduce competition on 33 origin and destination (O&D) city pairs between the EEA and Canada. These include 29 O&Ds where both companies offer direct services and four where one company flies direct and the other one indirect via one of its hubs.
- The Commission's preliminary market investigation revealed that Air Canada and Transat have been historically competing head-to-head for the passenger air transport services between the EEA and Canada.
- In particular, Air Canada, with its Air Canada Rouge brand, developed a business model to address the lower-cost and leisure-oriented nature of the EEA-Canada passenger air transport markets, thus directly competing with Transat. Other airlines, in particular the EEA national carriers, were found to be more distant competitors, only competing on a very small subset of routes out of their respective home hubs.
- Commission finding: even if the Canadian airline WestJet has expanded its transatlantic operations to the EEA countries, it is unlikely that WestJet would exert a sufficient competitive constraint on the merged entity with respect to the O&Ds that the Commission found problematic following its preliminary market investigation.”

SUBSIDIES/ STATE AID



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State Aid/Subsidies

What is State Aid?

- **Government support to firms**
 - Public ownership model
 - Airport financing
 - Bailouts
- **Risks distortion of competition**
 - Central in EU system
 - Unique strength of EU model
- **Must include (cumulative criteria):**
 - State resources
 - Advantage
 - Selectivity
 - Market distortion
 - Effect on trade

Key Concepts

- **Advantage**
 - Advantage means non-market benefit
- **Market investor principle**
 - Profitable investment is not state aid
 - Burden of proof is on state wishing to grant aid
- **Legality vs Compatibility**
 - Must notify aid before granting
 - Illegal aid can be recovered
 - Even valid aid can be illegal if not notified
 - Dependent on Commission's approval
- **State Aid Problems**
 - Political incentives
 - Misuse of subsidies
 - Delayed enforcement

Exceptions

- Infrastructure aid/investment
 - Airport Financing
 - Operating aid
- Safety and security
- Emergency aid
 - Temporary frameworks e.g. covid 19 (recent EU decision declaring Covid bail out as illegal. Lufthansa had refunded Germany)
- Connectivity Aid
 - Territorial continuity- remote territories USA, Canada & EU (PSO)

State aid

US one country and centralised
EU is different states and decentralised

Goals:

- Legal certainty for investments
- Proper enforcement
 - Centralised institutional decision making
 - Sanctions from AU to the RECs
- Tailor made competition regime
- Transition phases

Africa

Africa model:

- AU- RECs
- Inter-REC
- REC- to state
- Bilateralism

A Fair Competition clause

- For Africa enforcement must be through Bilateralism because YD/SAATM is implemented in ASA
- Suspension or limitation of traffic rights as agreed by the AU/RECs:
 - Ownership and control
 - Safety

AFCAC- Role would be to audit

Multilayerd approach

Proposed Enforcement

- Common guidelines at AU level
- Auditing- AFCAC plus AU and RECs
 - Stipulate by law who has to be associated with the audit
- RECs imposing sanctions
- States enforcing because of BASAs

Comparative Enforcement mechanism in Safety Name and shame

- ICAO audit
- Regional RSOOs Sanctions
- State Sanctions

EU- State Aid

Article 107 TFEU on Aids Granted by States

- Any aid granted by a Member State or through State resources in any form whatsoever **which distorts or threatens to distort competition** by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- § ECJ, 2003, Altmark: The various elements of the concept of State aid in Article 92(1) of the Treaty must be considered. It is settled case-law that classification as aid requires that all the conditions set out in that provision are fulfilled 75. Article 92(1) of the Treaty lays down the following conditions. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition.”

CASE STUDY: State Aid

- Air Berlin's bankruptcy EUR 150 million bridge loan granted to Air Berlin to protect the interests of passengers (short duration of aid) (Case SA.48937, 4 September 2017)
- Lufthansa decided not to acquire Niki on 13 December 2017, as initial remedies (slot divestiture) got rejected by the Commission (Lufthansa would have had quasi-monopoly on 50 routes)
- Conditional approval of Lufthansa's acquisition of Air Berlin subsidiary LGW (Case M.8633, 13 February 2018) – Commitment to reduce the use of slots at Düsseldorf airport
- Case M.8672 (12 December 2017) clearing the acquisition of certain assets by EasyJet at Berlin Tegel Airport (slots, overnight parking stands, customer bookings and certain aircraft furnishing and equipments): LOT v. Commission (Case T-240/18, pending)
- Case T-1/18 (Lufthansa vs. Commission, on the standstill derogations during Lufthansa's unsuccessful acquisition of Niki assets) removed from register Ryanair lodged a complaint with the German competition authority
- The Commission is reconsidering its policy on remedies regarding slots
 - Defined on a route pair basis (customer oriented)
 - Do not sufficiently take into account the network effect nor airport slot congestion (competition oriented)

Model Comparison

USA

- Competition law only
- No state aid control
- Bankruptcy adjustments
 - Enforcement intensity: High
 - Institutional design: Regulating body constant oversight
 - Role of the State: Regulate and enforce

EU

- Integrated regime
- Strong enforcement
- State aid control
 - Enforcement intensity: High
 - Institutional design; commission constant oversight
 - Role of the State: Regulate and apply sanction

ASEAN

- Soft law
- National diversity
- Limited aviation specificity
 - Enforcement intensity: Not high
 - Institutional design: No central body
 - Role of the State: Regulate, enforce but conflict of interests exist

LACAC

- Harmonized national laws
- Limited central enforcement
 - Enforcement intensity: Not high
 - Institutional design: No central body
 - Role of the State: Regulate, enforce but conflict of interests exist

African Challenges

- Sovereignty questions
 - State ownership models
 - Fragmented markets
 - Capacity constraints on institutions: mandate and powers lie in RECs not AU organs
- Reliance on National Competition authorities
 - Lack capacity (human resource [number and skill], financial and technical)
 - Underdeveloped legislations
- Conflicts of interest
 - Aviation regulators are also custodians of air transport market
 - Airlines have dominant voice on regulation
- Unitized organs
 - Courts are not used or shy to enforce with politically significant decisions
 - Secretary Generals of RECs are litigation shy; prefer diplomacy

Lessons for Africa

- Gradual enforcement
 - African aviation needs tailored rules
 - Regional lessons from elsewhere matter
 - Hybrid African model
- Legislation is key
 - Create clear state aid rules
 - Regional coordination
 - **Harmonised legislation**
- Policy Recommendations
 - Strengthen AFCAC
 - Aviation-specific guidelines
 - Institutional independence and empowerment for oversight and enforcement



Questions?