Dipartimento di Giurisprudenza Cattedra European Business Law

A NEW APPROACH TO ANTITRUST LAW: EVIDENCE FROM THE AIR TRANSPORT INDUSTRY

RELATORE
Prof. Nicola de Luca

CANDIDATO
Francesco Maria Achille
Matr. 119653

CORRELATORE
Prof. Ugo Patroni Griffi

ANNO ACCADEMICO 2016/2017

TABLE OF CONTENTS

INTRODUZIONE

Questa tesi ha lo scopo di evidenziare il nuovo approccio che l'Unione Europea ha adottato nel campo del diritto della concorrenza tramite l'analisi di uno dei settori che maggiormente ha beneficiato di questa evoluzione, ovvero il trasporto aereo.

Sin dalle prima fasi, la dottrina che ha maggiormente influenzato la nascita delle Comunità Europee, ora Unione Europea, è stata la dottrina ordoliberista. Il primo presidente dell'allora Comunità Europee, il Professore Hallstein, era infatti molto vicino al gruppo ordoliberale di Friburgo, città dove le idee ordoliberiste nacquero e si svilupparono. Questa corrente di pensiero sostiene che le regole in materia di concorrenza enunciate dal trattato, non sono destinate a tutelare soltanto gli interessi di concorrenti o consumatori, bensì la struttura del mercato, e in tal modo, la concorrenza in quanto tale, vietando tutti i comportamenti che siano lesivi del corretto dispiegarsi del gioco concorrenziale. Dunque, sotto la spinta del Presidente Hallstein la legislazione in materia di concorrenza fu adoperata in modo strumentale al raggiungimento di un mercato fortemente competitivo e di una crescita equilibrata e non inflazionistica. Si tentò di riprodurre a livello europeo il miracolo economico tedesco (*das Wirtschaftswunder*). Infatti, sin dal 1971, data della prima edizione del *Report on Competition Policy*, la Commissione iniziò a promuovere, tramite la pubblicazione annuale di tali *Report*, l'integrazione del mercato interno, la conversione delle industrie, l'occupazione, l'innovazione e l'efficienza. A questa grande opera promossa dalla Commissione si accompagnò lo sviluppo della giurisprudenza a livello europeo con il consolidamento di taluni principi quali la proporzionalità, l'uguaglianza e la certezza del diritto. Il più famoso esempio di giurisprudenza è il caso *Polypropilene* dove viene esposta una nuova interpretazione degli articoli 101 e 102 del Trattato sul Funzionamento dell'Unione Europea che sia più flessibile e che dia maggior peso alle condizioni economiche delle società coinvolte e non più solo alla lettera della norma. Il Tribunale di Prima Istanza, chiamato a decidere sul caso, afferma infatti che lo scopo delle norme sulla concorrenza (ex. Art. 85 Trattato CEE) consiste nel tutelare l'esigenza delle imprese di poter operare in modo più efficace, soprattutto in mercati

caratterizzati da enormi costi fissi e molte inefficienze, e a preservare la "*razionalità economica e la lealtà commerciale*". Lo sviluppo normativo e giurisprudenziale a cavallo tra la fine degli anni '90 e i primi anni duemila seguì l'innovativa impostazione di tale sentenza, accogliendo i principi di razionalità economica e di lealtà commerciale per le compagnie di trasporto aereo che operano in diversi contesti, nazionali, europei ed internazionali.

Originariamente, i trasporti aerei in Europa erano prevalentemente dominati da organizzazioni di diritto nazionale, retaggio del precedente monopolio che gli stati nazionali esercitavano nei confronti dei vettori aerei. Il settore è infatti caratterizzato da enormi investimenti che solo gli Stati nazionali potevano permettersi alla fine del secondo conflitto mondiale. Una volta consolidatisi i mercati nazionali, in buona parte con strutture oligopolistiche, il passo successivo è stata la liberalizzazione dei mercati, la quale ha avuto inizio negli Stati Uniti d'America con l'*Airline De-regulation Act* del 1978. L'anno successivo venne approvato l'*International Air Transportation Competition Act*, finalizzato a promuovere la liberalizzazione del mercato aereo anche nei confronti dei paesi che avevano rapporti di natura commerciale con i vettori statunitensi tramite la conclusione dei cosiddetti *Open Skies Agreements* (OSAs). Seguirono altri paesi quali la Nuova Zelanda nel 1983, il Canada nel 1984 e l'Australia nel 1990. L'Europa adottò invece un processo di liberalizzazione più lento, per permettere a tutti gli stati nazionali di adeguare la propria legislazione domestica. Nel 1992 venne infatti approvato il terzo di una serie di pacchetti per la liberalizzazione del trasporto aereo composto dai Regolamenti 2407/92, 2408/92 e 2409/92, i quali hanno rimosso molte delle restrizioni commerciali applicate nei confronti dei vettori europei. I Regolamenti hanno creato inoltre il Mercato Unico Europeo dell'Aviazione, sostituito nel 2004 dal più grande Accordo Comune Europeo sull'Aviazione che ha permesso di raggiungere paesi non aderenti all'Unione ma appartenenti all'Europa geografica (ad esempio l'Azerbaijan), e hanno riaffermato la nozione di vettore aereo comunitario eliminando ogni riferimento ai vettori aerei nazionali ed introducendo alcuni importanti principi dedicati alle compagnie aeree, tra i quali:

- le compagnie devono essere di proprietà ed effettivamente controllate dagli Stati Membri o da persone, anche giuridiche, appartenenti ad uno degli Stati Membri;
- la sede principale degli affari deve risiedere in uno Stato Membro.

Nonostante ciò, nel 1998, nel caso *Commissione v Repubblica Federale di Germania*, venne statuito che il *third package* non era completo in quanto non trattava dei servizi offerti dalle compagnie aeree non possedute o effettivamente controllate dagli Stati Membri. Venne dunque messa in risalto una forte lacuna legislativa relativa ad una serie di importanti vettori che operavano in Europa grazie agli *OSAs* o agli Accordi bilaterali di Servizio Aereo (*ASAs*) siglati dai singoli Stati Membri. Questo caso rappresenta un punto di svolta se analizzato contestualmente all'elezione della Commissione Prodi (1999-2004) il cui obiettivo dichiarato è stata proprio la '*modernizzazione*' del diritto della concorrenza europeo per rendere più efficienti le società europee che operano in contesti prevalentemente internazionali. La sentenza del 5 novembre 2002 favorì il raggiungimento di questo obiettivo poiché annullò gli Accordi bilaterali di Servizio Aereo conclusi dai singoli Stati membri e riservò alla sola Commissione Europea poteri esclusivi per la conclusione di accordi internazionali di servizi aerei. La conseguenza fu la caducazione di tutti gli accordi bilaterali conclusi dai singoli Stati membri, il rafforzamento del Mercato Unico Europeo dell'Aviazione e del potere che la Commissione può esercitare su di esso e sugli operatori del settore. A suggello della nuova impostazione, l'anno successivo venne approvato il Regolamento 1/2003, che segnò un traguardo fondamentale per il processo di modernizzazione dell'intero settore. Esso rafforzò il potere di controllo della Commissione, sanò la mancanza di una legislazione *ad hoc* per i trasporti aerei ed introdusse due principi che rappresentano gli elementi fondanti dell'attuale sistema di regolamentazione anti concorrenziale per le compagnie aeree:

- l'efficienza economica rientra fra gli scopi dell'articolo 101.3 TFUE;
- l'efficienza economica è la sola condizione che permette di controbilanciare un comportamento potenzialmente anti-competitivo.

Questi principi rispondono ai criteri di razionalità economica e lealtà commerciale promossi nel caso *Polypropilene*, permettendo dunque di prendere in esame e

valutare complessivamente l'impatto degli accordi, i loro effetti anticompetitivi - ossia tali da ridurre il benessere dei consumatori e delle compagnie aeree - e procompetitivi - ossia tali da incrementare tale *surplus* -. Il cambiamento è evidente nei casi che riguardano accordi potenzialmente restrittivi della concorrenza per il trasporto aereo. Ne sono un esempio gli accordi di condivisione dei codici di volo, i cd. *code-sharing agreements*, ovvero accordi per cui il codice di un volo operato da un solo vettore viene condiviso con altre compagnie le quali vendono semplicemente il servizio di trasporto offerto dall'unico vettore che opera la tratta. Casi importanti sono i casi Air France/Alitalia e Iberia/British Airways/GB Airways in cui la Commissione ha approvato tali accordi sulla base di un beneficio in termini di efficienza economica. Lo stesso ragionamento viene applicato ad accordi ancora più intensi, ovvero i cd. *branded strategic alliances*, dove si raggiungono collaborazioni simili a rapporti di *Joint Venturing*. Le *alliances* sono accordi che investono in maniera totale la cooperazione fra vettori, creando una condivisione di informazioni che potenzialmente potrebbe inficiare la libera concorrenza fra le imprese che vi appartengono. Attualmente esistono tre grandi alleanze, Star, OneWorld e SkyTeam, che dominano i mercati internazionali. Un caso molto recente ed importante è il caso A++ Joint Venture in cui la Commissione ha approvato la conclusione di un accordo di *revenue-sharing joint venture* sulla base degli impegni vincolanti assunti dalle parti e di un riscontro positivo su tali impegni da parte delle compagnie che non avevano siglato l'accordo.

Ne deriva che attualmente l'analisi economica e il contraddittorio con le compagnie aeree coinvolte è centrale per giungere ad una corretta decisione, così come l'allora Commissario Prof. Mario Monti ricorda in molti dei suoi discorsi. I casi vengono analizzati basandosi su molti fattori, quali ad esempio la potenziale sostituibilità degli aeroporti, l'analisi della coppia aeroporto di partenza/destinazione, gli impegni delle parti e del rilascio degli *slot*, l'impatto dei programmi fedeltà (FFP) e il valore della porzione di mercato detenuta. Per ottenere un corretto risultato la Commissione fa uso, senza mai dichiararlo, di principi di economia ed econometria, ad esempio l'Indice Herfindahl-Hirschmann (HHI) ed il costo incrementale, e valuta gli impegni che le imprese assumono per mitigare gli effetti

anticoncorrenziali dell'accordo. Uno dei risultati di questo nuovo approccio, frutto della '*modernizzazione*' del diritto della concorrenza europeo, è una sensibile riduzione dei casi decisi in senso contrario dalla Commissione. La Commissione privilegia infatti il dialogo-contraddittorio con le imprese, il mantenimento di alti livelli occupazionali e la maggiore competitività e perciò favorisce la formulazione di impegni da parte delle imprese coinvolte al fine di ridurre i rischi di pratiche anti concorrenziali e concedere dunque l'autorizzazione ad eseguire tali accordi. Questo lo rileviamo non solo negli accordi di *code sharing* e di *branded strategic alliance*, ma anche nei casi di fusioni o aiuti di stato.

Per le fusioni e acquisizioni il recente caso Alitalia/Etihad pone l'accento sull'efficienza economica e il dialogo con la Commissione. L'acquisizione del 49% della compagnia Alitalia, percentuale massima che può essere acquistata secondo quanto previsto dalle regole europee sulla proprietà ed il controllo dei vettori aerei, da parte di Etihad è stato possibile solo a seguito dell'impegno di liberare due slot al giorno per la tratta Roma-Belgrado. Il medesimo discorso può essere fatto valere per il più famoso caso di fusione tra KLM e Air France, in cui gli impegni su quattordici rotte, oltre ad altre condizioni, ha permesso di ottenere l'autorizzazione alla creazione della quarta più grande compagnia aerea europea. Lo scopo della Commissione è permettere dunque alle imprese di operare le proprie scelte di mercato, eliminando le pratiche anti concorrenziali e rendendo vincolanti gli impegni assunti che rispondano proprio ai presupposti di razionalità economica e lealtà commerciale.

Per quanto riguarda la legislazione sugli aiuti di stato, essa è un elemento caratterizzante proprio dell'Unione Europea e segna il momento di maggiore indipendenza dall'evoluzione normativa di altri Paesi, ad esempio gli Stati Uniti d'America. In Europa vi è infatti una diffusa tendenza a utilizzare fondi pubblici per aiutare imprese di pubblica utilità o che si trovano in difficoltà, ma il legislatore dell'Unione anziché vietare *tout court* tale pratica, così come avviene in America, vi ha riconosciuto un elemento di positività per favorire gli investimenti in aeree svantaggiate dell'Europa. Zone remote che beneficiano di collegamenti rapidi come

quelli aerei possono conoscere forti crescite economiche, perciò permettere che gli Stati Membri adottino degli aiuti, anche di natura finanziaria, rivolti alle società di gestione aeroportuale ed alle compagnie aeree, cosiddetti aiuti di *starting up*, per favorire la crescita e lo sviluppo di zone che possono beneficiare in maniera rilevante da un aumento dei collegamenti da e per tali aree è un elemento che non va eliminato ma regolamentato. A questa esigenza rispondono le Linee Guida del 2014, le quali, sostituendo le precedenti, hanno portato alla modernizzazione della disciplina all'articolo 107 TFUE anche per i vettori aerei e le infrastrutture aeroportuali, richiedendo come principale condizione che gli aiuti concessi siano finalizzati a promuovere imprese che siano in grado di raggiungere in un arco di tempo massimo pari a tre anni l'indipendenza dagli aiuti concessi.

L'evoluzione sin qui delineata è rappresentativa dello sforzo che la Commissione e tutte le istituzioni europee hanno intrapreso per rendere più efficaci le regole della concorrenza per le imprese europee o extra-europee operanti in regime di passaporto. Il settore del trasporto aereo, così come l'intera economia del Vecchio Continente, è attualmente sottoposto ad un'enorme pressione a causa della dimensione globale in cui le imprese operano. Molto spesso le imprese operano con difficoltà, dovuta alle differenti norme che sono tenute a rispettare in diverse aree geografiche, perciò lo scopo che l'Unione si è posta con l'*Aviation Strategy* del 2015 è di rivedere e modernizzare l'intera struttura normativa europea, rafforzando ed incrementando la rete di relazioni internazionali, per creare un sistema normativo comune a livello internazionale. Se ne dà evidenza nel documento pubblicato nel giugno 2017 in cui la Commissione propone la revisione della strategia fin d'ora adottata con il Regolamento 868/2004 sugli aiuti alle compagnie aeree straniere ed il rafforzamento della propria politica antitrust con l'introduzione di clausole sulla concorrenza negli *Air Service Agreements* conclusi con Paesi terzi. Il controllo su tali clausole, anche per il tramite delle attuali organizzazioni internazionali come ICAO, IATA e OMC, permetterebbe infatti un'applicazione uniforme a livello internazionale di regole comuni che assicurino una corretta concorrenza fra i vettori aerei.

Si può dunque concludere con certezza che un nuovo approccio ed una nuova fase del diritto della concorrenza è in atto. Si è dimostrato che la regolamentazione dei trasporti aerei si sta spostando sempre più verso il suo naturale sbocco rappresentato dal mercato globale, così sta avvenendo anche per il diritto antitrust che sposta la sua attenzione verso le dinamiche internazionali al fine di tutelare e regolamentare le imprese che operano con maggiore frequenza in un mercato globalizzato.

OVERVIEW

This thesis aims at highlighting the new approach the European Union has adopted in the antitrust legal framework throughout the analysis of one of the sectors that vastly benefited from this evolution (i.e. the air transport sector).

Since the first phases of such evolution, the European Union has been influenced by the ordoliberal school of thought that originated in Germany, in the small city of Friburg. This school of thought has catalyzed the focus of the European antitrust enforcement towards the development of non-economic outstanding principles that ground the common single market by affirming that the competition legislation is intended to protect not only the interests of competitors or consumers but also the structure of the market and thus competition as such. The first president of the former European Communities, Professor Hallstein, had close ties to the ordoliberal group of Friburg, and he upheld the attainment of a competitive market through the antitrust enforcement action exercised by the Commission. The ambition was to replicate at the European level the German economic miracle (*das Wirtschaftswunder*). Since 1971, date on which the first edition of the *Report on Competition Policy* was published, the Commission started promoting objectives such as the integration of the internal market, the interests of society as a whole, the industrial adaptability, and the competitiveness of the European economy. The European court followed suit by enshrining some principles such as the proportionality, the equality and the legal certainty. One of the most renowned examples is the Polypropylene case, in which a new interpretation of the articles 101 and 102 of the Treaty on the Functioning of the European Union is disclosed. In point of fact, the Court of First Instance, while delivering its judgement, stated that the competition rules (former article 85 of the EEC Treaty) are aimed at allowing undertakings to better conduct their businesses, especially in markets featured by fixed costs and lot of inefficiencies, and at upholding the principles of "*economic rationality and business fair play*". Thinkers have been discussing for decades on the opportunity to welcome this new concept of economic rationality and business fair play in the European air transport sector.

Originally, the air transports in Europe were mainly dominated by domestic organizations, being the only ones that could afford the huge investments the airlines needed after the WWII. Once the national markets consolidated, in most of the cases featured by oligopolistic structures, the next step was the liberalization of those markets. This process began in 1978, in the US, when the Congress approved the Airline De-regulation Act. One year later, the International Air Transportation Competition Act was approved in order to boost the liberalization in other countries that were flying from and to the US, due to the conclusion of special arrangements known as the Open Skies Agreements (OSAs). The result was the approval of liberalizing laws in New Zealand (1983), in Canada (1984) and in Australia (1990). The European Union preferred a more cautions liberalization process in order to allow all the Member States to comply with the new rules. In 1992, after the first two liberalizing packages, the last one was approved, the *third package*, made of the Regulations 2407/92, 2408/92 and 2409/92 that removed all the remaining commercial restrictions applied to European carriers. These Regulations also established the European Single Aviation Market, replaced in 2004 by the European Common Aviation Agreement, which included countries belonging not only to the political Union, but also to the geographical Europe (e.g. Azerbaijan), and reaffirmed the notion of Community Air Carriers (CACs) by discarding any reference to national carriers, and by introducing some principles, such as:

- air companies shall be owned and effectively controlled by Member States and/or nationals of Member States;
- their principal place of business shall be located in a MS.

Nevertheless, in 1998, in the case *Commission v Federal Republic of Germany*, the Court stated that the *third package* was incomplete, since it did not concern the services offered by the airlines that were not owned or effectively controlled by Member States and/or national of Member States. It was then highlighted the lack of norms dedicated to all these carriers operating in Europe, through the OSAs or the bilateral Air Services Agreements (ASAs), signed by the single MSs. This case is the turnaround point, if analyzed simultaneously with the election of the Prodi Commission (1999-2004), whose main aim was the '*modernization*' of the

European competition law, as to improve the economic efficiency of companies operating at the international level. The sentence of November 5th, 2002 paved the way to the attainment of this objective of the Commission, as it made clear the powers of the European Union in the field of international air services, by stating that only the European Commission has exclusive rights to conclude international Air Services Agreements. The result was the annulment of all the bilateral ASAs signed by the single Member States, the strengthening of the European Single Aviation Market and of the power the European Commission can exercise on it and its firms. One year later, the Regulation 1/2003 was approved. This is the '*modernizing*' deed of law *par excellence*, considering that until 2003 the air transport sector was the only sector left without an *ad hoc* legislation. It also established two grounding principles for the entire antitrust enforcement related to air carriers:

1. the economic efficiency falls within the scope of the Article 101(3);
2. the economic efficiency is the only condition that can offset the anticompetitive harm.

This change of course embraces the Polypropylene case principles of economic rationality and business fair play, evident from the decisions concerning important types of agreements that are commonly concluded among air companies; it allows to assess both the anticompetitive – the reduction of consumers and firms' welfare – and the procompetitive – the increase of such welfare – effects of the contracts. For example, as far as the *code-sharing agreements*, widely used in the European skies, the Commission usually approves these agreements, that could be detrimental to the competition, on condition that there are positive effects for the economic efficiency (e.g. Air France/Alitalia and Iberia/British Airways/GB Airways cases). The same can be said for deeper types of cooperation among undertakings, such as the *branded strategic alliances*, whereby members share in different degrees their networks with other alliance's members, thus offering the opportunity for enhanced revenue synergies. The degree of involvement of an air company starts from a 'basic' level of cooperation, to higher and more complex levels. There are only three big alliances in the world (SkyTeam, OneWorld and Star), and the information those agreements allow to share could potentially reduce the competition among air

companies. Although, if the economic efficiency requirements are met, the cooperation is deemed compliant with the law (e.g. the A++ Joint Venture case).

Nowadays, the economic analysis and the contradictory with the undertakings are fundamental for adopting a correct decision, when competition concerns are assessed. The former competition Commissioner Prof. Mario Monti often mentioned this new assumption in his speeches, and the cases are indeed based on different factors such as the airports substitutability, the origin and destination airports, the commitments of the parties, the release of slots, the fidelity programs and the value of the market shares. To correctly ascertain such indexes, the Commission uses, without making express reference to them, economic and econometric models, such as the Herfindahl-Hirschmann Index (HHI) and the incremental cost, and evaluates the parties' commitments. The result of this new '*modern*' approach is a reduction of the cases negatively decided by the Commission. The EU Institution opted for the dialogue-contradictory with the companies so as to protect the employment levels and the competiveness of undertakings; hence, now prefers to be open to the requests and commitments of the parties in order to lessen the potential anticompetitive effects of the notified agreements and thus concede the clearance of the latter. This is not only true for the *code-sharing agreements* and the *branded strategic alliances*, but also for the mergers and acquisitions and the legislation on state aid.

For instance, the commitments were essential to approve operations such as the acquisition of the 49% of Alitalia by Etihad, or the merger between two big companies like KLM and Air France that created the fourth largest European airline. While, as far as State aid legislation, this is a distinctive feature of the European legal framework. It was adopted to cope with the widespread tendency of Member States to interfere with the governance of businesses, mainly when they are struggling. While in the US this behavior is outlawed, in Europe it is regulated. Indeed, certain remote and poorer European regions can benefit from quicker connections from and to other European areas, thus allowing Member States and public authorities to provide aid schemes, for a limited period of time, to airlines

and airports managing firms is a great boost to the development of air services. The investments shall be carefully assessed and for this reason the 2014 Guidelines, part of the '*modernization*' process, modified the interpretation of the article 107 TFEU by allowing some starting up funds, in order to provide financial aid to companies that are willing to invest in those regions, and expect to be able to operate without any extra injection of public money after a period of time of maximum three years.

The evolution analyzed in this dissertation shows the efforts made by the Commission and the European institutions to make the competition rules more effective for the European and the extra European companies operating in the continent. The air transport industry, as the entire European economy, is under a lot of pressure due to the global dimension the firms are operating. Often companies are encountering problems to comply with different rules in different parts of the world. This is a considerable problem, the European Union is willing to solve through its *Aviation Strategy* launched in 2015. It is willing to update the aviation legal framework and to keep developing international ties, in order to establish a common legal framework at international level. The evidence of this purpose is contained in a recent document published in June 2017, whereby the Commission proposes on one hand the revision of the strategy adopted with the Regulation 868/2004 on the aids to foreign airlines and on the other the reinforcement of its antitrust policy, by introducing competition clauses in the Air Service Agreements signed with third countries. A better enforcement of such clauses, through the action of international organization such as the ICAO, the IATA and the WTO, would result in a uniform application of common standards to ensure a correct and fair competition between air carriers.

Finally, it can be said that a new approach and a new phase of the competition law is under process. It has been proved that the air transport legislation is shifting its focus towards the global level; the same is happening to the competition law that is shifting towards the international dimension to protect and regulate those firms that are engaged in the global markets.

CHAPTER 1

AN INTRODUCTION TO ANTITRUST LAW

William Landes, emeritus professor of Law and Economics at the Chicago Law School, in one of his masterpieces, reports the words of the 1991 Nobel prize winner in economics, Ronald Coase, who said "*[I am] tired of antitrust because when the prices went up the judges said it was monopoly, when the prices went down they said it was predatory pricing, and when they stayed the same they said it was tacit collusion*"[1]. His words were aimed at censoring the development of the antitrust legal framework during the '70s and '80s, in the US. Since then, the US legislation has developed greatly, making great steps towards a better suited antitrust environment.

Changing perspective, on this shore of the ocean, in the same decade of the XX century, Europeans were not keeping the same level of development. In fact, many Member States still had not a national antitrust authority - for example, Italy, only in 1990, adopted its first law on the matter[2] - and competition issues were only gradually advancing in our system[3]. Despite the historical gap between the US - where in 1890 the Sherman Act[4] was enacted - and the EU, - where the first

[1] Landes William (1981) *The Fire of Truth: A Remembrance of Law and Econ at Chicago*, Journal Law and Economics, p. 193

[2] Legge 10 ottobre 1990, n. 287, recante "*Norme per la tutela della concorrenza e del mercato*".

[3] The first Report of EU Institutions on competition was released in 1971.

[4] Below the first paragraph of the Sherman Act in its consolidated version of 05.01.2009:
"*§ 1. Trusts, etc., in restraint of trade illegal; penalty*
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."

reference to competition rules is contained in the Treaty of Rome[5] of 1957 - the development in Europe was fast-paced. Nowadays, this gap can be considered widely reduced or even non-existent. The words of Mr. Coase are still outstanding,

[5] Below the Articles 85 and 86 of the Part Three (Policy of the Community), Tile I (Common Rules), Chapter I (Rules on Competition), Section I (Rules applying to undertakings) of the Treaty of Rome:
"*Article 85*
1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decision by associations of undertakings 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 common market, and in particular 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, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
any agreement or category of agreements between undertakings; any decision or category of decisions by associations of undertakings; 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:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
Article 86
Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.
Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts".

even today, considering the state of the art of the antitrust legislation in our continent and the difficulty to identify clear definitions and objectives of antitrust laws.

For these reasons, this dissertation aims at understanding and interpreting the recent evolution of the EU Antitrust Law and its application on one relevant sector, the air transport industry, in the light of the wave of M&As that has brought a wider concentration to this business and the transnational interests the air companies have worldwide, and not only within the boundaries of the European Union.

1.1 A COMPETITION LESSON FROM THE US

In Europe, a key role was played by the United States, when at the end of World War II and at the beginning of its influence on the continent, the US legislator and politicians started to concede economic aid in exchange for the implementation of some cherry-picked laws, among which we find the antitrust legislation[6]. This is why it is fundamental to carry out a brief overview of the American system, behind the creation of a free competing market.

In the United States of America the main law applicable in competition is the Sherman Act[7]. The US was the first country to adopt a complete legislation regulating anticompetitive behaviors, such as cartels, concentrations and abuses of dominant position.

[6] D. Gerber, *Law and Competition in Twentieth Century Europe*, 1998.

[7] The statute proposed and sponsored by Sen. Sherman was the answer to the agricultural movement in the USA and the single States' led activism in this area. Indeed, many States had already passed their own antitrust statute and a unique legislation was then needed. In 1890 it was approved, it is still considered at the same time a good and a bad law. In this respect, it is interesting the view of Robert L. Bradley Jr. on the statute contained in its essay published for the 100th anniversary of the law, *On the origins of the Sherman Antitrust Act* published by the Cato Institute: "*The Sherman Act was bad law. It not only preserved the nation's high tariff policies by diverting attention away from the root restraint of trade; it greased the wheels for another tariff law later the same year*".

On the matter, Section 1 of the Sherman Act is clear as it forbids "*contracts* […] *in restraint of trade*",[8] while Section 2 prohibits to "*monopolize any part of the trade*"[9]. As far as the execution of mergers, the Clayton Act, in its Section 7, outlaws M&As that substantially lessen competition[10].

The wording of the relevant deeds of law concerning anticompetitive behaviors and M&As in the European Union, are very similar to those applicable in the United States. In point of fact, the Sherman Act's first two sections have their counterpart

[8] Full text of the Section 1 of the Sherman Act reads as follows: "*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 hereby declared to be illegal*".

[9] Full text of Section 2 of the Sherman Act reads as follows: "*Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony*".

[10] Section 7 of the Clayton Act states "*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.*"

in articles 101[11] and 102[12] of the Treaty on the Functioning of the European Union. Whereas, the Article 2 (3) of the EC Merger Regulation[13] has deep similarities to the Section 7 of the Clayton Act.

---

[11] Article 101(ex Article 81 TEC):
"*1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings 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, and in particular 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, thereby placing them at a competitive disadvantage;(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
- any agreement or category of agreements between undertakings,- any decision or category of decisions by associations of undertakings,- 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:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".
[12] Article 102 (ex Article 82 TEC):
"*Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.*
Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;(b) limiting production, markets or technical development to the prejudice of consumers;(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts I".
[13] Article 2, paragraph 3 of the Reg. 139/2004 (Merger Regulation) reads as follows
"*A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation*

These very close correlations, between the wording of the rules applicable in the European Union and the United States, are the result of a system of influence that departed from the New Continent and reached the Old one.

When adopted in both continents, the rules were phrased in general terms to assess as many cases as possible. At the beginning, judges had to apply those new piece of legislation, finding that these terms were too much general and vague, and considered this feature as a weakness of such norms. On the contrary, the later development showed that this was a point of strength, because the rules lacked of clarity on some key definitions, giving judges and scholars a set of malleable norms at their disposal, adaptable to the many different situations they encountered. This feature catalyzed the attention of the scholars, since the outcomes of this malleable laws resulted in different decisions, either for cases similar to one another, or for cases concerning the same actors and facts[14].

The rationale behind the decision to exercise general terms, was the recognition that the economic development was faster than law adaptation and regulations enactment; hence, the purpose was to create a set of norms that could be easily adapted to a changing economy. That is the reason why, after 127 years, the Sherman Act is unchanged and it is considered the best example to be exported world-wide, first of all in the European continent.

At the beginning, the purpose of the Sherman Act was not clear to scholars and judges. The lack of clear definitions in the law was thought to be just a mistake of the legislators that had to be corrected by the Congress. It was thought that the aim was only to maintain and protect viable, small, locally owned businesses, so to keep and promote a market made of small producers, who based their success on their own capabilities[15]. In this respect, the social and moral effect of a society made of small businesses was regarded as a better alternative to an economy with few

or strengthening of a dominant position, shall be declared incompatible with the common market."

[14] Some of the most outstanding case were *Boeing/McDonnel Douglas, GE/Honeywell and Microsoft*.

[15] Some cases are: *United States v Trans Missouri Freight Assn*; *United States v Aluminium Co of America et al*; *Brown Shoe Co v United State*s.

leading the others towards a predetermined economic objective. Thus, everyone had to follow their own desires, finding and conquering markets and customers relying mainly on their own skills. The confluence was then considered to be rich people's greed and were fined by courts in all states. Although, soon, the judges found out that the result of this process of dismantlement of the great aggregations, in favor of smaller entities, were somewhat disappointing.

1.1.1 The Standard Oil of New Jersey case

The most influential example of this approach, of the beginning of the 20th century[16], is the Standard Oil of New Jersey case. John D. Rockefeller, a billionaire monopolist, was capable of avoiding the effects of the Sherman Act, by creating a trust of all his companies that were able to cover more than the 90% of all oil and kerosene market in the United States. After the adoption of the Sherman Act, the first company of Mr. Rockefeller, the Standard Oil Co., which was part of the Standard Oil Trust, was dismantled by the Ohio Supreme Court. All the assets were right away transferred under a new holding company, the Standard Oil Trust of New Jersey, incorporated in the state of New Jersey. This company operated until 1911- 21 years after the enactment of the Sherman Act- before being forced to be dismantled and broken up in more than 30 companies. Though, this was not the end of the fortune of the Rockefeller family; on the one side, obliged to close their company, since it was considered to be a monopoly, on the other side, due to the division of the latter, the family became the major shareholder of the new smaller companies, making them richer than ever. It is then clear, that all the efforts to share the wealth among as many producers as possible, by protecting an environment of small businesses is not always viable. Some industries do need a great amount of investment, that only few can afford, but it could not be achieved by dividing big firms, as the actual control would still be under the same people. The idea behind

[16] It is useful to remind the spread of socialists' theories during the first two decades of the XX century. They brought to an abrupt coup d'état in Russia and the rise of companies' nationalization and the addition to the political agendas of purposes of spreading the wealth among as many citizens as possible. These theories will finally be considered not successful when the Soviet bloc will fall apart and former socialist countries will then open up to the free market.

the dismantling solution – widespread during the socialist ideology expansion – was then soon abandoned after WWII as the markets were opening to a globalized economy. In the '70s the court's interpretation soon changed[17], in order to shape an adequate environment for big companies and multinational corporations.

1.2 THE DEBATE AND THE LEGAL THEORIES

To fully understand the pace and the importance of the antitrust legislation in the world, and how this evolution reached the peak in Europe and in the US, it is necessary, if not mandatory, to mention the debate among scholars, professors, and even universities[18] in the XX century.

The first step in the growth of the competition legal debate happened in the 30s in Boston, at Harvard University Law School, where some of the most brilliant professors began advocating the efficiency[19] as the aim of the legislation; meaning that the protection of the *total welfare* of an economic area[20] was the primary objective of the antitrust rules. The discussion among these intellectuals[21] brought them to establish a new school of thought, which resulted as highly influential,[22] and its result was the incrementation of the standards in courts when a competition case was heard before judges; in fact, that case was no longer affecting only the

[17] Influence of the Chicago school of thought is notable in *Continental T. V., Inc v GTE Sylvania Inc; United States v Arnold Schwinn & Co; State Oil Co. v Khan; Leegin Creative Leather Products, Inc. v PSKS, Inc; Northwest Wholesale Stationers, Inc v Pacific Stationery & printing Co; and FTC v Indiana federation of dentists*.

[18] Indeed, the main schools of thought are categorized based on the universities where the assumptions and theories were born and developed. Those are the Harvard, Chicago and Freiburg universities. The ideas spread by the Chicago school of thought were so fundamental to the modernization of competition rules, that all the ideas developed after the 1970s are called the Post-Chicago schools.

[19] Also known as "*Total Welfare*"

[20] This area could be a city, a province, a state, a continent or even a bigger area. It naturally depends on the aggregate welfare of the firms and the citizens involved.

[21] To cite only the most outstanding and prolific authors on the matter: E. Mason, J. Bain, D. Turner, P. Areeda, C. Kaysen and S. Breyer.

[22] On the influence of the Harvard school of thought, it is still nowadays a hot debate in the US. According to some authors, E. Elhauge, W. Kovacic and H. Hovenkamp, there was a great revamp of these theories in some decision of the US Supreme Court in the period 2004-2008.

firms involved, their customers and few other parties - if any -, but also the generality of the people of a city, a province or a state. The Sherman Act was not only there to protect small businesses against magnates, but it had an influence on other areas of the economy, the labor and surprisingly also the environment[23]. For the first time the competition was not only a tool to dismantle big companies[24], but it was a mean that could be aimed at something bigger and greater. The real issue was the identification of such tools, and of the objectives that could be reached by competition rules. Forty years after the introduction of this new way of thinking, as the premises of the Harvard school were still too vague, (hinting a *total welfare* to be protected without really identifying problems and solutions in this legal area), a new approach was needed. During the 70s everything changed, at the University of Chicago, a question was raised by one great intellectual, Professor Bork: "*Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law-what are its goals? Everything else follows from the answer we give"*[25]. The publication gave the right path to legislators and commentators to follow: finding the objectives the competition law should aim at, and clarifying them, was imperative in order to bring beneficial effects after the assessment of a case. This objective could have been the total welfare, as the Chicago school advocated[26], though some outstanding topics had to be set in

[23] Recently, based on this enlarged influence the antitrust law exercises, the European Commission was able to derive the protection of the environment and the topic of climate and energy from the competition legislation, introducing as an aim of this set of rules also the objectives of the renowned program Europe Horizon 2020 on the climate changes. It is then evident the broad room of maneuver the EU Commission enjoys when assessing an antitrust case. See the European Commission, *Communication 'Europe 2020 – A strategy for smart, sustainability and inclusive growth'* COM (2010) 2002 final.

[24] See *Standard Oil Co. of New Jersey v. United States* 221 U.S. 1 (1911) at JUSTIA database of the US Supreme Court, https://supreme.justia.com/cases/federal/us/221/1/case.html.

[25] RH Bork, *The Antitrust Paradox*, 1978, 50

[26] The most outstanding scholars associated with the Chicago school of thought are RH Bork, F. Easterbrook and R. Posner. They were all in favor of the protection of the total welfare, but they felt the need to identify with clarity the objectives within the total welfare advocated by the Harvard school of thought. Nonetheless some of these thinkers were from the Yale School of Law and Prof. Bork wrote his outstanding publication, *The Antitrust Paradox*, at Yale Law School, the Supreme Court repeatedly cited their works in relation to the Chicago school of thought.

stone[27]. Defining those topics with clarity was seen as the primary aim of the studies, and the debate was soon welcomed by some European universities as well. The debate left space to many alternative proposals that represented the answers to different views and perspectives on the evolution of the economy, based on free-competing firms.

On the one side, the Americans proposed an efficiency-centered model, but they lacked in clarity on the final results and the instruments; while on the other side, in Europe the small academia in Freiburg,[28] developed a successful model based on *fairness* and *equality of opportunity*. This was a strong response to the question raised by the key figures at Harvard Law school. Indeed, Freiburg main intellectuals[29], for the first time in Europe, identified with clarity some of the main objectives that antitrust legislation should aim at. They were not the typical objectives of efficiency, greater production, reduction of costs or total welfare; in fact, those were considered to be too vague and difficult to really be attained and be examined when a court had to deliver a judgement[30]. As stated by Anne C. Witt in her publication, in which she studies the Freiburg academia proposal, the "*proponents of this approach argue that one of its key aims is to protect individual*

[27] The idea borne at Harvard University was definitely a giant leap for people working on the competition field. On this, prof. Elhauge was clear, but the world and the economy changed rapidly after the 30s. A World War introduced new geopolitical equilibria, the world was going towards a bilateral division, with a Soviet influence area and an American one. In the meantime, American enterprises were entering new markets in Europe, Middle East and Asia and competition was then an international topic, not a matter for local courts any longer. According to many jurists, this process could be catalyzed by some good practices, among which fair competition was considered a fundamental one. That is why it was decided to study the matter and set some areas in which fair competition could bring innovations and a faster development, protecting as many interests as possible. That was the beginning of a new way of thinking, right in the moment where Europe was starting to assess the pros and cons of a modern legislation for its companies and it was under the strong influence of its American partner.

[28] "Die Albert-Ludwigs-Universität in Freiburg" did not develop new model by chance. The position of this tiny campus is peculiar. It is indeed located in the middle of Europe, in in the South-West of Germany, close to the border with France and Switzerland. It was at the heart of the fractured Europe after the end of WWI.

[29] W. Eucken, F. Bohm and L. Miksch

[30] L. Miksch, *Wettbewerb als Aufgabe*, 1937, F. Bohm, *Wetterbewerb und Monopolkampf*, 1933 and W. Eucken, *Die Grundlagen der Nationalokomie*, 1940.

freedom of action, in particular individual's freedom to participate in the market, and their commercial autonomy against unfair business strategies of economically powerful businesses that use their power to drive out their less powerful opponents, or make it impossible for them to enter the market in the first place"[31]. The ideas were developed during the 30s, alongside the Harvard school's assumptions; but the peculiarity of the European approach had a key role in protecting the state, its citizen and the economy. According to the founders, the greater threat to the political stability of a country was the concentration of power in the hands of few; which is why it was believed that a fair competition would avoid these distortions, in order to protect the freedom of nations in Europe. It was a very original and successful solution that led to the foundation of the ordoliberal school of thought, or also known as *ordoliberalism*,

"*In contrast to many other neoliberals, ordoliberals* […] *argued the necessity of a legal order (hence 'ordo') restraining the exercise of both public and private economic power so as to protect individual freedom. They envisaged a legal framework that would laid down clear and general rules in a constitutional framework that clearly established the limits of state intervention in the market*[32].

These assumptions were very far from the idea of a free competing economy in the US. State intervention was often attacked and criticized by the intellectuals of both the Harvard and the Chicago school of thought; then, an idea of competition as a way to protect the state with the state itself, as the principal actor of this process, could not be taken into consideration by American scholars[33].

---

[31] Anne C. Witt, *The more economic approach to EU Antitrust Law,* 2016, 83

[32] W. Eucken, *Die Wettbewerbsordnung und ihre Verwirklichung*, 1949, W. Frotscher, *Wirtscahftsverfasungs- und Wirtschaftverw*altungsrecth, 2008, P. Badura, *Wirtschaftsverfassung und Wirtschaftverwaltungs*, 2008, and Anne C. Witt, *The more economic approach to EU Antitrust Law*, 2016, 84.

[33] The work of scholars in the US, profoundly influenced the evolution of the Supreme Court decisions. In addition to his disruptive first masterpiece, Bork wrote also *The Goals of Antitrust Policy* in 1967, and a revised version of *The Antitrust Paradox,* entitled *The Antitrust Paradox: A Policy at War with Itself*, New York Free Press, 1978, as well, while Areeda wrote in 2001 a comprehensive 2nd edition of *The Antitrust Law.* Those are some of the publications that were the solid grounds on which the Supreme Courts modified its view on competition law, adopting decisions in cases like *Reiter v Sonotone Corp*, 1979, *Brooke Group Ltd v Brown*

Moreover, "[ordoliberal] *fundamental premise was that individual freedom was an indispensable prerequisite for a democratic, moral, socially just and prosperous society. According to ordoliberals, the protection of the individual's freedom of action was therefore the central mean of organizing society. They believed that the greater threat to individual freedom meant from the concentration of power, both in the public and in the private sphere. One of the most dangerous forms of private power, in their view, was the concentration of economic power in the hands of cartels or monopolists, which could be used to infiltrate and corrupt the political system"*[34]. It is evident that, unlike the theories shown and discussed in the American academies, this theory was both a political and legal-economic theory, that had its roots in the political scene Germany was facing. The crisis of 1929 - which also influenced the Harvard school[35] - and the failure of the Weimar Republic, were the environment in which those theories were elaborated and discussed. Nonetheless, after the Freiburg scholars started elaborating their ideas, around 100 years ago, this theory remained essential and, after end of the World War II and the fall of the Nazi regime[36], it was recovered in aid to the reconstruction and reunification of the German territories.

The definition of the ordoliberal movement, stated above, suggested the aims of ordoliberalism: it aimed to a more "*democratic, moral, socially just and prosperous*

& Williamson Tobacco Corp., 1993, *NCAA v Board of Regents of the University of Oklahoma*, 1984, *Broadcom Corp. v Qualcomm Inc.*, 2007, *Rebel Oil Company Inc., Auto Flite Oil Company Inc v Atlantinc Richfield Company*, 1995

[34] Anne C. Witt, *The more economic approach to EU Antitrust Law*, 2016, 84, and W. Eucken, *Staatliche Strukturwandlungen und die Krisis des Kapitalismus*, 1932.

[35] The need of protection of the welfare of as many people as possible is a consequential result of a deep crisis that impoverished millions of American families. Giant companies, it was thought, had to share their welfare with the collectivity, not by imposition as it was happening in the communist Russia, but by keeping in mind such aim when judging cases. Indeed, the protection of small businesses is the simplest way to protect jobs and low and middle-income families, so judges followed this path in cases like *United States v Trans Missouri Freight Assn*; *United States v Aluminium Co of America et al*; *Brown Shoe Co v United State*s.

[36] O*rdoliberalism* was kept under-ground during the Nazi regime because it was definitely not consistent with Nazi theories.

society"[37] and these aims coincided with those at the basis of the establishment of one of the greatest German political party, the Christian democrats. After the division of Germany, the Christian Democratic Union of Germany, or CDU, banded together scholars and politicians, who joined their efforts for the reconstruction of their country by establishing the so-called Freiburg Circle. From that moment on, the Circle will have a key position in shaping policies in Germany. Some of its members reached first choice positions in the cabinet of the national government. The Minister of Economics, Ludwig Erhard, was a CDU member and an affiliate of the Freiburg Circle. He was amused by the social market economy theory that was developed there, *der soziale Marktwirtschaft*, and he implemented that theory in post-war Germany, concurring to realize the German economic miracle, *das Wirtschaftswunder*. In effect, the recovery in the German territories was strong and stable, and according to many authors, the ordoliberals theories were decisive for such miracle,[38] and for shaping the first German antitrust legislation[39].

By the same token, as it was valid and effective to bring prosperity to a country, *das Wirtschaftswunder* was brought to the negotiation table for the creation of the EEC. At the time, Ludwig Edward was Ministry of Economic Affairs, and his representative was Alfred Muller Armack. The latter was not involved in the Freiburg Circle, but he was strongly influenced by these ideas. The same can be said of his deputy, Hans von der Groeben, who participated at the Spaak Report Group, as one of the authors of the Report, and was the chairman of the working group on the part of the EEC dedicated to competition. As a conclusive proof of a heavy influence of German thinkers, on the establishment of a European antitrust legislation, the first President of the EEC was a German professor, prof. Hallstein, who had close links with the Freiburg Circle. Hallstein, as the President, heightened the attention of the competition officers to the protection of the total welfare of the

[37] Anne C. Witt, *The more economic approach to EU Antitrust Law*, 2016, 84, and W. Eucken, *Staatliche Strukturwandlungen und die Krisis des Kapitalismus*, 1932.
[38] H. Buch-Hansen and A. Wigger, *The Politics of European Competition Regulation*, 2011 and Gerber, *Law and Competition in the Twentieth Century Europe*, 1998.
[39] Gesetz gegen Wettbewerbsbeschränkungen (GWB) of 27 July 1957, BGBl I 1081.

Communities, and of the other non-economic interests,[40] that were upheld by ordoliberal thinkers, too.

Finally, it is clear that the academic debate on the two shores of the ocean was an impressive boost for the area of antitrust. Firstly, American scholars went beyond the first aim of competition rules - i.e. protecting small businesses - introducing the need for protecting the welfare of all the parties involved. European scholars, in particular Germans, went beyond, aiming at using the antitrust legislation to shape a market that, does not only protect small businesses, firms and customers, but it also aims at greater results.

1.2.1 The aims of the European competition legislation

The first set aim was expressed in the Commission's Reports on Competition Policy of 1971. Since 1971, the Reports would be the official channel used by EU Institutions to identify the objectives of antitrust legislation in Europe and communicate them to all the parties involved, from judges to jurists. The principal aims can be subdivided according to the topics:

- integration of the internal market;[41]
- preventing the concentration of economic power;[42]

---

[40] He supported the creation of the internal market by boosting the enforcement of antitrust rules in the EEC. He was very keen on the role of the Commission as a strong booster of the policies envisaged in the Treaties "*As I see it, the Commission should eventually be empowered to take all measures necessary for the implementation of the Treaty* […]".

[41] European Commission, *First Report on Competition Policy*, 1971, 11, European Commission, *Second Report on Competition Policy*, 1972, 15, European Commission, *Sixth Report on Competition Policy*, 1976, 9, European Commission, *Eight Report on Competition Policy*, 1978, 9, and European Commission, *Ninth Report on Competition Policy*, 1979, 9, European Commission, *Twelfth Report on Competition Policy*, 1982, 12, European Commission, *Thirteenth Report on Competition Policy*, 1983, 11, and European Commission, *Twenty-fifth Report on Competition Policy*, 1995, 15.

[42] European Commission, *Fifth Report on Competition Policy*, 1975, 13, European Commission, *Seventh Report on Competition Policy*, 1977, 10, European Commission, *First Report on Competition Policy*, 1971, 16, European Commission, *Eleventh Report on Competition Policy*, 1995, 15, European Commission, *Fifth Report on Competition Policy*, 1975, 13, European Commission, *Seventh Report on Competition Policy*, 1977,10, European

- economic growth;[43]
- industrial adaptability;[44]
- fighting inflation;[45]
- competitiveness of the European economy;[46]
- consumer interests;[47]
- interests of society as a whole;[48]
- fairness;[49]
- individual commercial freedom and other democratic values;[50]
- employment;[51]

Commission, *Ninth Report on Competition Policy*, 1979,10, and European Commission, *Twelfth Report on Competition Policy*, 1982, 13.

[43] European Commission, *Twenty-Third Report on Competition Policy*, 1993, 22, and European Commission, *Twenty-Fifth Report on Competition Policy*, 1995, 7.

[44] European Commission, *Fifth Report on Competition Policy*, 1975, 7, European Commission, *Seventh Report on Competition Policy*, 1977, 9, European Commission, *Twenty-Fifth Report on Competition Policy*, 1995, 15, European Commission, *Twenty-Sixth Report on Competition Policy*, 1996, 7, European Commission, *Twelfth Report on Competition Policy*, 1982, 12, and European Commission, *Eleventh Report on Competition Policy*, 1981, 11.

[45] European Commission, *First Report on Competition Policy*, 1971, 11, European Commission, *Second Report on Competition Policy*, 1972, 9, European Commission, *Third Report on Competition Policy*, 1973, 26, European Commission, *Fifth Report on Competition Policy*, 1975, 13.

[46] European Commission, *Twelfth Report on Competition Policy*, 1982, 13, and European Commission, *Thirteenth Report on Competition Policy*, 1983, 11.

[47] European Commission, *First Report on Competition Policy*, 1971, 11, European Commission, *Twelfth Report on Competition Policy*, 1982, 12, European Commission, *Fifteenth Report on Competition Policy*, 1985, 145, European Commission, *Twentieth Report on Competition Policy*, 1990, 11, European Commission, *Twenty-Second Report on Competition Policy*, 1992, 19, and European Commission, *Twenty-Fifth Report on Competition Policy*, 1995, 15.

[48] European Commission, *Twenty-Fourth Report on Competition Policy*, 1994, 19.

[49] European Commission, *Eight Report on Competition Policy*, 1978, 9, European Commission, *Ninth Report on Competition Policy*, 1979, 10, European Commission, *Eleventh Report on Competition Policy*, 1981, 11, and European Commission, *Twelfth Report on Competition Policy*, 1982, 9.

[50] European Commission, Eight *Report on Competition Policy*, 1978, 9, and European Commission, *Fifteenth Report on Competition Policy*, 1985, 11.

[51] European Commission, *First Report on Competition Policy*, 1971, 11, European Commission, *Thirteenth Report on Competition Policy*, 1983, 11, European Commission, *Fifteenth Report on Competition Policy*, 1985, 11 and 145, European Commission, *Twenty-Third Report on Competition Policy*, 1993, 22, European

- innovation;[52]
- efficiency;[53]
- fundamental Union objectives.[54-55]

The aforementioned aims are the most relevant objectives that are found in the Reports published by the EU Commission, and the number is already overwhelming. This confirms that the EU institutions use the legislation of this area to attain important scopes, that pertain to the entire Union, affecting the firms and their competitiveness, the customers and their welfare, the innovation capability, and a wide variety of economic and non-economic objectives.

The latest Report, published in its final version on 31 May 2017, focuses the attention towards the social aspects of competition law and the challenges it faces in a globalized world. The words of President of the EU Commission Jean-Claude Juncker are recalled in the Report, stating that "[a] *fair playing field also means that in Europe, consumers are protected against cartels and abuses by powerful companies.* […] *The Commission watches over this fairness. This is the social side*

Commission, *Twenty-Fourth Report on Competition Policy*, 1994, 18 and 19, and European Commission, *Twenty-Fifth Report on Competition Policy*, 1995, 7.

[52] European Commission, *Eleventh Report on Competition Policy*, 1981, 11, European Commission, *Twelfth Report on Competition Policy*, 1982, 9, European Commission, *Thirteenth Report on Competition Policy*, 1983, 11, European Commission, *Fifteenth Report on Competition Policy*, 1985, 11 and European Commission, *Twentieth Report on Competition Policy*, 1990, 11.

[53] European Commission, *Fourteenth Report on Competition Policy*, 1984, 11, European Commission, *Fifteenth Report on Competition Policy*, 1985, 11, European Commission, *Twentieth Report on Competition Policy*, 1990, 11, European Commission, *Twenty-First Report on Competition Policy*, 1991, 11, European Commission, *Twenty-Second Report on Competition Policy*, 1992, 19, and European Commission, *Twenty-Sixth Report on Competition Policy*, 1996, 17.

[54] This is a general term which includes the scopes that pertain to other areas rather than only the economy the welfare. There are protected the raise of the living standards, the promotion of a harmonious and balanced economic development, the fight against climate change, closer relationships between Members States *et alia*.

[55] European Commission, *Twenty-Second Report on Competition Policy*, 1992, 13, European Commission, *Twenty-Third Report on Competition Policy*, 1993, 14 and European Commission, *Twenty-Sixth Report on Competition Policy*, 1996, 17.

of competition law. And this is what Europe stands for"[56]. It cannot slip the mind of the reader, the notable reference to fairness, reminded by the President Juncker, which was one of the pillars - together with the equality of opportunity -, of the early Freiburg proposal. In addition, the Report mentions globalization, because "[the] *globalised economy also requires a global competition culture. This is why the Commission is strongly engaging with other EU institutions, international organizations and competition enforcers all over the world. Working together helps to multiply and spread the benefits of fair competition, in Europe and worldwide*"[57].

Thus, the malleability of this legislation, which, as recalled earlier[58], derives from its original weakness - i.e. the vagueness of the definition of anti-competitive behavior -, has now turned up as the real power of this piece of legislation, that can be easily used to attain the scopes of the EU body. It answers to the various challenges the Union faces, originally to the creation of the internal market and the inflation, now to the social inclusion and the competitiveness in a globalized economy.

According to the Commission, the social inclusion in the recent years passes through the fight against tax evasion and tax arbitration[59], while the competitiveness

[56] State of the Union 2016, available at http://ec.europa.eu/priorities/state-union-2016_en

[57] European Commission, *Forty-Sixth Report on Competition Policy*, 2016, 2.

[58] European Commission, *Forty-Sixth Report on Competition Policy*, 2016, 3.

[59] "[…] *if a few selected companies can avoid tax, it makes it hard for companies that do pay their share of taxes to compete on equal terms. Giving a specific tax treatment to a particular company gives that company a benefit comparable to receiving cash* […]", European Commission, *Forty-Sixth Report on Competition Policy*, 2016, 3.

is obtained by boosting the creation of the Single Digital Market[60] and achieving efficiency in the transport sector across the EU[61].

Whether the single scopes change from time to time, from a Commission to another, the future outlook for antitrust is always the same, and it "*is to make sure that EU rules apply in a fair manner to any company that does business in the EU's single market - regardless of size, sector or nationality*"[62]. But a rising globalization poses new problems to European firms, they do not only compete in the Continent, and their competitors are coming from all parts of the world. "*With companies increasingly operating across national borders, a growing number of merger*

[60] "*By creating a deeper and fairer Single Market, competition policy has a very concrete impact on people's life: EU citizens and business deal with the market every single day. Building a society that treats everyone fairly means that the market should work in a way that empowers consumers and ensures that their voices are heard. Competition enforcement steps in when, for instance because of a cartel, consumers pay more than they should or have troubles finding the product they look for. Merger control is also essential to ensure that mergers do not harm the competitive structure of the markets and thus consumers and the wider economy*", European Commission, *Forty-Sixth Report on Competition Policy*, 2016, 9.
The Single Digital Market has also a beneficial effect on the social inclusion, being stated that "*the Digital Single Market is about much more than just making the economy more efficient. It is a way to give everyone a fair chance to reap the benefits of technological development. And it is a way to put consumers in control*", European Commission, *Forty-Sixth Report on Competition Policy*, 2016, 5.

[61] Great focus and efforts are dedicated to the air transport sector and its processes. Some behaviors are beneficial to firms and consumers but if taken too far they could be detrimental to the free competition. An example is the codeshare agreements. "*A codeshare agreement is a commercial agreement whereby the airline operating a flight allows another airline to market the flight and issue tickets for it, as if it were operating the flight itself. Codeshare partners also agree on how they will compensate each other for the seats they sell on their partner's flights. Codesharing can bring benefits for passengers in terms of wider network coverage and better connections. However, the Commission has concerns that in this particular case Brussels Airlines and TAP Portugal may have used their codesharing to restrict competition and harm passengers' interests on the Brussels to Lisbon route*", European Commission, *Forty-Sixth Report on Competition Policy*, 2016, 9.

[62] While talking about on ensuring a true level playing field for all, the EU Commission reminds the need to create in any case a fair competing market. The ways are not defined and they change each year according to how the market evolves, but the objective of fairness must be always kept in mind, as stated in European Commission, *Forty-Sixth Report on Competition Policy*, 2016, 2.

transactions, cartels and other anti-competitive practices have an international dimension and affect markets in several countries, and often different continents. As companies go global, so must competition enforcers: therefore, finding better ways to work together is a priority for competition authorities around the world"[63]. The solution to the world market is the creation of a deep collaboration by national and supranational antitrust authorities, or even further the establishment of a world antitrust authority. This is still not achievable through one agreement among the relevant states, therefore the EU Commission in the past years has been proactive in signing many bilateral and multilateral agreements with partners to assess the free competition issue[64] at a global level.

[63] European Commission, *Forty-Sixth Report on Competition Policy*, 2016, 16.

[64] Only in 2016 the Commission confirmed its commitment in this area, by actively participating in competition- related international bodies such as the Competition Committee of the OECD, the World Bank and the United Nations Conference on Trade and Development (UNCTAD). The Commission is also a leading member of the International Competition Network (ICN), the main global forum of competition agencies with 132 members. Important results of this multilateral engagement are the Merger Remedies Guide and the Cartel Working group's Catalogue on Investigative Powers, both adopted by the International Competition Network in 2016.
At bilateral level, in 2016 the Commission started Free Trade Agreements (FTAs) negotiations with Armenia, Mexico, Indonesia and Philippines, reopened negotiations with Mercosur, and made progress in the negotiations with Japan. The Commission's efforts on FTA negotiations in the competition area focus on the inclusion of competition and State aid provisions, with the aim of promoting convergence of competition policy instruments and practices across jurisdictions, as well as protecting the global level playing field.
In June 2016, the Commission submitted to the Council a draft agreement to include provisions on the exchange of information collected in the course of competition proceedings into the existing EU-Canada Cooperation agreement. The possibility to exchange evidence would improve cooperation between the Commission and the Canadian Competition Bureau, leading to enhanced competition law enforcement. In addition, the Commissioner for Competition Margrethe Vestager agreed with Chairman Sugimoto, the Head of the Japan Fair Trade Commission, to start negotiations to upgrade also the EU-Japan cooperation agreement with provisions for the exchange of evidence.
The Commission is also actively engaged in technical cooperation with emerging economies that are developing their competition policy and enforcement regimes. In June, the Commission signed a Memorandum of Understanding (MoU) with South-Africa, which adds to the MoUs signed with all other BRICS countries in recent years.

1.2.2 A solid groundwork for competition cases in Europe

Having analyzed the academic debate on competition, that was vital in the EU as it was in the US, and having understood that this piece of legislation - i.e. antitrust law - is instrumental to the attainment of primary scopes of the Union, we commence to study the principles that this long progress realized in academies and negotiation tables enshrined in the Treaties and the acts of law of the European Union.

The main provisions that contain a clarification on the behaviors that are meant to distort the correct competition between undertakings, are the articles 101 and 102 of the Treaty on the Functioning of the European Union. These two articles are the direct heirs of the former articles 81 and 82 of the EC Treaty. The Lisbon Treaty has modified and introduced new articles, and a process of renumbering has been made, but these two provisions still maintain the same original essence and meaning as they had in the beginning[65].

As mentioned above, the first competition provisions were enshrined in the Treaty of Rome. In 1957, the six founding states[66] recognized that "*the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition*",[67] and desired "*to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade*"[68]. Having regard to what was contained in the recitals, they introduced the first set of rules that were imposed to the undertakings of these six countries. Later, more countries[69] joined the European Communities,[70] created by

[65] With respect to these two articles, it is essential to mention that the enactment of some new regulations as well as the modification of the context in which these rules shall be read, has partially innovate the interpretation given by scholars and judges.
[66] Belgium, France, Germany, Italy, Luxembourg and the Netherlands.
[67] Fourth recital of the Treaty of Rome.
[68] Sixth recital of the Treaty of Rome.
[69] Denmark, Ireland, UK, Greece, Portugal and Spain accessed the EEC.
[70] In 1967 the Brussels Treaty merged the legislative and administrative bodies of the three communities - the European Coal Steel Community, the EURATOM and the European Economic Community - in the European Communities (EC).

the Treaty of Brussels,[71] and the European body kept developing until it reached the form we know today as the European Union, composed by 28 Member States[72].

The provisions on competition were then amended from time to time - merely for what concerned the numbering in the relevant treaty - obtaining a first new connotation in the EC Treaty, from article 81 to 89. These articles should be interpreted while considering the principles of free movement of people, capitals, goods and services expressed by the same Treaty in the articles 2, 3, 5 and 10,[73] and all the other relevant principles applicable. Often, when delivering a judgement, European courts remind to applicants that "[…] *every provision of community law must be placed in its context and interpreted in the light of the provisions of community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied*"[74]. Moreover, without prejudice the gradual abandonment of the former three main pillars of the European Community, the current objective is still the creation of a unique body of rules and principles that could be applied harmoniously among the different countries that chose to or, are willing to, join the Union; thus avoiding any contrast in the application of the acts of law. Indeed, the Treaty on the Functioning of the European Union currently contains the former articles 81 to 89 of the EC Treaty,[75] and the work of interpretation of community law is even more fundamental today, than it was in the past, considering the ever-changing challenges the Union would cope with. For these reasons, some basic principles have been identified by scholars and judges as a set of unique and irreplaceable foundations. Those are not subjected to the decision of the EU Commission, sporadically addressed in its annual Reports, but kept as the groundwork of EU courts. Among them we find, *inter alia*:

---

[71] The treaty was signed in Brussels on 8 April 1965 and came into force on 1 July 1967.
[72] Trigger of Article 50 TEU by the U.K. is still under development; as of today, EU is still made up of 28 MSs.
[73] Now replaced by Part Three, Title I of the TFEU, Article 26 and following.
[74] See Case 283/81 *CILFIT v Ministero della Sanità* [1981], paragraph 20 and Cases T-22 & 23/02 *Sumitomo v Commission* [2005], paragraph 47
[75] Renumbered in Title VII, Chapter I as articles from 101 to 109.

- the principle of proportionality, as mentioned by the Court in, among the others, the Case 479/04, *Laserdisken v Kulturministeriet;*[76]
- the principle of equality and non-discrimination, recalled by the Court in the Case 36/91, *Imperial Chemical Industries plc v Commission;*[77]
- the principle of legitimate expectation, exemplified in Cases 182 & 217/03, *Belgium and Forum 187 v Commission;*[78]
- the principle of legal certainty, resulting from the Case 3/06, *Group Danone v Commission;*[79]

---

[76] Paragraph 53. *"According to settled case-law, the principle of proportionality, which is one of the general principles of Community law, requires that measures implemented through Community provisions be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it*" See also the Case C‑491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002], paragraph 122.

[77] Paragraph 93 "*Having regard to the general principle of equality of arms, which presupposes that in a competition case the knowledge which the undertaking concerned has of the file used in the proceeding is the same as that of the Commission, the Commission' s view cannot be upheld. The Court considers that it is not acceptable for the Commission alone to have had available to it, when taking a decision on the infringement, the documents marked "IV", and for it therefore to be able to decide on its own whether or not to use them against the applicant, when the applicant had no access to them and was therefore unable likewise to decide whether or not it would use them in its defence. In such a situation, the rights of defence which the applicant enjoys during the administrative procedure would be excessively restricted in relation to the powers of the Commission, which would then act as both the authority notifying the objections and the deciding authority, while having more detailed knowledge of the case-file than the defence*". The same statement is also used by the Court in the Case 30/91, *Solvay SA v Commission* and lately in the Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94,T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, paragraph 1012.

[78] Paragraph 147 "*The Court has repeatedly held that the right to rely on the principle of the protection of legitimate expectations extends to any person in a situation where a Community authority has caused him to entertain expectations which are justified. […] Similarly, if a prudent and alert economic operator could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead that principle if the measure is adopted*". For other references see also Case C-506/03 *Germany v Commission*, paragraph 58 and Case 265/*85 Van den Bergh en Jurgens and Van Dijk Food Products Lopik v Commission*, paragraph 44.

[79] Paragraph 36 "*the Court of First Instance held that there was no infringement of the principle of legal certainty based on the fact that neither Regulation No 17 nor the Guidelines specify a maximum period in relation to the finding of repeated*

- the principle of fair hearing, as enshrined in the European Convention on Human Rights, nowadays fully incorporated in the Lisbon Treaty since 1 December, 2009.[80]

In consideration of the foregoing, it is important to bear in mind that the evolution of the Antitrust legislation in Europe is influenced on one side by a path of harmonization, and on the other side by the need of certainty of the law, widely invoked by civil law countries. This bedrock of solid principles is collateral to the development of several interests, that are occasionally at stake, and are heightened by EU institutions in its Reports to the rank of primary principles of EU antitrust legislation. The role of antitrust legislation and policy making is vital, but years of judgements have the merit of having created a pool of certain rights for the parties involved.

1.2.3 A competitive global market

Once these rights are enshrined, and currently accepted by courts at all levels, the importance of competition law would be linked to the necessity of forbidding the anti-competitive agreements, among firms, of tackling the abuses of dominant positions, and of coping with the issues related to an excessive concentration of market share in case of a merger.

In the first place, the ideal market, most economists and scholars pursue, is a free market as firms can enter and leave without incurring in extra costs; whereby

---

infringement"; and paragraph 37 "*That appraisal by the Court of First Instance is consistent with the law. In accordance with settled case-law, the Commission has a particularly wide discretion as regards the choice of factors to be taken into account for the purposes of determining the amount of fines, such as, inter alia, the particular circumstances of the case, its context and the dissuasive effect of fines, without the need to refer to a binding or exhaustive list of the criteria which must be taken into account*". For further reference see, inter alia, order in Case C-137/95 *P SPO and Others v Commission*, paragraph 54, and judgment in Case C-219/95 *P Ferriere Nord v Commission*, paragraph 33.

[80] It is the Article 8 of the Convention that entitles not only legal but also natural persons to this right – Case *Dombo Beherr v Netherlands* A/274 – and on a different position in the U.S.A. is expressed in Case *Hale v Henkel* 201 US 43, where corporations cannot rely on the Fifth Amendment, since it "*protects individual civil liberties, not economic business interests*".

consumers know all the different competitors, their prices, and are ideally not influenced by advertising *et similia*. This kind of market is well known as being an utopia, an objective to aim to and to reach as close as possible. This market is simply a standard reference for the adoption of policies and laws that go towards that direction, creating at least a market with a close-to-free competition. This type of market is meant to enhance efficiencies, forcing, to a certain extent, companies to offer products at the very best price or to compete by the means of great investments in R&D, to introduce better products and to seize a greater share of market[81]. When agreements and concerted practices do not exist, it is a fight on equal terms, and firms are constantly watching and analyzing the trends and the competitors. Therefore, this market allows the entry of smaller firms and, since there are no barriers, companies are free to enter and leave as they please; whereas consumers have a vast choice between many products and are safeguarded from bigger aggregations that could dictate terms and conditions of the relevant transactions (mainly selling & buying)[82]. Unfortunately, it is evident that companies instead of

---

[81] "*The concept of competition* […] *is seen as essential to the proper working of the free market itself. The market 'efficiently' allocates resources and aligns factors of production precisely because firms compete to maximize their profits. Second, competition is a concept that can be deployed to keep the state out of the market: the existence of a free market means that firms mays be allowed to compete on 'a level playing field'* […]", Catherine Barnard, Albertina Albors-Llorens and Markus W Gehring, C*ambridge Yearbook of European Legal Studies*, Vol. 15, 2012-2013, pag. 298.

[82] Some scholars were critical towards the narrow approach of the European institutions on the safeguard for consumers. This approach could reduce the room of manoeuvre of many undertakings, since any tiny change in the market was considered a restriction of consumer freedom of choice. On these terms: "[…] *Although the Community courts and the Commission continued to refer to harm to consumers, they gave it a narrow meaning: consumer harm was associated with limiting consumers' choice to source their supplies from different producers. Needless to say, consumer harm defined in this way is not difficult to find whenever a competitor is endangered because elimination of even one competitor, even if it is less efficient than the dominant firm, reduces the choice* […]", Rousseva, *Modernizing by Eradicating: How the Commission's New Approach to Article 81 EC Dispenses with the Need to Apply Article 82 EC to Vertical Restraints*, Common Market Law Review 42, n. 3, 2005, 592. In addition: "[…] *When the Community courts - first the ECJ and later the CFI - kept referring back to Continental Can and talked about "consumer harm", they gave a very narrow meaning to this concept. It became associated with the limitation of consumers' choice to source the supply from different suppliers. Such a narrow definition makes it quite easy to*

fighting to keep their market share, prefer finding better viable alternatives to protect their quota, to also avoid having new competitors in the market. So commonly we see collusive practices, such as agreements and cartels, to raise barriers[83] against new entrants and to divide the current market among the incumbents, impeding to reach the efficiencies and the benefits so typical of a free competition[84].

In consideration of this target, European countries aimed at creating a common economic area with a set of shared principles, among which we find the basic principles individuated by the European courts[85]. Although, they are not sufficient in order to create a real European economic area, especially if different countries may still apply different principles and rules in some statutory areas. The rules must be the same for all undertakings while operating, thus the first step to consider

---

find consumer harm […]", Liza Lovdahl Gormsen, *Antitrust Marathon* II, European Competition Journal 4, n. 1, 2008, 242.

[83] "[…] *According to established practice, barriers to entry can be roughly divided into three categories: structural barriers to entry usually arise from certain technological or demand-related industry characteristics, bat may also lie in the resources that are required to be successful on the market. They are not generally created intentionally to prevent entry.*
strategic barriers to entry are intentionally set up by market leaders in a market in order to deter potential suppliers from entry.
statutory barriers to entry are those set up in the context of the state's monopoly on power in the form of laws, regulations and administrative practices. […]"
Doris Hildebrand, *Economic Analyses of Vertical Agreements: A Self-assessment*, Competition Law Series, Kluwer Law, 2005.

[84] "[…] *The forces of competition in open markets cause the actual allocation of resources to be ever shifting in pursuit of the constantly moving equilibrium point. And the more closely the economy approximates this limiting condition, the more closely woo we approach the maximization of consumer welfare. Indeed, the best practicable approximation to the limiting condition can realistically be called the maximization of consumer welfare* […]" Daniel A. Crane and Herbert Hovenkamp, *The making of Competition Policy: Legal and Economic Sources*, Oxford University Press, 2013.

[85] As stated earlier those are the principle of:

- proportionality;
- equality and non-discrimination;
- legitimate expectation;
- legal certainty;
- fair hearing.

should be on the area of competition. That is why we witnessed countless steps[86] towards a full integration of the Eurozone in this area[87].

In addition, we should also acknowledge that nowadays Europe is not the leading economic power, and its undertakings must compete with other firms coming from extra-European powers, such as the USA and China. Indeed, firms are competing not only with their European competitors but mostly with - to cite only few - Americans, Chinese and Russians. Therefore, protecting and increasing their market share in areas where rules applied are different, could be harder than expected[88]. Moreover, there are sectors that are naturally born to maintain a close-

[86] This process of development is rather hard than smooth and simple due to the diverse views and solutions Member States adopt domestically and are willing to "impose" to other countries. One clear example is indeed in the area of competition, where for the first 30 years the EU was lacking a real power on the mergers companies were carrying out in the Continent. The Spaak Report (Intergovernmental Committee of the Messina Conference, Report by the Heads of Delegations to the Foreign Ministers of 21 April 1956) asked states to confer EU institutions the power to act, but a clash between the British and the German doctrine was delaying the adoption of a regulation on the matter. Only in 1989, with the Reg. 4064/89, the German proposal passed and the "substantive test" was enshrined in the EU law, just 33 years later the proposal of the Spaak Report.

[87] "*So I think that competition policy has an important role to play in facing up to the biggest challenges of our time. And I think that we need to be confident about what we can do, but also modest about the things that are best done by others. There are many reasons in favour of an open and more competitive market. It can help answer many of our challenges. Competition gives people a fairer share of the benefits of growth. It helps us to keep down the costs of protecting our environment. Insight gained from enforcing competition rules can help legislators to design better regulations. At the same time, effective competition enforcement must have a clear legal framework with independence at its core. The moment we turn a blind eye to a company breaking the competition rules, just because that might help to achieve other aims, we would lose the independence that makes us effective. In short, the best way for us to contribute is simply to do our job. Because competition drives us all to do better. It gives us that extra push that helps us to deal with our challenges. And I think that is already a contribution we can be proud of.*" Margrethe Vestager, Speech delivered at the 15th OECD Global Forum on Competition, Paris, 1 December 2016.

[88] "[…] *European competition law on both the national and trans-European level has been increasingly influenced by global factors. While US antitrust law has developed with limited concern for international issues until fairly recently. European competition laws have evolved in the shadow of US antitrust. The thought and practice of European states has been continually confronted with the power of US antitrust law institutions and the weight and attractions of US antitrust thinking.*

to-be oligopolistic environment, in which it is very hard to impose an antitrust legislation without allowing some exemptions. Indeed, imposing the antitrust codification in all sectors, without having regard to the various peculiarities, would surely result in a heavy loss for the competitiveness of European companies; but it would also have a tremendous repercussion on the extra-European undertakings willing to invest in the EU. A different legislation for companies of the same industry but different countries in a globalized economy would definitely lead to aberrant results[89].

For this set of reasons and in consideration of the historical debate discussed previously, where the main actors were the European Union and the United States of America, the introduction of new regulations and the interpretation of the EU Courts on the matter has still great interconnections with our current major

---

Moreover, Europeanization and globalization have played increasing roles in their operations. In this respect, their position in relationship to global markets is similar to the position that most competition laws face now and will face in the future […]" David. J. Gerber, Global Competition: Law, Markets and Globalization, Oxford University Press, 2012.

[89] See the tensions and statements exchanged by the EU Commission and the US Administration when the Boeing/McDonnel Douglas, GE/Honeywell and Microsoft cases were under scrutiny. For example, in 1997 during the Boeing/McDonnel Douglas, the Clinton administration threatened to bring the case before the World Trade Organization or to start a trade war, while Karel van Miert - the European competition Commission's officer – threatened to impose fines up to 10% of revenues.

As in the past, European legislators were influenced by the debate and the legislation the Congress enacted, in the present EU still checks the evolution of the US legislation, bearing in mind the importance laws have also for the development of economy and the success of European firms. Moreover Dr. Beltrametti remind that "[…] [f]*amiliarity with competition law was however not widespread when the integration movement started, and the negotiators of the newly formed EC had to refer to the U.S. example, the only country that had a comprehensive system of competition law in place at the time. The U.S. Sherman Act thus became a model for the competition laws of the European Coal and Steel Community (ECSC), the entity that laid the foundations for the EC* […] " Silvia Beltrametti, *Capturing the Transplant: U.S. Antitrust Law in the European Union*, Chicago Law School, Vanderbilt Journal of Transnational Law, Vol. 4, pag. 1148. For further analysis, see also Alan D. Neale and D.G. Goyder, *The Antitrust Law of the United States of America*, 488, 1980.

economic partner[90]. Notwithstanding the rise of China as a new world's economic power, the characteristics of its economy are not appealing for our system and for the business strategy of our entrepreneurial system yet, so we keep looking with great interest at the development and at the decisions of the American competition authorities[91]. As a matter of fact, scholars and experts often keep track of development on both side of the ocean, aiming a more univocal convergence of vision for US and EU institutions, criticizing views anchored to old and discarded theories and catalyzing a more rapid modernization of the antitrust law[92]. For instance a renowned example of this dialectic process among US and EU institutions and thinkers is the Boing/Mc Donnell Douglas which will be discussed in the second chapter.

1.2.3.1 The Polypropylene case

To conclude this analysis of the historical development of competition law and of the great influence the Freiburg Circle exercised on it we shall focus on the

[90] As in the past, European legislators were influenced by the debate and the legislation the Congress enacted, in the present EU still checks the evolution of the US legislation, bearing in mind the importance laws have also for the development of economy and the success of European firms. Moreover Dr. Beltrametti remind that "[…] [f]*amiliarity with competition law was however not widespread when the integration movement started, and the negotiators of the newly formed EC had to refer to the U.S. example, the only country that had a comprehensive system of competition law in place at the time. The U.S. Sherman Act thus became a model for the competition laws of the European Coal and Steel Community (ECSC), the entity that laid the foundations for the EC* […] " Silvia Beltrametti, *Capturing the Transplant: U.S. Antitrust Law in the European Union*, Chicago Law School, Vanderbilt Journal of Transnational Law, Vol. 4, pag. 1148. For further analysis, see also Alan D. Neale and D.G. Goyder, *The Antitrust Law of the United States of America*, 488, 1980.

[91] "*With regard to Antitrust Law, the similarities on both sides of the Atlantic outweigh the remaining differences by far. This holds true, at any rate, today, after more than 100 years of legal development. […] With regard to specific areas of law, the Antitrust Laws have played the most influential role. And they continue to do so without a loss of momentum.*" Wernhard Möschel, *US versus EU Antitrust Law*, 2007.

[92] For instance, HR Varian wrote "*The European Commission's merger task force naturally considered Cournot's 1838 analysis of merger complementors*" while GL Priest stated "*The Commission's Merger Task Force is relying on economic theories that, though dressed in modern grab, were discarded in the US 30 years ago*".

judgement of March 10th, 1992 adopted by the Court of First Instance concerns a Commission decision fining 15 producers of polypropylene for infringing Article 85(1)[93] of the EEC Treaty. Propylene was and, still it is, one of the principal bulk of thermoplastic polymers and it is widely used in the petrochemical industry[94]. At the time of the contested decision the undertaking Montedipe S.p.A. was the greatest producer in Europe, with a market share of about 14.2-15%, so it was the prominent actor of this case[95].

The decision is noteworthy because it was released right when the clash among the *per se* and the *rule of reason* doctrines was rising. For instance, it helpfully summarizes the orientation of doctrine and jurisprudence, that was dominant in Europe until the beginning of the new century, on the right application of article 101(1) and on the definition of concerted practices. Indeed, the judges refer to the many previous cases[96] in which the Commission clarified that "*the criteria of coordination and cooperation laid down by its case-law, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the competition provisions of the Treaty according to which each economic operator must determine independently the commercial policy which he intends to adopt in the common market. This requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or*

[93] Then renumbered as Article 81(1) of the EC Treaty, now Article 101(1) of the TFEU

[94] "The product which is the subject- matter of the contested decision (hereinafter referred to as 'the Decision'), poly- propylene, is one of the principal bulk thermoplastic polymers. It is sold by the producers to processors for conversion into finished or semi-finished products. The largest producers of polypropylene have a range of more than 100 different grades covering a wide range of end uses. The major basic grades of polypropylene are raffia, homopolymer injection moulding, copolymer injection moulding, high- impact copolymer and film. The undertakings to which the Decision is addressed are all major petrochemical producers", paragraph 1 of Montedipe S.p.A. v Court of First Instance - Case T 14/89.

[95] "Montedipe SpA was one of the producers supplying the polypropylene market before 1977 and held controlling patents which expired in most European countries between 1976 and 1978. It was the main producer of polypropylene and its market share was between about 14.2 and 15%", paragraph 3 of Montedipe S.p.A. v Court of First Instance - Case T 14/89.

[96] See Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, *Suiker Unie v Commission*, paragraphs 173 and 174.

anticipated conduct of their competitors but it does strictly preclude any direct or indirect contact between them the object of effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market [...] *Such conduct may fall under Article 85(1)* [then Article 81(1), now Article 101 (1)] *as a 'concerted practice' even where the parties have not reached agreement in advance on a common place defining their action in the market but adopt or adhere to collusive devices which facilitate the coordination of their commercial behavior"*[97]. It is therefore clear that companies are always free of initiating their activities, but they shall have regard to the potential cohesiveness of their actions. In point of fact, for there to be an agreement within the same meaning of Article 101(1) it is surely sufficient that the undertakings in question have expressed, directly or indirectly, their intention to conduct themselves on the markets in a specific way[98].

Whereas in the proceedings the applicant firms try to show the benefits of the reduction of prices that have derived from the meetings they had in the past – in previous cases similar meetings were cleared[99] - and the reasons why they reduced so greatly prices[100], the Court replies that the only purpose of the cartel was to "*channel the massive arrival on the market of the new producers and minimize the price consequences of the resulting over capacity*"[101]. In this respect, the reply of

---

[97] Paragraph 211 of the Case T 14/89, Application for annulment before the Court of First Instance of the decision *Montedipe Spa v Commission*.

[98] See Case 41/69, *ACF Chemiefarma v Commission*, paragraph 112, Joined Cases 209 to 215 and 218/78, *Van Landewyck v Commission*, paragraph 86 and also Case T14/89, *Montedipe Spa v. CFI*, paragraph 230. See further the paragraph 262 of Case T14/89 "*the Commission nevertheless adds that a cartel which, like the one in issue in this case, concerns the prices which each of the undertakings charge on the sale of their own products constitutes an infringement per se of the EEC Treaty, even on a very broad interpretation of the rule of reason*".

[99] Case 48/69, *Imperial Chemical Industries Ltd v Commission*; Case 26/76, *Metro SB-Grossmarkte v Commission*; Case 107/82, *AEG-Telefunken v Commission*.

[100] "*The applicant submits that the Commission should have examined the agreements in relation to their economic context, that is to say the fact that all the polypropylene producers were operating at a loss*", paragraph 257 of Montedipe S.p.A. v Court of First Instance - Case T 14/89.

[101] paragraph 8 of Montedipe S.p.A. v Court of First Instance - Case T 14/89.

the companies was unanimous, and it considered that firstly they were undergoing a situation of distress because the patent of Montedipe S.p.A had expired and secondly that many new competitors entered the market thus reducing greatly the returns for the European undertakings[102]. Moreover the applicants criticized the too formalistic view of the Commission on the matter[103], that resulted in a further restriction of the competitiveness of the firms involved[104]. Finally they reminded the judges that the objectives of the Treaties should be obtained also through an enhancement of free competition[105], not through its restriction.

---

[102] Only in Europe, the year the patent expired seven new producers entered the market. On this the Commission "*following the expiry of the controlling patents held by Montedison, seven new producers came on stream in western Europe in 1977*", paragraph 2 of Montedipe S.p.A. v Court of First Instance - Case T 14/89.

[103] "*The Commission, it says, displayed an entirely formalistic view of the law of competition, as if the rule in Article 85(1) of the EEC Treaty was self-sufficient and should be applied and interpreted per se, instead of regarding it as an instrumental provision intended to achieve the objectives set out in the preamble to the EEC Treaty and give effect to the principles laid down in the first part of the Treaty*", paragraph 257 of Montedipe S.p.A. v Court of First Instance - Case T 14/89.

[104] "*The applicant submits that if the Commission had applied the rule of reason in this case it would necessarily have concluded that the attempt by producers to survive in a situation of market collapse has the effect of safeguarding competition, not restricting it. On the basis of an analysis of the case-law of the Supreme Court of the United States and of the Court of Justice the applicant asserts that the prohibitions laid down in Article 85 of the EEC Treaty cannot be defined in the abstract but must be appraised in relation to their economic context. Consequently, the Commission must gather information to show that the structure of the market has in fact been altered, that benefits to consumers have been reduced and that effective competition in the common market and intra-Community trade have been affected*", paragraph 259 of Montedipe S.p.A. v Court of First Instance - Case T 14/89.

[105] "*In its reply it states that even if the interpretation of certain rules of the EEC Treaty for repressive purposes were not incompatible with the objectives and general principles set out in the preamble and the first part of the Treaty, it would in any event be necessary to apply the rule of reason according to which the real criterion of the lawfulness of a restrictive practice is whether the restriction which it entails merely regulates competition, or even encourages it, or whether it has the effect of suppressing competition. In order to resolve that question a court must normally examine the facts specific to the sector of activities concerned by the restriction, its situation before and after the restriction was imposed, the nature of the restriction and its actual or probable effects*", paragraph 258 of Montedipe S.p.A. v Court of First Instance - Case T 14/89.

Moreover applicants invited the Court to open up to the new instances belonging already to the US legislation, recognizing the non-formalistic view of the law on this legal area, i.e. the *rule of reason*. Indeed, it was well clear that the long experience of the courts in the USA had already brought into the country this innovation. The American judges, being aware that the economics of undertakings are not always linear and limpid, were not deeming certain situations as infringements *per se,* and they were applying the so-called *rule of reason* for the benefit of the entire economic system and environment. For these reasons mentioned above, in 1992 the Montedipe Spa's attorneys while making reference to all these new reasonings, they asked judges to take into consideration this new approach so popular among American judges and practitioners[106], even if the Commission's view on the *rule of reason* was unequivocal since it considered it a new plea in law. The case left the question of the admissibility of the plea open to the Court's decision[107] and Montedipe and the other defendants were hoping for a change on the approach finally also in the European continent.

Surprisingly, the Court of First Instance, by adopting its decision, overturned the Commission's view on the *rule of reason.* It rejected the idea that the argument was a new plea in law[108], even if in the next paragraph it added that such violation was so clear that the use of the rule of reason would not have been successful in the

[106] "*On the basis of an analysis of the case-law of the Supreme Court of the United States and of the Court of Justice the applicant asserts that the prohibitions laid down in Article 85 of the EEC Treaty cannot be defined in the abstract but must be appraised in relation to their economic context. Consequently, the Commission must gather information to show that the structure of the market has in fact been altered, that benefits to consumers have been reduced and that effective competition in the common market and intra-Community trade have been affected*", paragraph 259 of Montedipe S.p.A. v Court of First Instance - Case T 14/89.

[107] "*The Commission replies that reliance on the rule of reason constitutes a new plea in law; it leaves the question of its admissibility to the Court's discretion*", paragraph 260 of Montedipe S.p.A. v Court of First Instance - Case T 14/89.

[108] "*The Court considers that in view of the economic and teleological nature of the arguments set out in the application, reliance on the rule of reason at the stage of the reply does not constitute a new plea, but merely an extension of the argument contained in the application*", paragraph 263 of Montedipe S.p.A. v Court of First Instance - Case T 14/89.

case[109]. To conclude its reasoning, in paragraphs 291 *et seq.*, the CFI stated that the Commission and the European institutions shall be ready to accept an agreement that could "*replace the law of the jungle with economic rationality and business fair play*", but the real problem lies in the definition of boundaries of unfair competition.

This decision is a stepping stone for the European legislation on competition. In point of fact, it paved the way to new doctrines in Europe setting the conditions for a prolific dialectic process among the EU and the US legislation. As the Polypropylene case affected the development of competition law in general[110], it also affected the air industry competition legislation. The industry was indeed under a process of revision and of implementation of liberalizing regulation that were

[109] "*Furthermore, the fact that the infringement of Article 85(1) of the EEC Treaty, in particular subparagraphs (a), (b) and (c), is a clear one precludes the application of a rule of reason, assuming such a rule to be applicable in Community competition law, since in that case it must be regarded as an infringement per se of the competition rules*", paragraph 265 of Montedipe S.p.A. v Court of First Instance - Case T 14/89.

[110] Applicants brought to the attention of the judges that in previous cases, the economic conditions companies were facing were taken into consideration and this was the case to apply them also to the polypropylene industry. The Court agued the contrary: "t*he applicant points out in its reply that, as is shown by Decision 84/387 of 19 July 1984, concerning a restructuring agreement between ICI and BP (IV/30.863 — BPCL/ICI, Official Journal 1984 L 212, p. 1), the Commission was well aware of the critical situation in the petrochemical industry, which, faced with overcapacity and strong competition from outside the Community, was suffering heavy losses and was obliged to reduce production capacity.*
It argues that the polypropylene sector had the same characteristics and was facing the same difficulties, as the Commission indicated in its Decision (points 6 to 11). It goes on to state that from 1973-74 to 1983-84 its prices remained the same despite inflation. Those characteristics were regarded as sufficient to justify the conclusion of an agreement in the Synthetic Fibres case (Decision of 4 July 1984, IV/30.810 —Synthetic fibres, Official Journal 1984 L 207, p. 17) and in the BPCL/ICI case. The remedies which the Commission authorized the undertakings to implement in those two cases are in reality similar to those envisaged by the polypropylene producers (production restrictions subject to verification). The applicant concludes that since the facts which led the Commission to approve the agreements entered into in those cases were identical to the facts of the present case it should have adopted the same attitude".
Paragraphs 267 and 268 of Montedipe S.p.A. v Court of First Instance - Case T 14/89.

aimed at boosting the development of the entire industry. Therefore, the principle of economic rationality and business fair play expressed by the Court of First Instance was considered and included in the enactment of the regulamentation concerning the firms operating in the air transport industry.

The very fact that the main law provisions applicable to the air companies were adopted while the EU Bodies were analyzing the effects of the aforementioned sentence on the competition environment, makes the analysis of the evolution of the air industry legislation – since 1989 until nowadays – right-fitted for assessing the main paths of development and the new approach the EU Commission started to adopt recently. The fast-paced evolution of the air transport sector during the '90s and the change of course in the 21st century are the foundations of a whole new approach to antitrust law and these outstanding topics will be discussed in the next chapter.

CHAPTER 2

THE AIR TRANSPORT INDUSTRY

As mentioned, this thesis focuses on the fast growing and developing sector of the air transport. This is an interesting area of analysis for studying the evolution of the European antitrust law. Firstly, we shall consider the birth and the recent fast-paced rise of this mean of transportation in Europe as well as in the world. As in the past it was reserved only to few, as of today, Eurostat measured about 918 million people moving by air[111] every year. It is widely considered as being an accessible and rapid way to reach all the main destinations of the continent and to close the gap of a poorly interconnected Union. From a world perspective, according to the International Civil Aviation Organization[112], also known as ICAO, in the 80s worldwide passengers' trips were about 4,028 billion, while as of today they are more than 19,125 billion. The number of travelers is still increasing, the fares are lower than those in the past, and about respectively 35% of the total of the international tourists and of the total of the value of goods flying to reach their destinations. The industry generates, both directly and indirectly, about 56 million jobs, and it is also expected to contribute $1 trillion to the world's GDP by 2026. A quick glance at these figures allows us to safely say that this sector has an outstanding value for the economy and it dispenses benefits to consumers.

---

[111] See more at http://ec.europa.eu/eurostat/statistics-explained/index.php/Air_transport_statistics

[112] The International Civil Aviation Organization (ICAO) is a UN specialized agency, established by States in 1944 to manage the administration and governance of the Convention on International Civil Aviation (Chicago Convention).
ICAO works with the Convention's 191 Member States and industry groups to reach consensus on international civil aviation Standards and Recommended Practices (SARPs) and policies in support of a safe, efficient, secure, economically sustainable and environmentally responsible civil aviation sector. These SARPs and policies are used by ICAO Member States to ensure that their local civil aviation operations and regulations conform to global norms, which in turn permits more than 100,000 daily flights in aviation's global network to operate safely and reliably in every region of the world.

This sector is traditionally characterized by heavy investments and lots of sunk costs related to example leasing or buying the vehicles and the relevant equipment. For this set of reasons, it has been primarily served by national authorities, and only recently it has been conducted by private actors as well. Therefore, its historical heritage leaves us a sector with big national carriers (known as the "*Flags*") fiercely competing with new entrants, and sometimes still undergoing processes of restructuring to find the right-fitted operational business plan, after the wave of controlled liberalization[113] sponsored by the European Union, during the end of the XXth century and the beginning of the new century[114]. Moreover, financial crisis and mismanagement conducts have forced many companies to merge or restructure, creating a very concentrated market with few big firms, many smaller competitors and high barriers that naturally raise concerns in the competition authorities of every state, from South Korea to Brazil, from the EU to the USA.

2.1 THE DEVELOPMENT

The first phase of development in the air transport industry concerns the development and the strengthening of domestic air connections. After this first period, the second phase consisted of implementing international routes, surely more appealing for European customers as a valid alternative to the time-consuming train journeys. This sector has undoubtedly a natural vocation for the international market, together with the intercontinental one, as it immensely reduces the time spent while traveling from a continent to another. Notwithstanding this global vocation, the air industry is still chiefly subjected to national authorities for many aspects[115].

---

[113] See the Alitalia restructuring process, from 2008 to still today after the acquisition of 49% of the shares by Etihad.

[114] In 1992 the third package - namely the Council Regulations (EEC) Nos 2407/92, 2408/92 and 2409/92, now replaced by Regulation (EC) No 1008/2008 of the European Parliament and of the Council - removed all remaining commercial restrictions for European airlines operating within the EU, thus setting up the European Single Aviation Market, known by the acronym ESAM.

[115] It may happen that the international routes are limited by restrictive regulations on consumer and environmental protection.

The principal actor of this second phase and of the evolution of the international air industry is the body of the United Nations, which in 1944 established the International Civil Aviation Organization - ICAO - by adopting the Chicago Convention. This is the first international act of law adopted to regulate the air industry. It is the bedrock on which the second phase or the international and intercontinental expansion of carriers began. The most striking points of the Convention, and its amendments, establish that:

- every state has "*complete and exclusive sovereignty over airspace above its territory*"**[116]**, individuating and important principle applicable to each landing and takeoff;
- the services shall be established on the basis of "*equality of opportunity and operated soundly and economically*"[117], underlining that discrimination shall not be applied when assigning routes and airports slots.

It is then evident that routes, frequencies, capacities and all other standards and requirements of airline operators are meant to be set by national authorities; when international destinations are at stake, standards and requirements are enshrined in bilateral agreements among the relevant countries. Thus, countries are bound to adopt several bilateral agreements, as many as they are necessary for all different carriers, subsequently creating a framework of Air Service Agreements, the ASAs. Those represented the legal basis on which international flights – for passengers, mail and goods – were provided between the US and the EU until the end of the XXth century and the beginning of XXI century. An Air Service Agreement contains provisions such as those on traffic rights[118], on designation and authorization of airlines, on revocation or suspension of authorization, on utilization

[116] ICAO, *Chicago Convention*, First Edition, 1944
[117] ICAO, *Chicago Convention*, Ninth Edition, 2006
[118] For example it may contain provisions on the right to fly across states' territory or to make stops for non-traffic purposes.

of airports facilities[119], on custom duties[120], on storage of airborne equipment and supplies, on entry clearance regulations, on capacity provisions[121], on tariffs, on transfer of earnings, on cooperative marketing arrangements, on airline representation, on approval of flight schedules and on aviation safety. Those mentioned are the most relevant provisions contained in a typical bilateral Air Service Agreement. The adoption of ASAs among more than two signing countries makes the recognition of air transports with common rules among more countries and this multilateral ASAs are often adopted for transcontinental routes. As of today, in its latest report[122], the International Air Transport Association (IATA) – an organization established to provide technical support and to introduce standards for the ICAO – counted more than 3500 ASAs worldwide that specify guidelines for aircrafts, routes *et alia*, and include, by the others, restrictions on foreign ownership and control, binding the carriers to be "*substantially* […] *and effectively controlled*"[123] by one of the contracting parties – i.e. the signing states –. This control is represented by a minimum percentage of share ownership – in most cases 50% –, then indirectly reducing the chance of takeovers by foreign competitors that, by acquiring another firm, would lose their right to operate in certain countries[124].

[119] A common provision is to forbid the imposition of higher charges or tariffs on non-national airlines.

[120] This provision allows to exempt fuel, lubricants and aircraft stores from the imposition of levies, taxes, inspection fee and custom duties.

[121] A very common clause that concerns competition is contained in this section of the agreement and it may read as follow: "Each Contracting Party shall allow fair and equal opportunity for the designated airlines of both Contracting Parties to compete in the international air transportation covered by this Agreement".

[122] *IATA*, *Airline Liberalization*, 2009

[123] Explanation of the ownership and control restrictions is contained in the Template of the ASA by the ICAO: "*The traditional 'substantial ownership and effective control' formula is still used in the majority of bilateral agreements. The phrase is not defined and the authorizing Party is the sole judge of whether the ownership and control criteria have been met. Nevertheless, "substantial ownership" is broadly considered to mean more than 50 per cent equity ownership. On the other hand, States take varying views in their domestic legislation or practice as to what might constitute "effective control". With the traditional clause, there have been individual instances where the authorizing Party has waived its right to require that the ownership and control criteria be met.*"

[124] In a case of acquisition by a company of another country, all the bilateral agreements, the ASAs, signed by the home country of the acquired company are

"*This approach uses the recommendation of the 1994 World-wide Air Transport Conference (ATConf/4) which refers to an airline which is and remains substantially owned and effectively controlled by nationals of one or more States that are not necessarily party to the agreement concerned but are within a predefined group with a "community of interest". A second group formulation by ATConf/4 is an airline which is substantially owned and effectively controlled by nationals of any one or more States that are parties to an agreement, or any one or more of the parties themselves*"[125].

The conditions and heavy restrictions on which carriers developed their network is evident. One system is unfortunately burdensome and for this reason the US and the EU started overtaking this system by creating a new and more efficient framework. This is the beginning of the third phase featured by the liberalization process that officially began in the US when the Congress approved the Airline Deregulation Act (ADA) in 1978. The year later the International Air Transportation Competition Act (IATCA) was adopted and the USA started promoting the so-called open skies agreements - the OSAs -. The first OSA to be signed with a European counterpart was the OSA of 1992 between the US and the Kingdom of the Netherlands. That first bilateral agreement with a European counterpart quite abruptly imported the liberalization on this side of the Atlantic. Indeed, the EU had started its gradual and decade-long liberalization process during the period from 1988 to 1997, following the example not only of the US but also of New Zealand (1983), Canada (1984) and Australia (1990), and when the Netherlands signed the OSA, the Europe was still undergoing its transition towards a full liberalization.

not applicable to the newco then owned by a third country. Then, if it is the case, the newco has to sign new ASAs to fly to its destinations.

[125] Explanation of the ownership and control restrictions is contained in the Template of the ASA by the ICAO

2.2 EU *PACKAGES* AND THE ENLARGEMENT OF THE EU SKIES

The liberalization process was the engine that boosted the growth of the air transport industry. The liberalization gave indeed access to new investors in the air transport sector, catalyzing the expansion and the growth of the entire industry and allowing new companies to enter the market.

Currently companies are divided into two main air carriers' categories that constitute about the entire market of airline operators. Those are the full-service carriers (the "FSCs") or legacy carriers[126] and the low-cost carriers (the "LCCs")[127]. The entry of LCCs and of new FSCs is one of the most outstanding result of liberalization in Europe and it began happening in the wake of the Single European Act of 1986 and the completion of the internal market[128]. Several sets of EU regulatory measures had gradually turned the heavily regulated and protected national aviation markets into a competitive single market for air transport. In fact,

[126] The Flag carriers we mentioned in the introduction to the chapter are practically FSCs

[127] "*ICAO has developed a definition of LCCs in the context of its Strategic Objective D.4 (liberalization of air transport regulation and efficiency of infrastructure management). Chapter 5.1 of the Manual on the Regulation of International Air Transport (Doc 9626) defines an LCC as "an air carrier that has a relatively low-cost structure in comparison with other comparable carriers and offers low fares and rates. Such an airline may be independent, the division or subsidiary of a major network airline or, in some instances, the ex-charter arm of an airline group.*" LCCs are also called low-cost airlines, or nofrills, discount, low-fares, budget or value-based airlines or carriers" in TENTH SESSION OF THE STATISTICS DIVISION Montréal, 23 to 27 November 2009 of ICAO.

[128] "For example, Ryanair, easyJet, and other European LCCs have taken advantage of the creation of a common aviation area in the European Union to capture 41% of the seat capacity on scheduled services in Europe in 2015. In Africa, where market access barriers remain high, the share of LCCs within the region is at 9%. In Asia, the LCC share in 2015 accounts for 23%.", at https://www.icao.int/sustainability/Pages/Low-Cost-Carriers.aspx

the first[129] *packages*[130], in 1987, and the second[131], in 1990, started to relax the rules governing fares and capacities.

In 1992 the *third package* - namely the Council Regulations (EEC) Nos 2407/92, 2408/92 and 2409/92, now replaced by the Regulation (EC) No 1008/2008 of the European Parliament and of the Council – was the instrument adopted by EU bodies to remove all remaining commercial restrictions for European carriers operating within the European Union skies, thus setting up the European Single Aviation Market, known as ESAM. The latter was subsequently extended to Norway, Iceland[132] and Switzerland[133] throughout bilateral agreements.

Furthermore, the *third package* reaffirmed[134] the notion of the so-called *Community air carriers* (the "CACs")[135], thus eliminating the *national air carrier* wording, and

---

[129] The relevant legislative proposals of this package were:
Regulation 3975/87/EEC on the application of the rules on competition to undertakings in the air transport sector;
Regulation 3976/87/EEC on the application of Article 85(3) EC Treaty on certain categories of agreements and concerted practices;
Directive 87/601/EEC on fares for scheduled air services between Member States; and
Decision 87/602 on the sharing of passenger capacity between air carriers on scheduled services between Member States and on access for air carriers to scheduled air service routes between Member States.

[130] When the EU institutions are preparing to radically change one sector, the provision are commonly referred to as packages.

[131] The relevant legislative proposals of this package were:
Regulation 2342/90/EEC on fares for scheduled air services, revoking Directive 87/601/EEC;
• Regulation 2343/90/EEC on the access for air carriers to scheduled intra-Community air service routes and rules on the sharing of passenger capacity between air carriers on scheduled air services between Member States, revoking Decision 87/602/EEC; and
• Regulation 2344/90/EEC amending Regulation 3976/87/EEC.

[132] The European Community and the Norwegian and Icelandic governments signed an Agreement on Air Transport on 2006

[133] The European Community and the Swiss Confederation signed an Agreement on Air Transport on 21 June 1999 in Luxembourg. The Agreement entered into force on 1 June 2002 in the Official Journal L 114 , 30/04/2002 P. 0073 – 0090

[134] It was already contained in the Regulation No. 2408/92, but as it is discussed below, the many court cases required the legislator to clearly affirm once again the definition introduced by previous regulation.

[135] "*'Community air carrier' means an air carrier with a valid operating licence granted by a competent licensing authority*", article 2 of the Reg. 1008/2008.

set, as a basic principle, the "*right of Community air carriers to operate intra-Community air services and* [to set] *the pricing of intra-Community air services*"[136]. Thus, as general provisions, any Community air carrier can freely set fares for passengers and cargo and can access any intra-EU route without requiring any permit or authorization. except for few exceptions on some very particular routes on which Member States can impose public service obligations, subject to caveats and conditions but only for a limited period of time[137].

The *package* also laid down the principal requirements CACs must comply with in order to be granted an operating license. The principal conditions read as follows:

- they shall be owned and effectively controlled by Member States and/or nationals of Member States;
- their principal place of business shall be located in a MS – as also stated in the ASAs;
- their financial situation shall be good and sound;
- they shall be appropriately insured to cover liabilities in case of accidents; and

[136] Article 1 of the Reg. 1008/2008 reads as follows: "*This Regulation regulates the licensing of Community air carriers, the right of Community air carriers to operate intra-Community air services and the pricing of intra-Community air services.*
The application of Chapter III of this Regulation to the airport of Gibraltar is understood to be without prejudice to the respective legal positions of the Kingdom of Spain and the United Kingdom with regard to the dispute over sovereignty over the territory in which the airport is situated".

[137] Recitals Nos. 11 and 12 of the Regulation EU 1008/2008 read as follow: "*To take into account the special characteristics and constraints of the outermost regions, in particular their remoteness, insularity and small size, and the need to properly link them with the central regions of the Community, special arrangements may be justified regarding the rules on the period of validity of the contracts for public service obligations covering routes to such regions.*
The conditions under which public service obligations may be imposed should be defined clearly in an unambiguous way, while the associated tender procedures should allow a sufficient number of competitors to take part in the tenders. The Commission should be able to obtain as much information as necessary to be able to assess the economic justifications for public service obligations in individual cases."

- they shall have the professional ability and organization to ensure the safety of operations in accordance with the regulations in force.[138]

In parallel with the setting-up of the European Single Aviation Market (ESAM), in December 2004, the Council of Ministers gave authorization to the European Commission to start negotiating a new agreement, the European Common Aviation Agreement – the ECAA – with the scope of further enlarging the reach of the ESAM to the non-EU members, embracing all the geographical European Continent. The scope stated by the Council of Ministers was to "*create new market opportunities due to an integrated aviation market of 36 countries and more than 500 million people. At the same time, the agreement will lead to equally high standards in term of safety and security across Europe, through the uniform application of rules.*"[139]. The aim is to set common standards for the proper functioning of the market, in light of the competition needs and the potential benefits for consumers.

Moreover, to effectively ensure a common level playing field, not only the legislation on competition shall be applied but also the legislation on State aid must

---

[138] According to Article 4 of the Reg. 1008/2008, the conditions to be granted an operating license are the followings:
"*its principal place of business is located in that Member State;*
it holds a valid AOC issued by a national authority of the same Member State whose competent licensing authority is responsible for granting, refusing, revoking or suspending the operating licence of the Community air carrier;
it has one or more aircraft at its disposal through ownership or a dry lease agreement;
its main occupation is to operate air services in isolation or combined with any other commercial operation of aircraft or the repair and maintenance of aircraft;
its company structure allows the competent licensing authority to implement the provisions of this Chapter;
Member States and/or nationals of Member States own more than 50 % of the undertaking and effectively control it, whether directly or indirectly through one or more intermediate undertakings, except as provided for in an agreement with a third country to which the Community is a party;
it meets the financial conditions specified in Article 5;
it complies with the insurance requirements specified in Article 11 and in Regulation (EC) No 785/2004; and
it complies with the provisions on good repute as specified in Article 7."

[139] The ECAA scopes under the European Union. See further at https://ec.europa.eu/transport/modes/air/international_aviation/country_index/ecaa_en\

be applicable to the air transport sector as well[140]. In point of fact, major public recapitalizations were and still are very common in Europe, and this has always been in contrast with the rules pertaining to State aid and naturally also fair competition. Then the Commission guidelines of 2014[141] introduced the notion of the recapitalization *una tantum*, the so called *one time last time* principle, therefore allowing this kind of operations only every 10 years, forbidding companies to undergo them more than one time during a decade. Notwithstanding these guidelines, the EU Commission is still scrutinizing some recurring restructuring

[140] "*Economic forecasts currently indicate that growth in the EU will remain low for some time. In this environment Europe must tap the full potential of a competitive internal market and, in a context of fiscal consolidation, governments must focus their spending on growth-enhancing priorities. I expect our state aid reform to help public authorities make more efficient use of scarce public resources and design public support to firms so that it helps achieve the EU's growth objectives while limiting competition distortions*", Joaquín Almunia, Commission Vice President in charge of competition policy.

[141] Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (2014/C 249/01), Article 3.6.1. 'One time, last time' principle: "*In order to reduce moral hazard, excessive risk-taking incentives and potential competitive distortions, aid should be granted to undertakings in difficulty in respect of only one restructuring operation. This is referred to as the 'one time, last time' principle. The need for an undertaking that has already received aid pursuant to these guidelines to obtain further such aid demonstrates that the undertaking's difficulties are either of a recurrent nature or were not dealt with adequately when the earlier aid was granted. Repeated State interventions are likely to lead to problems of moral hazard and distortions of competition that are contrary to the common interest.*

When planned rescue or restructuring aid is notified to the Commission, the Member State must specify whether the undertaking concerned has already received rescue aid, restructuring aid or temporary restructuring support in the past, including any such aid granted before the entry into force of these guidelines and any non-notified aid (38). If so, and where less than 10 years (39) have elapsed since the aid was granted or the restructuring period came to an end or implementation of the restructuring plan was halted (whichever occurred the latest), the Commission will not allow further aid pursuant to these guidelines.

[…]"

operations (for instance *LOT Polish Airlines*[142], *Estonian Air*[143], *Cyprus Airlines*[144]). The *una tantum* principle was not obvious and indeed major public recapitalizations of airlines were definitely common until the mid-1990s, given the widespread direct control national governments exercised on them. The Commission guidelines of 2014[145], that replaced those of 1994[146] and 2005[147], were

[142] State aid by Polish government approved on 07/29/2014. "*LOT has prepared a credible restructuring plan that should make it a viable company in the near future. At the same time, it gives up some profitable routes and slots at several congested airports, which creates opportunities for its competitors and reduces the competition distortions brought about by the aid*", Joaquín Almunia, Commission Vice President in charge of competition policy.

[143] State aid by Estonian government has been considered incompatible with 2014 guidelines on 11/07/2015. "*Companies should compete based on a sustainable business model rather than relying on continued support by the State to stay in the market. Estonian Air has repeatedly received public subsidies over the past five years but did not carry out the necessary restructuring to become viable as a business. It would not be a good use of taxpayer money to keep Estonian Air in the market artificially – nor would it be fair to competitors, which have to compete without such support*", Commissioner Margrethe Vestager, in charge of competition policy.

[144] State aid by government of Cyprus has been considered incompatible with 2014 guidelines on 12/01(2015. "*Cyprus Airways has received large quantities of public money since 2007 but was unable to restructure and become viable without continued state support. Therefore, injecting additional public money would only have prolonged the struggle without achieving a turn-around. Companies need to be profitable based on own merits and their ability to compete and cannot and should not rely on taxpayer money to stay in the market artificially*", Commissioner Margrethe Vestager, in charge of competition policy.

[145] Guidelines on State aid to airports and airlines (2014/C 99/03). More on the subject is available at http://ec.europa.eu/competition/state_aid/modernisation/index_en.html

[146] The 1994 Aviation guidelines were meant to regulate the airlines and still considered the infrastructure projects (such as airports, motorways, bridges, etc.) as general measures of economic policy which cannot be controlled by the Commission under the Treaty rules on State aids. This is not by far the view of the Commission on the matter. In its judgment in the Joined Cases T-443/08 and T-455/08 Mitteldeutsche Flughafen AG and Flughafen Leipzig Halle GmbH v Commission, ('Leipzig-Halle airport' judgment), [2011] ECR II-1311, in particular paragraphs 93 and 94; confirmed by Case C-288/11 P Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission, [2012], the General Court clarified that the operation of an airport is an economic activity, of which the construction of airport infrastructure is an inseparable part.

[147] The 2005 Aviation guidelines made clear the conditions under which certain categories of State aid to airports and airlines could be declared compatible with the internal market while supplementing the 1994 Aviation guidelines (see above).

felt as needed to match the current market environment and to prevent the still excessive presence of MSs in the business of the airline operators.

2.3 THE AIRPORTS AND THE SLOTS

In 1993, in a further attempt to liberalize the market, the European Commission started coordinating the so-called slots[148], which are the permissions to land or take off on a specific date and at a specific time[149]. In a free competing market, those shall be allocated to airlines in an equitable, non-discriminatory and transparent way by an independent coordinator[150]. However, this slot allocation system is not efficient since it prevents the optimal use of airport capacity, considering that airlines prefer underusing their slots to avoid returning them to the slot pool for reallocation to competitors. In addition, it is worth noting that in 2016 the EU had about 90 slot coordinated airports whereas the US had only two of such airports[151]. For that reason, the Commission proposed in 2011 several amendments to Regulation No. 95/93 to improve the efficiency of the system, but so far there has been no agreement on those between the two legislators.

Therefore the current legislation applicable is still the Regulation (EEC) No 95/93 that - in its consolidated version of 06/30/2009[152] - concerns the fairness of the access to airports and airport services. This act of law was deemed to be necessary considering that airports were and still are a prerogative of national authorities that

[148] The European Commission approved the Regulation No. 95 93.

[149] "*'slot' shall mean the permission given by a coordinator in accordance with this Regulation 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 as allocated by a coordinator in accordance with this Regulation*", Article 2 of the Regulation No. 95 93.

[150] The State as well cannot be considered as a fitting coordinator being directly involved in the competition as one of the main shareholder of the Flags, or for its involvement in many companies related to the air transport industry as a whole.

[151] See notably the European Parliament on "*Airport slots and aircraft size at EU airports"*, 2016

[152] More info available at https://ec.europa.eu/transport/modes/air/airports/slots_en

by providing their services impede the free competition and have the tendency to prefer national Flags[153].

Other important services offered in airports - e.g. the passage and baggage handling, fueling and cleaning of aircraft - are regulated as well. On the matter Directive 96/67/EC has gradually opened to competition the market for such services. Moreover, another Commission proposal from 2011 was seeking to further open this market at the biggest European airports[154] but it was not approved by the

[153] Notwithstanding the stand of the principle of equality expressed in article 49 of the TFEU, national authorities of some MSs showed their insistence and vehemence on protecting their national airline; for example they insistently asked a fifty per cent share of the market for their Flags during the discussions that preceded the adoption of the first package of rules in 1987.

[154] The most relevant aims of the amendment proposal contained in the Proposal for a Regulation of the European Parliament and of the Council on ground handling services at Union airports and repealing Council Directive 96/67/EC /* COM/2011/0824 final - 2011/0397 (COD) were the:

"*Full opening of the self-handling market and increase in the minimum number of service providers to three at large airports*

Directive 96/67/EC allows Member States to restrict self-handling or third-party handling to minimum two suppliers for four categories of services. As a consequence, at some airports airlines are faced with a limited choice between two suppliers for each of these services, and are not always authorised to self-handle. Every airport user should be allowed to self-handle. Moreover, the number of authorised third-party suppliers of groundhandling services should not be less than three suppliers at large airports with not less than 5 million passengers annually or 100 000 tonnes of freight .

Mutual recognition of approvals with harmonised requirements
Three-quarters of the Member States have an approval system in place resulting in a numerous different administrative requirements that the suppliers of groundhandling services or self-handling airport users have to meet in the EU. The mutual recognition of national approvals with harmonised requirements will reduce administrative costs for operators and reduce barriers to entry.

Better management of centralised infrastructures
Centralised infrastructures are essential for the performance of groundhandling services. In the absence of a clear legal framework, distortions of competition on the groundhandling market may arise. The proposal includes a clear legal framework for the definition of centralised infrastructure and for the fees to be charged to suppliers of groundhandling services and self-handling airlines for the centralised infrastructure.

legislator and then it was withdrawn by the Commission in 2014. A Directive that lays down the basic principles for the levying of airport charges paid by air carriers

---

Legal separation of airports and their groundhandling activities
If an airport is itself a provider of groundhandling services, it should be ensured that the groundhandling services provided by the airport do not unduly benefit from the airport management activities of the airport.
The current system of separation of accounts for groundhandling airports is very difficult to monitor and is felt to be insufficient to ensure fair competition. The proposal calls for airports to keep their groundhandling activities in a legal entity separate from their airport management activities.

Improved tender procedure
The current maximum period of 7 years for which a supplier of restricted groundhandling services is selected is perceived to be insufficient notably to write off the cost of ground equipments. The proposal provides for an increase of the maximum duration to ten years.
The proposal contains further specifications on the details of the selection procedure for the suppliers of restricted services to ensure a harmonious application and ensure that selected companies are indeed those best suited to operate groundhandling services.
In the selection of the supplier for restricted groundhandling services the AUC needs to be consulted. The proposal contains provisions for rules of procedure for the Airport Users' Committee to avoid any conflict of interest for airlines also providing groundhandling services.

Clarified rules for subcontracting
While subcontracting increases the sometimes necessary flexibility for suppliers of groundhandling services, subcontracting and cascade subcontracting may also result in capacity constraints and have negative effects on safety.
The proposal therefore contains clear rules for subcontracting allowing suppliers of groundhandling services to subcontract but limiting subcontracting by airports and self-handling airlines to situations of force majeure and prohibiting cascade subcontracting.

Responsibility of airport operators for minimum quality requirements for groundhandling operations to be defined in delegated act
The sub-standard quality of one supplier of groundhandling services can disturb the airport system to the detriment of all stakeholders in the air transport industry.
The absence of common minimum quality standards for all groundhandling providers at an airport was reported by stakeholders as a shortcoming of the current Directive.
The proposal provides the setting of minimum quality standards for the performance of groundhandling services to be met by all suppliers of groundhandling service and self-handling airport users".

for the use of airport facilities and services was instead approved by EU bodies in 2009[155].

To ensure a competitive market with a fair access to the distribution networks the Union has enacted a set of rules aimed at providing, *inter alia*, that the Computerized Reservation Systems (the CRSs), which serve as the technical intermediary between the airlines and the travel agents, shall display air services of all airlines in a non-discriminatory way on the travel agencies' computer screens[156]. In any case the current role of CRSs is marginal considering that the online distribution is more and more in general use, including the carriers' websites.

To ensure a uniform and reasonable level of safety throughout the EU, national safety rules have been replaced by common safety rules which have been progressively extended to the entire air transport chain. In addition, a European Aviation Safety Agency has been established, to monitor the implementation of the above-mentioned standards. Security requirements at all EU airports have also been harmonized to better prevent malicious acts against passengers and goods, and Member States still retain the right to apply more stringent security measures[157].

---

[155] Directive 2009/12/EC, second recital states: "*It is necessary to establish a common framework regulating the essential features of airport charges and the way they are set, as in the absence of such a framework, basic requirements in the relationship between airport managing bodies and airport users may not be met. Such a framework should be without prejudice to the possibility for a Member State to determine if and to what extent revenues from an airport's commercial activities may be taken into account in establishing airport charges*". In addition, Article 1(1) of Directive 2009/12/EC reads as follows: "*This Directive sets common principles for the levying of airport charges at Community airports*".

[156] Regulation (EC) 80/2009 ninth Recitals states: "*In order to protect consumers' interests, it is necessary to present an unbiased initial display to users of a CRS and to ensure that information on all participating carriers is equally accessible in order not to favour one participating carrier over another*". Moreover, Article 1 recites: "*This Regulation shall apply to any computerised reservation sys- tem (CRS), in so far as it contains air-transport products, when offered for use or used in the Community.*

This Regulation shall also apply to rail-transport products, which are incorporated alongside air-transport products into the principal display of a CRS when offered for use or used in the Community".

[157] Unfortunately, this has been the case with the recent terrorist attacks on the airports of France and Belgium. In 2017 the airport of Brussel Zaventem has one of the highest levels of security measures, with army and special agents controlling people when accessing the building and when checking in the gates.

Furthermore, common rules to protect air passengers' rights aim at ensuring that passengers receive at least a minimum level of assistance in the event of serious delays or cancellation have been introduced through air transport Regulations (EC) No 261/2004 and (EC) No 1107/2006. However, considering that they are proving difficult to apply and they frequently lead to court cases, then the Commission was forced to adopt an interpretation of the rules currently in force based on case law[158].

2.4 THE RECENT EVOLUTION OF THE REGULATORY FRAMEWORK

To conclude this analysis on the development of the European skies and of its carriers we shall assess some of the weakness points raised by the judgement of 5 November 2002 of the Court of Justice that finally laid down the foundations to a complete liberalization of the skies in Europe and finally provided the EU Institutions with a set of concrete powers.

The Court reasoned that the functioning of the European Single Aviation Market and of the European Common Aviation Area is still perfectible[159], basing this assumption on factors such as:

a) the flaws in the slot allocation system;
b) the fact that four fifths of routes departing from European airports are mainly served by only one or two carriers;
c) the financial difficulties that several airlines and secondary airports are facing; and

---

[158] The White Paper – COM (2016) 3502 final of 10 June 2016 - delivered by the European Commission contains several interpretations on the repayment scheme. For example, on the different responsibility of the Operating or the Marketing Carrier, the Article 2.2.3. entitled 'Application to operating air carriers' states "*In accordance with Article 3(5), the operating air carrier is always responsible for the obligations under the Regulation and not, for example, another air carrier which may have sold the ticket*".

[159] "*Moreover, the very fact that those two regulations do not govern the situation of air carriers from non-member countries which operate within the Community shows that, contrary to what the Commission maintains, the 'third package' of legislation is not complete in character*", Case C-476/98, Commission of the European Communities v Federal Republic of Germany, paragraph 119

d) the complicated oversight of air carriers now operating in several Member States.

Hence, in the judgement of 5 November 2002, the Commission contested the bilateral agreements signed from 1992 on by some Member States with the United States (the Open Skies Agreements) because in doing so single countries were exceeding their power in the external relations competence. Indeed, the Court stated as follows: "*In the area of external relations, the Court has held that the Community's tasks and the objectives of the Treaty would be compromised if Member States were able to enter into international commitments containing rules capable of affecting rules adopted by the Community or of altering their scope*"[160]. Thus, the judgment clarified the European Union's powers in the field of international air services by recognizing that it has certain exclusive responsibilities in external relations in the field of aviation, while single Member States cannot negotiate international air service agreements by themselves. It is the European Commission that shall have mandate to negotiate agreements with third countries that involve all the EU Member States, with the aim of further liberalizing the market keeping a common level playing field for all companies, whatsoever the European country they are operating in[161]. Secondly, the judgment ruled that Member States may not reserve certain benefits in such agreements to their national carriers or Flags: the freedom of establishment principle laid down in Article 49 TFEU[162] enshrines that the equality between European carriers (regardless of their

[160] See also see Opinion 2/91, paragraph 11, and also, to that effect, the AETR judgment, paragraphs 21 and 22

[161] See cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98 against the United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany. The judgments establish that Member States acted illegally when they entered into agreements with the United States on several issues where Community laws are in place. The judgment specifically identified slots, intra-Community fares and CRSs as being matters of Community competence. The Court also found that Member States acted illegally in agreeing bilateral agreements that discriminate between Community air carriers on the basis of the nationality of their owners.

[162] Article 49 TFEU reads: "*Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also*

country of establishment) needs to be preserved as to their operation of flights from any European airport towards third countries' destinations[163].

Following the Court ruling, the Council of European Union adopted a new framework for the air industry, asking Member States to interpret also the Open Skies Agreements signed in line with the freedom of establishment within the EU, as the Court ruled in its decision. For this purpose, the Reg. EU No. 847/2004 provides for a revising process of current agreements that operates via a notification duty for Member States. They shall indeed notify the bilateral or multilateral agreements concluded in order to let the Commission verify the respect of the principles of the Treaties[164]. Then, the EU bodies also approved and enacted the Regulation No. 1/2003[165] that repealed Regulation 17/62 and Regulation 141/62

---

apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital".

[163] See also judgement of the Court of Justice in Case C-466/98 Commission v United Kingdom [2002] ECR I- 9427; Judgement of the Court of Justice in Case C-467/98 Commission v Kingdom of Denmark [2002] ECR 9519; Judgement of the Court of Justice in Case C-468/98 Commission v Kingdom of Sweden [2002] ECR 9575; Judgement of the Court of Justice in Case C-469/98 Commission v Republic of Finland [2002] ECR 9627; Judgement of the Court of Justice in Case C-471/98 Commission v Kingdom of Belgium [2002] ECR 9681; Judgement of the Court of Justice in Case C-472/98 Commission v Grand Duchy of Luxemburg [2002] ECR 9741; Judgement of the Court of Justice in Case C-475/98 Commission v Republic of Austria [2002] ECR 9797; Judgement of the Court of Justice in Case C- 476/98 Commission v Federal Republic of Germany [2002] ECR 9855.

[164] Article 1 of Reg. No. 847/2004 states as follows: "*A Member State may, without prejudice to the respective competencies of the Community and its Member States, enter into negotiations with a third country concerning a new air service agreement or the modification of an existing air service agreement, its Annexes or any other related bilateral or multilateral arrangement, the subject matter of which falls partly within the competence of the Community, provided that:*
any relevant standard clauses, developed and laid down jointly between Member States and the Commission, are included in such negotiations, and;
[…]".

[165] Council Regulation (EC) No 411/2004 of 26 February 2004 repealing Regulation (EEC) No 3975/87 and amending Regulations (EEC) No 3976/87 and

and replaced the Regulation 1017/68 (road, rail and inland waterways), Regulation 4056/86 (maritime transport) and Regulation 3975/87 (air transport). The Regulation 1/2003 made clear that article 101(1) applies to concentrations in the air transport industry but that article 101(3) shall be taken into consideration when assessing the potential anti-competitive behavior. The fourth recital of the Regulation indeed states "*The present system should therefore be replaced by a directly applicable exception system in which the competition authorities and courts of the Member States have the power to apply not only Article 81(1) and Article 82 of the Treaty, which have direct applicability by virtue of the case-law of the Court of Justice of the European Communities, but also Article 81(3) of the Treaty*".

The merit of this deed of law is to clearly define the powers of the European Commission[166], to enshrine once for all the 'exemption regime'[167] applicable to

(EC) No 1/2003, in connection with air transport between the Community and third countries, Official Journal L 68, 06.03.2004, p. 1-2

[166] "*For the purpose of applying Articles 81 and 82 of the Treaty, the Commission shall have the powers provided for by this Regulation*", according to Article 4 of the Regulation 1/2003. In general terms, those are: a) requiring that an infringement be brought to an end; b) ordering interim measures; c) accepting commitments; d) imposing fines, periodic penalty payments or any other penalty provided for in their national law.

[167] Article 29 of the Reg. 1/2003 "*Where the Commission, empowered by a Council Regulation, such as Regulations 19/65/EEC, (EEC) No 2821/71, (EEC) No 3976/87, (EEC) No 1534/91 or (EEC) No 479/92, to apply Article 81(3) of the Treaty by regulation, has declared Article 81(1) of the Treaty inapplicable to certain categories of agreements, decisions by associations of undertakings or concerted practices, it may, acting on its own initiative or on a complaint, withdraw the benefit of such an exemption Regulation when it finds that in any particular case an agreement, decision or concerted practice to which the exemption Regulation applies has certain effects which are incompatible with Article 81(3) of the Treaty.*

Where, in any particular case, agreements, decisions by associations of undertakings or concerted practices to which a Commission Regulation referred to in paragraph 1 applies have effects which are incompatible with Article 81(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that Member State may withdraw the benefit of the Regulation in question in respect of that territory".

agreement between air vectors[168] and to illustrate the power (a) to require that an infringement be brought to an end, (b) to order interim measures, (c) to accept commitments, and (d) to impose fines, periodic penalty payments or any other penalty provided for in their national law[169].

An even further step forward in the liberalization of European and American air traffic is marked with the provisional application in March 2008 of the EU-US Air Transport Agreement. This agreement followed suit of the 2002 Court Decision and of the Regulation No. 847/2004 by introducing new commercial freedoms for EU and US airline operators and a unique legal regulatory groundwork for cooperation in the field of transatlantic aviation that replaced the individual agreements solely signed by each of the Member States and the United States and removed barriers for EU and US airlines wishing to offer passenger and cargo services between the European Union and the United States.

The most important article contained in this agreement is the Article 3 that lists all the rights conceded respectively to European and American carriers. The most important are:

---

[168] "[…] *there is a need to rethink the arrangements for applying the execption* [i.e. exemption] *from the prohibition on agreements, which restrict competition, laid down in Article* [101.3] *of the Treaty.* […] *account must be taken in this regard of the need to ensure effective supervision, on the one hand, and to simplify administration to the greatest possible extent, on the other*", recital 2 of the Regulation 1/2003. Furthermore Article 10 of the Regulation, entitled 'Finding of inapplicability', states the following: "*Where the Community public interest relating to the application of Article* [101 and 102] *of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Article* [101] *of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article* [101.1] *of the Treaty are not fulfilled, or because the conditions of Article* [101.3] *of the Treaty are satisfied*".

[169] The US has a similar regulatory regime being that: "the approach remains one of "regulatory exception". While DOJ is responsible for enforcing the antitrust laws across all industries, including the airline industry, DOT has authority to make limited grants of ATI from those laws. Thus, airlines may seek ATI from DOT to coordinate their international operations. Because requests for ATI may raise important competitive issues, in practice DOT and DOJ work together to assess the competitive effects of international airline alliances", *Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches*, A report by the European Commission and the United States Department of Transportation, 16 November 2010

a) "*the right to fly across its territory without landing;*

b) *the right to make stops in its territory for non-traffic purposes;*

c) *the right to perform international air transportation between points on the following routes:*

   I. *airlines of the United States (hereinafter "U.S. airlines"), from points behind the United States via the United States and intermediate points to any point or points in any Member State or States and beyond; and for all-cargo service, between any Member State and any point or points (including in any other Member States);*

   II. *for airlines of the European Community and its Member States (hereinafter "Community airlines"), from points behind the Member States via the Member States and intermediate points to any point or points in the United States and beyond; for all‑cargo service, between the United States and any point or points; and, for combination services, between any point or points in the United States and any point or points in any member of the European Common Aviation Area (hereinafter the "ECAA") as of the date of signature of this Agreement*".[170]

---

[170] The Article 3 of the EU-US air transport agreement lists other rights such as:
"2. Each airline may on any or all flights and at its option:
operate flights in either or both directions;
combine different flight numbers within one aircraft operation;
serve behind, intermediate, and beyond points and points in the territories of the Parties in any combination and in any order;
omit stops at any point or points;
transfer traffic from any of its aircraft to any of its other aircraft at any point;
serve points behind any point in its territory with or without change of aircraft or flight number and hold out and advertise such services to the public as through services;
make stopovers at any points whether within or outside the territory of either Party;
carry transit traffic through the other Party's territory; and
combine traffic on the same aircraft regardless of where such traffic originates;
without directional or geographic limitation and without loss of any right to carry traffic otherwise permissible under this Agreement.

The agreement basically expresses a mutual recognition of the nine freedoms of the air[171] between the Union and the United States of America.

---

3. The provisions of paragraph 1 of this Article shall apply subject to the requirements that:
for U.S. airlines, with the exception of all-cargo services, the transportation is part of a service that serves the United States, and
for Community airlines, with the exception of (i) all-cargo services and (ii) combination services between the United States and any member of the ECAA as of the date of signature of this Agreement, the transportation is part of a service that serves a Member State.

4. Each Party shall allow each airline to determine the frequency and capacity of the international air transportation it offers based upon commercial considerations in the marketplace. Consistent with this right, neither Party shall unilaterally limit the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the airlines of the other Party, nor shall it require the filing of schedules, programs for charter flights, or operational plans by airlines of the other Party, except as may be required for customs, technical, operational, or environmental (consistent with Article 15) reasons under uniform conditions consistent with Article 15 of the Convention.

5. Any airline may perform international air transportation without any limitation as to change, at any point, in type or number of aircraft operated; provided that, (a) for U.S. airlines, with the exception of all‑cargo services, the transportation is part of a service that serves the United States, and (b) for Community airlines, with the exception of (i) all‑cargo services and (ii) combination services between the United States and a member of the ECAA as of the date of signature of this Agreement, the transportation is part of a service that serves a Member State.

6. Nothing in this Agreement shall be deemed to confer on:
U.S. airlines the right to take on board, in the territory of any Member State, passengers, baggage, cargo, or mail carried for compensation and destined for another point in the territory of that Member State;
Community airlines the right to take on board, in the territory of the United States, passengers, baggage, cargo, or mail carried for compensation and destined for another point in the territory of the United States."

[171] "*First Freedom of the Air - the right or privilege, in respect of scheduled international air services, granted by one State to another State or States to fly across its territory without landing (also known as a First Freedom Right).*
Second Freedom of the Air - the right or privilege, in respect of scheduled international air services, granted by one State to another State or States to land in its territory for non-traffic purposes (also known as a Second Freedom Right).

Third Freedom of The Air - the right or privilege, in respect of scheduled international air services, granted by one State to another State to put down, in the

Then, according to the agreement airline operators in Europe can enter a point-to-point route from any airport in the EU, including those outside their home Member State. This is meant to allow national Flags to start operating flights in other Member States' airports. For example, soon after the enter into force of the

---

territory of the first State, traffic coming from the home State of the carrier (also known as a Third Freedom Right).

Fourth Freedom of The Air - the right or privilege, in respect of scheduled international air services, granted by one State to another State to take on, in the territory of the first State, traffic destined for the home State of the carrier (also known as a Fourth Freedom Right).

Fifth Freedom of The Air - the right or privilege, in respect of scheduled international air services, granted by one State to another State to put down and to take on, in the territory of the first State, traffic coming from or destined to a third State (also known as a Fifth Freedom Right).

Sixth Freedom of The Air - the right or privilege, in respect of scheduled international air services, of transporting, via the home State of the carrier, traffic moving between two other States (also known as a Sixth Freedom Right). The so-called Sixth Freedom of the Air, unlike the first five freedoms, is not incorporated as such into any widely recognized air service agreements such as the "Five Freedoms Agreement".

Seventh Freedom of The Air - the right or privilege, in respect of scheduled international air services, granted by one State to another State, of transporting traffic between the territory of the granting State and any third State with no requirement to include on such operation any point in the territory of the recipient State, i.e the service need not connect to or be an extension of any service to/from the home State of the carrier.

Eighth Freedom of The Air - the right or privilege, in respect of scheduled international air services, of transporting cabotage traffic between two points in the territory of the granting State on a service which originates or terminates in the home country of the foreign carrier or (in connection with the so-called Seventh Freedom of the Air) outside the territory of the granting State (also known as a Eighth Freedom Right or "consecutive cabotage").

Ninth Freedom of The Air - the right or privilege of transporting cabotage traffic of the granting State on a service performed entirely within the territory of the granting State (also known as a Ninth Freedom Right or "stand alone" cabotage)", on Manual on the Regulation of International Air Transport (Doc 9626, Part 4). ICAO characterizes all "freedoms" beyond the Fifth as "so-called" because only the first five "freedoms" have been officially recognized as such by international treaty.

agreement, on March 2008, British Airways started operating on the Paris-New York route while Air France entered the London-Los Angeles route[172].

Other important scopes of the agreement, and of its Amendment signed on 24 June 2010, are stated in the recitals where the two parties recognize their desire: "*to promote an international aviation system based on competition among airlines in the marketplace with minimum government interference and regulation; to facilitate the expansion of international air transport opportunities, including through the development of air transportation networks to meet the needs of passengers and shippers for convenient air transportation services; to make it possible for airlines to offer the traveling and shipping public competitive prices and services in open markets; to have all sectors of the air transport industry, including airline workers, benefit in a liberalized agreement; to ensure the highest degree of safety and security in international air transport and reaffirming their grave concern about acts or threats against the security of aircraft, which jeopardize the safety of persons or property, adversely affect the operation of air transportation, and undermine public confidence in the safety of civil aviation; to establish a precedent of global significance to promote the benefits of liberalization in this crucial economic sector*"[173]. As stated by both parties, the scopes are to introduce an agreement sample that allows to further liberalize the sector in the global market by giving a first standard reference to the other countries; to remove market access barriers; to maximize benefits for consumers and; to enhance access of airlines to the global capital markets.

Finally, the peak of the above mentioned European liberalization development is summarized in the recitals of the Regulation No. 1008/2008 that enshrines important principles and value for the correct operation of the air transport industry, highlighting the focus of the EU Commission on many different aspects that must be taken into consideration while assessing the development of the sector:

[172] *Transatlantic Airline Alliances: Competitive Issues and Regulatory Approach*es, A report by the European Commission and the United States Department of Transportation, 16 November 2010.

[173] Recitals of the EU-US air transport agreement of April 30, 2007

- a potential link between financial health of carriers and safety[174];
- licensing authorities of MSs shall carry out regular controls and assessments of the air carriers' financial situation, with special regard to the first two years[175];
- in case firms fail these tests and controls, they must stop operations to protect consumers' interests[176];
- air carriers must be insured to cover incidents liabilities[177];
- leasing of aircraft of third countries shall be limited in time and shall strictly respect European safety standards[178];
- to complete the internal aviation market, "*restrictions on the code sharing on routes to third countries or on the price setting on routes to third countries with an intermediate stop in another Member State (sixth freedom flights) should be lifted*[179]";
- public service obligations may be imposed in special circumstance and under the scrutiny of the EU Commission[180];
- consumers shall have access to comparable fares from any community area without discrimination[181]; and
- given the international vocation of the sector, herein reinstated, the principle of subsidiarity will be applied[182].

Truly, what strikes the most is the unmodified provision on limitations on control and ownership that many scholars and commentators were hoping to see removed by this agreement. These limits are yet recommended by the ICAO but this limitation evidently reduces the chances of the companies to enjoy the complete freedom that other firms in different market enjoy. They are a limitation to the

[174] Recital No. 3 of the Regulation EU 1008/2008
[175] Recital No. 5 of the Regulation EU 1008/2008
[176] Recital No. 6 of the Regulation EU 1008/2008
[177] Recital No. 7 of the Regulation EU 1008/2008
[178] Recital No. 8 of the Regulation EU 1008/2008
[179] Recital No. 10 of the Regulation EU 1008/2008
[180] Recitals Nos. 11 and 12 of the Regulation EU 1008/2008
[181] Recital No. 15 of the Regulation EU 1008/2008
[182] Recital No. 18 of the Regulation EU 1008/2008

airlines' competiveness, reducing the opportunity to access to new sources of funds, to increase the concentration of services thus reducing the costs and benefiting the customers. For this reason the market analyzed in this dissertation evidently lacks still a complete freedom when competition issues are assessed. That is why the air transport sector is still considered as a very peculiar market, given for instance its market structure - which is by far one of the fastest growing -, the semi-dependency of the carriers on the public sector, the already mentioned limitations on control and ownerships and the still heavy presence of national authorities regulating and thus restricting free competition. It is then doubted whether the phases of development and the wave of controlled liberalization has really come to an end, since the market is evidently not completely liberalized for many aspects. As of today, it is safe to say that the air transport sector has its own characteristics, which differ from others already liberalized, and some areas could be better regulated so to boost competition among firms. In addition, the liberalization process is cumbersome if the several caveats, exemptions, cooperation and alliances used in this market are taken into account, since they make unclear which degree of competition the sector enjoys. Only by acquiring a deep knowledge of the cooperation forms that have been grounding the development of the air transport for the past 30 years, it is possible to clearly assess which degree of free competition firm enjoy and on which basis the Commission takes its decision regarding the operations of the carriers.

2.5 COOPERATION IN THE AIR TRANSPORT SECTOR

For acquiring a deep knowledge of the air transport market, we shall focus on the way those companies in the past, but still in the present, are able to enhance the quality of their services, keeping a high level of competitiveness, while reducing costs and offer better connections. We shall necessarily then study the expansion of a new business model that has been a notable feature of the entire air transport sector during the 90s. In particular, this new business model consisted in the creation of several partnerships between companies so to make more efficient the use of aircrafts on same routes and to offer better services to customers. More recently, at the beginning of XXI century, the rise of the globalization process and the high

costs airline companies were facing while operating forced them to introduce an even deeper system of partnerships in the market[183]: it is known as the model of the *alliance agreements*.

Those agreements can vary in the form and the substance, and generally they contain several collaboration agreements which differ on the basis of the different grade of involvement of the firms. For this purpose commonly air vectors enter in *tactical alliances*, which are partnerships that "*typically involve only two carriers and cover a limited number of routes, with the principal objective of providing connectivity to each carrier's respective networks*"[184]. The most common forms of such alliances are the *joint ventures* (JV), the *code sharing agreements*, the *interlining*, the *leasing*, the *franchising*, or other more specific market strategies[185]. These kinds of alliances are still common, but many carriers that provide international routes and compete on global markets prefer joining *branded strategic alliances*, better known also as *global alliances*. Scope of *global alliances* members is to "*coordinate on a multilateral basis to create the largest possible worldwide joint network*"[186], seeking higher levels of cooperation that could enhance efficiencies and protect from competitors.

Common to all the different alliance agreements are on one side the strategical and efficiency-enhancing purposes and on the other side the rising doubts on the legitimacy of these agreements in the light of the applicable antitrust legislation. Indeed, on one side the alliance agreements allow both to share the business risk,

---

[183] AO Circular 269-AT/10, *Implications of airline codesharing*, Montreal,1997

[184] *Transatlantic Airline Alliances: Competitive Issues and Regulatory Approach*es, A report by the European Commission and the United States Department of Transportation, 16 November 2010. Examples of tactical alliances are: Virgin Atlantic / Continental (a code-sharing arrangement), American / jetBlue (an interline and frequent flyer programme arrangement), and Air France / FlyBe (a code-sharing arrangement).

[185] G. Callegari ans S.Prati, *I nuovi contratti di utilizzazione dell'aeromobile*, AA.VV. *Il nuovo diritto aeronautico,* Milano,2002, 539 ; R.I.R. Abeyratne, *Outsourcing and the Virtual Airline, Legal Implication*, Air & Space Law, 1997, 182; R.I.R. Abeyratne, *Franchsing the Airline Industry, Some Implications at Common Law*, Air & Space Law, 1997, 284; J. Balfour, *Airline Mergers and Marketing Alliances, Legal Constraints*, Air & Space Law, 1995,112.

[186] *Transatlantic Airline Alliances: Competitive Issues and Regulatory Approach*es, A report by the European Commission and the United States Department of Transportation, 16 November 2010

while enlarging the services and routes offered to consumers[187], and to accede to new geographical areas and destinations; on the other side such agreements are signed between actual or potential competitors and they allow them to share relevant and essential data such as timing, flight frequency, tariffs, prices, fidelity programs *et similia*. It is then evident that some essential pieces of information are at stake and can be used for adopting a collusive behavior among the companies participating to the agreement. For this set of reasons, the vigilance of the EU Institutions on those agreements is extremely important and, indeed, the EU Commission enacted some regulations, such as the abovementioned Reg. (EC) No. 1/2003 - that repealed the Reg. (EEC) No. 3975/87 and modified the Reg. (EEC) No. 3976/87 -, that were specifically crafted for the air transport sector, thus ending the anomalous situation in which, until 2003, the air sector was the only one in which the EU Commission did not have a clear set of powers at its disposal for this area[188].

2.5.1 The *code sharing* agreements

One of the most common *tactical alliance* agreement, widely used by the flight operators, is the *code sharing* agreement. This an effective instrument to manage the aircrafts, since it helps at reducing operative costs while expanding the geographical areas and the services provided to customers. Usually, the code sharing agreement is signed among two or more flight carriers and it consists in

[187] According to the U.S. Department of Transportation, Office of the Secretary, in its relation "*Transatlantic deregulation – the alliance network effect"*, the alliance agreements between American and European companies has brought an enhancement of the competitiveness, a reduction of the prices, an increase in the standard quality of the services offered.

[188] The Regulation 1/2003 made clear that article 101.1 applies to concentrations in the air transport industry but that article 101.3 shall be taken into consideration when assessing the potential anti-competitive behavior. The merit of this deed of law is to clearly individuate the powers of the European Commission, to enshrine once for all the 'exemption regime' applicable to agreement between air vectors and to illustrate the power (a) to require that an infringement be brought to an end, (b) to order interim measures, (c) to accept commitments, and (d) to impose fines, periodic penalty payments or any other penalty provided for in their national law.

sharing the IATA flight codes[189] and the transportation service by air for people or goods.[190] Once signed, one of the company will factually provide the aircraft and the transportation to the destination (Operating Carrier – also known as OC[191]) while the other signatories will be in charge of promoting and of selling the tickets for the flight operated by the OC[192]. Then, on the basis of such agreement, the MCs will use their code on the services provided by the OC when they sell tickets related to that flight[193]. Thus, the *code-sharing* system generates a coordination mechanism among two or more operators on the same connection and on the same market[194].

---

[189] According to the IATA *Passenger Service Conference Resolution n. 762* the flight is made of two or three letters plus three arabic numbers.

[190] ICAO *Manual on the Regulation of International Air Transport*, code sharing definition: "*use of the flight designator code of one air carrier on a service performed by a second air carrier, which service is usually also identified (and may be required to be identified) as a service of, and being performed by, the second air carrier*". An European Union definition is not given but according to European Competition Authorities of 2004, "*A code-sharing agreement is an agreement between two or more air carriers whereby the carrier operating a given flight allows one or more other carriers to market this flight and issue tickets for it as if they were operating the flight themselves. In practice, these other carriers add their own carrier designator code and flight number onto that of the operating carrier. Code share partners also agree on how they compensate each other for the seats they sell on one another's flights*". According to the American Department of Transportation, "[t]*he term 'code-sharing' may be defined as a marketing arrangement that permits a U.S. air carrier to sell service under its name and airline designator code when the service is provided in whole or in part by an-other air carrier — for discussion in this bulletin, a foreign air carrier*", in Flight Standards Information Bulletin (FSIB) for Airworthiness (FSAW) and Air Transportation (FSAT) n. FSAW 95-06 and FSAT 95-14 entitled *U.S. Air Carrier code sharing Authorizations and Various Alliances with Foreign Carriers*.

[191] Operating Carrier, so the one that operates the flight, is defined by S. Bursti, in "*Contratto di trasporto aereo*", in Trattato di diritto civile e commerciale Cicu-Messineo, Milano, 2001, 518, as "[…] *the one, without auxiliaries or aid of the Marketing Carrier, operates the transport of goods and passengers without requiring further authorization by the Marketing Carrier* […]". See also S. Zunarelli, in *La nozione di vettore*, Milano, 1987.

[192] The latter(s) is known as the Marketing Carrier (MC).

[193] Strictly relevant and functionally linked to the code sharing agreement is the so called class mapping which offers a classification mechanism to convert tariffs, prices and the passenger categories (Premium, Basic, Economy and so forth). Basically it lets the Computer Revised System (CRS) for ticket bookings to dialogue with all the signatories' CRSs.

[194] Reg. 80/2009 introduced some rules in the Computer Revised System with reference to the code sharing agreements, providing in the Annex I that: "*Where air*

Furthermore, the coordination is strengthened by the sharing of info and data on passengers, timing, and modifications to the flights.

A singular hypothesis, which differs from the *code-sharing* framework, is represented by the lack of sufficient combination of numbers and letters to differentiate the flights in a same market or region. Then it is evident that there could be an undue confusion for the customers, since the IATA flight codes are considered distinctive of each flight operated by distinct operators. Then the IATA association adopted a resolution on the matter, allowing companies to have the same codes only if codes use could not result in any confusion for the customers. This is the rare case where there is no a *code-sharin*g agreement applicable among the companies, but simply a case of codes duplication, by doctrine known as *controlled duplication*[195].

What it is striking in the *code-sharing* accords is that the pieces of information shared are factors that affects the grade of companies' competitiveness when talking about connections offered by the different carriers[196]. Indeed, sharing such sensible pieces of information, on the one hand, can affect the free competition on routes and on airports where such agreements are in effect, since they allow signing firms to know such info and to use them to opportunistically change their behavior. In practical terms it has the same final effect of any horizontal agreement[197]. On the

---

carriers operate under code-share arrangements, each of the air carriers concerned — not more than two — shall be allowed to have a separate display using its individual carrier-designator code. Where more than two air carriers are involved, the designation of the two carriers shall be a matter for the carrier actually operating the flight".

[195] IATA Resolution n. 762, art. 5 where the code 'SJ' was used in 1994 both by the Polar Air Cargo of California and by New Zealand southern Air for passengers.

[196] Very complicated code sharing agreements are seen in flights connecting archipelagos. An example is the Mauritius (MRU) – Nairobi (NBO) flight, connected via St.Denis-de-la-Réunion (RUN) and Moroni (MAH), operated by Air Austral (UU). This flight is sold under many different codes according to where the passenger takes off: MK 534 (flying from MRU to NBO), MK534 and UU534 if flying from MRU to RUN, MK534 if flying from MRU to HAH, UU 534 if flying from RUN to HAH, AF 4534 if flying from RUN to NBO, MK 534 or UU 534 if flying from HAH to NBO, *ICAO Circular 269-AT/10, Implications of airline code sharing*.

[197] Commission Notice, *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements*, (2001/C 3/02).

other hand, the beneficial effects of such agreements are great for companies and customers. The flight is operated by one company that shall care exclusively of the flight operations, while selling and distributing tickets is made by other companies whose main responsibility is just to let as many people as possible to fly out to their destination. This system allows some considerable reductions of costs, being possible for firms to focus their efforts towards the operational or the marketing area, while offering the best services to the customers[198]. That is why the European Courts had been very cautious on determining the nature of code sharing agreements since it could be beneficial to the competitiveness of flight companies and to the customers.

As exemplified by several decisions[199], judges have the duty to weigh the positive and negative effects of each *code-sharing* accord being brought before them. They have to check the anticompetitive effects, the pros for the consumers, the features of the airline companies involved, the duties contained in the contract, the grade of coordination reached and the importance and the quantity of routes subjected to the arrangement. Indeed, analyzing the airports and routes involved is essential to really assess the danger the agreement poses to the free competition.

Accordingly, we subdivide those agreements in different categories. In point of fact, a *code-sharing agreement* is defined *naked* if it merely shares the IATA flight codes and contains the allotment program. If instead it concerns other features beyond

[198] It is considered by the ICAO as a sort of joint venture accord (JV), in order to share costs and benefits using the same flight code, *ICAO Circular 269-AT/10, Implications of airline code sharing*.

[199] European Commission decision COMP/37.444 – SAS/Maersk Air and COMP/37.386 – SUN Air/SAS and Maersk Air, 18.7.2001 (2001/716 EG). confirmed by CFI decision T-241/01, 18.07.05; see joined cases T-191/98, T-212/98 and T-214/98, Atlantic Container Line (TACA), para. 939, and case T-395/94, Atlantic Container Line, [2002] ECR II-875, para 330; European Commission decision COMP 37.730 – AuA/LH, OJ, 10.09.2002, L 242, 25. On the matter some outstanding cases judged by Italian courts and authorities are: Agcm, 13 gennaio 1999, n. 6793, Alitalia/Meridiana, in Boll.n. 2/1999; TAR Lazio, 7 settembre 1999, n.1917; Consiglio di Stato, 18 dicembre 2002, 7028; see also Agcm, 24 ottobre 2002, n. 11330, Alitalia/Volare, in Boll. n. 43/2002; TAR del Lazio, 27 febbraio 2003, n. 4267; Agcm, 26 febbraio 2003, AS254, "*Ripartizione del traffico aereo sul sistema aeroportuale di Milano*", in Boll. n. 8/2003.

those usually contained in the *naked* agreements, the arrangement is known as *common product agreement*[200].

Truly, *code-sharing* agreements are used by firms to expand the market they cover by sharing a flight operated by another company, thus the vast majority of them are stipulated for specific destinations and involved mainly just two cities or airports[201]. Those agreements are called usually *point-to-point*. While if such agreements are used in the context of a wider connection – usually among different continents[202] – and they coordinated the departure and arrival time - so to drop-off/drop-in passengers right away - they are defined as *feeding/defeeding* agreements.

Another interesting feature of these contracts is the way companies subdivide the seats available in the aircraft. The total capacity could be freely handed by the OC to the MC(s) without any limits of numbers and categories - those are the *free flow*[203] code sharing agreements -, while the capacity can be partially handed to the MC(s) through *give back* or *block space* agreements[204]. In the *block space* contracts it is often used the following wording to underline the business risk is also on the VM: "*operating carrier will provide an agreed number of seats to the marketing carrier on specified services between points in(...) and points in (...).The two carriers will buy to each other a number of seats on the services/sectors under the scope of the agreement according to the details specified*", adding that "*both*

[200] If the agreement has a deeper exchange of info and relevant data, close to the model of an alliance, then the arrangement is included in the alliance framework and it falls outside the definition of code sharing.

[201] The first use of these agreements was in the US, where big companies had to comply with the duty to connect also the smallest airports and cities. So they share their codes with local and regional flight operators so to offer also these destinations at the national level, (US DoT E-25834 of 13 October 1967), J.E.C. De Groot, *Code Sharing, Unites States' policies and the lessons for Europe,* 64

[202] First European examples of code sharing agreements is the flight Madrid – Beirut operated by Middle East Airlines in 1975, M.Z.F. Li, *Distinct features of lasting and non-lasting airlines alliances*, in Journal of Air Transport Management, 2000.

[203] In those the *last seat availability* principle is applied, according to which all the seat available, until the last one, could be allocated by the MVs on the market.

[204] The latter is more stringent to the MV because the unsold seats are paid by the MV itself, while in the give back contract the MV has a period of time to sell the tickets otherwise the seats will be given back to OC that could sell them by itself. According to some authors, for instance J.E.C. De Groot, this contract has been defined as a *partial wet lease* agreement.

airlines will pursue an independent tariff and sales policy with regard to respective capacity on each code-share service"[205]. The last addition is essential to avoid antitrust claims of unlawfulness, since it is clear that providing a fixed tariff for all the participants in the agreements will reduce their space of free competition thus creating the basis for an illegal concentration behavior.

Furthermore, the *common product* agreements single features are left to the complete autonomy of the parties that could freely add several variations to the *naked code-sharing*, being aware those shall not reach the complexities of an alliance agreement[206]:

- pro-rate or interlining agreements for defining rules on sales and invoices;
- class mapping for the allocation of tickets` categories;
- timing coordination for allowing better connections;
- coordination of the handling services;
- revenue sharing agreements;
- shared frequent flyer programs;
- standardization of services to offer a seamless service

Some residual examples of arrangements that are very close to the code sharing agreements are the f*ranchising* and the *pooling* agreements. The franchising agreement is featured by a *franchisor* which shares to its affiliate(s) – *franchisee* - its IATA flight codes, the trademarks and other commercial signs while the *franchisee* will operate the flight according to some set standards. The violation of these standards will cause the application of monetary fines or the resolution of the contract. The *pooling* agreement simply provides that two or more companies will share the costs and revenues on some flights where they use their own different IATA codes[207].

---

[205] *IATA block space agreement layout: An example for companies.*

[206] On the matter the ICAO expressed its concern in the *ICAO Circular 269-AT/10,Implications of airline code sharing*

[207] J.P. Tosi, *Problemes actuels posés par l'affretément aéerien,* in Revue Fr. De Droit aérien et spatial, 1989, 15 ss.

2.5.2 The antirust analysis of *code sharing* agreements

The current state of the art for *code-sharing* agreements counts more than 600 different kinds of partnerships between airline operators in the different forms of *naked code-sharing* or *common product framework* (blocked space, class mapping, joint ventures, franchising *et alia*)[208].

Understanding the several extra or supplementary arrangements contained within the *code-sharing* agreements is essential to determine whether they have anti-competitive effects. Indeed, on a recent statement, the European Commission made an important remark on how the terms and conditions of the single contract must be assessed to clearly identify potential threat to competition: "*Whether or not a code-sharing arrangement is anti-competitive depends to a large extent on the supplementary arrangements, such as a franchising type of code sharing arrangement, which eliminates competition between partn*ers"[209].

According to what is stated above, it is evident that the *code-sharing* agreements represent the autonomous choice of air transport vectors, to share benefits and costs of flights, to improve service, reduce costs and compete in the global market. They have plenty of positive side effects, but it is also true that those were repeatedly considered as detrimental and horizontal agreements in several competition cases assessed by the European institutions. On the matter, the European Commission intervened at the beginning of the XXIst century – in 2001 - with reference to all those practices and agreements autonomously signed by private companies that had as their object sharing certain info, data and other relevant features. Indeed, in the Commission Notice entitled "*Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements*", the European Commission stated that "[…] *A cooperation is of a 'horizontal nature' if an agreement or concerted practice is entered into between companies operating at the same level(s) in the market. In most instances, horizontal cooperation amounts to cooperation between competitors.* […] *Horizontal cooperation may lead to competition problems. This*

[208] ICAO in Worldwide air transport conference: *Challenges and opportunities of liberalization*

[209] *Guide to European Community legislation in the field of civil aviation*, Directorate-General for Energy and Transport, European Commission, June 2007

is for example the case if the parties to a cooperation agree to fix prices or output, to share markets, or if the cooperation enables the parties to maintain, gain or increase market power and thereby causes negative market effects with respect to prices, output, innovation or the variety and quality of products"[210]. Notwithstanding the alert of the European Commission Notice, where it is clear to EU authorities that those agreements are mainly positive to the SMEs European system; then, the European Commission, shall be cautious when delivering a decision on the matter. In fact, the European Commission added *"*[on] *the other hand, horizontal cooperation can lead to substantial economic benefits. Companies need to respond to increasing competitive pressure and a changing market place driven by globalization, the speed of technological progress and the generally more dynamic nature of markets. Cooperation can be a means to share risk, save costs, pool know-how and launch innovation faster. In particular for small and medium-sized enterprises cooperation is an important means to adapt to the changing market place* […]"[211].

Moreover, the European Commission repeatedly reminded all the parties involved in the process of surveillance on these agreements, that only a case-by-case approach could result in a fair analysis of such accords. For this reason, the European Commission explains that: "[m]*any horizontal cooperation agreements, however, do not have as their object a restriction of competition. Therefore, an analysis of the effects of the agreement is necessary. For this analysis it is not sufficient that the agreement limits competition between the parties. It must also be likely to affect competition in the market to such an extent that negative market effects as to prices, output, innovation or the variety or quality of goods and services can be expected. Whether the agreement is able to cause such negative market effects depends on the economic context taking into account both the nature of the agreement and the parties' combined market power which determines - together with other structural factors - the capability of the cooperation to affect*

[210] Commission Notice, *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements*, (2001/C 3/02), paragraphs 1 to 3.
[211] Commission Notice, *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements*, (2001/C 3/02), paragraphs 1 to 3.

overall competition to such a significant extent"[212]. The European Commission is then affirming that a valid analysis shall pass through a *rule of reason* approach, for instance verifying the "*market effects as to prices, output, innovation or the variety or quality of goods and services*".

The SMEs system is vital to Europe's economy, while operating under the law; adopting a *code-sharing* agreement is then a major issue for the enactment of such agreements between air companies. In the Reg. n. 1008/08 the legislator, aware of the relevance of those agreements, redundantly reminded that firms can sign and undergo *code-sharing* agreements but "*without prejudice to the Community competition rules applicable to undertakings*"[213]. Besides this reminder, the agreement shall be clearly assessed considering its side effects, for example those

[212] Commission Notice, *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements*, (2001/C 3/02), paragraphs 19 to 20.

[213] Reg. 1008/08 on common rules for the operation of air services in the Community, articles 15.4 and 15.5:

"*4. When operating intra-Community air services, a Community air carrier shall be permitted to combine air services and to enter into code share arrangements, without prejudice to the Community competition rules applicable to undertakings. Any restrictions on the freedom of Community air carriers to operate intra-Community air services arising from bilateral agreements between Member States are hereby superseded.*

5. Notwithstanding the provisions of bilateral agreements between Member States, and subject to the Community competition rules applicable to undertakings, Community air carriers shall be permitted by the Member State(s) concerned to combine air services and to enter into code share arrangements with any air carrier on air services to, from or via any airport in their territory from or to any point(s) in third countries.

A Member State may, in the framework of the bilateral air service agreement with the third country concerned, impose restrictions on code share arrangements between Community air carriers and air carriers of a third country, in particular if the third country concerned does not allow similar commercial opportunities to Community air carriers operating from the Member State concerned. In doing so, Member States shall ensure that restrictions imposed under such agreements do not restrict competition and are non-discriminatory between Community air carriers and that they are not more restrictive than necessary".

cited by the Directorate-General such as the effects on small and mid-sized air carriers[214] and on the quality of the services provided[215].

The principal legal problem is to assess whether the single accord is in contrast with article 101 TFEU, which forbids the establishment of "[…] *all agreements between undertakings, decisions by associations of undertakings 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* […]"[216].

The second issue is to prevent restrictive agreements while boosting the conclusion of accords that have beneficial effects to consumers, partners, suppliers *et alia*. For this reason, the EU Bodies started introducing exemptions for certain categories of agreements that have a technical nature "*as their sole object and effect is to achieve technical improvements or cooperation*"[217], providing in the Regulation 3975/87, a not exhaustive list of sample cases that could be used by courts when assessing these cases. Those are considered not relevant cases, due to the fact that their sole scope is to enhance efficiencies at the technical level for air transports. The list[218] contains the following samples:

a) The introduction or uniform application of mandatory or recommended technical standards for aircraft, aircraft parts, equipment and aircraft supplies, where such standards are set by an organisation normally accorded international recognition, or by an aircraft or equipment manufacturer;

---

[214] "Exclusion from code sharing possibilities can be a threat to small and mid-sized air carriers who wish to find a partner to create links to the rest of the world, especially to markets where they do not have traffic rights", Guide to European Community legislation in the field of civil aviation, *Directorate-General for Energy and Transport*, European Commission, June 2007

[215] "code sharing arrangement may also allow more effective accommodation of passengers of the code share partners in the same airport terminal (easier transfers for passengers and baggage and common lounges), common scheduling, common marketing, mutual participation in each other's frequent flyer programs etc", Guide to European Community legislation in the field of civil aviation, *Directorate-General for Energy and Transport*, European Commission, June 2007

[216] Article 101.1 TFEU

[217] Article 2.1 Reg. 3975/87 of 14 December 1987

[218] The list is the not exhaustive and it is attached in the Annex I to the Reg. 3975/87

b) the introduction or uniform application of technical standards for fixed installations for aircraft, where such standards are set by an organisation normally accorded international recognition;
c) the exchange, leasing, pooling, or maintenance of aircraft, aircraft parts, equipment or fixed installations for the purpose of operating air services and the joint purchase of aircraft parts, provided that such arrangements are made on a non-discriminatory basis;
d) the introduction, operation and maintenance of technical communication networks, provided that such arrangements are made on a non-discriminatory basis;
e) the exchange, pooling or training of personnel for technical or operational purposes;
f) the organisation and execution of substitute transport operations for passengers, mail and baggage, in the event of breakdown/delay of aircraft, either under charter or by provision of substitute aircraft under contractual arrangements;
g) the organisation and execution of successive or supplementary air transport operations, and the fixing and application of inclusive rates and conditions for such operations;
h) the consolidation of individual consignments;
i) the establishment or application of uniform rules concerning the structure and the conditions governing the application of transport tariffs, provided that such rules do not directly or indirectly fix transport fares and conditions;
j) arrangements as to the sale, endorsement and acceptance of tickets between air carriers (interlining) as well as the refund, pro-rating and accounting schemes established for such purposes;
k) the clearing and settling of accounts between air carriers by means of a clearing house, including such services as may be necessary or incidental thereto; the clearing and settling of accounts between air carriers and their appointed agents by means of a centralised and automated settlement plan or system, including such services as may be necessary or incidental thereto.

After this first piece of legislation, the European legislator has moved forward the creation of a system of exemptions for companies, recognizing that the air transport may benefit from an exemption framework for *code-sharing* and *common product* agreements. In this context, the Reg. 3976/87 – it immediately followed the Regulation mentioned above – provided that further exemptions could be granted to "*certain categories of agreements between undertakings, decisions of associations of undertakings and concerted practices concerning:*

- *the allocation of seat capacity and the coordination of timetables;*
- *consultations on tariffs;*
- *certain agreements on joint operation of new services;*
- *slot allocation in airports;*
- *computer reservation systems.*"[219].

Then in 1993 to further extend the area of exemption for such agreements, that could include also passenger tariffs and class mapping, the Reg. 1617/93 of 25 June 1993[220] introduced exemptions on the passenger tariffs "*on condition that:*

- *participants discuss passenger tariffs only;*
- *for each tariff category and for the seasons covered by consultations, passengers are able to combine the service with services on the same route on the same ticket and, in so far as circumstances allow, to replace or change reservations;*
- *passenger tariffs are applied on a non-discriminatory basis;*
- *participation in consultations is optional and open to all air carriers;*

[219] Reg. 3876/87 Summary of Act

[220] The Regulation was amended by Reg. 1105/2002 of 25 June 2002, Reg. 1083/1999 of 26 May 1999 and by Reg. 1523/96 of 24 July 1996. Those numerous successive amendments significantly reduced the scope of this Regulation. It is now limited to consultations on passenger tariffs and slot allocation at airports.

- *consultations are not binding on participants, which means that participants must maintain, after consultations have ended, the right to act independently on passenger tariffs;*
- *consultations do not give rise to an agreement on staff pay or other aspects of tariffs covered by the discussion;*
- *where tariffs have to be notified, each participant informs the competent authorities of the Member States concerned, on an individual basis, of any tariff not covered by the consultations.*

The exemption concerning slot allocation and scheduling applies on condition that:

- *consultations are open to all air carriers;*
- *priority rules are drawn up and applied without any discrimination;*
- *the priority rules are made available to any interested party on request;*
- *new arrivals are entitled to 50% of new or unused slots;*
- *by the time of these consultations at the latest, the participating carriers have access to the information.*"[221]

From this perspective, it is fairly evident the intention of EU Institutions to mitigate the effects of antitrust legislation on certain sectors by enacting special provisions. The Regulations enacted along the years for the air transport industry are the valid proof of the need to provide in certain cases exceptions to the Article 101(1) regulatory regime, in order to allow companies to operate, thus benefiting from cooperation, and to share these benefits with third parties, first of all the passengers.

2.5.2.1 SAS/Maersk Air case

Notwithstanding these numerous exemptions applicable to the *code-sharing* agreements, there are some cases in which the European authorities – along with national authorities – found some companies in breach of article 101 TFEU. Usually companies are allowed to undergo such agreements, even if they last for

[221] Reg. 3876/87 Summary Act

more than few years, if the vectors are not directly competing or if the single vector could have not autonomously operated the route because of technical or economic issues[222]. Attention shall be focused on subsequent accords that might follow the first *code-sharing* agreement. The first contract could be the stepping stone for knowing and understanding some dynamics within the competing companies and – if it is the case - for deciding to invest in them and include them in their global alliance. An example is the case of Finnair and Aer Lingus, that signed such accord for the route Dublin – Stockholm in 1997, then deciding to enter in the Oneworld *branded strategic alliance*.

On the other side, if the agreements contain a restriction on the companies, for instance for opening new routes or for adding more seats, the European Commission shall intervene to censure such agreement. An example is the SAS/Maersk Air case[223], where the European Commission found out that a horizontal was in practical terms applying among the two. In point of fact, on some domestic[224] and international routes[225] it was agreed that:

a) "*the parties remain independent and retain their own corporate identity, brand name and capacity to take autonomous decisions;*
b) *in circumstances where SAS is not in a position to operate certain routes or flights to/from Copenhagen or to/from Jutland, SAS will invite Maersk Air to start operations on such routes (subject to SAS' regulatory, commercial and strategy considerations);*

---

[222] J.P. Tosi, *Problémes actuel posés par l'affrétement aérien*, 34, in Code-sharing agreements in scheduled passenger air transport, 13

[223] 2001/716/EC: Commission Decision of 18 July 2001 relating to proceedings pursuant to Article 81 of the EC Treaty and Article 53 of the Agreement on the European Economic Area (Case COMP.D.2 37.444 — SAS Maersk Air and Case COMP.D.2 37.386 — Sun-Air versus SAS and Maersk Air) (Text with EEA relevance) (notified under document number C(2001) 1987)

[224] Copenhagen-Billund; Copenhagen-Esbjerg; Copenhagen-Bornholm; Billund-Aalborg

[225] Copenhagen-Athens; Copenhagen-Faroe Islands; Copenhagen-Kristiansand; Copenhagen-London (Gatwick); Copenhagen-Venice; Billund-Amsterdam; Billund-Brussels; Billund-Frankfurt; Billund-Faroe Islands; Billund-London (Gatwick); Billund-Nice; Billund-Paris; Billund-Stockholm.

c) *the costs for services provided by one party to the other under the implementing agreements shall not be less favourable than the costs for such services offered by such party to any third carrier;*

d) *each party shall develop at its own cost automated procedures to provide the non-operating carrier with its seat inventory information, in order to enable the non-operating carrier to sell seats under its own designator code;*

e) *both parties undertake to achieve the shortest possible connection time between flights. In particular, Maersk Air will coordinate its schedules of the code-shared flights, to maximise passenger connection opportunities and minimise the waiting time for connecting passengers;*

f) *the parties shall as soon as technically feasible provide passengers travelling on the code-shared flights with through check-in, seat assignments, boarding passes, documentation checks, baggage tags and FFP credits for connecting flights*"[226].

In addition to the above-mentioned objectives, there were some that were not expressly declared in the contract:

- "*first, a key (shared) objective of SAS and Maersk Air during the negotiations that they held during the whole of 1998 was to determine which routes should be operated by which carrier after the co-operation had entered into force. For example, Maersk Air requested that 'SAS should withdraw from Billund and leave its future development to us'; or that 'Maersk should take over all Danish domestic routes'. The document also records the SAS demand to Maersk Air to 'limit development of routes out of Copenhagen to what is mutually agreed';*
- *second, SAS wished Maersk Air to cease cooperating with other airlines. SAS demanded that Maersk Air should 'refrain from participation in other*

[226] 2001/716/EC: Commission Decision of 18 July 2001, SAS/Maersk Case, paragraph 16

alliances', 'abandon cooperation with Finnair' and 'abandon cooperation with Swissair at Geneva';

- *third, SAS aimed at avoiding price competition. One of SAS' demands at the early negotiation stage was that 'Maersk should allow SAS to determine prices in Scandinavia';*
- *as regards routes out of Copenhagen, Maersk Air and SAS agreed that Maersk Air would not operate new international routes without specific request or approval by SAS and, conversely, that SAS would not operate on domestic or international routes that are operated by Maersk Air.*"[227]

Those above are some of the principal and most interesting scopes[228] that were clearly in contrast with competition rules[229], since they were aimed at fixing prices or output, sharing markets, and maintaining, gaining or increasing market power. For this reason, the European Commission - via its Competition Commissioner Mario Monti - stated that "[t]*he sharing-out of the route network may be advantageous to the parties. It is unlikely that the parties would have concluded the agreement if it had not been in their mutual economic interest. For example, each party now has a guarantee that the other will not start to operate on its routes. However, the improvement of the parties' position by anti-competitive means does not satisfy the requirements of Article 81(3). Rather, in order for Article 81(1) to be declared inapplicable, the agreements should produce appreciable objective*

[227] 2001/716/EC: Commission Decision of 18 July 2001, SAS/Maersk Case, paragraphs 20 to 21

[228] See 2001/716/EC: Commission Decision of 18 July 2001, SAS/Maersk Case, paragraphs from 21 on for a deeper assessment on each single route by the European Commission

[229] "[…] *A cooperation is of a 'horizontal nature' if an agreement or concerted practice is entered into between companies operating at the same level(s) in the market. In most instances, horizontal cooperation amounts to cooperation between competitors.* […] *Horizontal cooperation may lead to competition problems. This is for example the case if the parties to a cooperation agree to fix prices or output, to share markets, or if the cooperation enables the parties to maintain, gain or increase market power and thereby causes negative market effects with respect to prices, output, innovation or the variety and quality of products*", in Commission Notice, *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements*, (2001/C 3/02), paragraphs 1 to 3.

advantages in the public interest of such a character as to compensate for the disadvantages in the field of competition. In the present case, there is nothing to suggest that the agreement produces any appreciable objective advantages. Moreover, even if these advantages existed, they would not compensate for the disadvantages resulting from the withdrawal of the main competitor from various markets, or from the overall non-competition clause between the two main airlines in Denmark […]"[230]. It is straightforward that no exception could be granted in the present case, since the benefits to the customers and the market were non-existent.

2.5.2.2 Air France/Alitalia case

A slightly different approach is needed when assessing long routes and routes to third countries. This kind of assessment could be critical[231]. For instance, this is the case in the exemptions granted to *code-sharing* agreement among Alitalia and Air France or British Airways, Iberia and GB Airways.

In Air France/Alitalia case[232], the two companies from 2002 on were mutually recognizing their own Frequent Flyer Programs (FFP)[233] and they were making an ample use of cooperation agreements such as code-sharing, network coordination and route cooperation:

"*AF and AZ will make extensive use of code-sharing on scheduled services worldwide, everywhere relevant on their respective networks, except where there exist aeropolitical constraints or technical limitations. The code-sharing will be on*

[230] 2001/716/EC: Commission Decision of 18 July 2001, SAS/Maersk Case, paragraph 77

[231] Cecilia Severoni, *Code Sharing*, 2010.

[232] Case COMP/38.284/D2 Sociètè Air France / Alitalia Linee Aeree Italiane S.p.A.

[233] "*For the time being, each Party will keep its own Frequent Flyer Programme (FFP). A progressive convergence to a Sky Team FFP could be envisaged later. The Parties have signed mutual recognition agreements for their respective FFPs which will allow the members of either Party's FFP to earn and redeem points when travelling with the other Party. Compensation payments will be established between the Parties in order to settle what the Parties owe each other in relation to the mutual recognition of FFPs*", Case COMP/38.284/D2 Sociètè Air France / Alitalia Linee Aeree Italiane S.p.A., paragraph 20.

a "free-flow" basis, which means that there is no pre-established limit on the number of seats that each Party can sell on the code-shared flights.

The Parties will use reasonable efforts to coordinate their flight schedules in order to minimise the waiting times of connecting passengers.

The Parties will coordinate their prices where possible. The key markets and the relevant city pairs for which common pricing will be developed will be identified by the Parties in due course, taking into account the common presence on the market, the market position and bilateral or Governmental issues (for example, third-country code sharing)

An example is the case of a bilateral agreement concluded by France with a third country that acts as an obstacle for AZ to add its code to the AF-operated flight between France and that third country.

The sales forces of the Parties will remain separate in their respective markets, but their policies will be coordinated. Each Party will keep its own reservation and ticketing system. Links will, however, be implemented between the different systems"[234].

Such trade was evidently restricting competition on routes of the Italy/France Bundle, further strengthening the position of the two companies in the market[235]. Yet, the agreement would have brought beneficial effects to consumers, suppliers and it would have reduced costs enhancing efficiencies.

In the end, the beneficial effects are *de facto* wider than the negative effects, then the Commission shall, accordingly to Reg. 3976/87[236] and the rules contained in the

---

[234] Case COMP/38.284/D2 Sociètè Air France / Alitalia Linee Aeree Italiane S.p.A., paragraphs from 15 to 19.

[235] "*The cooperation between the Parties affects trade within the Community and in particular, between France and Italy. The agreements relate to the provision of air transport services on such markets and alter the manner in which those services would have been provided in the absence of an agreement. As a consequence, the agreements affect trade between the Member States*", Case COMP/38.284/D2 Sociètè Air France / Alitalia Linee Aeree Italiane S.p.A., paragraph 104.

[236] the Reg. 3976/87 provided that further exemptions could be granted to "*certain categories of agreements between undertakings, decisions of associations of undertakings and concerted practices concerning:*

- *the allocation of seat capacity and the coordination of timetables;*
- *consultations on tariffs;*
- *certain agreements on joint operation of new services;*

third package[237], accept the agreement. Indeed, considering such agreement in the wider context of the Sky Team Alliance[238], the European Commission stated "[t]*he Commission can accept that, overall,* [it] *contributes to improving the production and distribution of transport services and to promoting technical and economic progress. The co-operation agreement is likely to generate benefits in terms of creating a more extensive network which would offer customers better services in terms of an increased number of direct and indirect flights. While an increase in the airline's' size does not necessarily lead to a cost reduction because of constant economies of scale, savings may be realised due to an increase in traffic throughout the network, better planning of frequencies, a higher load factor, and so forth*"[239].

2.5.2.3 Iberia/British Airways/GB Airways case

The European Commission showed a positive behavior in favour of code-sharing agreements also for several other companies belonging to different Alliances. For instance, in 2003, the European Commission cleared such accord for three companies – Iberia, British Airways and GB Airways – members of the Oneworld alliance.

- *slot allocation in airports;*
- *computer reservation systems.*"

[237] The principal conditions read as follows:
they shall be owned and effectively controlled by Member States and/or nationals of Member States;
their principal place of business shall be located in a MS – as also stated in the ASAs;
their financial situation shall be good and sound;
they shall be appropriately insured to cover liabilities in case of accidents; and
they shall have the professional ability and organization to ensure the safety of operations in accordance with the regulations in force.

[238] Alitalia and Air France were both members of the Sky Team Alliance in 2002. On the matter the European Commission wrote: "[…] *through their cooperation, the Parties seek to establish a far-reaching strategic bilateral alliance, the main elements of which are as follows: […] b) coordination of the Parties, passenger service operations, including extensive use of code-sharing*".

[239] Case COMP/38.284/D2 Sociètè Air France / Alitalia Linee Aeree Italiane S.p.A., paragraph 132.

The parties involved wanted to extend their cooperation in the Spanish and British markets by adopting a further:

1) "*extension of code-sharing services (that is placing the code of one carrier on certain of the others' service), in particular on routes between the UK and Spain and vice versa*
2) *coordination of pricing and commission policy, with respect to those services they deem relevant;*
3) *common network planning, in order to better adapt capacity to customer demand;*
4) *common approach towards cargo activities, including cooperation in planning, pricing, capacity management, sales and handling activities;*
5) *revenue and profit sharing (passenger and cargo);*
6) *customer service; the parties intend to provide each other with data relating to customer service performance and customer satisfaction;*
7) *inventory and yield management;*
8) *other joint activities to be agreed between the parties.*

In addition BA and Iberia plan to co-operate in the following areas:

1) *development of Frequent Flyer Programmes ("FFPs"); the parties wish to explore possible ways of improving co-operation on FFPs and services in particular for customers resident in the EU;*
2) *co-ordination of sales and marketing; the parties intend to converge their sales, e.g. through the combination of retail outlets, joint advertising, but the parties will maintain their individual brands;*
3) *ground-handling; the parties intend to use common handling agents and consider opportunities of shared facilities;*
4) *joint contracting with travel agencies, distributors, general sales agents and other organisations and individuals;*
5) *harmonisation of service and product standards in order to provide a seamless product to passengers travelling on codeshare flights;*

6) *joint purchasing initiatives;*
7) *information technology*"[240].

The European Commission decisions was based on the potential anti-competitive effect of the agreement for what concerns the article 101 TFEU; then secondly it was assessed whether the accord was yet potential restrictive to free competition but it could bring beneficial effects that are more relevant than the infringements; final step was to check whether these beneficial effects are applicable in the relevant markets identified on the basis of the *point of origin/point of destination pair* principle (O&D)[241]. The analysis shall be carried out on several routes distinguishing the overlapping from the non-overlapping routes. The agreement was yet found to be restrictive of the competition basing the analysis on this sequence, but it was in any case cleared considering that it contributed to improving the production or distribution of goods or to promoting technical or economic progress to the benefit of consumers[242], it allowed consumers a fair share of the

[240] CASE COMP/D2/38.479: British Airways / Iberia / GB Airways, paragraphs 8 to 9

[241] Generally Commission follows this sequence. This is reported for example in the Air France/Alitalia case "*In order to determine whether or not the non-operating Party was a potential entrant on a given non overlap route, an economic approach has been applied, based on a set of objective criteria which make it possible to determine whether entry on this route would be commercially realistic for the non-operating Party. According to this approach, an airline will, in principle, only be considered as a potential competitor on a specific route if that route is either directly linked to one of its hubs or is sufficiently large and frequented by local traffic to allow market entry on a point-to-point basis, while taking into account the operational requirements and benchmarks of the respective business strategy. As benchmarks, the Commission has notably examined whether the carrier in question operates routes of similar size/characteristics, whether it has already a local market presence and whether it operates appropriate aircraft*", Case COMP/38.284/D2 Sociètè Air France / Alitalia Linee Aeree Italiane S.p.A., paragraph 111.

[242] "*According to the parties the envisaged co-operation will result in important efficiencies, such as cost savings, more efficient use of resources, improved connectivity, new on-line connections, better support and coverage on thin routes, development of new products and promotions etc, leading to lower fares and better quality of services. Joint working groups will explore the full range of cost savings available to underpin future price reductions and service enhancements to improve customer proposition.*

resulting benefits[243], finally it was deemed *indispensable* to keep a certain grade of competitiveness of the companies involved[244].

The number of cases regarding *code sharing* agreements that were positively decided by the European Commission in recent years is great and still increasing, because of the consolidated tendency of the EU bodies to make vast use of the new approach in the competition area, i.e. the *rule of reason* approach. Indeed, the cases are assessed via a case-by-case approach, the economic analysis is fundamental, the

---

The envisaged fully fledged alliance between the parties, which have largely complementary networks, is indeed likely to lead to efficiency gains both in terms of cost savings as in terms of benefits in the form of new or improved airline services. So far in particular, new services have been and will be created by the parties. Moreover, given the fact that the number of connecting passengers concerned by the transaction is quite high on the more important routes London-Barcelona and London-Madrid,14 the alliance is likely to bring concrete benefits in terms of improved connectivity", CASE COMP/D2/38.479: British Airways / Iberia / GB Airways, paragraphs 44 to 45.

[243] "*According to the parties the envisaged improved pricing and customer service offerings will directly benefit the consumer. In particular, customers will benefit from lower fares, expanded and improved quality of services, better flight schedules and timing, better airport facilities, new fare products and promotions, greater opportunities for frequent flyers, extended code-sharing services, ticket interchangeability and seamless baggage handling for interline journeys.*

Although there are at this stage only a few concrete indications that the above identified benefits of the co-operation have indeed been passed on to consumers (e.g. increased code sharing, new services) there is as such no reason to believe that they would not on those routes where the parties are subject to sufficient competitive constraints from actual and/or potential competitors", CASE COMP/D2/38.479: British Airways / Iberia / GB Airways, paragraphs 46 to 47.

[244] "*According to the parties the implementation of the transaction is indispensable for achieving the identified benefits. The envisaged high frequency and closely co ordinated service is held to be inconceivable in the absence of a close and stable co- operation. The synergies and cost savings could only be achieved through the envisaged degree of integration.*

It can be acknowledged that, to the extent that the benefits of the envisaged co-operation will extend beyond those already achieved through membership of BA and Iberia in the global alliance "oneworld", further co-operation between the parties must be required. The benefits outlined by the parties are dependent on the full integration of the parties' networks and services, including joint revenue sharing, scheduling and fare setting and the restrictions in the co-operation agreement are necessary to attain those benefits. The Commission has accepted in similar air alliance cases that these benefits are not likely to be achieved by less restrictive forms of co-operation", CASE COMP/D2/38.479: British Airways / Iberia / GB Airways, paragraphs 48 to 49.

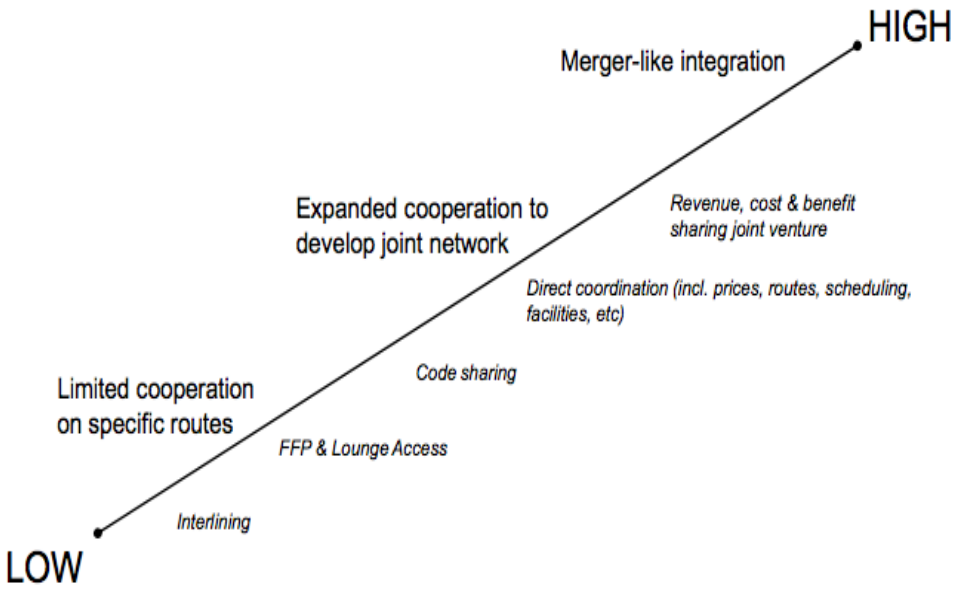
rule of reason applies and the exemptions are often used to strengthen the position of companies. This is a marked difference in respect of the antitrust legislation enforcement in the US during the first half of the XX century and in Europe from the 70s until the 90s. In those years the ideal aim of competition was to maintain and protect viable, small, locally owned businesses, so to keep and promote a market made of small producers, who base their success on their own capabilities. In this respect, the social and moral effect of a society made of small businesses was regarded as a better alternative to an economy with few leading the others towards a predetermined economic objective. Finally, it is safe to say that now competition legislation aim is to seek and to promote the strengthening of undertakings via cooperation forms, so to make use of economies of scale, to reduce costs and to better compete in markets, both the European and the global markets.

2.5.3 The *branded strategic* alliances

For better competing in continental and global markets, the *branded strategic* or *global* alliances were created to coordinate on a multilateral basis and to establish the largest possible worldwide joint network. The *global* alliance members share in different degrees their networks with other alliance's members thus offering the opportunity for enhanced revenue synergies. The degree of involvement of an air company starts from a 'basic' level of cooperation to higher and more complex levels of cooperation.

A brief description of the degree of integration of airline's' networks is shown in the table below which was presented by the Department of Transport of the United States but it is fully valid for the European market as well. As shown below, there is a broad spectrum of cooperation by alliance partners, ranging from basic, arm's length arrangements to highly integrated joint ventures ("JVs"). To assess the competitive effects of a given alliance, competition authorities must engage in a fact-intensive inquiry to determine case-by-case the structure, scope, and overlap created by each transaction. Carriers in a standard cooperation, mostly involving cooperation with respect to FFP, lounge access and *code-sharing*, engage in the lowest degree of cooperation. On the contrary, companies participating in a

revenue- or profit-sharing merger-like integration enjoy the highest degree of cooperation[245], giving birth to a *global alliance*.



Actually there are three main *global* alliances operating in the world. Together the three cover about 90% of all the flights operated every day in the globe, and it is properly considered the most extensive and most successful form of cooperation in the market[246].

The first established alliance is the '*Star Alliance*', founded in 1996 by Air Canada, Lufthansa, SAS, Thai Airways and United Airlines. It now counts about 26 members, it serves about 37,6% of the transatlantic market. Three years later American Airlines, British Airways, Cathay Pacific, Canadian Airlines and Qantas followed the example by establishing the '*One World*' in 1999. It now serve about 22,7% of the transatlantic market. The last Alliance to be created was the '*Sky Team*', established by Delta, Air France, Aéromexico and Korean in 2000. It now serves about 28,3% of the transatlantic market.

[245] It needs to be noted, however, that the degrees of cooperation are not definitive, and do not capture all the unique characteristics of each specific cooperation between carriers.

[246] Until 2003, Northwest and KLM tried to operate their own alliance but it was not successful and in 2004 they joined the Sky Team Alliance.

The reason to join the alliance is that this cooperation brings several improvements for carriers and subsequently for their passengers. Indeed as a joint DoT and European Commission research states "[g]*lobal alliances allow airlines to link their networks of routes and sell tickets on the flights of their commercial partners, thereby offering travelers access to hundreds of destinations around the world on a single virtual network. Airlines participating in an alliance aim to provide value to consumers by creating a comprehensive route network, more convenient and better coordinated schedules, single on-line prices, single point check-in, coordinated service and product standards, reciprocal frequent flyer programs, and service upgrade potential.*

By covering more destinations and providing better connections, alliance partners are also able to better address the needs of corporate customers, certain of which may be interested in a single contract covering a large network and offering attractive schedules. Although carriers with basic alliance membership in the same alliance (that is, that are not party to a JV or code-sharing agreement with price coordination) tend to compete with each other, a joint alliance offer can nonetheless provide more flexibility to give customers what they are seeking and enhance revenues".

While the carriers can improve their brand recognition through *code sharing* agreements that allow them to benefit of a wider network reach, an alliance carrier has the possibility to familiarize passengers with its individual brand by associating it with the global alliance brand. Alliance partnership with other carriers can also significantly improve access to feeder traffic of alliance partners – particularly important for long-haul operations[247]. The increase of Alliances' might render

[247] There are some airline companies of the middle east that until recently thought the alliance system was not a proper solution to pool enough resources. These companies were for example Qatar Airways and Etihad Airways, two firms that benefit from plenty of funds conceded by public authorities. They underwent a period of acquisition in Europe, Asia and Oceania until when those operations were stopped because of the rules on ownership and control. Qatar then entered the Oneworld alliance, while Etihad created a partnership entity called "*Etihad Airways* Partners" with all the companies in which it has relevant stakes. It is not using the branded strategic alliance, but a kind of holding system to offer better services for its worldwide customers that use one of its participated firms (Air Berlin, Air

difficult for unaligned carriers to secure feeder traffic at some airports. This can therefore encourage or even force them to join an alliance to benefit from more attractive conditions for feeder traffic from fellow members[248]. Also technology plays a relevant role, by allowing alliances' members to pool resources to modernize IT systems, to make them compatible with partner airlines, and thus potentially more competitive in respect of non-aligned carriers. Finally alliances are a preferred alternative or substitute to merger. The latter is definitive, while the formers are not definitive and do not encounter the limitations on control and ownership sponsored by the ICAO.

2.5.4 Antitrust enforcement for *global* alliances

At the EU level the College of Commissioners of the Commission[249] is in charge with choosing the competition policies to uphold and to assess competition infringements. The European Commission is then the enforcer of the EU competition rules, and it shall initiate an alliance investigation "*on its own initiative*" if there are concerns that the cooperation may infringe EU competition law or if it has received a complaint by another company operating in such market. Naturally, as evinced and explained in the previous chapter of this dissertation, the main EU competition rules applicable to such cases are laid out in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), together with the Regulations, White Papers and agreements we discussed above and that were enacted in the past years in the effort to improve liberalization.

Serbia, Aer Lingus, Alitalia, Etihad Regional, Jet Airways, Air Seychelles and Niki).

[248] This is what happened to Northwest and KLM when they tried to operate their own form of cooperation. The presence of three big alliances rendered impossible for them to efficacy compete in the international market.

[249] The strength of the College of Commissioners is that it groups together the Commissioners in charge of all EU policies, including competition, transport, energy, and environment. In this way, the Commission ensures that each policy area is given due consideration and that decisions are taken consistently across all areas of its competence.

2.5.4.1 The A++ Joint Venture

A very recent and relevant case concerns a deep cooperation method among some of the biggest air companies in the world. The decision[250] was released by the European Commission on 25 May 2013 and it concerns four undertakings - namely Air Canada, United Airlines, Continental Airlines and Lufthansa – that aimed at further integrating their network[251] by establishing "*a revenue-sharing joint venture ('A++ joint venture')*". In point of fact "*the agreement ('A++ agreement') concluded between AC[252], UA, Continental Airlines Inc. ('CO')[253] and LH[254] (together 'the parties') in relation to the establishment of a revenue-sharing joint venture ('A++ joint venture'), which covers among others all passenger air*

[250] CASE COMP/AT.39595 - Continental/United/Lufthansa/Air Canada

[251] These companies are the founding members of the first and still largest global alliance in the world, the Star Alliance that "*in 2011* […] *carried over 650 million passengers and member airlines had a total revenue of USD 167 180 millions",* CASE COMP/AT.39595 - Continental/United/Lufthansa/Air Canada, paragraph 8.

[252] "*AC, registered in Canada, is a subsidiary of ACE Aviation Holdings Inc. and is Canada's largest full-service network airline. AC operates a global network with hubs in Toronto, Montreal and Vancouver in Canada. In 2011, the airline achieved a total worldwide turnover of CAD 11 612 million (approximately EUR 8 438 million)*", CASE COMP/AT.39595 - Continental/United/Lufthansa/Air Canada paragraph 5.

[253] "*UA is the company created following the merger between United Air Lines Inc. and CO, two U.S. airlines. Although that merger took place in 2010, the integration of those two companies was only completed on 31 March 2013. In this Decision, references to CO should therefore be understood as a reference to UA where appropriate. UA is a publicly-held U.S. corporation with its headquarters in Chicago in the United States of America. It is a fully owned subsidiary of United Continental Holdings, Inc. The total worldwide turnover of United Continental Holdings. Inc. was USD 37 110 million (approximately EUR 26 659.5 million) in 2011.7 The merged entity operates hubs at Chicago, Cleveland, Denver, Houston, Los Angeles, Newark, San Francisco and Washington in the United States of America*", CASE COMP/AT.39595 - Continental/United/Lufthansa/Air Canada paragraph 6.

[254] "*LH is the holding company of Lufthansa Group with its headquarters in Cologne, Germany. Its passenger air transport business includes in particular Lufthansa Passenger Airlines, Swiss International Air Lines Ltd., Brussels Airlines S.A./N.V., Austrian Airlines AG, Air Dolomiti S.p.A., Eurowings GmbH, and low-cost airline Germanwings GmbH. LH operates hubs in Frankfurt, Munich, Brussels, Zürich and Vienna. Its 2011 total worldwide turnover was EUR 28 734 million*" CASE COMP/AT.39595 - Continental/United/Lufthansa/Air Canada paragraph 7.

transport services of the parties on routes between Europe and North America ('transatlantic routes'). The A++ agreement provides for extensive cooperation between the parties, which includes pricing, capacity and scheduling coordination, as well as the sharing of revenues"[255].

The European Commission started its investigation on these four companies through a preliminary investigation undergone according to article 9.1 of the Reg. 1/2003. The preliminary investigation raised some concerns about the outcome of this proposed Joint Venture on some routes and markets. For this reason the Commission started assessing the *city pair markets* (O&D), the *premium and non-premium passengers*, *non-stop and one stop flights*, and *airport substitutability*.

As evidenced by the investigation the parties involved were aiming at integrating at the maximum levels their networks, so to reach the so called metal-neutrality. The definition of this genre of closeness of their network is "*a state of events in which each Party will be incentivised to treat all flying, regardless of airline, within the scope of the provisions of the A++ agreement as flying on its own network and in which customers will also become neutral to the choice among the parties as airlines and among itineraries on any given route*"[256].

So the Commission checked whether a competition restriction applies by object and effect in the case, thus analyzing the kind of agreement signed by the parties, its aims, the practical effect on routes where before the execution of the agreement all or some of the parties are competitors. The assessment outcome was quite negative: "*The whole concept of metal-neutrality conflicts patently with the concept inherent in the Treaty provisions relating to competition, since the parties substituted competition with full cooperation for the risk of competition that would occur due to individual airlines' different incentives*"[257]. The agreement is then found being "*patently*" in contrast with article 101(1) of TFEU, with special regard to the Frankfurt-New York route.

---

[255] CASE COMP/AT.39595 - Continental/United/Lufthansa/Air Canada, paragraph 2.

[256] CASE COMP/AT.39595 - Continental/United/Lufthansa/Air Canada, paragraph 35.

[257] CASE COMP/AT.39595 - Continental/United/Lufthansa/Air Canada, paragraph 37.

As requested by Regulation 1/2003, by Commission guidelines and by the European Court's case law, it is then needed to verify if the conditions of Article 101(3) TFEU apply to such agreement, so being possible for parties to benefit from an exemption to the regulatory regime of Article 101(1) TFEU. This exemption could be granted only if the parties are able to demonstrate that the agreement meets the conditions set out in the Article 101(3) Guidelines of the European Commission, being those:

1) the agreement must create efficiencies;
2) the restrictions imposed by this agreement must be indispensable to the creation of these efficiencies;
3) consumers must receive a fair share of these efficiencies, and
4) the agreement must not create the possibility to eliminate competition in respect of a substantial part of the market.

The burden of proof is on the signatories of the agreement and, as evidenced by Article 27.4 of the Regulation 1/2003, they can also offer to integrate their agreement with certain commitments tended to free up competition and reduce entry barriers. Duty of the Commission is to evaluate such commitments, also with the help of the other parties interested – for instance the other airline operators interested in certain routes may raise questions and issues -. Such power is definitely relevant for the European Commission, since it allows it to approve, under commitments, agreements that could really bring benefits to firms and customers. It has then a power to direct restrictive accords towards lawful agreements and to turn negative accords into efficiencies and competitiveness enhancing agreements. This is one of the most outstanding power the European Commission enjoys, since it can really intervene in the conclusion of a private accord by adding terms and conditions that are in the Union's interest.
This is evident in the decision it took in the case we are discussing above. At the beginning it was considered as fully conflicting with the concept of free competition, but in the end the European Commission cleared it by adding four

transparent commitments[258] and by being assured by other airline operators that the commitments were sufficient for them to exploit those new commitments to enter the market[259] and compete with the new enhanced cooperation[260].

The commitments in the case were:

- slot commitment that involves the release of landing and take-off slots by the parties at airports to interested competitors that are ready to operate new or increase existing frequencies;
- fare combinability that provides for the possibility for a competitor (or travel agents) to offer a return trip to premium passengers, thus comprising a non-stop service provided one way by one of the parties, and the other way by that competitor;
- special prorate agreements or SPAs that allow interested airlines to obtain favorable terms from the parties to carry connecting passengers on flights of the parties on short-haul routes in geographical Europe and Israel on the one hand, and North America (Canada, United States of America and Mexico), the Caribbean and Central America on the other hand, in order to 'feed' their own transatlantic services;

---

[258] "*In order to address the Commission's competition concerns as set out in the preliminary assessment, the parties offered the initial commitments on 11 December 2012. On 15 May 2013, in response to the comments received from third parties in response to the communication of the Commission published pursuant to Article 27(4) of Regulation (EC) No 1/2003, the parties submitted the signed final commitments pursuant to Article 9 of the same Regulation. The key elements of the initial commitments offered by the parties on 11 December 2012 are described in recitals (82) to (97) of this Decision*", CASE COMP/AT.39595 - Continental/United/Lufthansa/Air Canada, paragraph 81.

[259] "The Commission considers, on the basis of the available information, that the level of interest shown by competitors in entering the Frankfurt-New York route, taking into account slots which the final commitments make available, is credible", CASE COMP/AT.39595 - Continental/United/Lufthansa/Air Canada, paragraph 118.

[260] "*Following the comments by third parties on the communication pursuant to Article 27(4), the parties proposed a few technical adjustments and clarifications to the initial commitments and extended the number of feeder routes in the SPA commitment. The parties accepted the comment* […]", CASE COMP/AT.39595 - Continental/United/Lufthansa/Air Canada, paragraph 119.

- Frequent Flyer Programs or FFP. The purpose of this commitment is to allow competitors to benefit from the FFPs of the parties, where such FFPs constitute a barrier to entry and expansion.

Having received those commitments and positive comments by third airline operators as well, the European Commission then affirmed that "[i]*n light of the final commitments offered by the parties, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end*"[261]. So the European Commission will keep checking whether those commitments are not infringed, since as long as those are kept as binding upon the parties involved the agreement will bring more beneficial effects than restrictive effects, thus allowing companies to enhance efficiencies and to reduce costs and fares for passengers. These Commission's powers are then more than essential for keeping a common ground level for all the firms and for allowing a development of the entire industry.

2.6 CONCENTRATIONS

Concentration behaviors are found when two or more previously independent undertakings merge (merger) or; when an undertaking acquires control of another undertaking (acquisition of control) or; where a full-function joint venture is created[262]. The concentrations are regulated by the Regulation 139/2004 (the EC Merger Regulation) and the Implementing Regulation. This area of competition law is highly relevant because it concerns agreements that could potentially strengthen the company's market power and then distort the fair competition among undertakings. To avoid these distortions the Regulation 139/2004 provides for the

[261] CASE COMP/AT.39595 - Continental/United/Lufthansa/Air Canada, paragraph 149.

[262] A full-function joint venture is a company performing on a lasting basis all the functions of an autonomous economic entity

main rules for the assessment of concentrations, including all procedural issues required (e.g. notification, deadlines).

To correctly ascertain whether a merger or an acquisition agreement is in contrast with competition rules, the Commission shall be notified of the future transaction so to check the anticompetitive nature of such arrangement. In the field of civil aviation, the Commission has been favoring the creation of bigger conglomerates of companies, especially the Flags. Indeed, these companies have lots of fixed costs and they provide an essential service for all sensitive passengers. The strengthening of their financial stability is a target for the European Union because it allows better safety conditions and better connections. The first case to be discussed, the Air France/KLM merger, happened about 13 years ago but it is the first case in which the Commission exhibits its purpose of consolidating airline companies.

2.6.1 Air France/KLM case

The case was submitted to the Commission on December 18th, 2003 and it is relevant because it concerns two big carriers, a French and a Dutch Flag, in relation with a third Flag, the Italian airline company Alitalia. The assessment of this case posed relevant problems to the European Commission since the proposed merger had to be reviewed in light of the commercial partnerships Air France and KLM signed with other airlines. The most important partner of both companies at the time was Alitalia: this partnership had the effect to create a wider network that the new Air France/KLM entity would have benefited from, thus creating the conditions for exercising an even bigger market power. Therefore, this merger shall be read also in light of the Air France/Alitalia Alliance decision[263] and the commercial agreements between KLM and Alitalia.

The Air France/Alitalia routes assessed by the European Commission in 2003 were mainly complementary, therefore the alliance raised some serious concerns. About

[263] European Commission, Case COMP 38.284/D2, *Société Air France/Alitalia Linee Aeree Italiane Spa* decision, OJ C297/10.

seven routes were identified as critical[264], the parties had strong market position on them and potential new entrants would have difficulties to access take-off and landing slots during peak times. On the one side, both companies would have been able to coordinate their behaviors in order to provide the majority of passengers, both time sensitive and non-time sensitive, with a sufficient number of flights, impeding competitors to appeal of those two categories of passengers. On the other side, passengers would benefit from unified Frequent Flyers Programmes and a wider number of flights. The European Commission was still concerned about such conditions, so it approved the Alliance on the basis of some extended commitments. In point of fact, the two parties agreed to make available 42 take-off and landing slots[265], a proper number of slots to allow competitors to offer their services to both time sensitive and –non-time sensitive passengers. In additions, parties were not allowed to increase the frequency of flights on the critical routes and to make available Frequent Flyer Programmes with third firms.

It is clear that the alliance between the French and the Italian Flags modifies the legal basis on which the routes between Italy and the Netherlands shall be reviewed in the proposed merger. In addition, Air France and Alitalia expressed their intention of expanding their cooperation beyond the French Italian bundle and of considering the opportunity of executing a merger among Air France/KLM and Alitalia. Finally, the European Commission took also into consideration the SkyTeam Alliance whose members are, by the others, Air France, Alitalia and Delta; and it analyzed also the joint venture between Air France and CSA Czech Airlines for the Paris-Prague route. Having examined such conditions, the European Commission concluded that the proposed merger would affect not only the two signing parties but also their respective partners[266]. In particular it would have reduced competition on fourteen routes:

[264] Namely: Paris-Milan; Paris-Rome; Paris-Venice; Paris-Florence; Paris-Bologna; Paris-Naples and Milan-Lyon.
[265] Of those 42, 19 were at the Paris airports of Charles de Gaulle and Orly.
[266] Delta, Alitalia, CSA Czech Airlines, Northwest and Kenya Airways.

- Intra European routes are: Amsterdam-Paris, Amsterdam-Lyon, Amsterdam-Marseille, Amsterdam-Toulouse, Amsterdam-Bordeaux-Amsterdam-Rome, Amsterdam-Milan, Amsterdam-Venice and Amsterdam-Bologna;
- Intercontinental or long-haul routes are: Amsterdam-New York, Paris-Detroit, Amsterdam-Atlanta, Paris-Lagos and Amsterdam-Lagos.

The decision then cleared the merger, creating the largest European carrier at the time, and proving a change of course towards a liberalization momentum and a favor for the creation of bigger conglomerates. The speech delivered by Commissioner Prof. Mario Monti marks this shift: "[…] *The liberalisation of the sector in this past decade allowed the European aviation market to evolve considerably. The European aviation market which was inhabited by a few carriers mandated to "carry the flag" gave way to a truly competitive market. New business models developed and proved successful. Low cost operators are fiercely competing for their share of the market and numbers show they have been successful. At the end of the day, the true winner is the consumer who benefits today from lower tariffs and better choice. At the same time, I understand the need for consolidation. Liberalisation makes markets competitive and, in response, operators look for synergetic solutions. I strongly believe that a balanced and even application of the competition rules to the sector will lead consolidation through the right path*"[267].

2.6.2 Alitalia/Etihad Airways case

To conclude this analysis regarding concentration and M&A is important to take into consideration the recent case concerning two important Flags, Alitalia and Etihad Airways. Alitalia is the most important Italian carrier, which recently suffered of mismanagement conducts. The first crisis happened in 2008, when the

[267] Professor Mario Monti, European Commissioner for Competition Policy, *Recent developments in European air transport law and policy*, European Air Law Association 15th Annual Conference

company was split into a bad and a good company, and then in 2014 when it had difficult financial conditions that led to the rescue plan that included the creation of a new entity joint-controlled by former Alitalia owners (51%) and by Etihad Airways (49%)[268]. In 2017, a new financial crisis hit the company that received a new bridge loan conceded by the Italian government for carrying out activities until a new owner comes.

The case discussed here is related to the second crisis that hit Alitalia in 2014. Etihad Airways, owned and financed mainly by the Abu Dhabi government expressed its interest in the Italian company. The move was right to attain the consolidation in the European market objectives pursued by the Abu Dhabi's company. The assessment was made difficult by the very large number of participations the emirates' airlines had in other European carriers. For instance, in Air Berlin or Air Serbia. Indeed, the company managed to acquire relevant portions of shares of many carriers, strengthening its position in the European and the African markets[269]. Therefore, the European Commission analysed Etihad's investments in other companies such as Airberlin, Jet Airways, Darwin Airline, Air Seychelles, Aer Lingus and Virgin Australia. The analysis did not raise concerns for the competition in all routes except for the route Rome-Belgrade, which is served only by Alitalia (49% Etihad) and Air Serbia (49% Etihad). The competition would be widely reduced, so the European Commission accepted the commitment to make available slots of twenty minutes in order to allow competitors to operate between Rome and Belgrade.

2.6.3 Conclusion

As evidenced by the above-mentioned cases, for concentrations operations the dialogue with companies and the applications of commitments are essential; the

[268] It is important to bear in mind that the 49% stake acquired by Etihad Airways is the maximum portion of shares it could acquire according to EU Regulation 1/2008 on ownership and control limits.
[269] These moves are all aimed at directing and creating new routes to and from Abu Dhabi so to make it a more appealing touristic and business destination.

dialogue with companies is important to allow companies to reach their objectives without reducing the spaces of competition. On the one hand, mergers, acquisitions or full-function joint ventures can hamper fair competition, that is why the European Commission work is highly important also for this area of competition, preventing the creation of conglomerates being able to abuse of their power. On the other hand, the creation of big companies is vital to the development of air carriers in the continent, that benefit from sufficient efficiencies and economies of scale to compete with the American partners. Finding the right-fitted equilibrium both at the European and at the global level is the Commission's task also for future years.

2.7 STATE AID AND REGIONAL AID

Legislation on State aid is a very typical feature of the European framework that was adopted to cope with the widespread tendency of Member States to interfere with the governance of their businesses, mainly when they are struggling. State aid is defined as a selective advantage in any form whatsoever conceded to undertakings by Member States or by public authorities. General features of State aid are:

- "*an intervention by the State or through State resources which can take a variety of forms (e.g. grants, interest and tax reliefs, guarantees, government holdings of all or part of a company, or providing goods and services on preferential terms, etc.);*
- *the intervention gives the recipient an advantage on a selective basis, for example to specific companies or industry sectors, or to companies located in specific regions competition has been or may be distorted;*
- *the intervention is likely to affect trade between Member States*"[270].

The application of such rules to the airport and air transport sectors is aimed at improving the competitiveness of the European airport and airline industries. A

[270] European Commission, What is Stated aid?, at http://ec.europa.eu/competition/state_aid/overview/index_en.html

level-playing field among airlines and airports is then required to attain those objectives, while regional airports can prove important both for local development and for the accessibility of certain regions.

In 2005 the European Commission adopted a set of guidelines on financing of airports and start-up aid to airlines departing from regional airports[271] (the '2005 Aviation guidelines'), that supplement the 1994 Aviation guidelines[272] , which mainly contained provisions with regard to the restructuring of flag carriers and social aid for the benefit of Union citizens, and specify the conditions under which certain categories of State aid to airports and airlines could be declared compatible with the internal market. The 2005 Aviation guidelines were introduced to take into account the new legal framework enshrined in the articles 107(1) and 107(3) of the Treaty on the Functioning of the European Union that concern the public financing of airports and airlines and specify the conditions under which such public financing may constitute State aid. In this context, it should be pointed out that operating aid constitutes, in principle, a very distortive form of aid and can only be authorized under exceptional circumstances. The Commission considers that airports and airlines should normally bear their own operating costs.

The topic is very sensitive for the air transport industry, considering that financial aids are vital to airports in order to develop new services and contribute to local accessibility and economic enhancement. Development of new air traffic should, in principle, be based on a sound business case, and appropriate incentives could be beneficial under certain circumstances. For instance, airlines may be granted start-up aid, if this provides them with the necessary incentive to create new routes from regional airports, increases the mobility of the citizens and to connect remote regions penalized by their poor accessibility. To find an equilibrium in between those needs, the new 2014 Aviation guidelines introduce a new approach to the assessment of compatibility of aid to airports:

---

[271] *Communication from the Commission - Guidelines on State aid to airports and airlines*, 2014/C 99/03

[272] Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector

a) "*whereas the 2005 Aviation guidelines left open the issue of investment aid, these revised guidelines define maximum permissible aid intensities depending on the size of the airport;*
b) *however, for large airports with a passenger volume of over 5 million per annum, investment aid should in principle not be declared compatible with the internal market pursuant to Article 107(3)(c) of the Treaty, except in very exceptional circumstances, such as relocation of an existing airport, where the need for State intervention is characterised by a clear market failure, taking into account the exceptional circumstances, the magnitude of the investment and the limited competition distortions;*
c) *the maximum permissible aid intensities for investment aid are increased by up to 20 % for airports located in remote regions;*
d) *for a transitional period of 10 years, operating aid to regional airports can be declared compatible with the internal market pursuant to Article 107(3)(c) of the Treaty; however, with regard to airports with passenger traffic of less than 700 000 per annum the Commission will, after a period of four years, reassess the profitability prospects of this category of airport in order to evaluate whether special rules should be devised to assess the compatibility with the internal market of operating aid in favour of those airports*"[273].

The guidelines introduce a system of exemption based on the average number of passengers that use the airport facilities. It is the allowed for very small airports, with less than one million of passengers to benefit from a 75% state aid, while for airports with about 1-3 million passengers they are allowed up to 50% of state aid, while if the airports serve about 3-5 million passengers the maximum aid to investments that could be granted by the State is 25%.

[273] *Communication from the Commission - Guidelines on State aid to airports and airlines*, 2014/C 99/03

On the matter two very recent cases concerning Italian airports and airlines were examined by the European Commission. They are very helpful to understand the application of the principle of proportionality and suitability of the aid conceded by the State.

2.7.1 Sardinian Airports

Italy is characterized by two main islands that are principally reached by sea through ferries. In recent years, in an attempt to boost the attraction of the island the Autonomous Region of Sardinia has implemented some schemes of financial aids to the airports so to support the flights also during the cold season, when ferries can have delays and not many passengers travel from and to the island.

In 2010, it was approved a regional law granting aids to the regional airports. In practical terms, according to the 2005 Guidelines on State aid for developing regional airports, this deed of law shall be considered as fully compatible because it helps increasing the passengers and cargo traffic for airports that are normally under used. In any case the European Commission opened an investigation in 2013 to check whether these aids were in accordance with the 2005 Guidelines.

The result was that the grants to the airports were in line with the 2005 Guidelines, because in real terms the airports never received any State aid, they were just intermediaries for granting these sums of money to selected airlines. Therefore, the European Commission investigation focused on the scheme aimed at the air carriers and found out that only some selected companies were the beneficiaries of those moneys and that the aids were granted in breach of the 2005 Guidelines. Indeed, the funds were a compensation for the opening of new routes from and to Sardinian airports; they were also a compensation for the firms' advertisings and marketing operations; finally, none of the involved undertakings was expected to be able to provide those same services without needing the public financial support in the next three years.

The funds were given without meeting the requirements of financial stability and autonomy after maximum three years and for activities, like marketing campaigns, that are part of their normal business. Therefore, the European Commission found the State aid granted incompatible with the current legislation on State aid.

2.7.2 Calabria Airports

This case has very close similarities with the previous one on Sardinian airports. Once again a poorly connected Italian region – it has no connection to the high speed trains – approves a financial schemes for relaunching its regional airports. One of those was closed because it went out of business in 2015, but airports are strategical for allowing tourists to come, thus the plan is approved. Differently than in the previous case, the European Commission approves the plan because it is compliant with legislation on State aid and the 2005 Guidelines.

The scheme is indeed proportional, with adequate funds; it is required for creating new routes from and to Calabria; it is transparent; it provides a three-year plan that expect air companies to be able to operate independently without any external public aid.

The scheme is aimed at making viable for air carriers transporting passengers and cargos at Lamezia Terme and Crotone airports, generating an adequate return on their investment. In this operation, they are funded up to 50% of the airports fee and rights, a value considered by the European Commission proportionate to the aim pursued.

Finally, in respect of the aid granted by the Sardinian authorities, the Calabria regional funds are well aimed at targeting a sustainable flux of passengers and cargos in a short-term period (three years). In absence of this aid, the companies would not be able to bare all the costs of such investment, therefore the aid is in compliance with the aim of just starting up new businesses and with the objective of supporting small and poorly connected regional airports.

2.7.3 Conclusion

State and Regional aid topic, as mentioned before, is a feature that characterizes the European Union policy. Indeed, "[in] *contrast to the EU, US competition law has no rules on state aid. However, US courts have in several cases ruled against aid by local authorities or US states on the grounds that it discriminates against interstate commerce*"[274]. It is a very widespread tendency preferring to help struggling companies by injecting public money; therefore, the European Union objective is not stopping this tendency which could be beneficial but to avoid these funds can distort competition. Moreover, State aid are very used in the sector of transports: allowing people to easily move from an area to another of the Union is an important target to be attained but for some marginal regions this could be very hard since starting routes from there is anti-economical. Therefore, in those cases, investments and aid by Member States are permitted so to sustain the development of routes by road, sea or air that could be operated by companies without further aid after maximum three years. In many regions of Europe, air transport is funded by public authorities since it allows to connect very far region to the most important airports and cities of Europe. For allowing Member States to adopt financial aid schemes without incurring in violations, the EU Bodies have released many guidelines on the State aid, the latest is the Communication from the Commission - Guidelines on State aid to airports and airlines (2014/C 99/03) that sets six basic principles:

1. Contribution to a well-defined objective of common interest;
2. Need for State intervention;
3. Appropriateness of State aid as a policy instrument;
4. Existence of incentive effect;
5. Proportionality of the aid amount;
6. Avoidance of undue negative effects on competition and trade.

[274] Gregor Erbach, *EU and US competition policies Similar objectives, different approaches*, 2014

These 2014 Guidelines are adopted in light of the modernization strategy for Europe and are the useful instrument to channel public funds towards a positive industrial development of the European regional economies. That is the case in some recent decisions the European Commission adopted concerning four Member States: Belgium, Italy, Germany and Sweden. On the matter Commission Vice President Joaquín Almunia in charge of competition policy expressed his view: "*EU state aid rules allow public authorities to grant support to airports where it is justified, in particular where it improves the accessibility of a region and provides a significant contribution to its economic development. However, duplicating unprofitable airport infrastructure or unduly favouring certain airlines wastes taxpayers' money and distorts competition in the Single Market*". The purpose of developing regional and less favoured airports was found to be applicable for the airports of Frankfurt-Hahn and Saarbrücken in Germany, Alghero in Italy and Västerås in Sweden. On the contrary, the European Commission considered the aid schemes offered for the airports of Zweibrücken in Germany and the airport of Charleroi in Belgium unlawful. On the one hand, the German airport was created at only 40 kilometers of an already existing small regional airport, Saarbrücken, that started operating at loss due to the opening of a new regional infrastructure that was able to operate only through State financial aid. The distortion of competition is evident. On the other hand, the Charleroi airport was considered as a good and beneficial state aid scheme during the first years, since it helped the Walloon Region development, but as the scheme was not withdrawn and the airport was getting bigger, serving millions of passengers every year, the European Commission has found that the aid must stop. The dimension of the passengers' traffic allowed the airport management firm and the airlines to carry out their business without needing external aid; therefore, the funds conceded to air companies were considered as a waste of taxpayers' money and the Commission ordered the funds to be returned.

In conclusion, it can be said that the European Union has developed its own legislation on State aid in order to channel resources and efforts towards predetermined objectives. It is a distinctive feature of this economic area, that aims at sponsoring well-reasoned investments for poorer regions without distorting

competition. It is also a piece of legislation that the European Union is willing to export worldwide because it recognizes it has been essential, and still it is, for assisting the creation and the strengthen of less connected regions. The ability to connect regions has a direct impact on the potential development of the region's economy, thus enabling better connections without distorting competition is definitely a well-aimed objective.

2.8 FINAL REMARKS

Principal scope of this chapter is to show, by having exemplified the regulatory regime and by having given concrete examples throughout cases, the rapid evolution of European competition law in the last 46 years[275] towards the so called '*modernization*' and the modification of the European Commission's powers in this respect. This path officially began in 1971, when competition cases were decided favoring the system of small businesses without really carrying out any analysis of the economics or the tradeoff between benefits and disadvantages of the signed agreements.

Anyway, quite rapidly, considering the same development took more than a century in the United States, the European Commission started shifting this trend by deciding to modernize the antitrust legislation framework. In this process also the air transport industry was affected, since the peculiarities of this market requested an extra effort by EU authorities. This is proven by the many attempts and laws[276] the EU bodies passed over the years in order to favor a modernization.

Indeed, notwithstanding the European Commission influenced the application of articles 101 and 102 TFEU through its guidelines, those were not sufficient for the air transport industry, a market where undertakings face lots of costs and concentrations are very much needed to offer better services and compete effectively. This is why many deeds of law were enacted and their applications were

[275] The First Competition Policy of 1971 is taken as the stepping stone of this evolution.

[276] An example are the EU *packages*, the special Regulations, the guidelines, the white papers and the agreements with third countries.

shown in practical cases like Alitalia/AirFrance or SAS/Maersk Air. The most important of those acts of law is the Regulation 1/2003, that represents the peak of the *modernization* process for European antitrust law overall: it enshrines in black and white the powers of the European Commission and the welcoming of the *rule of reason* approach by the European Union.

In an outstanding article in the Competition Policy Newsletter[277], the authors wrote on the Regulation 1/2003 that "[the] *most central feature of the new Regulation is the direct application of Article 101(3) of the Treaty.* […] *Furthermore, the new Regulation represents a great step forward in terms of establishing a level playing field for agreements in the internal market. For the first time in European antitrust history, Article 3 of Regulation 1/2003 obliges Member States' enforcers to apply EC competition law to all cases where trade between Member States may be affected and establishes Article 101 as the single common standard for the assessment of agreements by all enforcers in the European Union*". For the first time in European history, the article 101 TFEU is applicable by all Member States and the exemptions are now an essential part in the application of this provision. This is a revolutionary act that fully recognizes the need for the European legal framework – and for its undertakings as well – of '*a more economic approach*' into its decisions, assessments and policy notices.

It is the beginning of a new course that was reached through the enactment of the Regulation 1/2003 and of the '*Modernisation Package*', a targeted package that consisted of six new Commission acts aimed at providing guidance. Those are the:

1. Commission Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty;
2. Commission Notice on cooperation within the network of competition authorities;

[277] *Regulation 1/2003 and the Modernisation Package fully applicable since 1 May 2004*, in Competition Policy Newsletter, Céline Gauer, Lars Kjolbye, Dorothe Dalheimer, Eddy De Smijter, Dominik Schnichels and Maija Laurila.

3. Commission Notice on the co- operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC;
4. Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty;
5. Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters);
6. Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty.

The aim of this modernization is "*to give the Commission new antitrust powers and procedures for an enlarged and more mature European Union. It replaces legal texts, rules and instruments adopted more than 40 years ago when there was little experience in Europe with competition policy both on the part of the industry and the public authorities*"[278], by clarifying the powers of national and European antitrust authorities and adopting a pronounced more 'economic approach' than in the past. In fact, on the powers side, as the procedure starts, the Commission is empowered to: 1) send information requests to companies; 2) enter the premises of companies; 3) examine the records related to the business; 4) take copies of those records; 5) seal the business premises and records during an inspection; 6) ask members of staff or company representatives questions relating to the subject-matter and purpose of the inspection and record the answers. Once it has gathered all sufficient info, it releases a statement of objections, prohibition decision or a commitment decision and it can also impose fines. On the other side, the proof of a 'more economic approach' is contained in the official European Commission Final Notices and Communications. These documents do not expressly cite any precise academic sources for their theories but they all now use concepts of economic theory such as:

[278] Press Release by Competition Commissioner Mario Monti after the enactment of the new Regulation.

- intra-brand competition[279];
- market power[280];
- foreclosure[281];
- Herfindahl-Hirschman Index (HHI) levels[282];
- free-riding[283];
- cross-price elasticities and diversion ratios[284];
- economies of scale and scope[285];
- qualitative efficiencies[286];
- hold-up problems[287];
- externalities[288];
- long-run average incremental costs[289], and;
- demand related advantages (network and learning effects)[290].

"*These are all concepts of economic theory* […] *removed from the Commission's early assessments under the antitrust rules, where the Commission normally limited itself to looking at whether the agreement or unilateral conduct affected the parties'*

[279] European Commission, *Guidelines on the Application of Article 81(3) of the Treaty*, paragraph 17
[280] European Commission, *Guidelines on the Application of Article 81(3) of the Treaty*, paragraph 25
[281] European Commission, *Guidelines on the Application of Article 81(3) of the Treaty*, paragraph 26
[282] European Commission, *Guidelines on the Application of Article 81(3) of the Treaty*, paragraph 29
[283] European Commission, *Guidelines on Vertical Restraints*, paragraph 107
[284] European Commission, *Guidelines on the Application of Article 81(3) of the Treaty*, paragraph 36
[285] European Commission, *Guidelines on the Application of Article 81(3) of the Treaty*, paragraphs 64 to 68
[286] European Commission, *Guidelines on the Application of Article 81(3) of the Treaty*, paragraphs 69 to 72
[287] European Commission, *Guidelines on Vertical Restraints*, paragraph 107
[288] European Commission, *Guidelines on Vertical Restraints*, paragraph 107
[289] European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, paragraph 26
[290] European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, paragraph 24

or a third parties' freedom. In individual assessment under Article 101, the Commission previously did not even use to define a market or take into account the parties' economic power in any form whatsoever"[291]. Nowadays the European Commission integrates its reasoning with the above mentioned concepts and other key economic models such as supply-side substitutability[292], hypothetical monopolist test[293] and price elasticities[294]. The European Commission occasionally makes express use of economic literature or of econometric models when examining the validity of an economic study submitted by parties, but it is clear from the aforementioned Notices and the economic concepts there contained that the European Commission is aware of those theories and it often uses them to decide upon cases.

Finally, as the European Commission opened up to these new terms and methods, many expected to see it abandoning some object categorizations, as the US Supreme Court did when it opened up to the *rule of reason* approach. However, as cited by an authoritative legal opinion, "*the object restrictions listed in the Commission's guidelines* [and White Papers] *are broadly the same as those that the Commission and the Court had considered restrictive by object prior to the reform: horizontal price fixing, output limitation and sharing of markets and customers, fixed and minimum resale price maintenance and restrictions providing absolute territorial protection*"[295]. One exception is contained in a 2001 case[296], for what concerns the resale price maintenance, since the Court stated that the maximum resale price maintenance should be assessed as to its actual effects, however, the Article 101(3) assessment still requires the parties to prove that the agreements brings beneficial

[291] Anne C Witt, *The More Economic Approach to EU Antitrust Law*, 2016
[292] European Commission, *Notice on the defintion of the relevant market for the purposes of Community competition law*, paragraph 13
[293] European Commission, *Notice on the defintion of the relevant market for the purposes of Community competition law*, paragraphs 16 to 17
[294] European Commission, *Notice on the defintion of the relevant market for the purposes of Community competition law*, paragraph 39
[295] Anne C Witt, *The More Economic Approach to EU Antitrust Law*, 2016
[296] "[such agreements] *may have an influence, direct or indirect, actual or potential on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States*", Case COMP/F.1/36.516), *Nathan/Bricolux*, 2001, paragraph 92.

effects and that the conditions required for exemptions are fulfilled. This requirement has not changed, while the '*modernisation*' has enlarged the hypothesis of exemptions, enlarging the concept of economic efficiencies thanks to the welcoming of economic theories in the European Commission's reasoning. In addition, the guidelines do not contain any '*form-based presumptions*' of legality for Article 101(3), while an objective presumption applies *a priori* for all the black-listed restrictions listed in the Block Exemption Regulations and for all the hard-core restrictions identified in European Commission's guidelines and Notices.

The progress made by the European Union is impressive. It is currently boosting its efforts by strengthening its relationships with partners in the aviation field. It started discussing some important bilateral treaties after the success of those signed with Morocco (2006) and the US (2008)[297]. This work is important for the airline companies since they are aimed at reducing procedures workload, authorization requests and are at speeding connections up. The purpose of the EU is also export its legal framework – consisting of the articles 101, 102 and 107 TFEU – in those developing countries. By closing ties with third countries in the field of civil aviation, the EU does not export only its guidelines, its experience and some laws, but it also indirectly export its approach to competition. As the air companies are free to operate as long as competition provisions are not breached, in the same way, this could be replicated to all firms that operate in global markets and may benefit from this with third countries such as the ASEAN bloc.

Therefore, the efforts made are a long-term investment for the European Union so to create a global legal framework on competition that will be soon needed not only in the air transport sector, but also for all sectors that have an international outlook. This purpose is well stated in the 2015 document released by the Commission: "[…] *As aviation's contribution to the overall performance of the EU economy and its global presence is so significant, it is critical that the EU aviation sector remains competitive, maintains its leadership position and is able to grow. Europe must be*

[297] Some agreements are still undergoing the negotiation phase; the most important of them is the agreement with the ASEAN countries bloc since it would be the first ever bloc-to-bloc agreement, with a combined population of 1.1 billion people.

a leading player in international aviation and a global model for sustainable aviation, with a high level of service and ambitious EU standards. The goal of this Aviation Strategy is to strengthen the competitiveness and sustainability of the entire EU air transport value network. […] *The European Union has already assumed the role of a "game-changer" with the creation of a single aviation market. When developing this market, the objective was to promote consumer interests, reduce barriers to trade, maintain a level playing field for operators, foster innovation, maintain the highest levels of safety and involve all stakeholders in the process. These principles must also be pursued globally. The EU aviation sector must keep up with the pace of growth and change, by ensuring access to key growth markets for EU industry and its citizens. The success of the EU's internal aviation market and the principles and rules it is based on should be promoted at international level through an ambitious EU external aviation policy and negotiations with key partners* […]".

CHAPTER 3

STATE OF THE ART OF COMPETITION IN EUROPE

The challenges the European Union face in a globalized context are relevant to the development of the European economy. When in 1989 the former EC welcomed the potential entry of new and '*foreign*' doctrines, it was the first sign of a revolution touching the European continent. Since then, EU Bodies tried to take all necessary steps to protect and boost the economy, through the enhancement of European firms' competitiveness. The result is the creation of a very peculiar legal framework that mirrors the characteristics of the European business environment. In its evolution, the European Union adopted a more economic approach, it abandoned some non-economic principles and kept certain unique features of its business environment, for instance it regulated the state aid legislation[298]. The European competition law path diverged from the American one thus creating two systems, which share some principles but are also different in many ways. Scholars are often analyzing these differences; among those we find Professor Kwoka.

John E. Kwoka of Northeastern University is one of the main intellectuals studying the relationship among the EU and the US. He wrote an outstanding publication, in which he clearly measured, by comparison, the legal and economic aspects of the US development[299].

3.1 A COMPARISON TO THE US ANTITRUST LEGISLATION

At a first glance, the American antitrust revolution, by refusing the mere legalistic-based approach and by introducing an interpretation primarily based on sound economic principles, should have brought important progresses in the field, by recognizing better conditions and certainty for the companies involved, providing

[298] European Commission, *Guidelines on State aid to airports and airlines*, 2014
[299] John E. Kwoka, Jr. and Lawrence J. White, *The Antitrust Revolution: Economics, Competition, and Policy*, 2013, Sixth Edition.

consumers with a strengthened protection and by trying to reach the most efficient market. The study, published by Professor Kwoka, and corroborated by other relevant recent studies, tells us instead a complete different story.

Indeed, in his paper published by the Washington Center for Equitable Growth, he showed how in the last 50 years the enforcement of some less important competition cases[300] had been dropped by the Federal Trade Commission and the Department of Justice, in favor of some most serious and relevant cases. It seems to be a great development, but in real terms the shift towards the economic principles has justified the approval of cases where the competition is lessened and where this reduction of competition is somehow countervailing by a potential increase of the consumer welfare. This means that in the United States, the lack of other aims of the antitrust legislation makes possible for firms to justify their actions - i.e. mergers and acquisition in most cases – by assuming that economic and econometric models predict an improvement of consumer welfare. This current situation is well described and analyzed in another paper[301], written by David Autor, David Dorn, Lawrence F. Katz, Christina Patterson, and John Van Reenen, and cited also by the Bruegel Institute[302] – an European think tank -, and the results are quite appalling: "[In the period 1980-2011, the f]*our-firm concentration, i.e. the share of industry revenues controlled by the largest four firms, rose from 38 percent to 43 percent in manufacturing, from 24 percent to 35 percent in finance, from 11 percent to 15 percent in* [services, from 25 percent to 40 percent in utilities and transportation], *from 29 percent to 37 percent in retail trade, and from 22 percent to 28 percent in wholesale trade*". An explanation of this concentration is the race to the technology

[300] We refer to cases where the resulting entities operating in the market are anyway more than five.
[301] David Autor, David Dorn, Lawrence F. Katz, Christina Patterson, and John Van Reenen, *Concentrating on the Fall of the Labor Share*, American Economic Review: Papers & Proceedings 2017, 107(5): 180–185.
[302] Bruegel is a European think tank that specialises in economics. Established in 2005, it is independent and non-doctrinal. Bruegel's mission is to improve the quality of economic policy with open and fact-based research, analysis and debate. We are committed to impartiality, openness and excellence. Bruegel's membership includes EU Member State governments, international corporations and institutions.

progress, where only "*superstar firms*" can reach a sufficient degree of technological development: "[…] *explanations involves a technological change that has made markets increasingly 'winner take most' so that superstar firms with higher productivity increasingly capture a larger slice of the market. Or if incumbents are more likely to innovate and the persistence of incumbent's innovative advantage has risen (Acemoglu and Hildebrand 2017), the incumbent advantage would increase and so would incumbents' market shares*"[303]. This could be one of the reason, from the economic point of view, of the raise of concentration in many industries, first of all the transportation industry. For instance, in the air industry, where undertakings face lot of sunk cost and the technological development is fast, one of the reasons behind the creation of *branded strategic alliances* is to be able to pool enough resources so to compete efficiently with other companies.

From Professor Knowka and Autor's studies is possible to infer some of the real consequences of this post-Chicago school approach: the lack of other objectives than the efficiency renders easier to attain a more concentrated market, allowing companies to reach a greater market share, yet offering services at lower prices, but reducing the innovation they can contribute to and raising even higher entry barriers[304]. An interesting recent study brings these economic assumptions on the legal point of view by relating the grade of enforcement operated by competition authorities and the grade of concentration of the market[305].

[303] David Autor, David Dorn, Lawrence F. Katz, Christina Patterson, and John Van Reenen, *Concentrating on the Fall of the Labor Share*, American Economic Review: Papers & Proceedings 2017, 107(5): 184

[304] An important factor that is co-responsible to the raise of entry barriers is technology. In the air industry, alliances are often used also to allocate more resources to the creation of technology platforms being able to efficiently compete with other air companies.

[305] To evaluate the market concentration, the study used the Herfindahl-Hirschman Index (HHI), one of the most common and widely used index to calculate the concentration of market power of the firms.

In point of fact, the reduction of the powers of the US Courts to stop or modify certain agreements[306], in light of higher interests at stake, has brought to a laxation of the competition enforcement at the federal level. This process resulted in the raise of the Herfindahl-Hirschman Index (HHI)[307], proving a wider concentration of the market shares in the hands of fewer companies. It can be proven by economic and econometric models that this concentration might bring to an enhancement of consumer welfare, but these conclusions shall not be considered as a valid motivation for reducing the competition in a market. Indeed, competition is not just the mere reduction of prices or the increase of production output; competition catalyzes the undertakings' race for offering better products, safer goods and innovative services. We do not consider the post-Chicago approach, known also as the US Antitrust Revolution, as a true progress for the American economy and we do align our reasoning with an outstanding paper published in 2017 on the Harvard Law & policy Review by Lina Khan and Sandeep Vahee.

In the paper, the authors study the most important markets, the pharmaceutics, the health care, the retails and food, the telecommunications, the energy and the airlines. The last one is relevant for the purpose of this dissertation. They analyzed

---

306 "*The shift from per se rules and presumptions to the rule of reason and other standards-based tests has dramatically undercut antitrust enforcement. Outside of cases alleging collusion, plaintiffs have to define relevant antitrust markets, establish that defendants have market power, and show that the suspect practice has likely anticompetitive effects. Antitrust litigation today requires the retention of economic experts and extensive discovery, which makes for costly and interminable litigation. And often times, plaintiffs have to do all this just to survive defendants' motions to dismiss or motions for summary judgment. Not surprisingly, these legal standards have pushed plaintiffs' probability of success in court in the twenty-first century practically down to nil. With good reason, one of the leaders of the intel-lectual coup in antitrust, Richard Posner, has described the rule of reason in practice as 'little more than a euphemism for nonliability'*", Lina Khan and Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counter Revolution and Its Discontents*, in Harvard Law & Policy Review, 2017, page 274.

307 This process of concentration in the hand of the major companies of the air industry was already well known to scholars. In a table shown by Fabio Carlucci in *Trasporto aereo: Regolamentazione e concorrenza*, 2003, it is put on display the increase from 1976 to 1991 of Majors concentration from 90,1% to 95.5%.

the evolution of air companies since the deregulation of 1978[308], and they state that : "[w]*hile this fact might suggest that the restructured industry has been competitive, the sector is, in fact, dominated by firms that wield market power—the result of a wave of mergers and exclusionary practices by dominant hub carriers. Looking both nationwide and at major hub airports, a defining feature of the industry today is extremely high concentration*"[309]. Indeed, the wave of mergers and acquisitions has eliminated head-to-head competition in most relevant routes, reaching and highly concentrated O&D market. In addition, "*in the latest merger wave, Delta purchased Northwest in 2008, United acquired Continental in 2010, Southwest bought AirTran in 2011, and American combined with US Airways in 2014*"[310]. It is clear that the new approach adopted by the Federal Trade Commission, the Department of Transport and the Department of Justice, led to an oligopolistic market. According to the deregulation advocates, this process has also increased the consumer welfare. This is partially true, considering consumer welfare increased (only) shortly after the mergers. Currently American air industry was characterized by four main conditions that prove that the economic and econometric models used were definitely wrong:

1. the oligopolistic market;

---

[308] In rewriting antitrust precedent on vertical restraints in a pro-defendant fashion, the Supreme Court has held that the rule of reason is the default legal standard. The per se rules that applied to vertical price and nonprice restraints have been overturned. This process began with the Supreme Court's 1977 decision in Continental Television, Inc. v. GTE Sylvania, Inc., which held that vertical non-price restraints should be evaluated using the rule of reason. This freeing of vertical restraints from antitrust proscriptions culminated in the 2007 decision Leegin Creative Leather Products, Inc. v. PSKS Inc. In this landmark ruling, the Court overruled the nearly century-old per se rule outlawing resale price maintenance. In the series of cases that ended with the ruling in Leegin, the Court relied on a theoretical—but empirically unsupported—view of competition in retail markets to assert that the vertical restraints at issue often had beneficial effects.

[309] Lina Khan and Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counter Revolution and Its Discontents*, in Harvard Law & Policy Review, 2017, page 260

[310] Christopher Drew, *Airlines Under Justice Dept. Investigation Over Possible Collusion*, N.Y. TIMES, 2015.

2. the pricing discipline;
3. the monopolized hub airports;
4. the entry barriers.

The first point is the direct result of the last wave of mergers, that leaves us with four major operating firms: Delta Airlines, American Airlines, Southwest Airlines and United Airlines. "*The effects of this concentrated market structure are clear. With just four major players in the market, the incentives to compete have been significantly diminished. A market structure conducive to coordinated pricing appears to have emerged. The big four carriers face each other in a number of markets and have little reason to undercut current fares and sabotage collective profits*"[311].

The second concerns the pricing behavior of airlines. Fuel prices declined dramatically in the past years but fares did not follow suit. Moreover "[a]*irlines indeed appear to follow each other in imposing new fees on fliers, an indication of tacit collusion. Pricing "discipline" (at the expense of consumers) is now the watchword among airline executives*"[312].

The third regards the system of airports' slots, leading towards the monopolization of hub and the increase of fares. "*The deregulation of the airline industry also ushered in the development of the hub-and-spoke model—an outcome that some deregulation advocates did not foresee and one that has produced monopolized hub*

[311] Lina Khan and Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, in Harvard Law & Policy Review, 2017, page 261. See generally Federico Ciliberto and Jonathan W. Williams, *Does Multimarket Contact Facilitate Tacit Collusion? Inference on Conduct Parameters in the Airline Industry*, 45 RAND J. ECON. 764, 2014. David McLaughlin and Mary Schlangenstein, *U.S. Looks at Airline Investors for Evidence of Fare Collusion*, BLOOMBERG, 2015.
[312] Lina Khan and Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, in Harvard Law & Policy Review, 2017, page 261. Tim Wu, *Enough with the Crazy Change Fees*, NEW YORKER, 2015. James B. Stewart, *"Discipline" for Airlines, Pain for Fliers*, N.Y. TIMES,2015.

airports. Instead of offering direct point-to-point service, airlines typically route fliers through one of their hubs. Hubs dominated by one airline include Dallas-Fort Worth (American) and Atlanta (Delta). Empirical research has found that higher concentration at an airport is associated with higher fares. These findings suggest that, by establishing a so-called fortress hub that it dominates, an airline can insulate itself from competition and make larger profits than it would at a more competitive airport"[313].

The last point is the consequential result of the first three points, leading to the exclusion of potential competitors. "*In light of the economic attraction of hubs, dominant airlines have taken a number of measures to impede and exclude new entrants. Dominant hub carriers have resorted to predatory pricing—short periods of below-cost competition—to drive out new entrants that threatened their monopolistic position. Among other carriers, American Airlines at Dallas Fort-Worth and Northwest at its Detroit hub appear to have resorted to deep, but short-lived, price cuts to exclude new rivals and maintain their hub market power. These campaigns have succeeded, in light of the fragile financial positions of many of the new entrants, and perpetuated the hub carriers' dominance. Monopolistic hub carriers also appear to have built large holdings of slots and thereby deprived rivals of the access that they need to serve an airport. Some carriers appear to have exchanged and purchased an excess number of airport slots (the right to take off or land) to shore up hub dominance and deny rivals access to these airports*"[314].

---

[313] Lina Khan and Sandeep Vaheesan, Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents, in Harvard Law & Policy Review, 2017, page 262. Justin Bachman, *This Is Why No Airline Will Ever Dominate LAX*, BLOOMBERG, 2016.

[314] Lina Khan and Sandeep Vaheesan, Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents, in Harvard Law & Policy Review, 2017, page 262. See Spirit Airlines, *Inc. v. Nw. Airlines, Inc*., 431 F.3d 917, 953 (6th Cir. 2005); *United States v. AMR Corp.*, 335 F.3d 1109, 1111 (10th Cir. 2003); Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 YALE L.J. 941, 981, 2001. Justin Bachman, *Forget About Airline Mergers. Now It's All About Trading Airport Slots*, BLOOMBERG, 2015. See also Jad Mouawad, *Justice Department Opposes United-Delta Swap for Newark Landing Slots*, N.Y. TIMES, 2015.

It is evident then, as both the empirical case law and the analysis of the laws applicable to air companies show, that the European major partner has introduced a novelty in the area of competition law, but the effects shall be considered as not fully positive. As stated by Lina Khan and Sandeep Vahee, "[t]*hese doctrinal changes have dramatically increased the power of businesses to control and steer how markets and industries develop. Large firms in concentrated markets today have broad latitude to acquire and merge with their direct rivals.* […] *Dominant and other powerful firms also have broad freedom to marginalize their rivals and dictate terms to other players. With the current permissive treatment of predatory pricing, refusals-to-deal, and other exclusionary conduct, dominant firms have the ability to smother their smaller rivals and protect their monopoly power. In consumer goods markets, powerful manufacturers and retailers can establish vertical restraints that raise final prices and hamper the entry and growth of smaller competitors*"[315]. The market power acquired by magnates resulting companies, brought more damages than beneficial effects to the markets and the economy in the United States of America.

The European Union is also setting the conditions for the establishment of bigger air carriers, but, at the same time, it is trying to avoid the acquisition by only some firms of such great market power that could hamper competition, as it is in the Unites States.

3.2 A NEW INTERPRETATION

In Europe, policymakers understood the negative effects of such legislation and they adopted a different strategy. In 2004 the Regulation 1/2003 was enacted and it represents the principal '*modernisation*' step of the European Union; the interpretation of the new principles introduced by the Regulation are enshrined in an European Commission Notice[316] entitled '*Guidelines on the application of*

[315] Lina Khan and Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, in Harvard Law & Policy Review, 2017, page from 274 and 275.

[316] It shall not slip the mind of the reader that by adopting an interpretation via a Notice, the European Commission retains the power to modify this document in the

Article 81(3) of the Treaty', published in 2004. The document has a clear indication on the departure from its early approach that was mainly influenced by the US framework. The two important stepping stones indicating this shift are:

1. The economic efficiency falls within the scope of the Article 101(3);
2. The economic efficiency is the only condition that can offset the anticompetitive harm.

In practical terms the first point is not a novelty, the economic efficiency was enlisted among the many objectives the former Article 81(3) was pursuing. The true novelty is that the guidelines make reference only to this object. Indeed the document reads as follows: "*The aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Agreements that restrict competition may at the same time have pro-competitive effects by way of efficiency gains. Efficiencies may create additional value by lowering the cost of producing an output, improving the quality of the product or creating a new product*"[317]. Specifically, it seems like in 2004 the European legislator wanted to show a clear departure from the Commission's position during the 70-90s, by starting over and considering the social benefits, the regional disparities, the protection of the environment, the harmonious development of the Member States, as mere ancillary aims, which are not sufficient to justify the refusal to approve an agreement that potentially restricts competition in Europe[318].

---

future to change its attitude and behavior in the context of the application of the Regulation 1/2003. In this way, the European Commission has still room of maneuver for impressing its agenda – which is political and changes in response to the new threats – and keeping the Regulation up to date.

[317] European Commission, *Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08)*, paragraph 33.

[318] The same can be said of the other Regulations approved in relation to Article 101(3) TFEU. For example, Regulation 330/2010/EU, OJ L102/1, recitals from 6 to 7; Regulation 461/2010, OJ L129/52, recitals from 7 to 8; Regulation 1218/2010, OJ L335/43, recital 6; Regulation 316/2014, OJ L93/17, recitals from 4 to 5.

For instance, since its first serious case, after the implementation of Regulation 1/2003, - the Air France/Alitalia case[319] - the European Commission has consistently applied the new interpretation contained in the Guidelines. It replaced non-economic defenses[320] with economic defenses. This has resulted in a dramatic drop of the rate of the successful Article 101(3) defenses. In the ECJ judgment in *British Ariways v Commission* case, where the European Court of Justice set out the efficiency defense that fully corresponds to the analytical structure of Article 101(3) TFEU as proposed by DG Competition by stating: "[…] *it has to be determined whether the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer* […]"[321]. In the same case the Advocate General Kokott affirmed "*it is thus ultimately a question of balancing the advantages and disadvantages for competition and consumer against one another. If the foreclosure effect of a dominant undertaking's bonus or rebate scheme bears no discernible relation to advantages for competition or consumers, or if it goes beyond what is necessary to achieve those advantages, that bonus or rebate scheme is to be regarded as abusive* […]"[322].

[319] Case COMP/38.284/D2 Sociètè Air France / Alitalia Linee Aeree Italiane S.p.A.
[320] The most important principles, we assessed in the first chapter as well, are: integration of the internal market;

- preventing the concentration of economic power;
- economic growth;
- industrial adaptability;
- fighting inflation;
- competitiveness of the European economy;
- consumer interests;
- interests of society as a whole;
- fairness;
- individual commercial freedom and other democratic values;
- employment;
- innovation;
- efficiency;
- fundamental Union objectives.

[321] Case C-95/04 P, *British Airways v Commission*, 2007, paragraph 86.
[322] Opinion of Advocate General Kokott, Case C-95/04 P, *British Airways v Commission*, 2007, paragraph 59.

Another relevant decision proving the '*modernisation*' approach is the C*ompetition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* case, whereby it reiterated its observations published under Art. 15.3 of Regulation 1/2003[323] and expressed at the OECD's Global Forum on Competition in February 2011. In these occasions "*the Commission considered that even if an agreement were capable of producing efficiencies the third condition of Article 101(3), requiring that the agreement be indispensable, was rarely likely to be fulfilled. The second conclusion one can draw from this submission is that the only types of benefits the Commission now considers relevant in the assessment of restructuring agreements under Article 101(3) are indeed economic efficiency gains. Social and employment considerations, by contrast, no longer seem to enter into the equation*"[324].

Some scholars tried to interpret the new course of the EU bodies, by affirming that its decisions are still based on non-economic values, such as improving energy standards. Among the many cases they quote[325], the best known example is the *CECED* case[326]. The case is very remote and it "*concerned an agreement between producers of domestic appliances to stop producing and importing washing machines that did not meet a minimum standard of energy efficiency. While finding that this agreement clearly had the object of restricting competition, the Commission exempted the agreement under Article 101(3) because it considered it likely to deliver both individual and collective benefits for users and consumers. It first took into account the agreement's likely efficiency effects, arguing that washing machines that use less electricity resulted in lower electricity bills for consumers. Also, it held that the restriction of competition on product dimension, i.e. energy consumption, was likely to increase competition on other product characteristics for example price. In addition to these effects, however, it also held*

[323] Observations No. 7764P
[324] Anne C Witt, *The More Economic Approach to the EU Antitrust Law*, 2016, page 169.
[325] Case COMP 34.493, *DSD*, 2001, OJ L391/1, Case COMP/D3/35.470, *ARA*, 2004, OJ L75/59 and Case COMP/D3/35.473, *ARGEV, ARO*, 2004, OJ L75/59.
[326] CASE IV.F..1/36.718, *CECED*, 2000, OJ L187/47

that the agreement's 'collective and environmental benefits' translated into further economic benefits in the form of 'savings on the cost of pollution'. It then estimated the savings in marginal environmental damage from avoided emissions and found on the basis of 'reasonable assumptions' and CECED's own estimates that the benefits to society brought about by the agreement appeared to be more than seven times greater than the increased purchase cost of more energy efficient washing machines. These environmental advantages for society, it held, would allow consumers a fair share of the benefits, even if no benefits accrued to individual purchasers of washing machines"[327]. The real reason behind this decision, that in any case precedes the implementation of the '*modernisation*' Regulation, is the potential technical improvement in the sector, felt as a need for boosting economic efficiency in the continent. In the motivations it is stated that "[w]*ashing machines which, other factors being constant, consume less electricity are objectively more technically efficient.* […] *The agreement is also likely to focus future research and development on furthering energy efficiency beyond the current technological limits of category A, thereby allowing for increased product differentiation amongst producers in the long run*"[328]. It was also pointed out that "[t]*he expected contribution to furthering energy efficiency both within the current technological limits of categories A to C and beyond the limits of category A, the cost-benefit ratio of the standard and the return on investment for individual users point to the conclusion that the agreement is likely to contribute significantly to technical and economic progress whilst allowing users a fair share of the benefits*"[329]. For this set of reasons, we consider misleading the interpretation of these scholars who state there is still a retained bedrock of European values in the antitrust enforcement and decisions. The EU bodies, looking for the set goal of the Lisbon-strategy Agenda in the area of competition, started instead changing their behavior way long before the enactment of the Regulation 1/2003 and the recurring references to '*technical and economic progress*' in its decisions are justified within this new course.

[327] Anne C Witt, *The More Economic Approach to the EU Antitrust Law*, 2016, page 170.
[328] CASE IV.F..1/36.718, *CECED*, 2000, OJ L187/47, paragraphs 48 and 50.
[329] CASE IV.F..1/36.718, *CECED*, 2000, OJ L187/47, paragraph 57.

Furthermore, bringing these innovations in the field subject of this dissertation, the recent cases decided in the area of the air industry are focused on the economic analysis of routes, hubs, complementary services and slots. The decisions are taken based on the efficiency gains and some disputable consumer welfare increases, while the objectives pertaining to the European Competition Reports are not taken into account anymore. They are ancillary to the final decisions, which is primarily based on models and studies of frequencies, type of passengers and flights. Indeed, the European Commission proceeds following some steps under Regulation 1/2003:

1. the European Commission opens proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003;
2. it conducts the investigatory phase, by sending several requests for information to the parties, to their main corporate customers, to travel agents if it is the case, to the parties' main competitors on the routes of concern and to airports and slot coordinators concerned; and by holding meetings with the parties and by considering the Parties' written submissions;
3. then it adopts a preliminary assessment pursuant to Article 9(1) of Regulation 1/2003, which sets out the Commission's competition concerns;
4. afterwards, the Parties submit commitments ('*the initial commitments*') to the Commission in response to the preliminary assessment;
5. a notice is published in the Official Journal of the European Union pursuant to Article 27(4) of Regulation 1/2003, summarizing the case and the initial commitments and inviting interested third parties to give their observations on the initial commitments within one month following publication;
6. moreover, the European Commission provides the Parties with non-confidential versions of the observations made by interested third parties on the initial commitments; parties are allowed to make amendments to their initial commitments so to send the final commitments;
7. finally, after having consulted the Advisory Committee on Restrictive Practices and Dominant Positions and having received the Hearing Officer

final report, the Commission, based on such pieces of information, delivers its decision.

Once the last step is reached, the decision is based on all the relevant economic factors, being the European Commission asked to analyse the:

- Relevant markets;
- The origin and destination (city pairs – O&D) markets;
- Premium and non-premium passengers;
- Non-stop and one-stop flights;
- Airports substitutability;
- Route-by-route analysis;
- Parties' commitments;
- Slot release commitments;
- Fare combinability commitment;
- Frequent Flyer Programme (FFP) commitment;
- Market share and market tests.

Such approach is fully compatible with the aims expressed by Competition Commissioner Mario Monti, one of the authors of the European competition '*modernisation*': "[…]*To this purpose the Commission has in recent years revised the totality of its block exemptions regulations and produced guidelines on main types of business practices and agreements that can be caught by competition rules. In making this revision, we have shifted from a legalistic based approach to an interpretation of the rules based on sound economic principles.*
To develop an economic interpretation of EU competition rules was, indeed, one of my main objectives when I took office as Commissioner for competition four years ago. Since then, I believe, we have made substantial progress, starting from the overhaul of our policy in relation to vertical restraints and horizontal co-operation agreements. Now, market power is a crucial element to take into account in applying Article 81 in these areas. Under the new type of block exemption regulations, companies with little market power, in particular the vast majority of

small and medium sized enterprises, are able to act within 'safe harbours' and do not have to worry about the compatibility of their agreements with EU competition law"[330]. "*Competition policy is* [nowadays undoubtedly] *based on legal and economic principles, and it is often associated with those two very important aspects*"[331], and this is fully valid also for the air industry in the continent.

3.3 FINAL REMARKS

The progress in competition obtained in the last decade is then evident and the drops of decisions by the EC are consistent with the new legal framework introduced by the Regulation 1/2003. Indeed, it has shifted the authority to decide upon cases to the National Competition Authorities (NCAs), the Commission just decides on a reduced number of cases then; moreover the Block Exemption Regulations[332] have not been abandoned and they are still relevant, since they allow the enactment of agreements, that bring technical efficiencies and that are unlikely to create anti-competitive effects, without recurring to the European Commission intervention; finally, the system of commitments help companies in finding a right-fitted solution and to conclude the agreements reducing the workload of the EU Institutions.

The other key element that should be mentioned is the 2015 Aviation Strategy. It is a forward-looking plan that aims at strengthening the position of its carriers and at setting its current legislation as a common reference for all new Air Services Agreements and for the creation of a desirable global level field. The European Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, titled "*An Aviation Strategy for Europe*" reads as follow, "*the EU aviation sector must be allowed to tap into the new growth markets where significant economic*

[330] Speech delivered by Prof. Mario Monti, European Commissioner for competition policy, *EU competition policy after May 2004*, Fordham Annual Conference on International Antitrust Law and Policy, New York, 24 October 2003.
[331] Report on Competition Policy 2016, published in May 2017, paragraph 1.
[332] The most relevant are the Regulation 3975/87, the Regulation 3976/87 and the Regulation 1617/93

opportunities will be generated in the decades to come. Geography is not the only factor that determines the location of successful international hub airports and airlines. The availability of suitable infrastructure, the nature of economic, fiscal and regulatory regimes, and historic, cultural and trading links all play a part. 14 These parameters can be managed and Europe has all the instruments at its disposal to do so.

Experience has shown that negotiating EU level comprehensive aviation agreements with third countries is an effective tool. For example, since the signature of the EU Air Transport agreement with the Western Balkan States, the number of passengers has almost tripled. In the case of Morocco, it has doubled. Since the conclusion of the agreements with US and Canada the combined growth in passengers between EU and these markets has been more than 3 million.

By adopting an ambitious external aviation policy through the negotiation of comprehensive aviation agreements, with a clear focus on growth markets, the EU can contribute to improving market access and investment opportunities for European aviation in important overseas markets, increasing Europe's international connectivity and ensuring fair and transparent market conditions for EU airlines. As the experience in the EU's aviation market has shown, market opening achieved through such agreements will also generate opportunities for new entrants and new business models to emerge. The Commission will seek to ensure swift progress in any forthcoming negotiations in a way that ensures continuing growth of the European airline industry"[333].

This plan is the response of the EU to the globalization process. Truly, since Mario Monti took office as Competition Commissioner, the globalization and the need to create a global culture[334] was considered a vital element to taken into account. The

[333] European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An Aviation Strategy for Europe*, 2015, paragraph 2.1

[334] "*Let me now conclude my remarks with a few words on the "external" component of competition policy after May 2004. With the growing number of merger operations covering multiple jurisdictions and cartels having often a truly global dimension, it is clear that efficient competition policy enforcement will continue to require more and more co-operation between competition authorities*", Speech

first step to create a common global culture was to be able to '*speak and exchange information*' between each other, between many different countries, and for this purpose a common language had to be established or adopted. The motivations for the change of course are definitely well justified. In the late 80s it was clear to many policy-makers that the global trend and the globalization process was unstoppable. Then, firms operating in different regions could hardly meet all the legal requirements in the different parts of the world: it is a burdensome and expensive process. The solution was to adopt a universal model, that could identify abuses and anti-competitive behavior in the same way and with the same principles everywhere in the world. The consequence would be the legal certainty for companies in at least the field of competition, a common level playing field for all undertakings, and the avoidance of distortive situations such as different treatments to firms operating in the same industry.

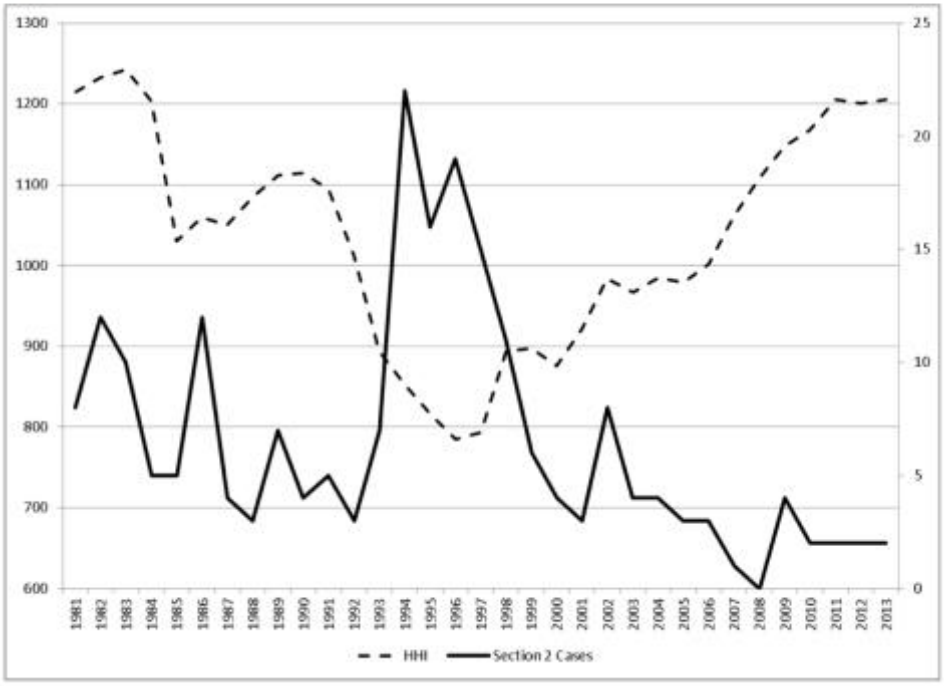
The results are unfortunately not satisfying. Concentration and cohesiveness of undertakings is reaching skyrocketing levels. The relation between the loosening of enforcement that followed the enactment of the *rule of reason* and the level of concentration is shown by the table (here below) contained in the study published by Gustavo Grullon, Yelena Larkin and Roni Michaely[335].

delivered by Prof. Mario Monti, European Commissioner for competition policy, *EU competition policy after May 2004*, Fordham Annual Conference on International Antitrust Law and Policy, New York, 24 October 2003

[335] Gustavo Grullon, Yelena Larkin and Roni Michaely, *Are US Industries Becoming More Concentrated?*, 2017.

Relation between Concentration Levels and Antitrust Enforcement

This figure depicts the relation between the aggregate HHI and the number of cases filed by the Department of Justice under Section 2 of the Sherman Act of 1890. The HHI is Herfindahl-Hirschman concentration index for all US publicly-traded firms that appear in CRSP and Compustat. To construct the HHI index, every year we sum up the squared total sales of each firm in a given NAICS 3-digit industry divided by the aggregate number of firms in the industry.



Gustavo Grullon, Yelena Larkin and Roni Michaely, Are US Industries Becoming More Concentrated?, 2017

Considering the high fixed costs companies in the air industry faces, they tend naturally to merger to pool resources, thus creating a quite oligopolistic market as well. In point of facts, acquiring another company is a recurring option[336] and indeed during the 80s and 90s[337] mergers and acquisitions between national air companies were very common. In the American market such M&As continued until the last wave of mergers brought to the creation of four giant companies[338], serving more than 90% of all the flights in the country.

[336] Last case is the bankruptcy of Air Berlin in July 2017 and the interest showed by many other carriers.
[337] Since 2006, Air Berlin acquired dba, LTU, LGW, Belair and flyNiki; Since 1955 Lufthansa has always been very proactive in the market. In the last 10 years, it bought Swiss Int'l Airlines, Austrian Airlines, BMI, Brussels Airlines, Jetblue. German Wings.
[338] Delta Airlines, American Airlines, Southwest Airlines and United Airlines.

Due to the unsatisfying results, the new plan of the European Union aims at remaining "*competitive,* [therefore] *it is essential that market access is based on a regulatory framework which promotes EU values and standards, enables reciprocal opportunities and prevents distortion of competition.*

As there is currently no international legal framework to deal with possible unfair commercial practices in international aviation, it is important and legitimate for the EU to address such practices to ensure fair and sustainable competition. Regulation 868/2004 15 on the protection against subsidisation and unfair pricing practices covers this issue but, as it currently stands, is not considered effective among stakeholders. This issue should be addressed in the context of the negotiation of EU comprehensive air transport agreements and by intensifying corresponding policy action at the International Civil Aviation Organization level. In addition, the Commission is considering proposing new EU measures to address unfair practices as soon as possible in 2016". The globalization has an undisputable influence over the development of economies and the response of the competition legislation shall be adequate. "*Aviation has become a catalyst for economic growth: a high-performing aviation sector contributes to a healthy EU economy.*

The European Union has already assumed the role of a "game-changer" with the creation of a single aviation market. When developing this market, the objective was to promote consumer interests, reduce barriers to trade, maintain a level playing field for operators, foster innovation, maintain the highest levels of safety and involve all stakeholders in the process.

These principles must also be pursued globally. The EU aviation sector must keep up with the pace of growth and change, by ensuring access to key growth markets for EU industry and its citizens. The success of the EU's internal aviation market and the principles and rules it is based on should be promoted at international level through an ambitious EU external aviation policy and negotiations with key partners.

Action at EU level is needed to overcome capacity and efficiency constraints, stemming from the inefficient use of current resources (airspace, airports) and market restrictions. Aviation must become an integral element of inter-modal

transport, for the best possible connectivity which in turn will help drive growth for Europe's economy.

The EU should pursue policies aimed at optimising the investment and market conditions affecting the aviation industry and improving the regulatory framework whilst maintaining the highest EU standards for safety, security, the environment and its citizens. The Commission is also convinced that intelligent investments in technology and innovation will help secure Europe's leading role in international aviation.

The successful implementation of this Aviation Strategy will depend on the willingness of all players to collaborate in a coherent and consistent manner. Aviation is a global industry and all parts of the EU aviation network create value. Only a competitive and sustainable air transport sector will allow Europe to maintain its leadership position, in the interest of its citizens and its industry"[339].

For this reason, the creation of a global level field is required. Currently, due to the rapid expansion in the world markets after the wave of mergers and alliances, the air transport companies need such a worldwide framework to be able to effectively compete and to offer better services. Indeed the European Commission often repeats that "*it may be assumed that where unfair practices exist, the competition on the international aviation market is distorted, i.e. takes place on an uneven playing field. Hence, the objective of the* [EU] *is to restore the economic situation as it would have been in the absence of unfair practices. The impact assessment attempts to indicatively assess to which extent different policy options can help in reinstating the competitive balance on the markets operated by EU airlines. The effectiveness in achieving this goal by the policy options will then determine the EU airlines' market position on extra-EU markets where unfair practices are alleged to exist most often. However, this assessment has to be treated with caution and like the PwC study, needs to start from a number of assumptions. These are the following:*

[339] European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An Aviation Strategy for Europe*, 2015, paragraph 3.3

- *Where EU airlines market position has declined in markets where unfair practices allegedly exist, it is assumed that part of the impact is due to such practices adopted by third countries and third country entities;*
- *Unfair practices are defined as practices favouring third country air carriers to the detriment of EU carriers*"[340].

The solution to this globalized market contained in the EU Aviation Strategy is implementing a new Regulation that concerns the aid to foreign air carriers, replacing the current Regulation 868/2004[341] and adding competition provisions on the Air Service Agreements signed, in order to bring the enforcement of competition provisions to the international level. As far as the Regulation 868/2004 "*the concept of 'unfair pricing practices'* [here contained], *inspired by GATT rules on product dumping, is not suitable for the aviation sector characterised by complex pricing and revenue management mechanisms. For that reason, the new Regulation* [would be proposed and it] *would abandon the objective of addressing unfair pricing practices in aviation and focus on action against subsidies which negatively affect EU competitors as one of the most common forms of alleged unfair practices distorting competition 130. As in other trade defence instruments, the new Regulation measures would only act against the subsidies which are proven to exist and cause injury to EU carriers* […] *The new Regulation would extend its scope to cases of violation of applicable international obligations. These "applicable international obligations" would be defined as obligations contained in an agreement to which the Union is a party, and which contain provisions relating to*

[340] European Commission, Impact Assessment on the proposal on safeguarding competition in air transport, repealing Regulation (EC) N° 868/2004, pages 58 and 59.

[341] The regulation provides for a shield against the subsidies conceded by public authorities to air carriers operating in the EU. Article 1 of the Regulation 868/2004 reads as follow: "*This Regulation lays down the procedure to be followed to provide protection against subsidisation and unfair pricing practices in the supply of air services from countries not members of the European Community in so far as injury is thereby caused to the Community industry*". The Regulation has been deemed ineffective by air companies so a replacement of the current legislation is desirable to prevent unfair competition exercised by aided foreign undertakings.

fair competition". For an action on the international level, as "*there is currently no international legal framework to deal with possible unfair commercial practices in international aviation, it is important and legitimate for the EU to address such practices to ensure fair and sustainable competition. (...) This issue should be addressed in the context of the negotiation of EU comprehensive air transport agreements and by intensifying corresponding policy action at the International Civil Aviation Organization level. In addition, the Commission is considering proposing new EU measures to address unfair practices as soon as possible*".

The program targets two policies in order to make the current legislation adaptable to world markets and it is also highly probable that new sectors, besides the air transport, will also need a proper legislation that goes beyond continental boundaries. For these reasons, this thesis exemplifies how the aviation industry is simply preceding the process of globalization of the competition law that soon will pertain to all industries that have a transnational outlook. The air transport is starting this new approach to competition law. The study of the solutions proposed and applied here shown is then relevant to the future of all companies that will also require a global level field and a well-defined legal framework that works for the best enforcement of competition rules (e.g. banking industry, constructions, IT).

BIBLIOGRAPHY

ABEYRATNE R.I.R., *Outsourcing and the Virtual Airline,* Legal Implication, Air & Space Law, 1997

ABEYRATNE R.I.R., *Franchsing the Airline Industry*, Some Implications at Common Law, Air & Space Law, 1997

ALMUNIA JOAQUIN, *press releases*

AREEDA (2001), *The Antitrust Law*, 2nd Ed

AUTOR DAVID, DORN DAVID, KATZ LAWRENCE F., PATTERSON CHRISTINA and VAN REEGEN JOHN, *Concentrating on the Fall of the Labor Share*, American Economic Review: Papers & Proceedings 2017

BACHMAN JUSTIN, *Forget About Airline Mergers. Now It's All About Trading Airport Slots*, 2015

BACHMAN JUSTIN, *This Is Why No Airline Will Ever Dominate LAX*, BLOOMBERG, 2016

BADURA P. (2008) Wirtschaftsverfassung und Wirtschaftverwaltungs

BALFOUR J., *Airline Mergers and Marketing Alliances,* Legal Constraints, Air & Space Law, 1995

BARNARD CATHERINE, ALBORS-LLORENS ALBERTINA and GEHRING MARKUS W. (2013) C*ambridge Yearbook of European Legal Studies*, Vol. 15

BELTRAMETTI SILVIA (2014) *Capturing the Transplant: U.S. Antitrust Law in the European Union*, Chicago Law School

BOHM F. (1933) *Wetterbewerb und Monopolkampf*

BORK RH (1967) *The Goals of Antitrust Policy*

BORK RH (1978) *The Antitrust Paradox*

BORK RH (1978), *The Antitrust Paradox: A Policy at War With Itself*

BRADLEY Jr. ROBERT L. (1990) *On the origins of the Sherman Antitrust Act*

BUCK-HANSEN H. and WIGGER A. (2011) *The Politics of European Competition Regulation*

BURSTI S., *Contratto di trasporto aereo*, in Trattato di diritto civile e commerciale Cicu-Messineo, Milano, 2001

CALLEGARI G. and PRATI S, *I nuovi contratti di utilizzazione dell'aeromobile*, Milano, 2002

CARLUCCI FABIO, *Trasporto aereo: regolamentazione e concorrenza*, 2003

CARLUCCI FABIO, *Trasporto aereo: Regolamentazione e concorrenza*, 2003

CELINE GAUER, LARS KJOLBYE, DOROTHE DALHEIMER, EDDY DE SMIJTER, DOMINIK SCHNICHELS and MAIJA LAURILA, *Regulation 1/2003 and the Modernisation Package fully applicable since 1 May 2004*, in Competition Policy Newsletter

CILIBERTO FEDERICO and WILLIAM JONATHAN W., *Does Multimarket Contact Facilitate Tacit Collusion? Inference on Conduct Parameters in the Airline Industry*, 45 RAND J. ECON. 764, 2014

CRANE DANIEL A. and HOVENKAMP HERBERT (2013) *The making of Competition Policy: Legal and Economic Sources*, Oxford University Press

DE GROOT J. E. C., *Code Sharing, Unites States' policies and the lessons for Europe*

DREW CHRISTOPHER, *Airlines Under Justice Dept. Investigation Over Possible Coll*usion, N.Y. TIMES, 2015

EDLIN AARON S., *Stopping Above-Cost Predatory Pricing*, 111 YALE L.J. 941, 981, 2001

EUCKEN W. 1932) *Staatliche Strukturwandlungen und die Krisis des Kapitalismus*

EUCKEN W. (1940) *Die Grundlagen der Nationalokomie*

EUCKEN W. (1949) Die Wettbewerbsordnung und ihre Verwirklichung

EUROPEAN COMMISSION (2002) *Report on Competition Policy, A Collection 1971-2001*

EUROPEAN COMMISSION (2010) *Communication Europe 2020 – A strategy for smart, sustainability and inclusive growth*

EUROPEAN COMMISSION, *Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty*, 2014

EUROPEAN COMMISSION, *Notice on the definition of the relevant market for the purposes of Community competition law*

EUROPEAN COMMISSION, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*

EUROPEAN COMMISSION, Directorate-General for Energy and Transport, *Guide to European Community legislation in the field of civil aviation*, June 2007

EUROPEAN COMMISSION, *Guidelines on Vertical Restraints*

EUROPEAN COMMISSION, *Guidelines on State aid to airports and airlines* (2014/C 99/03)

EUROPEAN COMMISSION, Directorate-General for Energy and Transport, *Guide to European Community legislation in the field of civil aviation*, June 2007

EUROPEAN COMMISSION, *The White Paper - COM (2016) 3502 final*, 10 June 2016

EUROPEAN COMMISSION, *Commission Notice - Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements*, 2011

EUROPEAN COMMISSION, *Commission Notice, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements*, 2001

EUROPEAN COMMISSION and the US DEPARTMENT OF TRANSPORTATION, *Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches,* 16 November 2010

EUROPEAN COMMISSION, *Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08)*

EUROPEAN COMMISSION, *Report on Competition Policy 2016*, May 2017

EUROPEAN COMMISSION, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* of 4 June 2015

EUROPEAN PARLIAMENT, *Airport slots and aircraft size at EU airports*, 2016

FROTSCHER W. (2008) Wirtscahftsverfasungs- und Wirtschaftverwaltungsrecth

GERBER DAVID J. (1998) *Law and Competition in Twentieth Century Europe*

GERBER DAVID J. (2012) *Global Competition: Law, Markets and Globalization*

GIANNACCARI ANDREA, *Apple, Amazon e gli e-book: una storia illecita, pro-competitiva*, in *Mercato Concorrenza Regole*, XVIII, n.1, aprile 2016

GORMSEN LIZA LOVDAHL (2008) *Antitrust Marathon* II, European Competition Journal 4, n. 1

GRARD LOIC, *Droit Communitaire des Transports aeriens*, 2003

GRULLON GUSTAVO, LARKIN YELENA and MICHAELY RONI, *Are US Industries Becoming More Concentrated?*, 2017

HAWK BARRY E, The American (Anti-Trust) Revolution – Lessons for the EEC?', 1988

ICAO, *Air carrier ownership and control clauses in bilateral air services* agreements, Worldwide air transport conference (ATCONF), Sixth Meeting, Montréal, 18 to 22 March 2013, ATConf/6-WP/49

HILDEBRAND DORIS (2005) *Economic Analyses of Vertical Agreements: A Self-assessment*

IATA, *Airline Liberalization*, 2009

IATA, *Passenger Service Conference Resolution n. 762*

ICAO, *Chicago Convention*, First Edition, 1944

ICAO, *Chicago Convention*, Ninth Edition, 2006

ICAO, *1994 Aviation Guidelines*

ICAO, *2005 Aviation Guidelines*

ICAO, *Challenges and opportunities of liberalization*, in Worldwide air transport conference

ICAO, *Implications of airline codesharing*, in Circular 269-AT/10, Montreal,1997

ICAO, *Manual on the Regulation of International Air Transport*

ICAO, *Manual on the Regulation of International Air Transport*

ICAO, *Circular 269-AT/10, Implications of airline code sharing.*

ICAO, *National restrictions on air carrier ownership and control*, Worldwide air transport conference (ATCONF), Sixth Meeting, Montréal, 18 to 22 March 2013, ATConf/6-WP/50

KWOKA JOHN E., Jr. and Lawrence J. White, *The Antitrust Revolution: Economics, Competition, and Policy,* 2013, Sixth Edition

KHAN LINA and VAHESAAN SANDEEP, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, in Harvard Law & Policy Review, 2017

LANDES WILLIAM (1981) *The Fire of Truth: A Remembrance of Law and Econ at Chicago,* Journal Law and Economics

LI M.Z.F., *Distinct features of lasting and non-lasting airlines alliances, in Journal of Air Transport Management*, 2000.

MCLAUGHLIN DAVID and SCHLANGESTEIN MARY, *U.S. Looks at Airline Investors for Evidence of Fare Collusion*, BLOOMBERG, 2015

MEDICI CHIARA, *Pratica restrittiva della concorrenza e prescrizione*, in *Orizzonti*, 2016

MIKSCH L. (1937) *Wettbewerb als Aufgabe*

MONTI MARIO, *EU competition policy after May 2004*, Fordham Annual Conference on International Antitrust Law and Policy, New York, 24 October 2003

MONTI MARIO, *speech delivered* in 2003

MöSCHEL WERNHARD (2007) *US versus EU Antitrust Law*

NEALE ALAN D. and GOYDER D.G. (1980) *The Antitrust Law of the United States of America*

OSTERUD ERIC, *Identifying exclusionary Abuses by Dominant Undertakings under EU Competition Law: the Spectrum of Tests,* in *International Competition Law Series,* 2010

ROSSI DAL POZZO FRANCESCO, *Servizi di trasporto aereo e diritti dei singoli nella disciplina comunitaria,* 2008, Giuffrè Editore

ROUSSEVA (2005) *Modernizing by Eradicating: How the Commission's New Approach to Article 81 EC Dispenses with the Need to Apply Article 82 EC to Vertical Restraints*, Common Market Law Review 42, n. 3

SEVERONI CECILIA, *Code Sharing*, 2010.

STEWART JAMES B., *"Discipline" for Airlines*, *Pain for Fliers*, N.Y. TIMES, 2015

TOIS J. P., *Problemes actuels posés par l'affretément aéerien*, in Revue Fr. De Droit aérien et spatial, 1989

UBERTAZZI LUIGI CARLO, *Commentario breve alle leggi su Proprietà Intellettuale e Concorrenza*, 2016, CEDAM

US DEPARTMENT OF TRANSPORTATION, *Flight Standards Information Bulletin (FSIB) for Airworthiness (FSAW) and Air Transportation (FSAT) n. FSAW 95-06 and FSAT 95-14*

US DEPARTMENT OF TRANSPORTATION, *Transatlantic deregulation – the alliance network effect*

VESTAGER MARGRETHER (2016) Speech delivered at the 15th OECD Global Forum on Competition, Paris, 1 December 2016

WITT ANNE C., *The More Economic Approach to the EU Antitrust Law*, 2016

WORLD ECONOMIC FORUM, *A New Regulatory Model for Foreign Investment in Airlines*, 2016

WU TIM, *Enough with the Crazy Change Fees*, NEW YORKER, 2015

ZUNARELLI S., *La nozione di vettore*, Milano, 1987.

TABLE OF CASES

Cases T-22 & 23/02 *Sumitomo v Commission*

Case *Boeing/McDonnell Douglas*

Case 322/81 Michelin v Commission

Case GE/Honeywell

Case Microsoft

Case United States v Trans Missouri Freight Assn

Case United States v Aluminium Co of America et al

Case Brown Shoe Co v United States

Case Continental T. V., Inc v GTE Sylvania Inc

Case United States v Arnold Schwinn & Co

Case State Oil Co. v Khan

Case Leegin Creative Leather Products, Inc v PSKS, Inc

Case Northwest Wholesale Stationers, Inc v Pacific Stationery & printing Co

Case FTC v Indiana federation of dentists

Case Standard Oil Co. of New Jersey v. United States

Case Reiter v Sonotone Corp

Case Brooke Group Ltd v Brown & Williamson Tobacco Corp.

Case NCAA v Board of Regents of the University of Oklahoma

Case Broadcom Corp. v Qualcomm Inc.

Case Rebel Oil Company Inc., Auto Flite Oil Company Inc v Atlantinc Richfield Company

Case T 14/89 Montedipe S.p.A. v Court of First Instance

Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, *Suiker Unie v Commission*

Case 41/69, *ACF Chemiefarma v Commission*

Joined Cases 209 to 215 and 218/78 *Van Landewyck v Commission*

Case 48/69 *Imperial Chemical Industries Ltd v Commission*

Case 26/76 *Metro SB-Grossmarkte v Commission*

Case 107/82 *AEG-Telefunken v Commission*

Case C‑491/01 *British American Tobacco (Investments) and Imperial Tobacco*

Case 30/91 *Solvay SA v Commission*

Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94,T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94

Case C-506/03 *Germany v Commission*

Case 265/*85 Van den Bergh en Jurgens and Van Dijk Food Products Lopik v Commission*

Case C-137/95 *P SPO and Others v Commission*

Case C-219/95 *P Ferriere Nord v Commission*

Case *Dombo Beherr v Netherlands*

Case *Hale v Henkel*

Case 479/04 *Laserdisken v Kulturministeri*et

Case 36/91 *Imperial Chemical Industries plc. v Commissi*on

Cases 182 & 217/03 *Belgium and Forum 187 v Commission*

Case 3/06, *Group Danone v Commission*

Case 68/12, *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.*

C-501/06 P, *GlaxoSmithKline Services and Others v Commission and Others*

Spirit Airlines, *Inc. v. Nw. Airlines, Inc*., 431 F.3d 917, 953 (6th Cir. 2005)

United States v. AMR Corp., 335 F.3d 1109, 1111 (10th Cir. 2003)

Case COMP/38.284/D2 Sociètè Air France / Alitalia Linee Aeree Italiane S.p.A.

Case C-95/04 P, *British Airways v Commission*, 2007

Opinion of Advocate General Kokott, Case C-95/04 P, *British Airways v Commission*, 2007

Case COMP 34.493, *DSD*, 2001, OJ L391/1

Case COMP/D3/35.470, *ARA*, 2004, OJ L75/59

Case COMP/D3/35.473, *ARGEV, ARO*, 2004, OJ L75/59

CASE IV.F..1/36.718, *CECED*, 2000, OJ L187/47