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Airline alliances
- A legal way of restricting competition?

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Contents

Summary

Competition law within the European Union prohibits any agreements that restrict competition. When an agreement has as its object to eliminate competition such an agreement will be considered as an infringement of Art. 101 TFEU. The airline industry consists of various cooperation agreements between airlines, some of these agreements create highly integrated joint ventures and the main object of all of these agreements is to restrict competition on key parameters of competition. Alliances have been created in order to meet the internal and external pressure within the airline industry, which is characterized by its high fixed costs and thin profit margins. By entering into an alliance there is a possibility for an airline to reduce its costs while still being able to provide world-wide services.

The Commission has assessed these airline alliances since the European airline industry was liberalized in the 1990s. Although there are obvious anti-competitive effects caused by airline alliances the Commission has deemed that the efficiencies created brings benefits that outweighs the disadvantages. Although the Commission has approved all alliances, this has not been done without imposing commitments on the airlines first. However, these commitments have not always led to the wanted effects as some markets have become monopolistic following the approval by the Commission. Further it seems as if the Commission has approved various cooperation agreements by imposing commitments that have consisted of further cooperation agreements with other competitors.

It would seem as if competition within the airline industry is not sufficiently maintained. However, this may be a way of fostering the airline industry. If airline alliances were to be considered as illegal, regardless of whether commitments were offered by the airlines, it is questionable if the industry would be able to stay at the level of operations as it is today. By taking a more lenient approach and emphasising the benefits created through alliances the Commission has kept the industry alive. If all cooperation were to be prohibited within the industry the negative effects would most likely be greater than what the elimination of competition causes when airline alliances are allowed. Airline alliances are therefore, to a certain extent, a legal way of restricting competition.

Sammanfattning

Konkurrensbegränsande avtal är förbjudna under Europeiska Unionens konkurrensrättsliga regleringar. Art. 101 i EUF-fördraget förbjuder alla avtal vars syfte är att begränsa konkurrensen inom den inre marknaden. Flygbolagsindustrin är kännetecknad av en stor mängd samarbetsavtal mellan flygbolag, där särskilda avtal innebär integrerade samarbeten. Det huvudsakliga syftet med dessa avtal är att begränsa konkurrensen, oavsett vilken nivå flygbolagen har valt att samarbete på. Flygbolagsallianser skapas för att kunna stå emot flygbolagsindustrins tuffa förhållanden. Industrin är känd för dess höga fasta kostnader och låga vinstmarginal, genom allianser finns det en möjlighet för flygbolag att minska deras utgifter samtidigt som de fortfarande kan erbjuda sina kunder möjligheten att flyga över hela världen.

Sedan liberaliseringen av flygbolagsindustrin har Kommissionen granskat flygbolagsalliansers förenlighet med konkurrensrätten. Kommissionen har ansett att de konkurrensfrämjande effekter som flygbolagsallianser leder till har vägt tyngre än eventuella konkurrensbegränsande effekter. Kommissionen har godkänt alla flygbolagsallianser dock med tillägg om åtaganden för att minska de konkurrensbegränsande effekterna. Dessa åtaganden har däremot inte alltid gett de effekter som Kommissionen har strävat efter då monopol har skapats på vissa marknader. Vidare har Kommissionen godkänt allianser genom att förplikta alliansen att ingå i ytterligare samarbetsavtal med andra konkurrenter.

Konkurrens inom flygbolagsindustrin är inte tillräckligt bibehållen, anledningen till detta kan vara ett försök att bevara flygbolagsindustrin. Om flygbolagsallianser hade förbjudits är det tveksamt om industrin hade kunnat bevara samma nivå av tjänster som den gör idag. Genom att ta större hänsyn till alliansers konkurrensfrämjande effekter bevaras industrin. Det är troligt att de konkurrensbegränsande effekterna på marknaden hade varit större om alla allianser hade förbjudits, än de konkurrensbegränsande effekter som uppstår till följd av en begränsad konkurrens. Flygbolagsallianser kan därmed anses vara lagliga konkurrensbegränsande avtal.

Preface

The day has finally arrived, six years of studying in Lund has come to an end and what a journey it has been. It is with a hinge of sadness that I close this chapter of my book and embark on my greatest adventure so far in life.

I would like to extend my gratitude to my supervisor Julian Nowag, for the insightful advices and directions you have given me during this semester.

I would also like to thank my parents, for always believing in me, and all of my family and friends that have stood by me through the years in Lund.

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To Christopher, thank you for embarking on this amazing journey with me. I have you to thank for a million things and more.

Gratefully,

Ida Hermansson
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Abbreviations

Air France	Société Air France
Alitalia	Alitalia Linee Aeree Italiane S.p.A.
American Airlines	American Airlines Inc.
Charles de Gaulles	Paris Charles de Gaulle Airport
Commission	European Commission
CJEU	The Court of Justice of the European Union
Gatwick	Gatwick Airport
Heathrow	London Heathrow Airport
IATA	International Air Transport Association
Iberia	Iberia Líneas Aéreas de España
IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
JFK	John F Kennedy International Airport
KLM	Koninklijke Luchtvaart Maatschappij N.V.
Lufthansa	Deutsche Lufthansa AG
Newark	Newark Liberty International Airport
Orly	Paris Orly International Airport
Sabena	Société Anonyme Belge d'Exploitation de la Navigation Aérienne
SAS	Scandinavian Airlines
Swissair	Swiss International Air Lines Ltd.
United	United Airlines Inc.
Virgin	Virgin Atlantic Airways Limited

1 Introduction

The airline industry transports over 3 billion passengers around the world every year, and a major percentage of these passengers travel with one of the major global airline alliances.[1] These alliances have grown bigger and their businesses have become more integrated than ever before, and various cooperation agreements have been entered into in order to facilitate the airlines businesses. A former director of a European carrier once stated "there can be little doubt that airline executives see alliances, especially when they involve code sharing and capacity rationalization, as a way of reducing or limiting competition"[2].

The purpose of European competition law is to ensure that competition is protected in the free market economy, as competition is believed to bring the most benefits to society. If an undertaking would be allowed to eliminate competition, without facing any consequences of these actions, the purpose of the free market economy within the European Union would be jeopardize.

The concepts and purposes of airline alliances do not correspond to the purposes of European competition law, however these alliances have not been prohibited. It is therefore necessary to further investigate the relationship between airline alliances and competition law in order to understand how it is possible for these alliances to keep acting on the market. Due to the specifics of the airline industry it is necessary to first understand how competition law has come to be applicable in the European airline industry.

1.1 Historical background

The first passenger plane to successfully leave the ground was the plan flown by the Wright brothers in 1903. The historical moment took place in North Carolina and marked the beginning of an ever growing and evolving global industry. Europe was not far behind and the first commercial flight left ground in 1916.[3] Although being an international industry focused on transportation between States it was purely nationally regulated in its early days.[4] Following World War II many States expressed the need for an

[1] ICAO, Air navigation report 2015 Edition, p. 5.
[2] Doganis, p. 95.
[3] Morrison p. 3 and Dempsey, p. 1.
[4] Doganis, p. 27.

international regulation. Therefore an international conference was held in Chicago in 1944, which lead to the creation of the Convention of International Civil Aviation[5]. The Chicago Convention established rules on air travel, aircraft registration, safety and other related areas. However, it did not regulate international passenger air transportation, economic rights or traffic rights. These issues were solved through individual bilateral agreements negotiated between States, so called Air Service Agreements, ASAs, which formed the base of international air transportation.[6]

For a long time the European air transport industry was characterized by its state-owned national flag carriers, which were mandated to operate by the national governments through the ASAs. The consequence of this market structure was that national carriers were often treated in a favorable manner, since they were considered to represent the State and therefore frequently received financial supported from the State. With time it became evident that a change was needed. Due to low productivity and high costs the carriers did not make as much profit as expected.[7] At this time, around the 1980s, European competition provisions were not applicable in the air transportation sector and the industry was still regulated by national legislation. The first sign of a change came when the European Court of Justice, the CJEU, in the case Nouvelle Frontieres[8] concluded that the Treaty's provisions on competition should be applicable to all modes of transportation. Liberalisation then took place in three stages, referred to as three packages, which would create the Single European Aviation Area.[9] The first step towards liberalizing the airline industry and removing the regulatory barriers was made through the first package. The first package was adopted in 1987 and contained provisions on market access, airfares and capacity control. The package allowed for the application of Art. 101 and 102 TFEU and gave the European Commission, the Commission, the authority to grant block exemptions.[10] The second package, adopted in 1990, contained regulations that focused on tariffs, market access and new block exemptions. It meant further flexibility when setting fares, although still within fixed pricing zones and access to the intra-EU market was opened for carriers within the Union.[11] The third package was the most important and radical as it fully liberalized the industry. It essentially meant that all restrictions were removed in favour of an open market regime within Europe. The package meant the abolishment of previous capacity

[5] Commonly referred to as the Chicago Convention.
[6] Dempsey, p. 18 – 27.
[7] Truxal, p. 70.
[8] Nouvelle Frontieres, Joined Cases 209 to 213/84, EU:C:1986:188.
[9] Schmauch, p. 27 – 29.
[10] Schmauch, p. 34 – 35.
[11] Faull and Nikpay, p. 1785 – 1786.

restrictions and restrictions on traffic rights. Following the third package airlines were free to set their own fares, without restrictions or pricing zones. The third package also meant the expansion of the previous packages, which approved the full application of competition provisions in the Treaty. Although this did not include the formal competence to apply EU competition provisions on transatlantic routes, it was later stated that the Commission had the same possibilities of dealing with these transatlantic alliance as it did with intra-European alliances.[12]

1.2 Aim of the Thesis

The purpose of this thesis is to assess whether competition law is sufficiently maintained within the airline industry. The focus is on whether airline alliances are compatible with Art. 101 TFEU. The concept of an airline alliance is to cooperate with its competitors on certain aspect of its business, some to a further extent than others. Since the purpose of Art. 101 TFEU is to prohibit any cooperation that negatively effects competition, it seems as if the mere creation of an airline alliance infringes competition law. It is necessary to further examine the concepts of these alliances and what their cooperation really means, and more specifically what the Commission has assessed in its decisions. The intention with this assessment is to gain an understanding of how these alliances are allowed to act on the market without breaching competition law, as the mere purpose of an alliance suggests an infringement. In order to do this, it is necessary to understand both Art. 101 TFEU and the concepts of these alliances. In order to gain a better understanding of the relationship between airline alliances and Art. 101 TFEU the following questions will be assessed,

- Is competition sufficiently maintained in the airline industry?
- Are the assessments performed by the Commission in accordance with Art. 101 TFEU?
- What effects can be seen on the market following the approval of airline alliances?

1.3 Methodology and Materials

The research in this thesis is carried out through a conventional legal dogmatic method in order to answer the research questions. The legal dogmatic method is used in order to establish the current state of law by using relevant legal European material such as case law and doctrine, in

[12] Balfour, p. 85 and Truxal p. 87.

order to get a clear picture of the current situation.[13] The literature used in this thesis has been examined and assessed prior to its used. The literature has been focused on either competition law or the airline business; restricted parts have discussed the airline industry from a competition law perspective. The selection of literature is based on its relevance with the stated purpose of this thesis; I have used my previous knowledge in this area of law when carefully selecting all sources. When the current state of law has been established the results will be analyzed and criticized.

The materials used in order to establish the current state of law is first and foremost the Commission's decisions, where alliance have been scrutinized under competition provisions. The Commission's decisions have been selected based on the level of cooperation within the alliance but also with reference to time. It begins with the first alliance ever assessed by the Commission following liberalization of the airline industry and is then followed by three highly integrated joint ventures concerning transatlantic alliances which have been reviewed by the Commission. The final Commission decision concerns a cooperation agreement where the Commission found competition law to be infringed, as the alliance was found to be a cartel. It is important to emphasis that the last case is different than the other cases, as the facts and actions are different compared to the other alliance. The case is not presented for the same reasons as the other cases, which is to assess the Commission's decisions, but is used in order to show the effects of an illegal alliance in order to later compare the differences between a legal and illegal airline alliance. Case law from the CJEU has been referred to when recalling the foundations of competition law and its provisions. Lastly, various reports and doctrine have been used in order to explain the concepts of the airline industry and the reasons for joining alliances.

1.4 Disposition and Delimitations

This thesis has begun with a historical background of the airline industry and the developments that have led to the full application of competition provisions within the industry. It is necessary to understand the historical background when further investigating today's industry and whether the history of the industry still affects today's businesses. The thesis will hereafter be followed by a reminder of competition law and the relevant provisions. Certain aspects of competition law are highlighted for the further discussion of its application in cases concerning airline alliances; which are presented in view of the approach taken in decisions concerning airline

[13] Sandgren, p. 41 – 42.

alliances. The next chapter describes the airline industry and the difficulties an airline is faced with, the concept of an alliance and its possible effects on the market. The following chapter will then review the Commission's decisions concerning selected airline alliances. The concepts of the agreements will be presented as well as the competitive assessment performed by the Commission followed by the suggested commitments. All cases are followed by short comments on aspects that the reader should further consider; some of these aspects are further emphasized with reference to doctrine. In the final chapters the interface between competition law and airline alliances are assessed with references to the research questions of this thesis.

It is important to emphasis that airline alliances are assessed from a competition law perspective in this thesis, however the economic perspective is just as important in this industry. Although the specifics of the industry are explained in this thesis there are many more economic aspects to the business that have been left outside the scope of this thesis due to its limitations. This thesis will focus on the application of Art. 101 TFEU on airline alliances within the European Union. Although many of these alliances include American carriers, US antitrust will not be assessed in this thesis although references to investigations performed in the US may occur. Although airlines transport more than just passengers, the thesis will only assess air transportation of passengers. The Commission's decisions will be presented in summaries where the most important aspects such as the competitive assessments and the imposed commitments have been emphasized. In order to receive a complete presentation of these cases the reader is encouraged to seek out the Commission decision. Although it would be very interesting to assess airline alliances relationship to Art. 102 TFEU this will not be done in this thesis. Neither will any other vertical alliances between airlines and other undertakings be assessed.

2 Competition Law

The first common European competition provisions were found in the Treaty of Paris as early as 1951. The creating of competition policy was made in accordance with the primary objective of the EU, to integrate national firms into a single market of the EU. This would bring an end to a market run by state owned firms and sanctioned monopolies.[14] Today primary competition provisions are found in the Treaty of the Functioning of the European Union, TFEU, and the Merger Regulation[15] and in Regulation 1/2003[16]. EU competition law can pursue many different objectives and in recent years the main objective has been consumer welfare and economic efficiency. Other objectives pursued have been consumer protection, protection of the competitor, economic freedom, fair competition and public policy. Even though there are many different objectives for competition law there has never been an agreement on what objectives that competition law is actually trying to achieve. The overall purpose is to achieve the aims of the Union in creating a single market with free movement, but the means of getting there are different.[17]

2.1 Article 101 TFEU

> *"The following shall be prohibited as incompatible with the common 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"*[18]

Art. 101 TFEU addresses agreements, or similar arrangements, between actual or potential competitors that restrict competition such as cooperation agreements between airlines. Agreements has been given a very wide definition by the Courts and includes more than just an actual agreement. It is necessary to show that the undertakings have expressed a joint intention to behave in a certain manner, a concurrence of wills, on the market. The form in which this has occurred has not been essential for the application of the provision, why concerted practices have been considered to fall under its scope.[19]

[14] Truxal, p. 68.
[15] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.
[16] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.
[17] Jones & Sufrin, p. 34 – 40.
[18] Art. 101 TFEU
[19] Faull et al., p. 204 – 205 and p. 218 – 219.

2.1.1 Restriction of Competition by Object or Effect

In order for an action to fall under the scope of Art. 101 TFEU the action must cause a restriction or distortion of competition, either by its object or by its effect. The CJEU has concluded that a restriction by object includes actions that by their very nature have the potential of restricting competition. In the case of *T-Mobile* the CJEU stated that "*it is sufficient that it has the potential to have a negative impact on competition*"[20], meaning that it would not be necessary to show that an actual effect had occurred on the market.[21]. If an agreement was considered to restrict competition by object, it would automatically be considered to appreciably restrict competition.[22] The concept of a restriction by object has been intensively discussed in recent years, as the CJEU has included an extensive amount of actions that have been considered as restrictions by object. As a consequence it has become very difficult to state what constitutes an object restriction and it has been questioned if there really is a distinction between object and effect.[23]

There are certain agreements that by their very nature are considered to be restrictions of competition by object, and have been specifically mentioned in Art. 101 TFEU. An example of such an agreement is a market sharing agreement where the parties divide markets between themselves in order to not compete on these markets. Market sharing agreements have been considered as a hardcore restriction of competition as the very nature of such an agreement has as its object to restrict competition and therefore eliminates all competition between the parties of the agreement. An example of such an agreement was the secretly concluded cartel between SAS and Maersk Air.[24] In situations where it cannot be shown that an agreement has as its object to restrict competition it is necessary to further investigate the effects of such an agreement, why it is important to define the relevant market.[25] It is not enough to only assess the current state of competition, but necessary to assess both actual and potential competition, which might be affected by the agreement.[26]

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[20] Case C-8/08, *T-Mobile*, EU:C:2009:343, para. 31.
[21] Whish and Bailey, p. 123 with reference to case law.
[22] Prior to the *Expedia* judgment, EU:C:2012:795, it was possible to claim that an agreement fell outside the application of Art. 101 TFEU if the undertakings held very small market shares. In *Expedia* the Court concluded that a restriction by object always has a appreciable effect on competition.
[23] Whish and Bailey, p. 123 – 125.
[24] See Chapter 4, Commission's decisions, SAS – Maersk Air.
[25] Whish and Bailey, p. 133 – 134, an extensive investigation was performed in *Delimitis* which showed to what an extension it is necessary to investigate in order to determine whether an agreement has the effect of restricting competition.
[26] Whish and Bailey, p. 134 – 135.

2.1.2 Article 101 (3) TFEU

Any agreements that falls under the scope of Art. 101 (1) TFEU are void.[27] However, it is possible for an agreement to be exempted if it falls under the scope of Art. 101 (3) TFEU.[28] The Commission has even found that extensive strategic alliances[29], which restricted competition by object, have satisfied these criteria. Although it is very difficult to argue that the criteria are met and should benefit from the exemption, when the object is to restrict competition.[30] The first criterion states that an agreement must contribute to the improvement in the production or distribution of goods or in technical or economic process. It is not sufficient if the agreement only brings value to a private actor, it needs to be of value for the entire EU and outweigh the possible disadvantages without causing disproportionate distortion of competition.[31] The second criterion states that the consumer must gain a fair share of the benefits created. The criterion is usually not satisfied if it only brings benefits to consumers on an unrelated market whilst consumers on the relevant market are negatively affected. However, the Commission has approved this if the markets have been related and the consumers have been substantially the same. This was the case in *Star Alliance*[32] where the Commission took into account efficiencies that were created outside the relevant market, as there was considerable commonality between the consumers on the different markets. The third criterion considers the indispensability of the restrictions caused by an agreement and whether there are other means of reaching the same efficiency that are less restrictive and that the restrictions caused are necessary in order to reach the efficiencies. The fourth criteria states that the agreement cannot lead to the elimination of competition in a substantial part of the market. It has been stated that the protection of competition will be the ultimate priority compared to the possible gains that will result from an anti-competitive agreement. It is therefore necessary to assess to what extent competition will be affected by an anti-competitive agreement.[33] If the Commission deems that all these criteria are satisfied, the anti-competitive effects caused by the agreement will be outweighed by the benefits created and the agreement will be exempted from Art. 101 (1) TFEU.[34]

[27] According to Art. 101 (2) TFEU.
[28] Faull et al., p. 306 – 307.
[29] With reference to an airline alliance between Air France and Alitalia.
[30] Whish and Bailey, p. 162.
[31] Whish and Bailey, p. 163 – 170.
[32] See Chapter 4 Commission decision below, United – Lufthansa – Air Canada (Star Alliance).
[33] Whish and Bailey, p. 171 – 174.
[34] Whish and Bailey, p. 161.

2.2 Block exemptions

There were block exemptions within the airline industry for a long time following liberalization. Regulation 1617/93[35] concerned agreements or concerted practices regarding consultations on passenger tariffs on scheduled air services and slot allocation at airports. This block exemption was specifically addressed towards the activities taking place at the passenger tariff and schedule coordination conference organized by IATA. These conferences were held in order to facilitate interlining and manage the problems occurring at congested airports.[36] Following investigations the Commission concluded that it was no longer possible to show that the benefits of these agreements or concerted practices outweighed the anti-competitive effects. It was questionable whether the tariff conferences created enough benefits for the consumer. Whereas for the slot allocation conferences it was certain that they would bring benefits to the consumer and it was therefore no longer necessary to safeguard these agreements. Therefore the Commission opted to terminate the block exemptions, which would be phased out by the end of 2007. Since then there are no longer any block exemptions within the air transport industry.[37]

2.3 Market definition

The relevant market is defined based on substitutability and is assessed both based on substitutability for the actual product but also if the same product from different Member States is considered as interchangeable, the relevant market therefore consists of a relevant product market as well as a relevant geographic market. There have been discussions regarding the approach taken by the CJEU when defining the relevant product market, where qualitative criteria such as characteristics, price and intended use have been used as benchmarks. In certain cases this has led to a very narrow definition of the market.[38] There has even been criticism stating that there has been too much focus on these criteria, which has defined a relevant market that does not reflect reality.[39]

[35] Commission Regulation (EEC) No 1617/93 of 25 June 1993 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices concerning joint planning and coordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air services and slot allocation at airports.
[36] Beuve-Méry and Struck, p. 45.
[37] Beuve-Méry and Struck, p. 46.
[38] The case of *United Brands* (Case 27/76, EU:C:1978:22) being an example. There the CJEU stated that the market for bananas was separate from the market of other fruits.
[39] Jones and Sufrin, p. 63 – 64.

2.3.1 Relevant product and geographic market

In order to give further guidance on the definition of the relevant market the Commission has released a Notice[40]. As previously stated the Commission assesses the substitutability, interchangeability, when defining the relevant product market. Such substitutability is assessed from two aspects, both from a demand and supply side. The demand side aspect concerns the consumer's need for a certain product or whether the consumer will be satisfied with a similar product. It has been noted that consumers sometimes have different preferences. This has meant that some consumers have been willing to substitute a product while others have not. When looking at the supply side aspect the Commission assesses if it is possible for a producer that is manufacturing similar products to easily switch to the relevant products.[41] It has been specifically stated that demand substitutability is the most important aspect to assess when defining the relevant market. A supplier cannot easily change conditions of a product, such as price, if it means that the consumer switches to another product.[42] The CJEU has stated that it, in some cases, is important to assess supply substitution. The market will be defined differently if it is concluded that a manufacturer can easily switch from producing one product to another product. The problem has been to distinguish supply substitution with potential competition. The Commission has therefore concluded that if a producer can easily switch production without a significant cost or risk this will be considered as supply substitution and not competition, and it will be part of the relevant market.[43] When determining the market power of an undertaking it is not only necessary to define the relevant product market but also the relevant geographic market. The Commission makes a preliminary distinction of a geographic market and then asks if the consumer would switch to a supplier in a different area if its original supplier raised its prices. If the consumer would switch then both areas would be part of the same market.[44]

2.3.2 Point of origin/point of destination city pair approach

When assessing the relevant market within the airline industry the Commission does not usually distinguish between the relevant product market and the relevant geographic market due to the specifics of the

[40] Commission Notice on the Definition of the Relevant Market for the Purpose of [EU] Competition Law, [1997] Official Journal C 372/5.
[41] Jones and Sufrin, p. 66 – 67, Whish and Bailey, p. 30.
[42] Jones and Sufrin, p. 67 – 71.
[43] Jones and Sufrin, p. 74.
[44] Jones and Sufrin, p. 82 – 83.

industry. When defining the relevant market in cases concerning air transport the Commission have applied the point of origin/point of destination (O&D) city pair approach, where each pair is a separate market. As the airline industry uses computer systems for all its bookings the Commission has extensive information when defining the relevant market. Nonetheless, it is not uncommon that the Commission requests further information from competitors and other actors in the business.[45] The O&D city pair approach was first used in the case *Ahmed Saeed Flugreisen*[46] where the CJEU concluded that the relevant market were to be defined using a test which would show if it was possible to distinguish between a scheduled flight on a certain route from other alternatives.[47] The Commission has taken a demand side approach in accordance with the Notice, although it still takes account of the supply side. Due to the demand based approach it has been necessary to make a distinction between different passengers, since services can be substitutable for some passengers while not for others. The distinction has been made between time sensitive passengers, referred to as premium passengers, and non-time sensitive passengers, referred to as non-premium passengers. Time sensitive passengers are mainly focused on the number of frequencies offered, the time of departure and arrival and the possibility to change their bookings. Whereas non-time sensitive passengers mainly focus on the fares and are more acceptable to longer travel time and not in need of the same flexibility as time sensitive passengers. This distinction has proven to be most important on intra-European routes where it has been shown to separate the market.[48] In some cases the Commission has also made distinctions between connecting passengers and point-to-point passengers and viewed this as separate markets.[49] The Commission assesses the substitutability between different kinds of services but also other means of transportation between the city pairs. Alternatives can be flights departing from secondary airports but also indirect flights as well as other means of transportation such as road, train or sea. The Commission then assesses these alternatives based on factors such as frequencies, fares and overall travel time.[50]

The O&D city pair approach has been criticized since the Commission has not assessed the network effects of an alliance, which has been believed to be an important aspect in a business where many airlines are in alliances and provides its services through that alliance. When alliances start a new route they do not only assess the specific route and the revenue generated through

[45] De Borca, Mielecka Riga and Suboés, p. 1790.
[46] Case 66/86, Ahmed Saeed Flugreisen, EU:C:1989:140.
[47] Case 66/86, Ahmed Saeed Flugreisen, EU:C:1989:14, para. 39 – 41.
[48] Gremminger, p. 75 – 76.
[49] Report of the ECA Air Traffic Working Group, p. 7.
[50] Gremminger, p. 75.

that route but also the passengers that have connection flights and the entire network. This aspect is neglected through the O&D city pair approach. Further most airlines build their networks based on the position of their hubs and cannot easily enter a market that has no connections to the airline's hub. However, as a network effects approach focuses on the supply side perspective the EU Courts have considered it appropriate to define the market based on the O&D city pair approach as markets are driven by the consumer demand. Investigations have however shown that corporate customers may find network effects important when entering into agreements with airlines, which will also be displayed in the decisions discussed below.[51]

[51] De Borca, Mielecka Riga and Suboés, p. 1791 – 1792.

3 The Airline Industry

At first glance the airline industry will appear to be glamorous and exciting, although in reality the industry is a very tough industry that constantly faces external and internal pressure. The airline industry is faced with high fixed costs, over-capacity and thin profit margins. Since fixed cost are high and the margins are so thin it is necessary to sell as many seats as possible on a flight in order to possibly generate some profit or at least to cover its costs although since there to a certain extent is over-capacity this is not always an easy task. Apart from these difficulties the industry also faces external pressure from actions such as terrorism, accidents and depressions. Even something as simple as a snowstorm can cause tremendous problems for an airline if it cannot transport its passengers, which is the purpose of their business. When faced with these kinds of difficulties the business suffers as demand inevitably decreases.[52]

Due to this constant pressure it is essential for an airline to generate profits in good times when demand is high in order to try to cover is losses when demand goes down. However, investigations have shown that profit margins in the industry are relatively low which makes it difficult to cover any previous losses. The reality of the industry has been confirmed when governments have been required to inject large amount of capital into the industry. During the process of liberalization in the EU, investigations showed that Member States had provided state aid of up to $ 9.6 billion. As a consequence of the liberalization the possibilities of obtaining state aid decreased tremendously.[53] It is safe to say that the opportunity to cut costs, and increase profits, is of high value within the industry.

With this understanding of the industry it becomes more evident why conferences concerning passenger tariffs have been exempted from the application of competition provisions for a very long time following liberalisation. Since the industry to a large extent is driven by the three major alliances it has been necessary for each alliance to consider the prices and strategies set by the other alliances. A minor decrease in price could be an advantage for a carrier but if this decrease is met by the other competitors then it might reduce profits for all carriers, in a business that already has marginal profits. The incentives to avoid competition on prices could under certain circumstances in certain market lead to fixing of prices, an illegal action under competition provisions. The risk of these actions are somewhat

[52] Dempsey and Gesell, p. 2.
[53] Doganis, p. 5 – 7.

lowered if there is an international conference set in order to prevent these actions.[54]

Following liberalization of the airline industry the landscape has changed. Many airlines have developed from being state-owned flag carriers to full service carriers focused on passenger and cargo transportation as well as maintenance. These carriers have built their business around a hub-and-spoke network. The hub has been the connecting point of these airlines and all of the carrier's traffic has originated from this or these hubs, and making is possible to provide connecting flights. Although the carrier has provided services worldwide no carrier has actually set up a worldwide network, instead these services have been provided through alliances. In order to retain its most frequent flyers all full service carriers have their own frequent flyer programmes that through alliances have been recognized by all carriers within an alliance.[55]

In recent years the industry has seen the birth of a new category of carriers, often called low cost carriers. The business strategy of low cost carriers is usually referred to as a "no frills" service that has built its business on a point-to-point model. These carriers are usually created in order to compete with the full service carriers and only provide passenger transportation. Although the services are provided from a few bases, where all traffic originates from, these carriers do not provide connecting flights. Low cost carriers usually uses secondary airports as the costs at these airports are considerably lower than the primary airports. As it is a no frills service these carriers do not provide any frequent flyer programmes or differentiate between ticket classes. Further the tickets are usually non-refundable and there is no possibility of rebooking with other airline as they are not members of any alliances.[56] Competition is no longer purely between alliances but also between alliances and low cost carriers. However, due to the differences in business models the airlines do not compete to a full extent, as there services are not always interchangeable. Although full service carriers still face a certain competition from these low cost carriers.

3.1 Alliances

The concept of airlines alliances is not new within the industry, the first airline alliance dates back to the early 1930s when Pan American-Grace Airways decided to exchange routes to Latin America with its parent

[54] Cento, p. 70,
[55] Cento, p. 18.
[56] Cento, p. 20.

company Pan American World Airways.[57] As more and more airlines begun operating, and cooperating, the need for coordination grew bigger. As a consequence the International Air Transport Association, IATA, was founded in 1945 with the purpose to coordinate inter-carrier transfer for passengers as well as luggage and freight for the benefit of the consumer.[58] Today there are three major airline alliances, Star Alliance, SkyTeam and oneworld. Although the alliances consist of many members, the level of integration between the members varies within the alliance. Some of the carriers have entered into highly integrated joint ventures while others are not as integrated although still cooperate through various agreements.[59]

There are many reasons for airlines to enter into alliances and airlines usually argue that they are all to the benefit of the consumer. Airline alliances have been formed in order to meet the growing demand from consumers and doing this while facing the difficulties that are prominent in the airline industry. It has not been possible for airlines to operate on every possible route, although their strategies have been to operate from anywhere to everywhere. In order to meet consumer demand it has therefore been necessary to enter into alliances, which has made it possible for carriers to provide a greater coverage for its customers without having to bare the cost of starting up a new route and trying to make this a profitable route.[60] In a demand driven industry it is of the essence to be able to meet the demand coming from its consumers.

An alliance usually brings its members greater economies of scale, scope and density, a reduction in costs, reducing the level of competition, which are all factors that will improve revenue. It has even been stated that an alliance generates approximately three to four new passengers per flight. In a business where fixed costs are high, the possibility to gain more passengers is very valuable.[61] The creation of an airline alliance has also been a way of circumventing the rules on airline ownership, which has been highly restricted. These rules have stated that airlines have to be "substantially owned and effectively controlled" within their own nation. This has been a requirement in order to be designated to operate international services in accordance with ASAs.[62] Following the "Open Skies" judgements[63] these restrictions were modified in the agreements with

[57] Bilotkach and Hüschelrath (2011), p. 335.
[58] Dempsey and Gesell, p. 643.
[59] Transatlantic Airline Alliances, para. 21 – 24.
[60] Transatlantic Airline Alliances, para. 13.
[61] Dempsey and Gesell, p. 644 – 652.
[62] De Borca, Mielecka Riga and Suboés, p. 1797.
[63] The cases brought against seven Member States that had individually entered into ASAs with the United States, an action that the Commission believed to infringe the external

the US and carriers within the EU were recognized as EU carriers and could operate freely within the Union. The restriction on ownership was amended although EU carriers still needed to be majority owned by the Member State or by nationals of the Member State where it is registered.[64] Since alliances do not include the change of control of an entity, the airline thereby circumvented the regulatory barriers preventing foreign ownership. Through these alliances it was thereby possible for airlines to gain the benefits from cooperation, such as extension of their reach and market presence, without having to bare all the risks attached to an expansion.[65]

3.1.1 Strategic and tactical alliances

There are different levels of integration within airline alliances and it is usually distinguished in two levels of cooperation, tactical or strategic alliances. A tactical alliance usually consists of a code sharing agreement, which means that one carrier can sell seats on a route operated by the other carrier and market this through its own code[66]. An agreement like this is usually specified to certain routes only and does not necessarily mean that the carriers frequent flyer programmes are coordinated or even recognized by the other carrier. Airlines usually enter into tactical alliances in order to address a certain insufficiency in its own network. Therefore it is common that tactical alliances are between a carrier that is not a member of a major alliance and a carrier that is a member of a major alliance.[67] The most integrated form of an alliance is a strategic alliance where the parties jointly form a marketing entity for network-wide cooperation. There are extensive code share agreements within these alliances and members coordinate their schedules and plan their fares. Within strategic alliances frequent flyer programmes are recognized by all members, however it is possible to recognize another airlines frequent flyer programme without being a member of a strategic alliance. Due to the depth of this integration it is not possible for a carrier to be a member of two strategic alliances, however it is possible for a carrier in a tactical alliance to be in another tactical alliance.[68]

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competence of the Union as Member States were not allowed to enter into agreements with non-Member States if these agreements could affect the Union rules.

[64] Official Journal L 134/4, Air Transport Agreement, Annex 4.

[65] De Borca, Mielecka Riga and Suboés, p. 1797.

[66] Every carrier has an individual two character code provided by the IATA and is used to identify a carrier and its services.

[67] Transatlantic Airline Alliances, para. 17.

[68] Fan et. al, p. 350.

3.1.2 Cooperation agreements in the Airline Industry

Alliances can consist of many different cooperation agreements, which concerns different operations within the business such as interlining agreements, code sharing, pooling agreements, blocked space agreements and recognition of members frequent flyer programmes. These are all ways of extending an airlines network without having to bare all the risks involved when starting a new route. As will be presented the Commission has used these agreement and agreements such as fare combinability agreements and special prorate agreements as commitments when approving airline alliances. The possibility of gaining access to a bigger network has been considered to reduce the barriers to entry prominent on certain routes.

Code sharing agreements are one of the most common agreements between carriers and were first developed when air traffic was highly regulated and access on certain routes were restricted. A code sharing agreement between two carriers means that a flight can be marketed with both carriers' code, although the flight will only be operated by one of the carriers. This way a carrier can offer its passengers services on flights and gain frequent flyer points without the carrier having to actually operate on that route. Some of these agreements include exclusivity clauses, which prohibits the carriers from entering into other agreements, often on specified markets.[69] These agreements are not purely entered into by the major alliance partners but also between independent carriers and between an alliance carrier and an independent carrier. However, one of the major alliances requires its members to enter into code sharing agreements as a condition for membership.[70]

An interlining agreement means that one carrier can sell the ticket for an entire route although the carrier itself only operates part of the route. When entering into an interlining agreement carriers agree to accept another carrier's ticket on its own flight, making it possible for a passenger to seamlessly catch its connecting flight without having to check in again. If the carriers additionally agree on a joint fare agreement this will usually lower the fares compared to if the passenger were to buy two separate tickets from the carriers. Interlining agreements are considered to be a fundamental part of the airline industry's framework however airlines are

[69] Report on Competition impact of airline code-share agreements, p. 12.
[70] Truxal, p. 131 and Report on Competition impact of airline code-share agreements, p. 9.

never obliged to enter into these agreements and can refuse to do so unless they are imposed as commitments under the Commission decisions.[71] A pooling agreement is usually set up in order to divide profits that are generated through cooperative operations. All profit is pooled in a fund and is later divided between the carriers in accordance with predetermined proportions. A blocked space agreement means that a carrier blocks a certain amount of seats for its passengers on another carrier's flight. The difference compared to other agreements is that the carrier actually purchases the seats at a wholesale price and then tries to sell it to its own passengers. The purchasing carrier thereby stands the risk in a situation where its seats do not get sold.[72] Apart from all these cooperation agreements alliance partners also agrees to recognize each other's frequent flyer programmes. This has been used in a way of attracting business travellers, who will be able to earn points with one carrier but can spend them on another.[73]

As stated the Commission has used certain cooperation agreements as part of the commitments imposed on airline alliances in a way of remedying the negative effects caused by such an alliance. A special prorate agreement means that a competitor will be given the possibility to sell tickets which includes connecting flights with another carrier. Through the special prorate agreement the competitor is given access to certain fares on the other carriers flight and uses these when marketing their own flight. The possibility to enter into these agreements has been believed to make it easier for a competitor to enter a market with high barriers to entry.[74] Finally a fare combinability agreement makes it possible for a competitor to sell return tickets where the competitor operates the flight one way and the alliance operates the other way. By concluding such an agreement the competitor benefits from the amount of frequencies the alliance operates on that specific route.[75]

3.1.3 Airport slots

A major issue in the last couple of years has been the difficulties of gaining slots for take-off and landing at congested airports within the E. When the single aviation market within the EU was created the need for proper allocation grew, as a consequence common rules for allocation of slots at airports in the EU were created. However, as the amount of flights have

[71] Dempsey and Gesell, p. 648 – 649 and Report on Competition impact of airline code-share agreements, p. 13.
[72] Dempsey and Gesell, p. 650.
[73] De Borca, Mielecka Riga and Suboés, p. 1810.
[74] De Borca, Mielecka Riga and Suboés, p. 1810.
[75] De Borca, Mielecka Riga and Suboés, p. 1810.

increased since the rules were implemented an updated regulation is needed.[76] Since there have been many congested airports within the EU, the Commission has used slot releases as a commitment when assessing airline alliance that have caused competitive restrictions on the markets. Slots have then been offered to ease some of the barriers to entry for a new entrant. Although slots have usually been released with the condition that they would be used for the specific routes identified by the Commission. In some decisions the Commission has given new entrants grandfather rights, meaning the carrier would be allowed to use the slot for other routes after having operated the specific route for a certain amount of years.[77]

3.2 The effects of airline alliances

There are prominent anti-competitive effects caused by airline alliances, as the mere nature of these cooperation agreements often goes against the purpose of competition law. There have been many discussions on whether the efficiencies created by the alliances are enough to counter the negative effects. Investigations have shown that consumers gain large benefits through these alliances as prices are cut. However, the Commission needs to balance the benefits to the consumer against the negative effects on competition. In order to perform such an assessment it is important to understand the effects of airline alliances.

As stated, code-sharing agreements are amongst the most common cooperation agreement within the industry. In order for the Commission to gain a better understanding of code-share agreements and its possible anti-competitive effects the Commission had a report prepared where these agreements were further assessed.[78] The investigation showed that there are both benefits and disadvantages with these agreements. On routes where both parties of a code-share agreement operated services the investigations showed that there was a risk of increased prices and a decrease in capacity. On beyond routes, where only one carrier would operate, customers would benefit from more connecting options. However, it could also cause barriers to entry for other carriers on these connecting routes. The investigation gave indications that there would be negative effects specifically on intra-European routes. Since there are no regulatory restrictions on operating within the EU, a code-share agreement would not expand the number of possible journeys but instead it could create barriers to entry as many European airports are congested and there are difficulties obtaining slots.

[76] Proposal for a Regulation of the European Parliament and the Council on common rules for allocation of slots at European airports, para. 6 – 12.
[77] De Borca, Mielecka Riga and Suboés, p. 1808.
[78] Report on Competition impact of airline code-share agreements.

Investigations also showed that if code share agreements leads to the use of preferred partners this might lead to higher fares, than compared to traditional interlining agreements.[79]

A restriction on competition is usually more visible on route-specific alliance and can be more difficult to assess in global alliances. The anti-competitive effects of an alliance is prominent on routes where the carriers have previously been the only competitors and when the alliance decide to only let one carrier operate the route following the alliance. Although such flights would be under both carriers' code, it would only be operated by one of the carriers. This would make it possible to hold back on capacity and set high fares on these flights.[80] If a route continues to be operated by both carriers following the alliance the effects of the alliance are not as obvious. However, depending on the circumstances of the alliance and the identified routes there can still be anti-competitive effects.[81] It has even been stated that these alliances can become effective monopolies following the alliance and if the alliance is not faced with competition it can use this position to "push up or keep up fares by holding back on capacity growth"[82].

Anti-competitive effects caused by an alliance have been deemed greater on short-haul flights than on long-haul flights. Alternative routes are usually not considered as competitive alternatives on short-haul flights as those routes would be considerably longer.[83] On long-haul flights passengers do not only travel on that specific route but also behind and beyond. Therefore passengers usually have more options if their destination is behind or beyond the alliances operation. It has also been stated that non-stop long-haul flights are usually substitutable with one-stop long-haul flights, which increases the number of options for the consumer. However, as has been shown in the Commission's investigations, time-sensitive passengers are usually not willing to travel on one-stop flights. The competitive issues on long-haul flights are usually if the route is between the carriers' hubs as these flights might only face limited competition.[84] As previously stated, many of the airports within the Union are congested and there are high barriers to entry on many routes originating from a congested airport. If a carrier has its hub at a congested airport this carrier will have an advantage compared to its competitors, as it usually has a large amount of slots in

[79] Report on Competition impact of airline code-share agreements, p. 45 and p. 59.
[80] Doganis, p. 96. This happened when Swissair purchased Sabena and thereafter withdrew all its services between Switzerland and Belgium and let Sabena be the only operator on these routes.
[81] See Chapter 4, Commission Decision, Lufthansa – SAS.
[82] Doganis, p. 107.
[83] Doganis, p. 97.
[84] Doganis, p. 109.

order to use an airport as its hub. If this carrier then enters into an alliance with a carrier that has its hub at the other end of the route, their collective market power will naturally rise. This will inevitably create even higher barriers to entry, as the alliance members can use their slots and maximise their services in order to meet competition. [85]

As can be seen, there are prominent anti-competitive effects when two airlines begin cooperating. However, since there are three major global alliances that have all been scrutinized by the Commission these alliances must also result in efficiencies that will benefit the consumer. Various empirical analyses have been performed in order to assess the effects of airline alliances. Although the alliances may have anti-competitive effects, these studies have also shown that fares have decreased as a result of an alliance. Alliances have been shown to benefit interlining customers, where prices have decreased when carriers have been able to coordinate their operations. Since the consumer have been able to purchase one ticket that covers both carriers' services the price has been noticeable lower than when the consumer have had to purchase to separate tickets. The benefits created by the alliances needs to be put in perspective if the alliance enhances the parties' market shares. If competition is eliminated through the alliance it can cause higher fares and a reduction in capacity on the affected routes. Unsurprisingly this will not be to the benefit of the consumer.[86] Although there are many anti-competitive effects originating from airline alliance the conclusion in the Commission's investigations have been that the efficiencies produced by the alliance are to the benefit of the consumers as it to a large extent decrease price but also increases frequencies, the number of destinations and can shorten travel time.

[85] Doganis, p. 97 – 98.
[86] Bilotkach and Hüschelrath (2012), p. 77.

4 Commission decision

The Commission has investigated many airline alliances from a competition law perspective since the airline industry was liberalized within the Union; the first alliance ever investigated was the alliance between Lufthansa and SAS. In recent years airlines have created highly integrated joint ventures to attend to the alliances transatlantic routes. Not all members of the alliances have been members of these joint ventures; it has merely been an inner circle, which has included many founding members of these alliances. An important aspect to keep in mind is that all of the transatlantic routes have been given antitrust immunity in the US, where parallel investigations were performed.

4.1 Lufthansa – SAS

In May 1995 the Commission was notified of a cooperation agreement between Lufthansa and SAS for which the parties requested an approval that this was not an infringement of Art. 101. The agreement between the parties was intended to create "*an integrated air transport system based on a comprehensive set of long-term commercial, marketing and operational relationships and involving integration of their worldwide networks and other operations*"[87]. The agreement would include setting up a joint venture, which would be jointly and equally owned by the parties. The joint venture would provide all air transportation services between Germany and Scandinavia, as the carriers would no longer operate services on these routes independently. Capacity, frequencies and fares would be set by the management of the joint venture.[88] However, the parties would remain autonomous and would thereby have the right to take autonomous decisions.[89] The parties were not prohibited from operating direct flights within its domestic market and other foreign destinations as long as these routes were economically viable.[90] The Commission concluded that the object and effect of the joint venture would be to coordinate the competitive behaviour of independent undertakings and would infringe Art. 101.[91]

[87] Official Journal L 54/28, para. 22.
[88] Official Journal L 54/28, para. 23.
[89] Official Journal L 54/28, para. 39 – 40.
[90] Official Journal L 54/28, para. 25 – 26.
[91] Official Journal L 54/28, para. 42 – 43.

4.1.1 Competitive assessment

The relevant market would be defined as the market for scheduled air transport of passengers for each of the routes that linked Scandinavia and Germany. Chartered air transportation was not a part of the relevant market as regular air transportation was not substitutable with charter flights. It was mostly business travellers on these routes and they would not accept the inconvenience of flying with a charter flight. The same conclusion was reached with reference to indirect flights, which were therefore not considered as an alternative. The Commission did state that high-speed train could be considered as substitutable means of transport although in this case these alternatives were not available to a significant extent. Although the Commission based its definition on the consumer's demand, it did state that an assessment of networks was not excluded as a consequence of this approach or the competition between airline's hubs.[92] The Commission noted that passengers on the identified routes were, to some extent transfer passengers that would continue past the identified routes. Although the routes for these passengers were only a part of a more extensive route, the Commission would not extend the identified routes beyond transportation between Scandinavia and Germany. As a consequence it was concluded that there were limited possibilities for substitution between routes.[93]

The Commission concluded that out of the 25 routes linking Scandinavia and Germany the parties both operated daily flights on eight of these routes Düsseldorf – Copenhagen/Stockholm, Frankfurt – Oslo/Gothenburg/Stockholm/Copenhagen, Munich – Copenhagen and Hamburg – Stockholm. Noticeable the carriers were the only carriers operating on these eight routes except for one daily frequency operated by Singapore Airlines between Copenhagen and Frankfurt. Apart from these eight routes, one carrier operated on another four routes. Following the creation of the joint venture the parties would thereby operate on 20 out of the 25 routes. As a consequence of the agreement actual and potential competition between the carriers would be restricted. Further the agreement would restrict competition from third parties, as high barriers to entry would be created.[94]

Lufthansa and SAS would gain economic strength through the new agreement since their resources would be coordinated; they would have extensive interlining agreements and would be able to coordinate their networks further since they would possess the largest fleet in Europe.

[92] Official Journal L 54/28, para. 30 – 35.
[93] Official Journal L 54/28, para. 36 – 38.
[94] Official Journal L 54/28, para. 47 – 51.

Through pooling of their frequent flyer programmes their economic position would be enhanced, as business travellers would prefer to travel with carriers with a joint frequent flyer programme. Since the identified routes were between the carriers' hubs they would gain further power as they controlled a large amount of slots at the airports on both ends of the routes. The Commission believed that the agreement would appreciably restrict competition between Lufthansa and SAS as well as pose a substantial entry barrier for third parties on the identified routes.[95] Although the cooperation agreement would extend further than the relevant routes it would not have the same effect on competition. On other routes the parties would be faced with direct competition and have limited market shares. The Commission therefore stated that the agreement would not cause any significant entry barriers on other routes than those linking Scandinavia and Germany. However, the Commission concluded that the agreement between the parties had as its object and effect to restrict competition on the identified routes and was therefore infringing Art. 101 (1) TFEU.[96]

Since the carriers believed that the agreement, although it may restrict competition to a certain extent, would contribute to efficiencies in accordance with Art. 101 (3) TFEU it was necessary to assess the possible efficiencies. It was concluded that the agreement would improve services provided to passengers, as SAS was strong on its Scandinavian routes and Lufthansa was strong on other intra-European routes. The pooling of these services would lead to an extensive network. Further it was stated that the cooperation would lead to a reduction of costs as a lot of actions would be integrated such as marketing, traffic management, data processing, which would lead to substantial savings.[97] When assessing the benefits to the consumer as well as the indispensable nature of the restrictions the Commission stated that there was a need to impose conditions to ensure that the efficiencies showed would remain throughout the agreement. Therefore the Commission concluded that a number of commitments needed to be fulfilled in order to safeguard the market and to solve problems with entry barriers.[98]

4.1.2 Commitments

The commitments suggested would target the eight different routes between where the parties had operated competitive services prior to the agreement. Firstly the parties were obliged to freeze their number of daily frequencies

[95] Official Journal L 54/28, para. 52 – 56.
[96] Official Journal L 54/28, para. 57 – 62.
[97] Official Journal L 54/28, para. 64 – 72.
[98] Official Journal L 54/28, para. 69 – 85.

on a route whenever a new entrant decided to begin operations on that route and this would remain in force until the competitor actually begun operating. This would prevent the parties from using their economic strength on the market by substantially increasing their service on the identified route with the purpose of forcing the new entrant to exit. The parties would be allowed to increase their frequency with one daily flight if a new competitor entered the market, as they should be allowed to "exercise the necessary degree of flexibility in operating their services"[99] and they would also be allowed to match the number of frequencies offered by the competitor if it exceeded the parties' number of frequencies.[100] Since airports at both ends of the routes were overcrowded at certain hours the parties were obliged to give up a sufficient amount of slots, when the need arised, in order for competitors to be able to enter any of the routes on the identified relevant market. Slots would only be given to entrants that were unable to acquire slots through the general slot allocation and could only be used for routes between Scandinavia and Germany, and where the new entrant had no connection with any of the parties.[101]

Since Lufthansa and SAS had pooled their frequent flyer programmes this could constitute another obstacle for new entrants. Therefore new entrants were to be afforded the possibility to participate in the parties' frequent flyer programme. Further it was stated that the possibility of entering into an interlining agreement with the parties would make it easier for a new entrant to enter the relevant market.[102] On a concluding mark the Commission stated that the parties needed to terminate any cooperation agreements that they had previously entered into with other carriers, if it concerned any of the identified routes.[103]

4.1.3 Comments

In this case the Commission did not make a clear distinction between different categories of passengers, although reference was made to business travellers it was not stated that there was a distinct market for these passengers. In later cases it will be shown that this distinction is usually made. Further the Commission did not take into account connecting passengers when defining the relevant market but instead focused entirely on the O&D city pairs. In this case one would find this noteworthy as the routes between Scandinavia and Germany were between the airlines' hubs.

[99] Official Journal L 54/28, para. 93.
[100] Official Journal L 54/28, para. 90 – 94.
[101] Official Journal L 54/28, para. 107 – 112.
[102] Official Journal L 54/28, para. 95 – 97.
[103] Official Journal L 54/28, para. 98 – 107.

Instead the Commission chose the general approach and focused on the specified routes, and nothing further.

It should be noted that the parties were obligated to terminate all of their previous agreements with other carriers, if these agreements concerned the routes where competition would be constraint following the alliance. However, the parties were obliged to enter into interlining agreements with new entrants and to let new entrants enter into their frequent flyer programmes. The parties were also obliged to freeze their frequencies, but would be allowed to increase their frequencies with on daily flight if a new entrant begun operating on the route.

This specific case was also discussed in doctrine, as the results of the alliance have been of interest when assessing alliances impact on competition. Since the parties were able to keep their positions on the market and provide a steady number of frequencies, competitors were discouraged from entering the market and the alliance parties were the only carriers operating on that market. In this case it was specifically interesting as the carriers frequencies were frozen through the commitments and the fares could thereby be set high and the carriers had high load factors. Since then the carriers have only seen competition from a low cost carrier that provided services between Scandinavia and Germany although from airports situated at such a distance from the airports that the carriers operated from that it was questionable if these services would be considered as competition.[104] The effects from the oligopolistic alliance that was created did not pass by unnoticed by the Commission, which in later cases imposed further commitments in addition to the regular slot releases.[105]

4.2 American Airlines – British Airways – Iberia (oneworld)

In 2009 the Commission initiated investigations concerning the cooperation agreements between American Airlines, British Airways and Iberia, after having received a complaint from Virgin regarding the alliance. It was stated that the cooperation in this agreements were of a far more extensive nature than other cooperation agreements within the oneworld alliance as the alliance would jointly manage schedules, capacity, pricing and revenue management on all routes between Europe and North America, which could have an actual or potential effect on competition.[106]

[104] Doganis, p. 96 – 97.
[105] Balfour, p. 83 – 84 and Doganis p. 112 – 113.
[106] MEMO/09/168.

4.2.1 Competitive assessment

With reference to the Commission's previous investigation and principles set out in the market definition Notice the Commission concluded that the relevant market would be defined in accordance with the O&D city pairs approach. The Commission concluded that this aspect corresponded with the corporate customer's demand for air transportation as well.[107] The Commission continued by addressing the distinctions between different categories of passengers on routes between Europe and North America, which was divided into either premium passenger (First or Business class) or non-premium passengers (restricted Economy class). Since investigations showed that there were differences between the classes on transatlantic routes, and therefore appealed to different categories of travellers, a distinction between these classes was necessary. It was concluded that services in First and Business class were in a different product market from the services provided in restricted Economy.[108]

The identified O&D city pairs were the routes between London-Dallas/Boston/Miami for both premium and non-premium passengers and the O&D city pairs London-Chicago/New York and Madrid-Miami for premium passengers only.[109] In order to obtain a correct market definition, the Commission assessed the possibilities of substitution in the O&D city pairs with multiple airports. In London it was concluded that Heathrow was the only airport within the relevant market, although noted that it would make no change to the competitive assessment if other airports in London were in the same relevant market or not. In New York the Commission found Newark and JFK to be part of the same relevant market for all passengers.[110] Further it was concluded that non-stop flight were remote substitutes for one-stop flights on transatlantic routes. However, this was dependent on what category of passengers that were travelling and the specific route. The Commission believed that only certain routes were subject to competition from indirect flights, more specifically routes from or to London via hubs in the United States. However, as all non-stop competition was eliminated as a consequence of the alliance it was not necessary to make a distinction between non-stop and one-stop services. Instead this had to be assessed on a route-by-route basis.[111]

[107] Case COMP/39.596, para. 17 – 19.
[108] Case COMP/39.596, para. 21 – 22.
[109] Case COMP/39.596, para. 34.
[110] Case COMP/39.596, para. 26 – 30.
[111] Case COMP/39.596, para. 23 – 25.

The Commission was of the opinion that the agreement was an infringement of Art. 101 TFEU and would have an appreciable effect on trade between Member States since the very nature of the agreements concerned cooperation regarding fundamental parameters of airline competition. The restriction was prominent on all the identified O&D city pairs, where the parties had strong market positions, the barriers to entry were significant and there was no real constraint from competitors.[112] The Commission concluded that the agreement would completely eliminate competition on routes where the carriers had competed prior to the alliance. The carriers were also considered to be strong competitors on the premium market of the identified O&D city pairs, on some of the routes they were even the closest competitors with very large market shares and the effect on competition would therefore be extensive. The parties' strong position on the market was further strengthened as there were high barriers to entry and expansion particularity due to the difficulties of gaining access to slots in London and New York, but also with reference to the number of frequencies provided by the carriers as well as their frequent flyer programme, corporate contracts and connecting passengers. Investigations performed by the Commission also showed that fares would increase as a result of less competition for non-stop services.[113]

In its investigation the Commission specifically assessed interlining agreements, since these agreements gave carriers the possibilities of connecting passenger on flights past the transatlantic routes. The possibility of offering these services on transatlantic routes were deemed important, as it was very difficult to operate on these routes without the possibility of further transfer past the carriers' hub. The alliance would restrict competition on to connecting traffic past the identified O&D city pairs, as they could refuse to enter into interlining agreements that would take passengers past the alliances hub-to-hub routes.[114] After having assessed the identified O&D city pairs with reference to aspects such as connecting passengers and frequencies the Commission concluded that the alliance would appreciable negatively affect competition on these routes. One-stop operations were not found to impose enough constraint. These negative effects were prominent both for premium and non-premium passenger on all routes except the on the routes London–Chicago/New York and Madrid–Miami where only premium passengers were affected.[115]

[112] Case COMP/39.596, para. 34 – 36.
[113] Case COMP/39.596, para. 38 – 41.
[114] Case COMP/39.596, para. 43 – 51.
[115] Case COMP/39.596, para. 53 – 76.

The parties claimed that although the agreements might negatively affect competition on the relevant market it would also lead to various efficiencies for the consumers in accordance with Art. 101 (3) TFEU. The parties claimed that the agreement would lead to lower fares as double marginalization would be eliminated and there would arise cost savings. Further the parties claimed that they would be able to supply a higher quality service. The Commission was not of the same opinion and stated that there was not enough evidence showing that the criteria in Art. 101 (3) TFEU were met.[116]

4.2.2 Commitments

As a response to the Commission's investigations the parties' submitted commitments where they offered to make slots available at either London Heathrow or London Gatwick, depending of the competitor's preference, and at JFK if necessary. There were to be slots for up to seven frequencies per week for each of the routes London-Dallas/Miami and up to 21 frequencies per week for each of the routes London-New York/Boston and the parties would not be compensated for the releases. In order to facilitate operations at New York JFK the parties offered to provide operating authorization to the competitors that would match the arrival of flights having received the slots that were released in London.[117] If a new entrant entered the market without using a slot from the parties, and was considered to be a new competitor not been considered in these investigations, the parties would be allowed to reduce the number of slots released under the commitments. Slots would only be available if a competitor could not receive slot from the general slot allocation and not if it had unused slots at the airport. As of 2013 unused slots for specific routes would be available for one-stop entrants. The allocation of slots be performed by the Commission. [118]

New entrants would be offered, upon request, to join the parties frequent flyer programmes on the identified city pairs if the entrant was not already a member of another frequent flyer programme.[119] The parties also offered the possibility to enter into fare combinability and special prorate agreements, which would lower the barriers to entry, although only if the entrant increased its services on the relevant route. Fare combinability meant that eligible competitors providing non-stop service between the O&D city pairs (connecting flights were specifically exempted), upon their request and

[116] Case COMP/39.596, para. 77 – 80.
[117] Case COMP/39.596, para. 106, 114 and 192.
[118] Case COMP/39.596, para. 82 – 87 and 114.
[119] Case COMP/F-1/39.596 – BA/AA/IB, Commitment to the European Commission, p. 20.

subject to availability, could offer return in accordance with such an agreement. However, on three of the identified city pairs this would only be possible with reference to premium passengers. Fares for these operations were to be set according to the parties' one-way fares. Special prorate agreements would provide competitors with favourable terms to carry connecting passengers past the parties hubs in both Europe and North America, under the condition that the competitor or any or its alliance partners did not have a hub at any end of the route.[120] The Commission concluded that the competitive concerns identified as a consequence of the alliance were sufficiently addressed through the commitments offered by the parties and that there were no longer any grounds for action according to Art. 9 in Regulation 1/2003.[121]

4.2.3 Comments

An interesting aspect in this investigation was that a parallel investigation was conducted in the United States, where the alliance had previously been declined antitrust immunity several times. American Airlines and British Airways first applied for antitrust immunity on their transatlantic routes in 1997 and then again in 2001 although their application was declined both times as the parties were deemed to have a dominant position at London Heathrow.[122] Although one week after the Commission published its decision the alliance was given antitrust immunity in the United States.[123] It has been suggested that the alliance was denied immunity as there was no open skies-agreement between the United Kingdom and the United States at the time, and that the United States used this alliance as a way of bargaining.[124]

In this case the Commission assessed the efficiencies that the parties claimed would be created following the alliance. However, it was not assessed whether the commitments provided led to an enhancement of the claimed efficiencies. Since the Commission closed the investigations following the commitments with reference to Art. 9 in Regulation 1/2003, this meant that there were not grounds to further investigate the alliance and did not mean that it found it to comply with competition provisions. The Commission stated that the alliance between the parties was a restriction by object, where is usually difficult to show efficiencies leading to the application of Art. 101 (3) TFEU. It is further interesting that there were no

[120] Case COMP/F-1/39.596 – BA/AA/IB, Commitment to the European Commission, p. 17.
[121] Case COMP/39.596, para. 240.
[122] Bilotkach and Hüschelrath (2011), p. 362 –366.
[123] Goeteyn and English, p. 449.
[124] Doganis, . 111.

longer any grounds for investigation following the commitments, although there was a restriction by object.

In the decision the parties committed to surrender slots at not just London Heathrow but also Gatwick although the Commission had stated that there was no real substitution between Heathrow and other London airports. It is therefore interesting to note whether commitments that concerns other markets then the relevant market can lead to an approval regardless whether there are any concerns regarding that aspect. Further it should be noted that one of the competitors that gained slots through this decision was Delta, a party of another major alliance.

4.3 United – Lufthansa – Air Canada (Star Alliance)

In 2009 the Commission initiated proceedings against United, Air Canada and Lufthansa with reference to the revenue-sharing joint venture the parties had entered into. The agreement covered passenger air transportation on transatlantic routes and involved extensive coordination on pricing, capacity and scheduling where the parties also agreed to share all revenues within the joint venture.[125]

4.3.1 Competitive assessment

As in previous decisions the Commission used the O&D city pair approach when defining the relevant market, where every O&D city pair was considered to be a separate market. Although corporate customers attached importance to network effects the Commission still believed that the O&D city pair approach was the correct approach as their need was to get from one point to another. Network effects should instead be considered when assessing the competitive impact on each identified route.[126] The Commission confirmed the distinction between premium and non-premium passengers. This distinction was correct, as investigations had shown that premium passengers required different services than non-premium passengers and therefore belonged to separate markets.[127] Whereas for the distinction between non-stop and one-stop flights, the Commission stated that it was not necessary to conclude whether these services were in separate markets, although it had previously agreed to include long-haul one-stop flights in the same market as long-haul non-stop flights. In this specific case it would make no material difference if the market consisted of both

[125] Case COMP/AT.39595 para. 2 – 3.
[126] Case COMP/AT.39595, para. 17 – 19.
[127] Case COMP/AT.39595 para. 20.

services, instead one-stop flights would be considered when assessing each route and whether it would exercise a constraint on each individual route.[128] Although there were several hundred transatlantic routes affected by the alliance the Commission decided to further investigate the routes where the condition in Art. 101 (3) TFEU would not be met. The Commission found that the route between Frankfurt and New York for premium passengers would cause anti-competitive concerns following the alliance.[129] Airports substitution was assessed both from a demand side as well as a supply side and investigations showed that the airports in New York, JFK and Newark, were substitutable and would thereby be considered as part of the same market.[130]

Although the alliance between the carriers was considered to be a contractual joint venture, the Commission stated that it would be assessed based on Art. 101 TFEU since the joint venture did not act independently from its parents and therefore did not qualify as a "full function" joint venture.[131] The alliance between the carriers would lead to an extensive cooperation on key parameters within airline competition such as pricing, capacity, schedules and frequent flyer program. The cooperation was therefore considered to be a restriction on competition by its very nature as competition between the parties would be completely eliminated as a consequence, and investigations showed that the parties were close competitors on the identified route. The parties would no longer have any incentive to succeed individually on the markets concerned but would focus all efforts on succeeding through the joint venture. Therefore the alliance was considered to be an infringement of Art. 101.[132]

Investigations showed that the parties had very high market shares on the identified route and the cooperation between the parties would therefore have an appreciable effect on the relevant market. Apart from this aspect the parties also had their hubs at both ends of the identified routes. This gave them advantages that other competitors did not have at the highly congested airports and competitors would therefore not be able to counter the anti-competitive effects caused by the alliance. The Commission concluded that the alliance was a restriction on competition both by object and effect on the relevant market.[133]

[128] Case COMP/AT.39595 para. 26.
[129] Case COMP/AT.39595 para. 4.
[130] Case COMP/AT.39595, para. 29 – 30.
[131] Case COMP/AT.39595, para. 34.
[132] Case COMP/AT.39595, para. 38.
[133]Case COMP/AT.39595, para. 54.

In this decision the Commission performed a thorough assessment of the efficiencies that the parties claimed justified the alliance in accordance with Art. 101 (3) TFEU. The Commission agreed that there were efficiency gains such as timesaving, economies of density and double marginalization was reduced. It was further shown that the agreement was indispensable to generating the efficiencies identified, and competition would not be eliminated on the route as the other two major alliance still operated on the route. However, the Commission was not of the opinion that a fair share of these efficiencies would be enjoyed by the consumers or at least that they would not be sufficient enough to compensate for the negative effects. The Commission assessed both consumers travelling on the identified route but also customers travelling behind and beyond the route as there was a considerable commonality between these consumers. However, this did not change the definition of the relevant market. Nevertheless ,it was concluded that the agreement constituted an infringement of Art. 101 TFEU with regards to premium passengers travelling between Frankfurt and New York.[134]

4.3.2 Commitments

In order to meet the concerns presented by the Commission's the parties submitted commitments, which would ease the barriers to entry and decrease the negative impact on competition. Firstly the parties offered to make slots available for up to seven weekly frequencies at Frankfurt airport, and if necessary at either of the airports in New York. Although the number of slots were set at up to seven weekly frequencies this number was subject to change in case competitors increased or decreased services on the identified route. If frequencies by competitors in the other two major alliances were increased without using the released slots the parties would not be required to release any slots. However, if frequencies decreased the parties would have to increase the number of available slots. The Commission accepted these commitments and stated that the number of slots made available in combination with other commitments were sufficient actions in order to meet its concern.[135]

The other commitments offered by the parties were the possibilities of entering into fare combinability agreements as well as special prorate agreements upon request, as investigations had shown that this would increase the willingness to start operations on the route. The Commission was to approve every fare combinability agreement in order to assess whether the agreement was reasonable. Further the parties offered to enter

[134] Case COMP/AT.39595, para. 64 – 79.
[135] Case COMP/AT.39595, para. 110 – 115.

into special prorate agreements with its competitors and this agreement could cover up to 20 feeder routes with origin or destination in predetermined areas. This possibility would open up competition for competitors that did not have access to long-haul service like the identified route and would reduce the advantage the parties held at their hubs. Lastly the parties agreed to let competitors be hosted in their frequent flyer programme, if they were not already members of an equivalent programme.[136] The Commission concluded that following the commitments there were no longer any grounds for action and the investigations were to be brought to an end.[137]

4.3.3 Comments

In this decision the Commission stated that there was no need to make a distinction between non-stop and one-stop flights. It is interesting that the Commission took this approach when it has previously been stated that it is on transatlantic routes where one-stop flight could actually constitute a substitutable flight.

When the Commission assessed the possible efficiencies produced through the alliance it considered the effects on not just the relevant market but also on related markets. To assess the effects of an agreement on a market that falls outside the relevant market, and where there is not enough efficiency created on the relevant market to constrain anti-competitive effects, is not common. There usually needs to be positive effects on the relevant market in order for an action to fall under the scope of Art. 101 (3) TFEU. However, as stated earlier, since the markets were related and there was a considerable commonality between consumers on both markets the Commission approved of this alliance. This was the first time where the Commission actually took into consideration the effects of a network, something that has not been evident in other investigations.

4.4 Air France – KLM – Alitalia – Delta (SkyTeam)

In 2012 the Commission initiated proceedings against four members of the SkyTeam alliance as the Commission suspected that the joint venture between the airlines, concerning passenger transport between the EU and the US, was an infringement of Art. 101 TFEU. The agreements meant the establishment of a joint venture focusing on transatlantic routes and

[136] Case COMP/AT.39595, para. 124 – 135.
[137] Case COMP/AT.39595, para 149.

behind/beyond routes, where the parties would fully coordinate capacity, schedules, pricing and revenue management as well as sharing profits and losses on the concerned routes.[138]

4.4.1 Competitive assessment

The Commission defined the relevant market in accordance with the traditional O&D city pair approach although it did recognize the parties' remarks with reference to network competition. The Commission agreed that at least corporate customers accounted for network coverage when negotiating corporate contracts, these customers where still focusing on certain routes when negotiating for discounts. The Commission therefore considered the O&D city pair approach to be the correct approach when defining the relevant market. However, network competition would be considered when assessing each individual route identified and what possible effects this would have on competition.[139] The Commission found that a distinction should be made between premium and non-premium passengers. Premium passengers were inclined to pay more for a ticket if it offered better flexibility and a higher quality of service, while non-premium passengers were not interested in flexibility or a higher quality of services. Premium passengers included passengers in First and Business class while non-premium passengers held restricted Economy tickets.[140] The Commission identified three O&D routes, Amsterdam/Rome–New York for premium and non-premium passengers and Paris–New York for premium passengers, where competition would be negatively affected by the alliance.[141] Further the Commission concluded that the airports in New York, Newark and JFK were substitutable as well as Charles de Gaulle and Orly.[142] Although the Commission had previously stated that one-stop flights could be in competition with non-stop flights was not necessary to determine if the services where considered to be in the same market. Instead this would be assessed on a route-to-route basis to see whether one-stop services were considered a constraint on the parties' one-stop services.[143]

The alliance would be assessed based on Art. 101 TFEU since the alliance was not considered as a "full function" joint venture independent from its parent carrier.[144] The Commission therefore assessed if the alliance, with its integrated cooperation, was to be considered as a restriction on competition

[138] IP/12/79.
[139] Case AT.39964, para. 18 – 21.
[140] Case AT.39964, para. 22 – 23.
[141] Case AT.39964, para. 42.
[142] Case AT.39964, para. 30 – 35.
[143] Case AT.39964, para. 28.
[144] Case AT.39964, para. 36 – 38.

by object. The alliance meant that the parties agreed to cooperate on all levels of pricing, capacity, scheduling and quality of service and frequent flyer programs. This was all considered to be key parameters of competition in the airline industry, which would be completely eliminated due to the alliance. Therefore the alliance was considered as a restriction on competition by object.[145]

The Commission assessed all three identified O&D city pairs were competition could be negatively affected and concluded that the carriers had very large market shares on all the routes, and that they were very close competitors on each route. As they would cooperate on key parameters through the alliance, competition between the carriers would be eliminated as a result. Competitors would not be able to counter the effects of the alliance, partly due to the very high barriers of entry on the routes. The alliance was in a favourable position as the carriers had hubs at both ends of the routes and could easily switch their slots, which gave them an advantage at the congested airports.[146]

One-stop flights did not provide enough of a competitive constraint on the identified routes and it was also unlikely that such a service would be expanded to an extent that it would compete with the alliance. Therefore the Commission considered that the alliance would have the effect of appreciably restricting competition on the identified routes.[147] During the investigations of the route between Amsterdam and New York the parties argued that this route had been investigated and exhausted when assessing the merger between Air France and KLM. The parties had already made slots available and therefore addressed the competitive issues on the route. The Commission was of another opinion as that decision was under the merger and only referred to Air France and KLM whereas the current alliance was under Art. 101 TFEU and concerned all parties. Market conditions had changed and since the merger decision and this concerned a new agreement it was justified to assess the agreements impact on this route. Further the Commission noted that the slots made available in Amsterdam had not been taken by any competitors.[148] Since the parties had not submitted any arguments with reference to Art. 101 (3) TFEU and possible efficiencies created due to the alliance, the Commission concluded that there were no efficiencies that would justify the appreciable restriction on competition caused by the alliance.[149]

[145] Case AT.39964, para. 39 – 41.
[146] Case AT.39964, para. 44 – 65.
[147] Case AT.39964, para. 65 – 109.
[148] Case AT.39964, para. 70 – 71.
[149] Case AT.39964, para. 111.

4.4.2 Commitments

As a response to the Commission's investigation the parties offered to undertake certain commitments in order to reduce the anti-competitive effects. The parties committed to making slots available both at airports in Amsterdam and in Rome, and if necessary at any of the airports in New York, with up to seven weekly frequencies on each route. The slots would be obtained if a number of conditions were fulfilled, such as exhausting all efforts of obtaining a slot through the general slot allocation. The slots would be available both for new entrants as well as existing competitors. It was noted that other member of SkyTeam would be eligible applicant as long as they did not belong to the same holding company as any of the parties or already cooperated on the route.[150]. The parties did not offer to make slots available on the route between Paris and New York, as competitors offered more frequencies than the alliance and new frequencies had been added recently.[151]

Further the parties offered to enter into fare combinability agreements with new entrants or competitors that begun operating non-stop services on the route. The parties also offered to enter into special prorate agreements on several feeder routes operated both by the parties and their subsidiaries, meaning routes behind and beyond the identified routes as long as the origin or destination where within certain predetermined locations. These agreements would help reduce the barriers at certain airports, as it made it possible for the competitors to offer connecting flights on the identified routes. On a concluding note competitors would be allowed to enter into the parties frequent flyer programme on the identified routes as long as the competitor was not in any other equivalent program.[152] The Commission accepted the commitments submitted by the parties and stated that there were no longer any grounds for action and therefore closed its investigations.[153]

4.4.3 Comments

A very interesting aspect in this case is the fact that there was no assessment with reference to Art. 101 (3) TFEU. The parties did not submit any arguments and the Commission did therefore not conclude any assessment with reference to the possible efficiencies created.

[150] Case AT.39964, para. 114 – 117.
[151] Case AT.39964, para. 150.
[152] Case AT.39964, para. 153 – 163.
[153] Official Journal, C 212/5.

Another highly interesting aspect of this case was the fact the other SkyTeam members would be eligible for slots that would have to be released as a consequence of the present agreement. The fact that the Commission to some extent referred to other SkyTeam members as competitors is also highly interesting.

4.5 SAS – Maersk Air

In early 1999 the Commission was notified of a cooperation agreement between SAS and Maersk Air where the parties agreed to enter into a code-share agreement for certain routes that were operated by Maersk Air as well as letting Maersk Air participate in SAS's frequent flyer programme. The parties were to coordinate their code-shared services in order to facilitate for connecting flights, it was also stated that Maersk Air would start operating on SAS's routes from Denmark where SAS was not able to operate any longer.[154] Following the initiation of the alliance the Commission received a complaint from a competitor that suggested that there were far more integrated cooperation between the parties than what had been announced. An investigation showed that both parties had retreated from routes where they had previously been competitors not long after the cooperation begun. Due to these indications the Commission decided to further investigate the cooperation. The investigations showed that there were several agreements that had not been notified to the Commission. The Commission therefore opened proceedings against the parties as it was of the opinion that the agreements between the parties, notified and non-notified, were infringing Art. 101 TFEU.[155]

4.5.1 Competitive assessment

When the parties notified the Commission of the cooperation agreement they stated that the nature of the agreement made it impossible to assess the relevant market based on specific routes. The agreements should be assessed as a whole, which would also be justified from a commercial point of view. The Commission was not of the same opinion and stated that a demand side perspective was the most important element when defining a relevant market. Therefore it was appropriate to apply the O&D city pair approach, where every pair was considered as a separate market. The Commission identified a number of relevant markets that were affected by the alliance and specifically assessed the routes between Copenhagen-Stockholm/Venice for time-sensitive passengers and Billund-Frankfurt for both time-sensitive and non-time-sensitive passengers. Apart from these routes there were

[154] Official Journal, L 265/15, para. 16 and 20.
[155] Official Journal, L 265/15, para. 4 – 11.

numerous domestic and international routes departing from Copenhagen and Billund that were affected by the agreement.[156] However, the Commission specifically assessed the Copenhagen-Stockholm/Venice route, as Maersk Air withdrew its services on the Copenhagen-Stockholm route and gained the exclusive right to operate on the Copenhagen-Venice route as compensation. Although the parties stated that Maersk Air withdrew from the route due to the economic losses, investigations showed that Maersk Air withdrew from the market before further reviewing possibilities of reducing their losses on the route. Maersk Air was compensated for its withdrawal by taking over the route Copenhagen-Venice where SAS stopped its operations. Investigations also showed that SAS withdrew from the route Billund-Frankfurt, where the parties had been the only carriers providing services prior to the alliance.[157] The Commission concluded that, although both carriers were suffering losses on the routes where they withdrew, they withdrew from the respective markets as a consequence of the agreement between the parties. The mere nature of this kind of market sharing agreement had as its object to restrict competition but the Commission therefore concluded that the agreements were infringing Art. 101 TFEU.[158]

4.5.2 Commitments

The Commission was of the opinion that the agreement was a hardcore competition restriction as it was a market sharing agreement and there were no exemptions applicable to this agreement. The agreement did not produce any appreciable objective advantages on the market and would not benefit from Art. 101 (3) TFEU. Instead the Commission imposed fines on the parties and concluded that the agreements were an infringement of Art. 101.[159]

4.5.3 Comments

In this case the Commission presented what aspects of an agreement that are generally prohibited with reference to competition provision and cooperative agreements. Market sharing agreements are prohibited under competition provisions as the very nature of these agreements are to restrict competition, are therefore considered to be a restriction by object. What needs to be further assessed is whether the effects of a market sharing agreement, like the one in this case, are the same as other agreement where

[156] Official Journal, L 265/15, para. 32 – 42.
[157] Official Journal, L 265/15, para. 49 – 58.
[158] Official Journal, L 265/15, para. 68 – 73.
[159] Official Journal, L 265/15, para. 79 – 84.

competition is restricted by object, like we have seen in the transatlantic joint ventures that have also been deemed to be restrictive by object.

5 Discussion

It is fair to say that the airline industry is a complex industry and its relationship with competition law is highly interesting in many aspects. Throughout this thesis it has been shown that the concept of an airline alliance goes against the nature of competition law and its objectives. It is therefore legitimate to discuss the questions that have been the guidance through the presentation of the current state of law. Are the assessments performed by the Commission in accordance with Art. 101 TFEU? What effects can be seen on the market following the approval of airline alliance? The focus on this question will be a continuation of the first question and will further assess the effects of the commitments imposed by the Commission. This will then lead us to the question, of whether effective competition is sufficiently maintained within the airline industry. The questions will be discussed in this order as this will lead us to the final understanding.

5.1 Are the assessments performed by the Commission in accordance with Art. 101 TFEU?

The purpose of this question is to review the Commission's assessments in cases concerning airline alliances. In the decisions it has been shown that the alliances have been considered as restrictions on competition by object, as the mere nature of the agreements has been to cooperate on key parameters within competition and thereby completely eliminate competition between the members of the alliance. Nonetheless, all airline alliances have been considered to either fall under the scope of Art. 101 (3) TFEU or there has no longer been grounds for further investigations following the commitments as the Commission has found there to been great efficiencies created through the alliances.

Although the Commission has been known to have a positive attitude towards airline alliances, the alliances have still been thoroughly investigated by the Commission. Furthermore the Commission has never stated that airline alliances do not cause restrictions on competition, but has repeatedly emphasized the anti-competitive nature of the agreements between airlines. The Commission has further observed the advantages arising from the same alliances, although none of the alliances have been approved when first notified or investigated. By imposing various conditions upon the alliances the Commission has been of the opinion that

the restrictions on competition have been appropriately met and thereby the benefits of an alliance have been greater than the restrictions on competition. This shows that alliances are indeed scrutinized under the relevant competition provisions as any other anti-competitive agreement and it also shows that the Commission has an understanding of the industry and its difficulties. Further it should be noted that the possibility to freely move within the Union is a fundamental freedom that is facilitated by air transportation, an aspect that the Commission surely is highly aware of.

However, the assessments of the efficiencies produced on the alliances have shown indications of a lenient approach towards alliances. An example of this is the Commission's assessment regarding efficiencies in the Star Alliance case. In this decision the Commission took into consideration the efficiencies created outside the relevant market which went beyond the usually assessments which focuses on the relevant market. In its competitive assessment the Commission concluded that the relevant market was routes between Frankfurt and New York, but did not account for the behind and beyond traffic. Although the Commission did not accept the alliance at first it was approved once commitments were imposed on the alliance. As the Commission stated that there were no grounds for investigation it is not certain that these efficiencies were decisive for the final decision. However, it is interesting to note that an agreement which restricts competition by object and where there is not enough benefits created for the consumer on the relevant market or the consumers on the related markets, to get approved following commitments. As will be further discussed later, these commitments do not always have the wanted effect either. This does indeed suggest that the Commission has taken a lenient approach towards airline alliances, when it assessed impacts on markets that are outside of the relevant market.

Another example was given in the SkyTeam decision where the Commission considered other SkyTeam members to be competitors to the same alliance assessed. It must be deemed highly unlikely that members of an alliance will actually compete against each other. Since the commitment also concerned the release of slots at a congested airport it is even more surprising that the alliance members were considered as competitors. It is not impossible that the carriers operated individual services on the identified routes without any cooperation, either way they would gain a tremendous advantage compared to other competitors if they received slots at a congested airport, which was also a hub of an alliance partner. Investigations have shown that market power at congested airports can create even higher entry barriers when alliances can use their market power to arrange their flights to meet competition. It has been emphasized both in

case law and in reports, that congested airports are a huge barrier to entry on the European markets. Although the slots might not have been released to SkyTeam members in the end, the Commission should have considered the possible anti-competitive effects that could have arisen from such a release.

Although it would seem as if the Commission has a lenient approach towards alliance one should keep in mind that the Commission in the same case imposed further commitment with reference to the slot release on the route between Amsterdam and New York. In this case the Commission did note that the commitments imposed in a previous investigation had no real effects once the alliance was approved. Although the competitive effects on that route had been assessed previously the Commission still reassessed and imposed new commitments on the parties.

It seems as if the Commission has not entirely considered the possible effects of the commitments that have been imposed on the carriers. It is therefore necessary to further discuss this question together with the second question, regarding the effects on competition following the approval of the airline alliances.

5.2 What effects can be seen on the market following the approval of airline alliances?

A way of assessing the effects on the market following the airline alliances is by discussing the different commitments imposed by the Commission in order to remove the anti-competitive effects of an alliance. The Commission has solved, or at least tried to solve, the anti-competitive problems by forcing the members of the alliance to enter into other cooperation agreements. The alliances assessed have concerned highly integrated joint ventures, whereas the commitments imposed on the parties have concerned less integrated, cooperation agreements. It is fascinating that the Commission has approved anti-competitive agreements between alliance parties by forcing these carriers to enter into cooperation agreements with other competitors as to incline competitors to enter the market. In other words competition between the alliance and the competitor wanting to enter the relevant routes has to a certain extent been eliminated due to the cooperation agreements imposed under the commitments. It is almost as if two wrongs make a right. By assessing the commitments imposed by the Commission, this point will be made evident.

In the alliances concerning transatlantic routes the Commission imposed several commitments on all alliances, which essentially were cooperation

agreements of different kinds. The carriers were obliged to enter into fare combinability agreements, special prorate agreements and to let competitors join their frequent flyer programme. This meant that a competitor would cooperate with the alliance to a certain extent on the concerned route. The competitor would be able to offer the alliance's services on a certain route combined with its own service. The competitor would also gain access and could sell tickets to connecting flights operated by the alliance. Finally passengers travelling with the competitor would gain access to the alliance's frequent flyer programme. Although new carriers would enter the market it is highly questionable if it would be considered as a real competitor to the alliance. One can speculate and assume that the new entrant would to an extent become a member of this alliance, or it would at least eliminate competition between the competitor and the alliance to a certain extent. However, it has not been necessary to enter into all of these agreements. If a competitor was to obtain a slot released under the commitments and not want to benefit from the other commitments this would obviously not create problems. Although it is almost safe to say that the competitor gaining such a slot would be a member of another alliance. Although that might not eliminate competition between that competitor and the alliance, it would most likely not foster competition either.

When assessing the market effects of the alliances and the commitments imposed by the Commission it is necessary to further discuss the alliance between Lufthansa and SAS. In this case it was stated that the parties had to freeze their frequencies when a new competitor entered the market in order for that competitor to not be pushed out of the market. Yet, the Commission also stated that the parties would be allowed to increase their frequencies by one when a competitor would start operating on the relevant routes. It would seem like the Commission's actions in practice contradicted itself, although this was most likely not the intention of the Commission. Separately these commitments would seem appropriate in an attempt to keep competition on the relevant market. The carriers should not be allowed to use their market strength to push a competitor from the market. The freeze would presumably increase incentives to start operating on the relevant routes since the competitors would not have to fear an aggressive approach taken by the alliance, which was likely the intention with this commitment. The possibility of adding one frequency does not in itself suggest that a party would be able to push competitors from the market. Although when the parties already enjoy high market shares, and are essentially the only carriers operating services on the identified routes, the addition of one frequency might not be a big difference for the carrier itself but could very well be an obstacle for a possible competitor if the alliance strategically placed the new frequency at a time where it would compete with the new

entrant. If the two commitments are assessed in the light of each other, its intentions of constraining anti-competitive behavior might not be as sufficient as the Commission expected when imposing this commitment.

It should also be kept in mind that in the alliance between Lufthansa and SAS the parties were obliged to terminate all other cooperation agreements with competitors if these concerned the identified routes in order to act in accordance with Art. 101 TFEU. They were further obliged to enter into interlining agreements with new competitors, upon request, in order to facilitate their entrance on to the relevant routes and the new entrant would be able to participate in the alliance's frequent flyer programme. One can question how much competition there would be between the new entrants and the alliance members following the entry into these agreements. However, no new competitors entered the market, as the carriers had a very strong market position and no other full service airline wanted to take the risk. Apart from this, the cooperation agreements with other carriers where terminated which possibly caused disadvantages for the passengers that had travelled under these routes. Effectively the commitments imposed by the Commission meant that all other competitors were excluded from the market and Lufthansa and SAS gained a monopoly.

Another commitment imposed on the alliance between Lufthansa and SAS was that the parties had to give up a sufficient number of slots to new entrants, although the parties were not obliged to give up any slots until a competitor actually decided to begin operations on the route. Thereby the parties could continue to operate until such an application was submitted. As presented the identified routes between Germany and Scandinavia are still only operated by the parties and have not seen any real competition since the parties entered into the agreements. Investigations by the Commission also showed that they faced little to none competition prior to the agreement and, as suggested in doctrine, the consequence of the alliance was that a monopoly was created on these routes. Today it is possible to fly with low cost carriers between Scandinavia and Germany although these routes do not match the identified O&D city pairs of the alliance. One low cost carrier performs direct services between the same city pairs, although this service is provided from a secondary airport. It is therefore questionable if they would be in the same catchment area as the airports used by the Lufthansa and SAS. Although the low cost carrier might not be considered as an actual competition on this relevant market, it is not impossible that some passengers have selected the low cost carrier's services.

Inevitably the commitments imposed on carriers have not always had the effect the Commission has been looking for when approving alliances. The

case between Lufthansa and SAS has specifically demonstrated this, although the effects have been pushed to an extreme position in this discussion. However, the purpose of competition law is to protect competition in order to bring benefits for society, an outcome that is difficult to argue with reference to the alliance between Lufthansa and SAS. It is important to keep in mind that this alliance was one of the first alliances assessed by the Commission following liberalization. The Commission has not changed its approach since, however it may explain why the commitments did not have any effects.

There is yet another aspect to assess with reference to an alliance's effects on the market. This should be assessed with reference to the case concerning the illegal alliance between SAS and Maersk Air. The difference in this alliance compared to other alliances assessed was that the carriers had deliberately withheld information regarding market share agreements. This would suggest that the parties were aware of the anti-competitive effects of these agreements and most likely suspected that it would not be possible to outweigh the negative effects created through these agreements. The interesting aspect of this case is to assess the actual effects of the agreements. The carriers agreed to divide markets between themselves and as a consequence withdrew from certain markets where they had previously been competing. The very nature of the agreement was therefore to restrict competition on the relevant markets, and thereby eliminate all competition between the carriers. The effects were obviously that the market was divided between the carriers. Other alliances have also been considered to restrict competition by object, as their agreements have meant the elimination of key parameters of competition. Although, the key difference has been that these alliance have not included a market sharing agreements. Nonetheless, it is not impossible to argue that the effects of these airline alliances may end up close to the effects of a market sharing agreement. Such a statement would however have to be backed up with extensive investigations to even come close to such a conclusion. Nevertheless, carriers enter into to alliances in order to provide services on markets where they do not operate. After having entered into such an agreement chances are low that the carrier will bare the cost in starting up services on that route when it has already covered it through the alliance. Although the intentions of these agreements are completely different, the outcome will be similar.

The question one is then faced with is if competition is sufficiently maintained in the airline industry.

5.3 Is competition sufficiently maintained in the airline industry?

Based on these findings it would be reasonable to state that competition is not sufficiently maintained within the airline industry. In all the presented cases the Commission has had anti-competitive concerns with the parties' agreements and not a single agreement has been approved without first having submitted commitments which have eased the Commission's concerns. However, as discussed these commitments have not always lead to effects sought by the Commission when requiring the parties to give up certain aspects of their business. Therefore it is not possible to state that competition is sufficiently maintained if no new entrants has entered the market or if the commitment has led to existing competitors containing their large market shares without facing any competition. However, if an airline cannot compete with another airline when given a favorable position should that airline then be on the market? Competition policy is aimed at fostering competition, not to help competitors.

It should be noted that all the alliances covering transatlantic routes were considered to be a restriction on competition by object. When an agreement is considered to restrict competition by its mere nature it has been proven to be difficult to claim that there are enough efficiencies produced to meet the anti-competitive effects. However, it has been shown that there is a possibility to do this in cases concerning airlines. It therefore seems as if airline alliance are an exemption to this assumption, as investigations have shown that competition continues to be restricted following the approval of airline alliances. However, this can also proof the importance of alliances within the airline industry. The reason for entering into all of these various cooperation agreements are in order to be able to cover its costs. It has been clearly stated that the industry is very tough and margins are thin. By assessing the efficiencies created through the alliances the Commission has considered these being to the benefit of the consumer. Airlines have also justified their actions with reference to cost savings. This suggests that although competition may be restricted through airline alliances, the effects would be even greater if it would be impossible to enter into agreement in order to lower your costs. When viewing the Commission's assessments from this perspective its approach would still be lenient but if the purpose is to keep the industry it is given another meaning. It still does not change the fact that competition is not sufficiently maintained within the industry and one can question if it is the right way to foster competition, but if the option would be an industry where only a few carriers would survive this too would be given another meaning.

The historical background illustrates how the industry has developed. This might also be an indication of where the industry is heading. It all began with an industry filled with state-owned carriers that were treated favorably and were given financial supports when times were rough. This is no longer the case in the airline industry, however when assessing the development that has occurred it seems as if the legislator has tried to ease the industry into the full application of competition law. Although the last package in the liberalization came into force several years ago, there were still block exemptions protecting the airline's conducts for a long time after liberalization. It is not impossible that the approach taken by the Commission is yet again a way of easing the airline industry into full application of competition provisions. Only time can tell if this is the case.

6 Conclusion

Based on the fact that airline alliances are permitted, despite the Commission's scrutiny and the anti-competitive nature of these agreements, shows that they are to a certain extent a legal way of restricting competition. Although competition might not be sufficiently maintained within the airline industry this might be a way of keeping the industry alive. It is not by coincidence that airlines have entered into these alliances and its main purpose has maybe not been to distort competition within the internal market. The likely explanation is that the industry is extremely challenging and it is difficult to survive in this climate, the slightest obstacle can create tremendous difficulties for an airline and by entering into an alliance these obstacles are not as difficult to handle but they will not disappear. If alliances would be prohibited and airlines would be unable to meet the industry pressure, the industry could turn into an oligopolistic market where only the strongest carriers would have survived. It is not possible to assume what effects this could have on the consumer, however it is safe to say that it would probably cause more disadvantages than what the alliances cause in today's industry. It has repeatedly been emphasized that an alliance brings economic benefits to the members, which also transfers to the consumer. The fact that these alliances have been present on the market for more than a decade also emphasizes this conclusion. Without the possibility of entering into these agreements the industry would most likely be completely different compared to what it is today.

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