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Protection of competition in selected liberalized network industries: the case of rail and air transport in the EU

Master Thesis

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Prohlášení

Prohlašuji, že předloženou diplomovou práci jsem vypracovala samostatně a že všechny použité zdroje byly řádně uvedeny. Dále prohlašuji, že tato práce nebyla využita k získání jiného nebo stejného titulu.

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V Praze, dne 19.dubna 2018 / In Prague, on 19 April 2018

Aneta Mohylová

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Introduction

Motivation for the topic's selection

Transport has always been a key sector of the economy in the European Union (EU) as it represents necessary precondition for the proper functioning of the European trade, labour mobility, prosperity and economic growth. The EU transport policy was one of the first common policies established in today's European Union. In addition, it has always been an important mean for the fulfilment of three out of four freedoms of the common market – the free movement of people, free movement of services and free movement of goods as set out in the Rome Treaty in 1957. Nowadays, it represents an important sector in the EU as it employs over 11 million people and contributes to its overall economy as it represents 4.8% of Gross Value Added.[1]

Transport sector represents a typical example of so-called network industry. The usual feature of such network industry is its natural monopoly structure, which means that one firm is able to offer services more efficiently and at a lower cost than more firms on the market. In addition, the system's duplication is economically inefficient and very expensive. Among other main defining characteristics of these industries belong very high fixed costs of developing their infrastructure, decreasing average costs by increasing output as well as the existence of benefits that arise from the conjoint production of various products in one firm. Furthermore, retailers usually depend on the decision of the major firms to invest into the network facilities. The network industries also provide essential services and are usually subject to some non-economic obligations to ensure the continuity of supply of their services as set out by the government.

This characteristics that is common to network industries is one of the reasons why in the past, transport sector was heavily regulated with many exceptions from the general EU competition law framework which could have been found in various regulations and directives. Recently, there has been a gradual transition from natural monopolies to competitive markets in the transport sector with the regulation still being in effect regarding the access to essential facilities. Moreover, the transport sector as all the network industries (such as telecommunications or electricity) can be divided into non-competitive and competitive segments. Regarding the above mentioned division, the competition is considered to be possible in the downstream market where services are offered.

[1] European Union (2014), *EU transport in figures, Statistical pocketbook* [online]. Available at http://ec.europa.eu/transport/sites/transport/files/factsfundings/statistics/doc/2014/pocketbook2 014.pdf (visited on April 29, 2017).

In contrast, the upstream market, which is represented by infrastructure, is not open to competition; however, the firms are usually obliged to provide the competitors with the access to it.

The transition of the air and rail transport from natural monopolies to competitive markets also meant that the EU authorities had to react to this transformation as the past regulation and specific competition rules with numerous exceptions from the general competition framework were no longer applicable. This situation thus led to a gradual progressive alignment of transport sector to the general rules applicable to all other sectors. The general competition framework as set out in the Article 101 and Article 102 of the Treaty on the Functioning of the European Union (TFEU) and in the Merger Regulation is thus now applicable to the air and rail transport.[2] Furthermore, the newly established competitive nature of this industry also contributed to numerous cases decided by the European Commission (Commission) and Court of Justice of the EU.

This thesis thus aims to analyse how the Commission and the Court of Justice of the EU manages to apply the competition rules regarding the specific nature of the transport sector. Moreover, analysis of the cases decided by the Commission and the Court of Justice of the EU is undertaken in order to look for the specific aspects inherent in the application of competition rules to the transport sector, specifically the airline and rail industry, in the EU. The two areas of the transport sector, airline and rail industry are specifically chosen as they represent convenient examples on which it can be demonstrated how the EU manages to cope with the liberalization process and apply the competition rules to these sectors. Moreover, these two areas have been subject to the most significant intervention of EU law. The airline industry is selected as it is considered to be fully liberalized now as opposed to rail industry which has not been fully liberalized yet and thus still retains certain specific characteristics that is common to network industries. The analysis of the airline sector can thus serve as a benchmark for the rail industry to which its specificities can be compared and certain improvements can be recommended.

Area of research: hypotheses and methods used

This thesis tries to answer the question of what specific features can be observed in the decision making of the Commission and Court of Justice of the EU regarding the competition rules in the transport sector, specifically air and rail industry. The analysis is done towards private entities as

[2] Consolidated Version of the Treaty of European Union and the Treaty on the Functioning of the European Union [2012], Official Journal 326, 26.10.2012, p. 13–390 and the Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Official Journal L 24, 29.1.2004, p. 1–22.

they are usually directed towards profit making and one can expect that the violation of competition law happens mainly in this area. The focus on private entities thus represents an efficient mean to point out specific features in the application of competition rules to the transport sector. The ex post application of competition rules as set out in the Article 101 of the TFEU and Article 102 of the TFEU and the ex ante enforcement of competition law towards merger control is investigated in the single transport market formation. Specifically, Article 101 of the TFEU deals with agreements that have as their object or effect the restriction of competition and Article 102 of the TFEU deals with conducts that constitute an abuse of dominant position. Under the Merger Regulation, the undertakings are required to notify proposed concentration to the Commission, which can be either prohibited or approved unconditionally, or subject to specific commitments.[3]

The research question also includes how Commission and Court of Justice take into account the specific features inherent in this network industry. More specifically, the air and rail industry are focused at as they represent two opposites regarding the liberalization process. Moreover, the intervention of EU law has been most significant in these specific areas of the transport industry. The air industry is said to be liberalized successfully while the rail industry still retains certain specific features. The two research areas thus offer convenient examples on which the different competition policy approaches can be presented with the comparison of their differences. The analysis also tries to cope with the question whether EU copes well and manages to apply the competition rules to these newly liberalized sectors of air and rail transport.

The methods used in this thesis are thus analytical, normative and comparative. First, analytical method is used as the cases decided by the Commission and the Court of Justice of the EU are investigated in terms of the specific features that can be found in the application of the competition rules to the air and rail transport. Subsequently, comparative method is used as the two sectors are compared in terms of the liberalization process and the specific application of competition rules as done by the Commission and the Court of Justice of the EU. In the end, normative method is also used as potential recommendations are suggested after doing the aforementioned analysis for the improvement of the EU transport policy.

[3] See Appendix 1 for the general overview of competition law framework applicable in the EU.

The contribution to the existing literature is straightforward as no such thorough study of the air and rail transport in terms of the EU competition law framework exists. This thesis could thus serve as a potential source of relevant information for various researchers, academics or practitioners since it summarizes the main relevant features that can be found in the case law of the Commission and the Court of Justice of the EU with respect to the specific nature of the air and rail transport. It also provides general overview of the air and rail transport's liberalization process in the EU context.

Structural overview

The thesis is structured as follows. In total, it includes six chapters, introduction, four main chapters and the conclusion. The first chapter is devoted to the EU transport policy as the goals of the transport policy, the liberalization process and its main characteristics are described. Specifically, the main milestones in the creation of single European transport policy in the airline and transport industry are presented and the main obstacles in the liberalization process in these sectors are discussed. The second and third chapters represent the core of the thesis since they employ an up to date analysis of the cases decided by the Commission and the Court of Justice of the EU. In the analysis, attention is paid to the specific features that the application of competition rules shows with respect to the air and rail industry. In addition, the analysis is also carried out with respect to the objectives, which the Commission follows while enforcing the competition law. The fourth chapter provides a summary of the specific features in the application of competition rules in the air and rail industry. Furthermore, the comparison of the competition rules in the rail and air industry is provided with the discussion of the differences and possible recommendations.

1 EU Transport Policy

Today's form of common transport policy, which was preceded by a long development, is regulated under the title VI of the TFEU.[4] The formation of common transport policy that would contribute to the liberalization of the transport sector and removal of the barriers between Member States was the cornerstone of the EU integration process and represented one of the first common policy areas of today's EU.[5] The Treaty of Paris represented the first milestone in the creation of EU transport policy. There was, however, only one provision on the transport policy that aimed to ensure comparable rates and conditions for the carriage of the coal and steel, which meant that for the rest, the respective Member States had their own transport policy.[6] The Treaty of Rome established the concept of the common transport policy in 1957. At this time, the grounds for liberalization of transport were introduced, as one of the aims of the Treaty was to promote freedom to provide services.[7] The provisions of the Treaty of Rome mainly dealt with the land transport while air and maritime transport were left to the Council's decision.[8]

Important judgement by the European Court of Justice that influenced the development of EU common transport policy was the French Seamen case. In its judgement, the European Court of Justice made clear that the general provisions of the Rome Treaty on transport also applied to the air and maritime transport and the special treatment for some parts of the transport sector enabling the Member States to adopt their own legal acts was reduced.[9] Following the years after the adoption of the Rome Treaty, Commission adopted various documents that focused on transport policy. In addition, Commission had only the power to act after the Council's authorization and could only advise the Council on the legal matters and issue various proposals that could have

[4] See Appendix 2 for the overview of important milestones in the development of common transport policy.

[5] European Commission (2014), *The EU explained: Transport*, Directorate-General for Communication, European Union 2014, p. 3 [online]. Available at https://europa.eu/european-union/topics/transport_en (visited on April 13, 2018).

[6] Treaty Establishing the European Coal and Steel Community and Annexes I-III, Paris, 18 April 1951.

[7] Treaty establishing the European Economic Community, 15 March 1957.

[8] Air and maritime transport were not included under the provisions of the transport policy in the Rome Treaty due to the protectionist-oriented countries like Netherlands, West Germany, Italy and France, as they did not want to abandon their sovereignty. See Majewska M. (2014), *EUROPEAN UNION TRANSPORTATION POLICY FROM THE TREATY OF MAASTRICHT UP TO NOW,* Univeristy of Białystok, Faculty of Law, p. 76 [online]. Available at http://dfk-online.sze.hu/images/sjpj/2014/1/majewska.pdf (visited on April 13, 2018).

[9] Judgment of the Court of 4 April 1974, *Commission of the European Communities v French Republic,* ECLI:EU:C:1974:35.

been only enacted by the Council.[10] Despite the Commission's efforts, the creation of common transport policy stagnated at that time due to the Council's inactivity towards the common transport market. This inactivity was further strengthened by resources and energy crisis in the 1970s that led to more cautious approach of the Member States towards further integration of the EU.[11]

Major turning point in the creation of the EU common transport policy represented the proceedings of the European Court of Justice that were initiated upon the complaint filed by the European Parliament together with the European Commission against the Council for failure to act in the field of common transport policy. European Court of Justice urged the Council to act in developing the EU common transport policy in its judgement in May 1985. It was the first judgement in which the Court held that Council failed to act and adopt measures to fulfil the goals set up by the Treaty of Rome. It was thus stated that this inactivity constituted an infringement of the Rome Treaty.[12] The judgement of the European Court of Justice then gave impetus to action regarding the creation of the EU common transport policy. On 14 June 1985, Commission acting on behalf of the Council issued so-called Cockfield's White Paper, which included two hundred eighty-two acts (mostly directives) that introduced the concept of internal market and sped up its creation.[13]

The Single European Act that came into force on 1 July 1987 largely built on the Cockfield's White Paper. The main aim of the Single European Act was the creation of internal market by 31 December 1992 and the revision of the Treaty of Paris and Rome Treaty. In addition, it introduced some important changes as it changed the unanimity requirement for the adoption of measures in air and maritime transport to qualified majority voting in the Council.[14] These changes in the European legal framework then led to and simultaneously formed basis for the adoption of various

[10] See for example European Commission (1961), *Memorandum on the General Lines of the Common Transport Policy*, COM (61) 50 final, 10 April 1961 or European Commission (1962), *Programme d'action en matière de politique commune des transports,* VII/COM (62) 88 final of 23 May 1962.

[11] Dempsey P. (2001), *Competition in the Air: European Union Regulation of Commercial Aviation,* Journal of Air Law and Commerce 979 Volume 66, p. 1003 [online]. Available at https://scholar.smu.edu/cgi/viewcontent.cgi?article=1587&context=jalc (visited on April 14, 2018).

[12] Judgment of the Court of 22 May 1985*, European Parliament v Council of the European Communities – Common transport policy*, ECLI:EU:C:1985:220.

[13] White Paper From The Commission To The European Council, *Completing The Internal Market*, COM/85/0310 FINAL, MILAN, 28-29 JUNE 1985.

[14] Single European Act Art.59, Official Journal L 169, 29.6.1987, p. 1–28.

liberalization measures by the Council. These liberalization measures were usually represented by directives or regulations and together formed so-called liberalization packages.[15]

1.1 Liberalization of air transport

Traditionally, airline industry in the EU was operated by so-called national flag carriers as most of the airlines were owned by State and considered as national valuable assets (such as British Airways, Air France or Lufthansa).[16] This was also codified in the 1944 Chicago Convention, which represented the regulatory framework for the air transport in the EU before liberalization. According to which each contracting state had exclusive sovereignty over its territory and no other air services operated by another State could be provided in its airspace without its special permission.[17] The structure of the airline industry thus consisted of a network of national markets that were interlinked by bilateral air service agreements concluded between the specific State and other States within and outside Europe. Bilateral agreements thus restricted the airlines in the choice of their operations since they could provide services only agreed under the provisions of bilateral agreements. Furthermore, national markets were subject to different national rules that promoted competition to a different degree and in many cases, the market entry was restricted for the benefit of the national flag carriers. As a result, the amount of competitors was quite low in the early nineties.[18] Such market setting was however incompatible with the EU's internal market and greater demand for air transport due to increasing standard of living.

The need for liberalized market setting thus appeared. The first steps towards liberalization of air transport were taken in 1986 and 1987 with the Nouvelles Frontières case and the conclusion of the Single European Act. The Nouvelles Frontières judgement by the European Court of Justice in 1986 gave important impetus to liberalization of air transport in the European Union as it was held that the competition rules in the Rome Treaty were applicable to the air transport.[19] In 1987,

[15] See Appendix 3 and 4 for the overview of aviation liberalization packages and rail liberalization packages.

[16] Balfour, J. (2014), *Airline Liberalisation and Competition: the EU Experience,* Directorate For Financial and Enterprise Affairs, Competition Committee, OECD, DAF/COMP(2014)22, p. 3 [online]. Available at www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAFCOMP(2014)22&docLanguage=En (visited on March 5, 2018).

[17] International Civil Aviation Organization (ICAO), Convention on Civil Aviation ("Chicago Convention"), 7 December 1944, (1994) 15 U.N.T.S. 295 [online]. Available at: http://www.refworld.org/docid/3ddca0dd4.html (visited on March 28, 2018).

[18] Burghouwt, G., P. Mendes de Leon and J. De Wit (2015), *EU Air Transport Liberalisation*, January 2015, p. 7 [online]. Available at https://www.itf-oecd.org/sites/default/files/docs/dp201504.pdf (visited on November 12, 2017).

[19]Judgment of the Court of 30 April 1986, *Criminal proceedings against Lucas Asjes and others, Andrew Gray and others, Andrew Gray and others, Jacques Maillot and others and Léo Ludwig and others (Nouvelles Frontières),* ECLI:EU:C:1986:188.

the liberalization process was further strengthened by the signature of the Single European Act which amended the Treaty of Rome as it embodied the creation of a single internal market and changed the unanimity requirement for the adoption of air transport legislation to qualified majority.[20] In addition, Member States had to transform their air transport policies in order to comply with the requirements of the Treaty.[21] In order to accomplish the goals set up by the Treaty of Rome and later by the Single European Act, specific set of rules needed to be developed in order to open up the aviation markets for competition and relax the conditions for fares or capacity sharing. This was done through three liberalization aviation packages that were adopted by the Council in the period from 1987 to 1992.

In 1983, first liberalization effort was made by the Council by adopting Directive 83/416/EEC on the liberalization of inter-regional air services; however, Member States still required restrictive conditions to be in place.[22] The first aviation liberalization package was agreed in 1987. It consisted of Regulation on the application of competition rules in the Rome Treaty, which was also the first measure that explicitly encompassed air transport under the competition provisions of the Rome Treaty. Moreover, the first package included Regulation on the application of the then equivalent Article 101(3) of the TFEU and Directive that dealt with the relaxation of restrictions on capacity, fares or single destination.[23] Despite the adoption of the first aviation liberalization package, the bilateral agreements had been still kept in effect. The introduction of the first package and the consequent removal of the single destination provision led to the entry of small airlines into the industry such as Air Europe or Ryanair. As a result, more airlines were able to operate on the major international routes in the EU, set the prices and capacity according to their policies. The

[20] See Single European Act Art.59, Op.Cit., p. 1–28.

[21] Weinberg, S. (1991), *Liberalization of Air Transport: Time For The EEC To Unfasten Its Seatbelt*, University of Pennsylvania Law School, Penn Law: Legal Scholarship Repository, 2014, p.11 [online]. Available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1574&context=jil (visited on April 15, 2018).

[22] Council Directive 83/416/EEC of 25 July 1983 concerning the authorization of scheduled inter-regional air services for the transport of passengers, mail and cargo between Member States, Official Journal L 237, 26.8.1983, p. 19–24.

[23] The first aviation package consisted of Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, Official Journal L 374 , 31/12/1987 P. 0001 – 0008, Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector, Official Journal L 374, 31.12.1987, p. 9–11, Council Directive 87/601/EEC of 14 December 1987 on fares for scheduled air services between Member States, Official Journal L 374, 31.12.1987, p. 12–18 and Council Decision of 14 December 1987 on the sharing of passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air-service routes between Member States, Official Journal L 374, 31.12.1987, p. 19–26.

first package also included requirement that it should be revised in 1990 on the grounds of Commission's proposals and that set of further measures should be introduced.

The second liberalization aviation package was thus agreed in July 1990 and consisted of three regulations that built on the first package.[24] It introduced 'double disapproval policy' which meant that an airline could set a fare between Member States on a route unless it was prohibited by both Member States which applied to increases in fares above five per cent (until then either Member State connected by the route could block the fare). [25]Although, the first and the second aviation liberalization packages managed to alter the competitive environment of the air industry a bit, the major changes were incorporated with the introduction of the third aviation liberalization package that was proposed by the Commission to the Council's approval and with some modifications, the third package took effect in January 1993.

The third package consisted of three regulations that had direct effect in the Member States and were adopted pursuant to Article 84(2) of the Rome Treaty.[26] In contrast to the first two aviation liberalization packages, it included provisions for charter and cargo services that were not covered by the previous packages. The main features of the final package were the introduction of common licensing criteria, the full application of competition rules of the Rome Treaty to the air transport and freedom to provide cabotage since April 1997. The concept of community air carriers as introduced under the common licensing criteria substituted the national flag carriers which meant that each Member State could grant the license for the provision of services to airlines in which the Member States had majority ownership and control. Moreover, under the last package all airlines that owned the EU operating license could freely access all routes within the EU and on routes that were essential for regional development, the government of the respective state could

[24] The second aviation liberalization package consisted of Council Regulation (EEC) No 2342/90 of 24 July 1990 on fares for scheduled air services, Official Journal L 217, 11.8.1990, p. 1–7, Council Regulation (EEC) No 2343/90 of 24 July 1990 on access for air carriers to scheduled intra-Community air service routes and on the sharing of passenger capacity between air carriers on scheduled air services between Member States, Official Journal L 217, 11/08/1990 P. 0008 – 0014 and Council Regulation (EEC) No 2344/90 of 24 July 1990 amending Regulation (EEC) No 3976/87 on the application of article 85 (3) of the treaty to certain categories of agreements and concerted practices in the air transport sector, Official Journal L 217, 11.8.1990, p. 15–16.

[25] Butcher, L. (2010), *Aviation: European liberalisation, 1986-2002*, SN/BT/182, May 2010. Available at http:// researchbriefings.files.parliament.uk/documents/SN00182/SN00182.pdf (visited on November 11, 2017).

[26] The third aviation liberalization package consisted of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, Official Journal L 240 , 24/08/1992 P. 0008 – 0014, Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers, Official Journal L 240, 24.8.1992, p. 1–7 and Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services, Official Journal L 240, 24/08/1992 P. 0015 – 0017.

impose Public Service Obligations (PSO) on a specific airline to ensure satisfactory operation of the respective route.[27]

The third package also introduced full freedom in the fare (passengers) and rate (cargo) setting and removed the obligation of the airlines to report their prices to the respective national authorities for approval.[28] The regulation represented a gradual transitional period for the transformation of national markets into a single market in order to give the already existing airlines time to adjust. This mostly affected the right to cabotage as there was no obligation until April 1997 to comply with this freedom. In general, cabotage meant that operation of air services in one Member State could be offered by other airlines than those owned or controlled by the respective Member States.

The major issue that still needed to be solved was the existence of bilateral agreements between the Member States and the United States as the transport ministers of the respective Member States in 1993 rejected to move the powers of negotiating the bilateral agreements on the Commission. In 1998, a complaint was filed to the European Court of Justice against seven Member States. The so-called Open Skies judgement adopted by the European Court of Justice in 2002 is quite important as it confirmed the competence of the Commission toward the external aviation policy. Furthermore, it stated that the nationality clauses in the bilateral agreements infringed the right of establishment as set out in the Rome Treaty as they discriminated air carriers of other Member States.[29]

1.2 Liberalization of rail transport

The first efforts to introduce a legal framework that would promote competition in the supply of rail services on the tracks appeared in the Prussian railway law in 1838. At that time the rail industry experienced growth and increased density which led to the creation of monopoly structure as the companies merged or created collusions. In the late 1870s, rail industry was nationalized by

[27] Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) Art. 3, Official Journal L 293, 31.10.2008, p. 3–20.
[28] Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast), Official Journal L 293, 31.10.2008, p. 3–20.
[29] Court of Justice (2002), *Commission v United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, Germany (Judgments in Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98),* Press Release No 89/02, 5 November 2002 [online]. Available at https://curia.europa.eu/en/actu /communiques /cp02/aff/cp0289en.htm (visited on April 15, 2018).

the Prussian government.[30] For a long period from the 1890s to the 1990s, rail industry was organized on a national basis with fully vertically integrated monopolies. This thus led to the existence of national markets with networks that did not interconnect due to different technical and operational standards employed on the respective markets. The rising popularity and success of motor cars and commercial aviation, however, undermined the success of railways that were experiencing unprecedented prosperity during the 19th century and the first half of the 20th century.[31] Moreover, the position of rail transport was worsened by the deregulation that took place in road and air transport. The international rail transport thus experienced even lower market share in the intermodal competition due to different legal frameworks at national level.

The European Economic Community thus tried to stop this decline by introducing a series of measures. Although, the first step towards more competitive and liberalized rail transport in the form of common transport policy was already introduced in the Treaty of Rome in 1957, no serious measures were introduced before 1985. Even before any action was undertaken at the European level, first liberalization measures were introduced in Sweden that contributed to vertical unbundling of the infrastructure manager and the service operator in 1988.[32] Since then more member states followed the Swedish example and progressed to increased competition. Sweden and other member states then served as an example for the introduction of reforms at EU level, which were aimed at liberalizing the rail transport.[33]

The liberalization process started with the adoption of Directive 91/440/EEC with regard to the Article 75 of the Rome Treaty. In 1996, the emphasis was given on further restructuring of the sector in the White Paper issued by the Commission on the railways so that the position of rail transport in the European internal market could be improved.[34] The goal of the first regulatory

[30] Knieps, G., *Competition and the railroads: A European perspective*, 2013, Oxford University Press, Journal of Competition Law&Economics, 9(1), 153-169 [online]. Available at https://academic.oup.com/jcle /article/9/1/153/864671 (visited on November 13, 2017).

[31] Commission of the European Communities (2006), *Report from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions on the implementation of the first railway package*, Brussels, 3.5.2006, COM(2006) 189 final.

[32] Alexandersson, G. and S. Hultén (2008), *The Swedish railway deregulation path*. Review of Network Economics, 7(1).

[33] The first member states that took proactive steps towards liberalizing their national railways were also the ones which benefited from it later as they performed best and managed to modernize their business. See Commission of the European Communities, *Report from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions on the implementation of the first railway package*, Op.Cit., p. 3.

[34] Commission White Paper of 30 July 1996, *A strategy for revitalising the Community's railways*, COM(96) 421, p. 1-40.

measures that were introduced was to enforce the access rights to the railway infrastructure, the removal of the state monopolies from the provision of rail services and the overall liberalization of the industry. The core step that had to be undertaken was the unbundling of the infrastructure manager from the undertakings in the railway operations. At this stage, the formation of an international grouping of at least two undertakings from different Member States and obtaining safety certificate from the national regulators was necessary in order to be able to provide international rail passenger transport.[35] The Communication from the Commission to the Council and the Parliament showed that the management autonomy had been quite well implemented by the Member States while the vertical unbundling of the rail services and infrastructure management and insurance of the fair access rights was found to be unsatisfactory.[36]

The four railway packages that were introduced throughout the years focused on accomplishing these goals. The first three packages were adopted by the Council in line the Treaty establishing the European Community and particularly Article 71 thereof and the last package was adopted in line with TFEU and in particular Article 91(1) and Articles 170 and 171 thereof. The first two packages dealt mainly with the liberalization of rail freight transport while the last two mainly focused on the passenger transport. The first railway package built on the outcomes presented by the 1996 White Paper and the shortcomings of Directive 91/440/EEC. The first package consisted of four directives. The goal of the first package was the vertical separation of infrastructure management and the actual operation of train services. Moreover, the interoperability requirements between the national networks required updating in order to ease the international freight transport. It also aimed to ensure the gradual opening of freight market to cabotage.[37] In 2001 White Paper that was built on the provisions from the first package, further development of the European railway area was suggested.[38]

[35] Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways Art.5, Official Journal L 237, 24.8.1991, p. 25–28.

[36] Communication from the Commission to the Council and the European Parliament on the implementation and impact of Directive 91/440/EEC on the development of the Community's railways and on access rights for rail freight, COM (1998) 202 final, 31.3.1998, Brussels [online]. Available at https://publications.europa.eu/en/publication-detail/-/publication/7efb9273-72a3-45c0-9ca6-3e7f904cffaa (visited on April 14, 2018).

[37] Commission of the European Communities, *Report from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions on the implementation of the first railway package*, Op.Cit., p. 9.

[38] White Paper submitted by the Commission on 12 September 2001, *European transport policy for 2010: time to decide*, COM(2001) 370 final.

The second railway package that was adopted in 2004 consisted of three directives and one regulation and continued in more extensive opening up of the rail freight market regarding free access of rail freight operators to the infrastructure. Regulation establishing European Railway Agency and measures for enhancement of the interoperability were also introduced. Any European rail freight operator should have been therefore able to provide freight services across the EU subject to the same technical and legal requirements. The goal was thus to open the rail freight market by the beginning of January 2007. In 2007, the international rail freight transport became fully liberalized.[39]

The last two packages then focused on liberalizing the passenger transport, more specifically the international rail passenger transport. The third railway package was introduced in 2007 and the main provisions included the introduction of open access rights including cabotage for international passenger rail transport and the European driver licence which enabled train drivers to provide operation of train services across the whole Europe. Moreover, the separation of infrastructure from operation of passenger and rail freight services at least into separate divisions with their own accounts was required and fare prices and allocation of paths should have been formed on a non-discriminatory basis. In 2010 the liberalization of international rail passenger transport was achieved.[40]

In 2014, the fourth railway package was introduced that consists of two pillars – the market and technical one. The market pillar continues in the gradual market opening that has been started with the adoption of the first railway package. It rests on delivering more choice to passengers in terms of rail services and its better quality. It focuses on enabling general right for railway undertaking to operate their services anywhere in the EU. In addition, it establishes mandatory and more transparent and competitive tendering of public service contracts which should force the railway operators to be more considerate of the provision of their services, enable to save more money and improve the quality of services. Furthermore, the technical pillar is designed to improve the competitiveness of the rail services and reduce administrative burdens (e.g., creation of uniform

[39] Eisenkopf, A. (2006*), Opening the Rail Freight Market in Europe – an Economic Assessment,* Forum on the Liberalisation of Rail Transport in the EU, DOI: 10.1007/s10272-006-0200-9, pp. 292-295 [online]. Available at https://link.springer.com/content /pdf/10.1007/s10272-006-0200-9.pdf (visited on November 13, 2017).

[40] European Commission (2014), *Liberalisation of passenger rail services: Situation in different member states*, Fourth report on monitoring the development of the rail market COM(2014) 353 final, part 2/2, p. 1 [online]. Available at http://www.europarl.europa.eu/resources/library/media/20160420RES24185/20160420RES24185.pdf (visited on November 14, 2017).

applications so that the undertakings can operate in the whole EU or further insurance of the interoperability of the European Rail Traffic Management System). Moreover, the varying national legislation should be reduced and harmonised in order to ensure non-discriminatory access to the rail market for new entrants. The market pillar of the Fourth Railway Package seeks to open up the domestic passenger services to competition, from 2020 (on-track competition) and from 2023 for public service (off-track competition).[41]

To sum up, the core goals of the liberalization efforts are enforcement of non-discriminatory open access to the infrastructure, development of independent regulatory institutions, vertical unbundling of the track infrastructure manager from the operation of transport services, the achievement of interoperability among the different railway networks across the EU in terms of technology and law. [42] In contrast to air transport, the legal tools used in most of the rail liberalization packages had the form of directives that needed to be transposed by the Member States and implemented into their national law in order to be binding. The reason for the use of directives rather than regulation in liberalizing the rail transport might have been the fact that directives left more space for the respective Member States to choose their own form and means and it acknowledged the differences in the national systems of the Member States which was suitable for the rail transport markets that had been organized on a national basis for a long time. Timely and correct transposition of the directives by the Member States should be thus ensured in the rail sector. Throughout the time, there were, however, numerous infringement procedures carried out against the Member States for not implementing the directives into their national laws.[43]

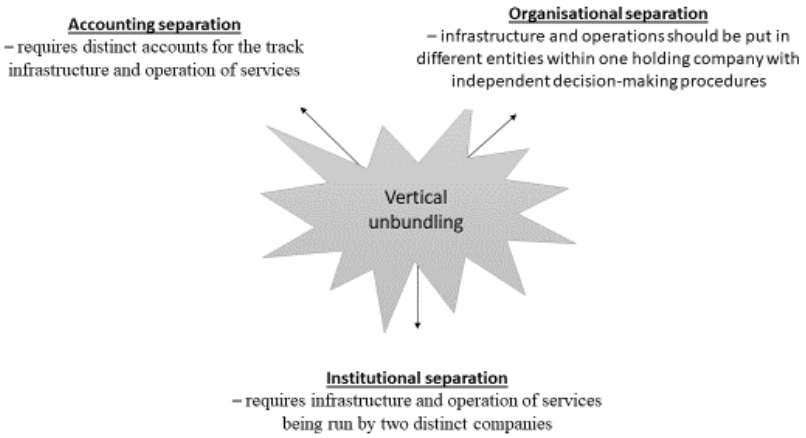
[41] For the overview of different stages of the liberalization process across different Member States see Appendix 5.

[42] In contrast to air transport where common rules for piloting and traffic control exist, rail transport can be characterized by existence of different control systems, gauges and electrical power supply. The technical standards are thus highly heterogenous and may be even different within one country. The intramodal competition in the EU rail transport is thus unthinkable without interoperable networks. See Eisenkopf, A., C. Kircher, G. Jarzembowski, J. Ludewig, W. Rothengatter and G. McCullough, *The liberalisation of railtransport in the EU*, Intereconomics 41(6), November/December 2006, pp.309 – 310 [online]. Available at https://www.researchgate.net/publication /24055920_The_Liberalisation_of_Rail_Transport_in_the_EU (visited on March, 13, 2018).

[43] Formal infrigement proceedings were started against 24 Member States with respect to the First Railway Package. The second railway package should have been transposed by 30 April 2006 and in year 2007 Commission announced that it started infringement procedure with 10 Member States including for example Germany or Slovakia. Moreover, the recast directive 2012/34 should have been implemented by 2015 and still in 2016 there were some Member States that had not transposed it yet. See European Commission (2016), *Fifth Report to the Council and the European Parliament on monitoring developments of the rail market*, COM(2016) 780 final.

Vertical unbundling means that the track infrastructure would be under control of a regulated public or private monopolist and there would be more firms competing in the downstream market for operation of services. The goal of vertical unbundling is to ensure transparent cross-financing and free access to the infrastructure for non-incumbent operators. There can be more ways how vertical unbundling can be achieved (see figure 1). Directive 91/440 required accounting unbundling (organisational or institutional separation being optional) of the infrastructure and operation of services. Later, the first railway package required at least organisational separation with institutional being optional. Fourth railway package still allows only organisational separation of the infrastructure and operation of services. There are number of variants to the three types of vertical unbundling as presented in figure 1 which can be seen across the whole EU but the goal should be to achieve the institutional separation. Institutional separation has been, however, so far achieved only in 15 Member States in the EU and thus it can be said that complete institutional separation is far from being achieved across the whole EU.[44]

Figure 1: Different variants of vertical unbundling[45]



1.3 The relationship of competition and regulation

It can be seen that both competition policy and sectoral regulation are important for ensuring proper functioning of the market. Moreover, customers benefit more when the markets function properly as they are provided with better choice, lower prices and improved quality of goods and services. According to former competition commissioner Joaquín Almunia, the goals of competition policy and sectoral regulation are actually complementary. Regulation is an instrument that works ex ante and its aim is to regulate the market structure while competition

[44] Institutional separation has been so far achieved in Belgium, Bulgaria, the Czech Republic, Croatia, Denmark, Estonia, UK, Finland, Greece, Netherlands, Portugal, Romania, Slovakia, Spain and Sweden. See Ibid., p. 7.

[45] Author's own creation based on the inspection of the regulatory measures described in the text.

rules are imposed ex post when the conduct is in violation with its provisions. In network industries, the experience has in fact shown that it is not enough to enforce competition rules in individual cases but in order to open up markets for competition and subsequently create competitive environment, it is necessary to establish regulatory framework which is supposed to function as an instrument for liberalization.[46]

In an industry where market access is strictly regulated, and thus proper competition does not exist (as was the case with the airline industry in most of Europe until the late 1980s), competition rules may be seen to be inappropriate. However, the more access to a market is liberalized, the more important it becomes to control the behaviour of the participants in that market. This was recognised at an early stage in the EU, and consequently increasing deregulation by way of liberalization on the one hand was accompanied by increasing regulation by way of application of the competition rules on the other hand, in two complementary processes.[47]

[46] Almunia, J. (2010), *Competition v Regulation: where do the roles of sector specific and competition regulators begin and end?*, 23 March 2010, Brussels, SPEECH/10/121.
[47] Balfour, J. (2014), Op.Cit., p. 3.

2 Application of competition rules to the air transport sector – evidence from case law

It took a long time before general competition framework as laid down in the Articles 101, 102 and 106 of the TFEU and the Merger Regulation could be fully applied to the airline sector. The provisions in the Treaty of Rome stated that general competition rules did not apply to air transport and it was up to the Council to decide whether, to what extent and by what procedure appropriate competition rules should be established for air transport.[48] It was, however, held in Nouvelles Frontières judgement that the general competition framework as laid down in the Rome Treaty applied to the air transport which gave Commission weapon against anticompetitive practices of the airlines.[49] Over the time, air transport has been subject to particular conditions. The first liberalization package not only eased some regulatory measures but it also provided first EU legislation on air transport and competition rules as procedural grounds for enforcement of competition law were established by 'implementing regulation' and regulation that gave the right to the Commission to grant block exemptions from the application of the then equivalent Article 101(1) of the TFEU.[50] It has to be pointed out that this did not apply to the equivalent of Article 102 of the TFEU which was applicable in the transport sector from the very beginning.

Even nowadays not all parts of air transport are open to competition. The usual feature is that the network industries, to which the air transport belongs, have both competitive and non-competitive segments as can be seen in table 1. In general, among activities which might be non-competitive belong infrastructure management while operation of services and maintenance of infrastructure are usually reported as potentially competitive. The goal of competition policy in the airline sector focuses on efficient and effective functioning of this market. Despite market liberalization, airline sector still suffers from the incumbents having significant market power which restricts the new entrants from gaining bigger share on the market.

[48] Treaty establishing the European Economic Community, Op.Cit., Art. 84(2).

[49] The Court of Justice opposed the view that in case of missing regulation governing the air transport, it would be exempted from the general competition framework. It also ruled that Member States should refrain from adopting measures that would exempt air transport from the general competition framework. See Nouvelles Frontières, Op.Cit, p. 4–4.

[50] Council Regulation (EEC) No 3975/87, Op.Cit., and Council Regulation (EEC) No 3976/87, Op.Cit.

Table 1: Overview of competitive and non-competitive segments in the air sector[51]

Sector	Activities which may be non-competitive	Activities which are potentially competitive
Air services	Airport services such as take-off and landing slots	Aircraft operations, Maintenance facilities, Catering services

The focus of competition policy in the airline sector is shifted towards the control of mergers and alliances as after ten years of liberalization, the industry is experiencing an emerging trend towards alliances and consolidations in order to create synergies and be able to compete on a global level with the major players of the industry. Such consolidation can, however, bring anticompetitive effects in the form of elimination of competition, creation of barriers to entry and lead to increases in prices for consumers. There are number of cases connected to alliances and concentrations that the Commission investigates every year under the Article 101 of the TFEU and under the Merger Regulation, respectively. Current competition problems are mainly connected to congestion at major airports in the EU that also serve as hubs to the major airlines. The presence of congestion at European airports makes it mainly difficult for new entrants to enter the market. The process of liberalization opened entry for new competitors which led to the decrease in prices and thus higher demand for the air transport and subsequently also higher demand for slots at the airports whose capacity is however limited.

Most of the cases that are described in this thesis deal with the restriction of competition by airlines however the scope of protection of competition in the air transport cannot be only limited to airlines as airports' conduct can also lead to restriction of competition. In the earlier years of liberalization, competition concerns regarding airports mainly resulted from discriminatory practices undertaken by airports and unfair pricing for the ancillary services at the airports. Nowadays, competition problems with regards to airports stem from state aid under the Article 106 of the TFEU which is not subject of this thesis.

[51] OECD (2006), *Report on experiences with structural separation*, Competition Committee, June 2006, p. 9 [online]. Available at www.oecd.org/regreform/sectors/45518043.pdf (visited on November 19, 2017).

Table 2: Overview of the Commission's activity regarding the enforcement of competition in the air sector

Economic characteristics	Potential competition problems encountered	Legal instruments of the competition policy	Specific examples of the airline cases
High barriers to entry (congestion at airports)	Airlines cooperate in order to overcome the barriers to entry: • Mergers • Alliances	Article 101 of the TFEU and Merger Regulation	• Ryanair/Aer Lingus I, III • Airline alliances
Special role of airports	• Discriminatory fees	Article 102 of the TFEU	• Portuguese and Finnish Airports • ADP v Commission
Special role of dominant air carriers	• Loyalty rebate schemes • Refusal to interline	Article 102 of the TFEU	• Virgin/British Airways • National cases (Lufthansa/Germania decision)[52]

2.1 Application of Article 101 of the TFEU to the airline sector

Airline industry can be characterized by the presence of various cooperation agreements between airlines as through various forms of cooperation, airlines try to strengthen their position on the market, expand their activities or become more competitive. The cooperation can have different forms. It can either take the form of a simple agreement or a joint venture without structural links which then falls under the regime of the Article 101 of the TFEU or it can lead to a merger reviewed under the Merger Regulation. Agreements that fall under the Article 101 of the TFEU can be distinguished on by object and by effect agreements. All of the agreements described in this chapter led to the restriction of competition by object. In this chapter it can be thus distinguished between by object agreements where commitments were possible and by object hard-core cartels which could not have been justified on any grounds. The attention of Commission in recent years is paid to airline alliances that together with the mergers form the core of the Commission activity regarding competition in the airline industry. There are three major alliances in the EU – SkyTeam, oneworld alliance and Star Alliance that belong among strategic alliances in which the cooperation is more integrated and they form one marketing entity. All of them were investigated under the EU competition law.[53]

[52] This decision was issued by German Bundeskartellamt and represents a landmark decision regarding predatory pricing in the airline industry. See Bundeskartellamt (2002): Beschluss in dem Verwaltungsverfahren gegen Deutsche Lufthansa AG, Köln, B 9 – 144/01, Bonn.

[53] Another general form of airline alliances is tactical alliance which is less integrated and usually involves code-sharing agreement (parties cross-sell seats on each other's routes and market it under their own code) and applies only to selected routes while the parties to the agreement remain independent. See Steer Davies Gleave (2007), *Competition Impact of Airline Code-Share Agreements,* Final Report, European Commission DG Competition, January 2007, p.1 [online]. Available at http://ec.europa.eu/competition/sectors/transport/reports/airline codeshare.pdf (visited on December 4, 2017).

2.1.1 Airline alliances

Commission has dealt with the concept of airline alliances since the industry's liberalization in the 1990s.[54] The main goal of such airline alliances is to overcome the obstacles that the airline industry faces as a network industry such as high fixed costs and thin profit margins. It can also bring various benefits to the parties of the agreement such as economies of scope, scale, fleet optimisation and expansion of route portfolio.[55] In the past, motivation behind the creation of airline alliances was also presence of several restrictions in bilateral agreements that did not allow cross-border mergers and acquisitions between airlines as one of the conditions to operate services within respective Member State was that the airline had to be substantially owned and effectively controlled by that Member State.[56] Although, the restriction on ownership has been relaxed, the EU carrier has to be still majority owned by the Member State in which it is registered in order to obtain the operating license.[57] Airline alliances thus offer a beneficial way how to get around this rule as they do not involve change of control of the entity but enable the airlines to extend their reach and market presence. Airline alliances can however have anticompetitive effects as they can lead to higher concentration on the market and less competition which can lead to lower quality, less choice for consumers and higher fares for consumers.

The formation of such alliances in the airline industry is thus likely to have anticompetitive effects and as a result fall under the scrutiny of Article 101 of the TFEU for possible infringement of competition. Under the Article 101 of the TFEU, the competition can be restricted either by object when the restriction of competition can be derived „*merely from a reading of the terms of the agreement"* or by effect.[58] Numerous case law on the airline alliances supports the view that Commission considers airline alliances to restrict the competition by object. As for example in American Airlines, British Airways and Iberia (oneworld alliance) case, the parties formed joint

[54] In 1996, Commission approved subject to conditions an alliance between SAS and Lufthansa. See Commission Decision of 16 January 1996 relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the EEA Agreement*, IV/35.545 - LH/SAS*, Official Journal L 54, 5.3.1996, p. 28–42.

[55] European Commission and the United States Department of Transportation (2010), *Report on Translatlantic Airline Alliances: Competitive Issues and Regulatory Approaches*, 16 November 2010, para. 13 [online]. Available at http://ec.europa.eu/competition/sectors/transport/reports/joint_alliance_report.pdf (visited on December 6, 2017).

[56] Balfour, J. (2004), *EC Competition Law and Airline Alliances*, Journal of Air Transport Management 10 (2004) 81–85, p.1 [online]. Available at https://www.sciencedirect.com/ science/article/pii/S0969699703000760 (visited on December 6, 2017).

[57] Air Transport Agreement (2007), Official Journal L 134/4, 25.5.2007, p. 4–41, Annex 4. and Regulation (EC) No 1008/2008, Op. Cit.

[58] Judgment of the Court of First Instance (Fourth Chamber, extended composition) of 27 September 2006, T-168/01 - *GlaxoSmithKline Services Unlimited v Commission of the European Communities*, ECLI:EU:T:2006:265, para. 147.

venture and jointly set fares, regulated capacity and coordinated their respective schedules and therefore according to the Commission „*these arrangements by their very nature aimed at, and had the potential of, restricting competition*" and thus were considered to eliminate competition by object.[59] Similarly, in United, Lufthansa and Air Canada case (Star Alliance), the alliance was considered to constitute restriction of competition by object as the parties formed so-called metal-neutral[60] revenue-sharing joint venture under the A++ agreement in which the parties acted as one entity and focused on the common interest of this entity thus eliminating any competition between the parties of such alliance.[61] In addition, Commission explicitly stated that there was restriction by object when investigating another major alliance SkyTeam in 2012, particularly its four members – Air France, KLM, Alitalia and Delta. Commission used similar line of reasoning as the undertakings created metal-neutral profit/loss sharing cooperation in which they again rather focused on the common interest and joint setting of capacity and schedules, price coordination, cooperation in the frequent flyer programmes or coordination of their revenue management.[62]

Absent the alliance, the incentives for setting prices, capacity or schedules of the respective airlines would be different as the parties would compete against each other. Formation of an alliance can be thus considered as a restriction of competition by object. Commission was, however, not always explicit in stating whether the alliance restricts competition by object or by effect for example in SAS and Lufthansa case, Commission only concluded that the alliance had appreciable effect on actual and potential competition as it involved setting up of a joint venture in which the parties would coordinate their capacity, frequency and fares but would remain autonomous.[63] In addition,

[59] Commission Decision of 14.07.2010 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, *Case COMP/39.596 – BA/AA/IB*, para. 32-33 [online], Available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39596/39596_4342_9.pdf (visited on December 7, 2017).

[60] Metal neutrality implies that the airlines in the alliance are indifferent as to which of the airlines is operating the services as they share the costs and revenues. See OECD (2014), *Airline Competition,* Directorate For Financial and Enterprise Affairs Competition Committee, DAF/COMP/WD(2014)28, 13 June 2014, p. 8 [online]. Available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2014)28&docLanguage=En (visited on April 15, 2018).

[61] Commission Decision of 23 May 2013 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union, *Case AT.39595 — Continental/United/Lufthansa/Air Canada*, C(2013) 2836 final, 23.5.2013, Brussels, paras. 36-38 [online], Available at http://ec.europa.eu/competition/antitrust/cases/dec_docs /39595/39595_3012_4.pdf (visited on December 6, 2017).

[62] Commission Decision of 12 May 2015 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union, *Case AT.39964 — Air France/KLM/Alitalia/Delta*, C(2015) 3125 final, 12.5.2015, Brussels, paras. 39-42 [online]. Available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39964 /39964_1755_5. pdf (visited on December 6, 2017).

[63] LH/SAS, Op.Cit., paras. 44-56.

in case of alliance between SN Brussels Airlines and British Airways, Commission found that the alliance restricted competition *'in principle'*.[64] As these two latter cases dealt with an alliance which would involve joint conduct in setting fares, capacity and schedules, it can be suggested that the agreements restrict competition by object even if it is not stated explicitly.[65]

The agreement can however also satisfy the conditions laid down in Article 101(3) of the TFEU and thus be exempted from the application of Article 101(1) of the TFEU. As Whish and Bailey argue, it is however very difficult to admit that the conditions are met as the object of the agreements is to eliminate competition.[66] The Commission has however applied Article 101(3) of the TFEU in its decisions regarding extensive strategic alliances and concluded that the alliances satisfy the criteria laid down in its provisions however also adds that the efficiencies created from such alliances fail to outweigh the negative effects incurred from the elimination of competition and thus the alliances usually constitute an infringement of Article 101 of the TFEU when the effect on competition from such alliances is appreciable. Moreover, the burden of proof lays on the parties of the alliance to show that the alliance is able to introduce efficiencies.[67] According to the Commission's guidelines on the application of the Article 101(3) of the TFEU, the efficiencies can be divided into cost and qualitative efficiencies.[68] In the case law, following examples can be encountered for the cost efficiencies: lower fares as double marginalisation would disappear,[69] cost reduction due to integration of marketing, traffic management and data processing.[70] Among the qualitative efficiencies, one can found supply of higher quality services,[71] establishment of a more

[64] Commission Decision of 10 March 2003, *Case Comp/A.38.477/D2- British Airways / SN Brussels Airlines*, 10 March 2013, para. 42 [online]. Available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/38477 /38477 _19_3.pdf (visited on December 7, 2017).

[65] Remetei-Filep A. (2013), *Strategic airline alliances and restrictions of competition by object under EU competition law*, King's College London, p. 40 [online]. Available at https://kclpure.kcl.ac.uk/portal/files/13554825/ Studentthesis-%C3%81d%C3%A1m_Remetei-Filep_2013.pdf (visited on January 20, 2018).

[66] Whish R. and D. Bailey (2012), *Competition law,* Oxford University Press, 7th edition, p.162 [online]. Available at http://bem.law.ui.ac.id/fhuiguide/uploads/materi/hpu-ebook-competition-law_richard-wish.pdf.

[67] In Air France, KLM, Alitalia and Delta (SkyTeam) case, the parties did not submit any evidence of efficiences resulting from the alliance therefore the Commission stated that there were no benefits that would justify the application of the Article 101(3) of the TFEU and thus would offset the negative effects from elimination of competition. See Air France/KLM/Alitalia/Delta, Op.Cit, paras. 110-111.

[68] Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty, Official Journal C101/08, 27.4.2004, p. 97–118.

[69] BA/AA/IB, Op.Cit., paras. 77-80, United/LH/AC, Op.Cit., paras. 55-61.

[70] LH/SAS, Op.Cit., paras. 64-68.

[71] BA/AA/IB, Op.Cit., paras. 77-80, LH/SAS, Op.Cit., paras. 64-68.

extensive European network,[72] fare combinability, reciprocity of frequent flyer programmes and higher quality schedule,[73] time saving and reciprocal lounge access.[74]

Although, the Commission has so far approved all alliances, it has always stressed the anticompetitive nature of such alliances. The restriction of competition is however justified in the light of the Article 101(3) of the TFEU when adequate commitments are imposed on the parties. The Commission argues that by imposing commitments on the parties provided that the parties comply with them, the concerns about elimination of competition are met and the alliance can be thus exempted from the application of Article 101. Interestingly, one of the commitments, Commission uses to remove the anticompetitive effects of the alliances, lies in forcing the members of the alliance to enter into other cooperation agreements. As for example in alliance between Lufthansa and SAS, the Commission ordered the parties to ensure that new entrants would have the possibility to participate in their frequent flyer programmes. Moreover, there was also the possibility to make an interlining agreement with the parties in order to ease the entry of a new undertaking into the relevant market. Similarly, in alliance among American Airlines, British Airways and Iberia, there was possibility to enter into prorate and fare combinability agreements.[75] The most usual type of commitment is the release of slots as Commission argues that it lowers the barriers to entry for the new competitors since many airports in the EU are congested. The slots were usually given for the specific route and sometimes were coupled with so-called grandfather rights which allowed the competitor to use the slots for other routes after a specific period of time.

It can be thus argued that by imposing commitments in the form of cooperation agreements with the new entrants, Commission itself supports cooperation on the market and in a way restricts competition as the parties to a joint agreement usually do not have the incentives to undertake steps that would harm the other party. On the other hand, all of the commitment decisions are time limited and thus it can be argued that such agreements might help the new competitor to establish its position on the market and once the position is established such commitments should no longer be in force and the competition should be restored. The commitments in the form of cooperation agreements can thus be viewed as the aim to ensure fair level playing field on the respective routes. As many airline alliances have been approved subject to commitments, it is relevant to ask whether

[72] SAS/LH, Op.Cit., paras. 64-68.
[73] BA/AA/IB, Op.Cit., para. 78.
[74] United/LH/AC, Op.Cit., para. 70.
[75] Fare combinability agreements allow the parties to offer return tickets on the flights of each other and special prorate agreements fix the rate at which the companies interline. See BA/AA/IB, Op.Cit., paras. 88-100.

such commitments were successful in promoting competition. The suggested efficiencies that would result from such airline alliances, were according to various economic studies over-optimistic.[76]

2.1.2 Market-sharing agreement (SAS and Maersk Air)

In the early 1999, Commission received a notification from SAS and Maersk Air airlines about their coordination agreement that consisted of a series of code-sharing agreements on specific Maersk Air's routes and agreement that Maersk Air could participate in SAS's frequent flyer programme and in return SAS passengers would receive points when flying on the Maersk Air's flight. The aim of these agreements was to coordinate their activities in order to reduce the costs and improve the connection of flights. Moreover, it was agreed that Maersk Air would operate flights to or from Denmark when SAS airlines were not able to operate them.[77] After the announcement of the investigation, Commission received a complaint from SAS and Maersk Air competitor - Sun-Air. In its complaint, Sun-Air stated that the cooperation between SAS and Maersk Air had been far more integrated than they announced.[78] The Commission thus started a preliminary enquiry.

From further investigation, it discovered that Maersk Air and SAS withdrew from certain routes, specifically Maersk Air stopped operating Copenhagen-Stockholm route where the two airlines previously competed and SAS ceased operations on Copenhagen-Venice route and Billund-Frankfurt route, leaving these two routes entirely to its previous competitor – Maersk Air. In addition, after the withdrawal, the Billund-Frankfurt route was operated only by one carrier. These withdrawals were not notified together with the code-sharing agreement and represented serious threat to the competition as the competitors literally divided the markets which even led to a monopoly situation on one route.[79] Commission also stated that the parties did not withdraw from the respective routes due to suffering economic losses as they suggested, but the withdrawal was caused by the agreement between the parties. Moreover, the parties also entered into an overall market-sharing agreement in which they agreed not to operate their services to/from Jutland (SAS)

[76]Balfour, J. (2014), Op.Cit., pp. 24-33.

[77] Commission Decision of 18 July 2001 relating to proceedings pursuant to Article 81 of the EC Treaty and Article 53 of the Agreement on the European Economic Area, *Case COMP.D.2 37.444 — SAS Maersk Air and Case COMP.D.2 37.386 — Sun-Air versus SAS and Maersk Air*, Official Journal L 265, 5.10.2001, p. 15–41, para. 15.

[78] Ibid., para. 4.

[79] Moreover, they agreed that Maersk Air would stop operating on Copenhagen-Geneva route and leave this route to SAS. Commission however did not investigate these routes as Regulation No 3975/87 only applied to EEA and thus Switzerland was out of its jurisdiction. See Ibid., para.5.

and to/from Copenhagen (Maersk Air) on the route where the other party was already providing services or where it wished to provide them.

As the mere nature of such agreements was to restrict competition, the agreements were considered as a restriction by object by the Commission. As the market-sharing agreements also represented hard-core competition restriction, they could not have been exempted from the provisions of the then equivalent Article 101 of the TFEU and thus automatically constituted an infringement of it. Furthermore, the agreement would not create any substantial efficiencies in order to be exempted under the then equivalent Article 101(3) of the TFEU. The parties were thus fined for their behaviour by the Commission.[80] The real cooperation agreement between the parties thus exceeded the presented agreement by SAS in the notification to the Commission. The SAS withdrawals from the respective routes were presented as its own decision and the fact that it was a part of an agreement with Maersk Air was concealed. The Commission's investigation also showed that the parties knew that they were infringing the then equivalent Article 101 of the TFEU and as a result took actions to hide the agreement from the Commission.[81]

2.1.3 Price-fixing cartel

On 7 December 2005, Deutsche Lufthansa AG and its controlled subsidiaries Lufthansa Cargo AG and Swiss applied for an immunity under Leniency Notice. Commission thus carried out inspection at various premises of air freight carriers in February 2006. Following the inspection at the premises, other undertakings applied for immunity under the Leniency Notice. The Commission's investigation uncovered that air freight providers created a network of bilateral and multilateral contacts which were focused on a common goal of coordinating pricing behaviour of the parties and as a result reducing uncertainty regarding the competitor's conduct with respect to setting prices.

The behaviour of the parties lied in price fixing in the air freight transport from the period of 1999–2006. The specific elements of the price for the air freight services that were covered by the agreement of the parties included the fuel surcharge (FSC), the security surcharge (SSC) and the payment of commission to forwarders on surcharges. The coordination in setting the FSC aimed

[80] Ibid., paras. 88-89.

[81] *'[A Maersk Air representative] stated that all material on price agreements, market-sharing agreements and the like had to be destroyed before going home today. Anything that might be needed had to be taken home. Also, any controversial material on PCs had to be deleted.*' Project managers' group meeting of 14 August 1998. See Ibid., para. 89.

at ensuring that all the airfreight carriers imposed a flat rate surcharge per kilo. The coordination was carried out through local representatives of the carriers who contacted each other regularly about the FSC setting and related issues mainly via phone and sometimes by email or on the meetings. The carriers followed a pricing mechanism set up by IATA in which FSC application was directly linked to fuel price index. The mechanism worked as follows, there were two thresholds, one set at a certain number and if reached, the FSC would be applied into the total rate for the air freight services while if the index dropped under the second threshold for some period, the FSC would be removed from the total rate for the freight transportation. The coordination thus included four areas of cooperation such as the introduction of FSC in 2000, the reintroduction of the FSC mechanism when the IATA mechanism was dissolved, the setting up of a new higher trigger points for the application of FSC and the coordination at a point where there was to be a decrease or increase in the FSC.[82]

Similarly, this mechanism was also applied to the SSC which was introduced by the airlines after the terrorist attacks in New York on 11 September 2001.[83] In addition, the cooperation among air freight carriers also involved the refusal to pay commission to freight forwarders on surcharges. The surcharges then accrued to them as a net revenue and thus prompted them even more to follow the cartel. Furthermore, by refusing to pay the commission on surcharges, the air freight carriers prevented the surcharges to be subject to the competition through various discounts to their end customers. The object and/or effect of these contacts was to either directly influence the behaviour of actual or potential competitor on the market or to set an example for the competitors how they should manage or contemplate managing their pricing behaviour on the market.[84]

The Commission stated that the undertakings formed a complex network of contacts that could be described as partly as an agreement and partly as a concerted practice. The price coordination took place within the EU/EEA, between the EU and Switzerland and on routes between EU/EEA and third countries over the respective period. The Commission argued that the parties coordinated their pricing behaviour which resulted in the price-fixing on the air freight market which is considered as a hard-core competition restriction and is prohibited by the Article 101 of the TFEU.

[82] Commission Decision of 9.11.2010 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport, *Case AT.39258 — Airfreight*, C(2010) 7694 final, 9.11.2010, Brussels, paras. 103-110.
[83] The introduction of SSC was justified by the increase in insurance premium, security costs and operational inefficiencies such as rerouting of certain flights. See Ibid., para. 566.
[84] Ibid., para. 890.

In addition, such price arrangements as seen in this case aim at reducing uncertainty about price setting in the market and have as their object prevention, restriction or distortion of the competition. The Commission thus prohibited the cartel by a 2010 decision and fined the parties of the cartel.[85] In 2015, the 2010 Decision was annulled by General Court on procedural grounds which led to the re-adoption of the decision by the Commission in 2017.[86]

2.2 Application of Article 102 of the TFEU to the airline sector

Commission applied Article 102 of the TFEU both to anticompetitive practices undertaken by the airlines that were mainly linked to loyalty and to anticompetitive conduct undertaken by airports. All the cases described below belong mostly to the pre-liberalization period. The anticompetitive conduct investigated in all the cases shows strong position of the national incumbents that tried to eliminate competition by creating barriers to entry.

2.2.1 Loyalty rebate schemes

Commission dealt with a series of incentive schemes conducted by dominant air carriers for travel agents in the past that aimed at remunerating travel agents for their loyalty. This set of incentive schemes undertaken by the dominant air carriers usually led to the restriction of competition in the form of abuse of dominant position. The first case, the Commission investigated, started upon the complaint from Virgin Atlantic Airways in 1993 against certain commercial practices of British Airways (BA) that included specific commissions to United Kingdom (UK) travel agents. BA had special Marketing Agreements (MAs) with the UK travel agents which ensured that apart from the basic fixed commission, they would receive an additional commission so-called 'performance reward' which depended on the ability of the travel agents to increase the sale of the BA tickets.[87] Moreover, in 1997, BA established so-called Performance Reward Scheme (PRS) in which the travel agents would receive a variable commission in addition to the flat commission. The PRS depended on the performance of the travel agents in terms of revenue accruing to the BA in a

[85] Lufthansa and Swissair were not fined due to the immunity granted to them under the Leniency Notice. See Ibid., para. 1400.

[86] Summary of Commission Decision of 17 March 2017 — Relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport, *Case AT.39258 — Airfreight*, Official Journal C 188, 14.6.2017, p. 14–19 and General Court of the European Union, Press Release No 147/15, 16 December 2015, Luxembourg [online]. Available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-12/cp150147en.pdf (accessed December 16, 2017).

[87] Commission Decision of 14 July 1999 relating to a proceeding under Article 82 of the EC Treaty, *IV/D-2/34.780 - Virgin/British Airways*, Official Journal L 30, 4.2.2000, p. 1–24, paras. 7-10.

respective calendar month when compared to the performance in the same month of the previous year. The PRS represented an additional bonus to the existing rewards under the existing MAs.[88]

The Commission's investigation showed that BA had a dominant position on the relevant market since it operated more routes from or to UK than any other airline.[89] In line with the Michelin and Hoffmann-La Roche case, loyalty discounts constitute an exclusionary abuse of dominant position. Extra commissions paid by BA to travel agents were based on fidelity as the travel agents were eligible for the commission if their sales of the respective year exceeded those of the previous year. Moreover, one of the examples in the provisions of the then equivalent Article 102 of the TFEU that constitutes an abuse of dominant position is: '*applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'.*[90] The PRS and MA schemes were discriminatory as they allowed the same commission for certain travel agents that sold different volumes of the BA tickets although their sales rose by the same percentage when compared to the previous year. Similarly, under such schemes, it was possible to receive different commission, as their sales of the BA tickets were different in the previous year even though the travel agents provided the same level of service to BA and managed to sell the same amount of BA tickets.

Commission argued that such incentive schemes had to be distinguished from discounts that could be received when certain efficiencies were reached. A dominant supplier could thus give discounts for example for large orders which allowed the supplier to produce large amount of the product; however, the dominant undertaking could not relate the discount to loyalty or incentives, for example link it to the refusal to purchase certain product from its competitor. BA incentive schemes thus constituted an abuse of dominant position under the then equivalent Article 102 of the TFEU since BA had dominant position on the UK market for air travel agency services. The BA practice involved loyalty discounts which were prohibited in the Michelin and Hoffmann-La Roche case and in particular were very similar to the practice that was prohibited by the Court in the Michelin case.[91]

[88] Ibid., paras. 21-24.
[89] Its market share accounted for more than 39,7% of the total sales in 1998 on the UK market for air services sold by travel agents. In addition, this share represented a multiple of the share of any other airline. See Ibid., para. 91.
[90] Treaty establishing the European Community (Consolidated version 2002), Official Journal C 325, 24.12.2002, p. 33–184, Article 82(c) of the Treaty.
[91] Hoffmann-La Roche represents the landmark case regarding loyalty rebates. The competitors in the cartel received various discounts for their production or sale of vitamins which was linked to the condition to purchase products from Hoffmann-La Roche. See Hoffmann-La Roche v Commission, Op.Cit. Michelin also developed a system of loyalty

Moreover, the loyalty schemes created illegal market entry barriers and the travel agents were also discouraged to sell air transport services of other airlines due to the fidelity relationship established between travel agents and BA. Such exclusionary nature of the commissions thus had an impact on the existing and potential competitors. The incentive schemes represented a significant harm to competition and as a result also to consumers. Commission therefore stated that BA incentive schemes constituted an infringement of the then equivalent Article 102 of the TFEU and imposed fine on BA.[92] BA also lodged complaint against eight other EU carriers with respect to their incentive schemes.[93]

2.2.2 Refusal to interline

Aer Lingus versus British Midland represents the first case in which Commission applied (quasi)-essential facilities doctrine regarding the competition in the airline industry.[94] When British Midland announced that they would start operating the London-Dublin route in 1989, Aer Lingus terminated its interlining agreement which it had with British Midland since 1964. At that time, there were two other air carriers that operated the London-Dublin route, Aer Lingus (national airline of Ireland) and BA. Nonetheless, British Midland entered the route and after two years, it reached remarkable 20% market share. Despite the fact that Aer Lingus refused to interline with British Midland, it continued its interlining agreement with other air carriers – BA and Dan Air. Moreover, British Midland had an interlining agreement with BA until its withdrawal from the

discounts that were linked to quantity purchased and service bonuses. See European Commission (2003), *The Court of First Instance upholds the Commission's decision to fine Michelin for practices which are unfair to its dealers*, Press Release, CJE/03/80 [online]. Available at http://europa.eu/rapid/press-release_CJE-03-80_en.htm.

[92] Airfreight cartel, Op.Cit., para. 122.

[93] BA lodged complaint against Sabena, Alitalia, Olympic Airways, Lufthansa, Air France, Austrian Airlines, KLM and SAS. Commission thus started investigation of these eight carrier´s incentive schemes. In addition, it started three ex-officio procedures regarding the incentive schemes. The result of the investigation was that some airlines did not infringe the then equivalent Article 102 of the TFEU however some of the airlines´ commissions to travel agents did raise anticompetitive concerns about possible abuse of dominant position. The airlines however managed to replace their existing incentive schemes or alter them in response to the Commission´s investigation. The Commission thus concluded that the incentive schemes were in line with the then equivalent Article 102 of the TFEU. See Tomboy, CH. and O. Stehmann (2003), *Commission closes probe into major EU airlines' incentive schemes for travel agents*, Competition Policy Newsletter No 2, Directorate-General Competition, pp. 65-67 [online]. Available at http://ec.europa.eu/competition/publications/cpn/2003_2_65.pdf. As a result, Commission introduced guidelines on the imposition of commissions to travel agents for any other airline in a similar situation based on the BA/VIRGIN case. See European Commission, *Commission sets out its policy on commissions paid by airlines to travel agents*, Press Release IP/99/504, 14 July 1999 [online]. Available at http://europa .eu/rapid/press-release_IP-99-504_en.htm?locale=en (visited February 4, 2018).

[94] Russo, F., M.P. Schinkel, M. Carree and A. Günster, (2010), *European Commission Decisions on Competition Economic Perspectives on Landmark Antitrust and Merger Cases*, Cambridge University Press, II. Title, ISBN 978-0-521-11719-7, pp 185.

London-Dublin route in 1991.[95] British Midland thus filed a complaint in 1990 against Aer Lingus to the Commission in which it alleged that Aer Lingus infringed the then equivalent Article 102 of the TFEU. As a result, Commission started investigation of the case in 1991.

Commission considers interlining agreements as one of the greatest achievements of IATA. Interlining agreement can be defined as a type of cooperation agreement that allows passengers to buy one single ticket for segments that are operated by different airlines or enables the passenger to use one ticket that includes a return journey operated by a different airline. Interlining agreements are mainly important for business travellers as they form approximately 60% of the total revenue and the purchase of such interlinable ticket is convenient for them for its time efficiency.[96] Commission pointed out that absence of interlining agreement would harm the airline as it could lose business passengers. Moreover, cooperation with travel agents would be at stake since they could not issue tickets from different airlines on the same list of paper if they did not cooperate via interlining agreements and thus the passengers and travel agents would use Aer Lingus which had higher frequency on the route and greater market share.

In addition, Commission argued that refusal to interline was not normal competition on the merits. It also added that interlining agreements had been used in the airline industry abundantly benefiting both airlines and passengers therefore refusal to interline for different reasons than worries about the airlines' creditworthiness and currency convertibility issues was unusual. Furthermore, Aer Lingus explained that an interlining agreement with British Midland would cause a reduction in its market share; however, Commission argued that the impact on Aer Lingus's costs would be only marginal when compared to the impact on British Midland's costs. It was also unlikely to justify a situation in which an airline had previously an interlining agreement which it decided to terminate just after the competitor started competing on an important route despite leaving all the other interlining agreements in force.

As Commission pointed out, Aer Lingus enjoyed a dominant position on the relevant market London (Heathrow)–Dublin as its market share in terms of the passengers carried was approximately 75%. In addition, there were quite significant barriers to entry as the route was already quite congested and its position of being a national Irish carrier ensured that many Irish

[95] Commission Decision of 26 February 1992 relating to a procedure pursuant to Articles 85 and 86 of the EEC Treaty, *IV/33.544 - British Midland v. Aer Lingus*, Official Journal L 96, 10.4.1992, p. 34–45, paras. 1-5.
[96] Ibid., para. 6.

nationals would choose Aer Lingus over other carriers.[97] Commission thus stated that Aer Lingus abused its dominant position as it conducted a strategy that was both exclusionary and selective and imposed a restriction on competition. The refusal to interline in this case meant a significant handicap for the competitor as it increased its costs and contributed to the reduction in its revenues.[98]

Some authors argue that Commission used essential facilities approach in this case despite the fact that it is usually linked to the downstream market (in this case British Midland was entering the same market).[99] New entrants are usually in a difficult situation on the market as they are faced with high fixed costs in the form of initial investments owing to which they obtain lower margins initially. They usually also need longer time to adjust to the new situation in order to start expanding their business. Commission took this into account and pointed out that these difficulties faced by new entrants could be severe for them thus it wanted to protect them by ensuring access to the essential facilities and giving them time to adjust. Commission also acknowledged that this could not continue indefinitely and once the new competitor had been established, access to the competitor‘s network and frequencies was not necessary. Commission considered it in its decision as it stated that the obligation to interline was limited to a two-year period.[100]

2.2.3 Discriminatory abuse by airports

With respect to discriminatory abuse, Commission and Court of Justice investigated mainly landing fees charged by airports and fees charged by airports for ground handling services that according to the Commission infringed the then equivalent Article 102(c) of the TFEU. Brussels-Zaventem Airport was the first case that was investigated by the Commission. In 1995, British Midlands Airways lodged a complaint against Brussels-Zaventem Airport that developed a discount system for landing fees which was based on the volume of traffic. In theory, the discount system should have aimed at attracting more airlines to Brussels as the more they would fly to the airport, the lower the landing fees would be. Commission argued that such volume rebate would

[97] Ibid., para.19.

[98] The Commission follows here the approach established in the United Brands by the Court of Justice. In this case, the Court allowed the dominant undertaking to refuse to supply as it was economically justifiable (the dominant undertaking had to protect its own interests).The Court held that the refusal to supply must be proportionate to the threat it imposes on the undertaking. The Commission stated that Aer Lingus refusal to interline was not proportionate as it harmed British Midland and created significant barrier to entry. See United Brands, Op. Cit., para.190.

[99] Nikolinakos, N. (2006), *EU Competition Law and Regulation in the Converging Telecommunications, Media and IT Sectors*, Kluwer Law International, ISBN 9041124691, pp.698, and Russo F. et al. (2010), Op.Cit., pp 80-81.

[100] Airfreight cartel, Op.Cit., para. 44.

not be a problem if it was based on objective justification such as economies of scale. It however resulted in applying dissimilar conditions to competitors as thresholds for obtaining the discounts were set in a way that only Sabena (national airline) could meet the lowest and highest threshold for obtaining the discount. The discount system as employed by Brussels-Zaventem thus put smaller airlines at a competitive disadvantage. Commission decided that Brussels-Zaventem conducted a discriminatory abuse and similarly to the reasoning provided in the Corsica Ferries II case, it decided that the airport infringed competition by benefiting national airline through an intermediary, The Kingdom of Belgium, which harmed the smaller competitors in the market.[101]

In 1999, Commission adopted two decisions regarding the landing fees systems in Portugal and Finland. These cases followed a similar rationale as in the Brussels-Zaventem Airport case. In both cases, the incorporated discount system led to the discrimination between domestic flights and intra-EU flights. In case of Finland, the landing fees were lower by 60% for the domestic flights in comparison to the intra-EU flights while in Portugal the difference was 50%. Moreover, the operators of the airports failed to show any objective justification such as economies of scale. In the Portuguese case, additional system of discounts that was based on the volume of traffic reached was also present that was similar to the Brussels-Zaventem discounts. In both cases, the operators of the airports were state-owned and they did not discriminate directly on the grounds of nationality but in practice only national airlines benefited from them. Moreover, in Finnish case the discount system was incorporated by the airport itself while in Portuguese case the discriminatory discount system was a result of a State measure.[102]

Another case regarding the vertical links between the airport operator and the ground handling services providers was related to the quality of services offered at Paris airports (Orly and Roissy Charles-de-Gaulle). Commission concluded that fees that were charged for ground handling services especially catering, aircraft cleaning or cargo services by the airport's operator, Aéroports de Paris („ADP"), were discriminatory. Commission's investigation showed that there was a difference between fees charged to airlines which provided their own ground handling services and the fees charged to third-party suppliers. Commission pointed out that there was no objective

[101] Commission Decision of 28 June 1995 relating to a proceeding pursuant to Article 90 (3) of the Treaty, Official Journal L 216, 12.9.1995, p. 8–14.
[102] Commission Decision of 10 February 1999 relating to a proceeding pursuant to Article 90 of the Treaty*, Case No IV/35.703 - Portuguese airports*, Official Journal L 69, 16.3.1999, p. 31–39 and Commission Decision of 10 February 1999 relating to a proceeding pursuant to Article 86 of the Treaty, *IV/35.767 - Ilmailulaitos/Luftfartsverket*, Official Journal L 69, 16.3.1999, p. 24–30.

justification for such difference in the amount of fees. ADP argued that it could not be held responsible as it did not participate in the markets for ground handling services and operation of air services. Commission, however, concluded that such reasoning as established in Tetra Pak II decision could not have been used since the abuse originated in the market of airports management in which ADP held dominant position.[103] This was later confirmed by the Court of Justice as it confirmed that there was no objective justification for such conduct. Interestingly, neither the Court nor the Commission dealt with the fact that the subsidiary, which benefited from the discriminatory fees the most, was a subsidiary of the major French airline which could have been also classified as discrimination on nationality grounds. In addition, the Court of Justice ruled that the management of airport facilities was the relevant market and it was indispensable for the provision of ground handling services. Another requirement for access to the airport was getting a license from ADP as without its authorization, the competitors would not be able to provide the ground handling services at the airport. [104]

2.3 Merger control

In the past, airline industry was significantly fragmented as the market consisted of a number of sovereign countries each having its own national carrier that was highly dependent on the support from the state. After the deregulation of the international aviation industry and its liberalization in 1997 through three liberalization packages that in principle allowed any community carrier to service any route within the common market, wave of mergers appeared between the former national incumbents. The deregulation also led to the privatization of the national incumbents and to the rise of low cost carriers that afterwards started to participate in the mergers, too. Nowadays, the air transport sector is still fragmented as over 150 airlines operate in the EU and five major airlines (Lufthansa, Air France/KLM, Ryanair, easyJet and IAG) account for approximately 50% of the market.[105] The fragmented nature of the European airline market means that there is more competition and pressure on the prices than on the more concentrated market.

[103] Commission Decision of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty, *IV/31043 - Tetra Pak II,* Official Journal J L 72, 18.3.1992, p. 1–68.
[104] Judgment of the Court (Sixth Chamber) of 24 October 2002, *Aéroports de Paris v Commission of the European Communities*, Case C-82/01 P, ECLI:EU:C:2002:617.
[105] Moreover, the incentive for further consolidation of the sector was slowed down due to decrease in fuel prices which led to higher profitability of the airlines. See European Commission (2017), *Report From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions,* Report on Competition Policy 2016, COM(2017) 285 final, 31.5.2017, Brussels [online]. Available at http://ec.europa.eu/competition/publications/annual_report/2016/part1_en.pdf (visited on February 16, 2018).

The rationale behind the airline mergers is usually their financial survival and reduction of overcapacity due to large congestion at particular airports.[106] The merger can however also create anticompetitive effects such as lessening of competition resulting in higher flight fares and less choice for consumers. It is thus up to the Commission or to national authorities to review the proposed transaction and its efficiencies in order to conclude whether it is compatible with the goals of the internal market.[107] Under the Merger Regulation, both EU and non-EU air carriers which operate within EU and thus their operations affect the functioning of the internal market, are reviewed by the Commission. The standard practice of the Commission is usually that either it approves the merger or it states that the merger could represent possible threat to the competition but it concludes that the threat can be solved by imposing commitments on the parties. Up to date, Commission has prohibited only two mergers – the first that involved two low cost airlines Ryanair and Aer Lingus and the second regarded transaction between Olympic and Aegean Airlines.

The overview of mergers reviewed by the Commission can be seen in Appendix 6. It can be seen that majority of the proposed cross-border mergers were eventually approved indicating that Commission favours consolidation of airline industry within the EU. One of the reasons might be also creation of strong airline globally that is able to compete with global champions.[108] In addition, majority of the mergers were approved in phase I investigation and only few went through the phase II investigation (for example SN Brussels Airlines, Martinair, Austrian Airlines). It can be also seen that majority of the approved mergers were subject to conditions in order to ensure competition and consumer welfare.[109] Moreover, merger activity in the EU was

[106]See for example the acquisition of Air Berlin, which was in financial difficulties, by Lufthansa and easyJET. The transaction was allowed unconditionally by Commission. See European Commission (2017), *Mergers: Commission approves proposed acquisition of parts of Air Berlin by easyJet*, Press Release, IP/17/5244 [online]. Available at http://europa.eu/rapid/press-release_IP-17-5244_en.htm (visited on February 17, 2018).

[107] In the earlier years, smaller transactions were rather reviewed by domestic regulators while European Commission investigated the larger ones. For example Germany's Federal Competition Authority approved Lufthansa's acquisition of a stake in BMI and Eurowings. For more examples see Chari (2015), *Mergers in the EU's Airline Sector: A Bumpy Ride?*, European Union Centre of Excellence Working Papers No 1, University of Alberta, Chapter 3 [online]. Available at https://cloudfront.ualberta.ca/-/media/eucentre/pdfs/raj-chari-working-paper2.pdf (visited on February 6, 2018).

[108] The crowded European airline sector faces competitive pressure from Middle-Eastern and Asian carriers. See Canelas, H. and Ramos, P. (2016), *Consolidation in Europe's Airline Industry*, Boston Consulting Group, August 2016, p. 1 [online]. Available at http://img-stg.bcg.com/BCG-Collaboration-and-Consolidation-in-the-European-Airline-Industry-Aug-2016_tcm9-53703.pdf (visited on March 3, 2018).

[109] Consumer welfare was stressed out be several competition commissioners over the years, for example Neelie Kroes said in relation to the acquisition of Austrian Airlines by Lufthansa: „*This case shows that consolidation in the airline sector is possible with proper remedies to safeguard consumers´ interests.*" See European Commission (2009), *Mergers: Commission clears proposed takeover of Austrian Airlines by Lufthansa, subject to conditions,*Press Release IP/09/1255, 28 August, 2009, Brussels [online]. Available at http://europa.eu/rapid/press-release_IP-09-1255_en.htm (visited on February 10, 2018) or Competition Commissioner Margrethe Vestager in relation to acquisition of Air

influenced by several restrictions on ownership and control clauses in bilateral air service agreements with other countries.

The standard approach Commission uses in evaluating the possible effects, the merger would have, usually starts with definition of the market. In the airline context, markets are defined on the individual city-pair basis in order to assess the anticompetitive impact for the entire network of the two merging carriers. If the analysis would be done on the whole network in which the airlines operate, the analysis would probably underestimate the potential anticompetitive effects. Moreover, dominance-centred substantive test is used as it allows to presume that the merger will have anticompetitive effects which is suitable in the industry that has predisposition to exclusionary conduct and that can be characterized by significant barriers to entry.

2.3.1 Commitment decisions

The first cross-border merger in the EU took place between KLM and Air France in 2004. Commission stated that this transaction would create largest airline group in Europe which would equip passengers with greater choice, improved services and costs reductions. Despite the fact that the services offered by the two airlines were considered rather complementary as KLM mainly focused on provision of services in Northern Europe and the Far East and Air France offered services mainly in Southern Europe and Africa, Commission argued that the merger would lead to elimination or significant impediment of the competition on 14 routes, both intra-European and intercontinental. After thorough review, Commission authorized the notified concentration however due to alleged competition concerns regarding mainly routes between Paris and Amsterdam and between Europe and the United States, it imposed several obligations on the companies. Commission pointed out that the major barriers to entry were represented by the lack of take-off and landing rights due to high presence of congestion at Paris and Amsterdam airports. The parties thus offered release of 47 pair of slots in total in order to maintain the competitive environment on the affected routes and freeze their frequencies in case new entrants should appear on the respective routes.[110] Moreover, new operators could acquire so-called grandfather rights which meant that if the operators stayed on the Paris-Amsterdam route for certain period, they

Berlin by Lufthansa said: „*Our job is to make sure that mergers do not make European consumers worse off.*" See European Commission, *Mergers: Commission approves acquisition by Lufthansa of Air Berlin subsidiary LGW, subject to conditions,* Press Release IP/17/5402, 21 December 2017, Brussels [online]. Available at http://europa.eu/rapid/press-release_IP-17-5402_en.htm (visited on February 10, 2018).

[110] In comparison to airline alliance, the slot remedies were also used but for limited period of usually six years, the remedies in this case were determined to last for unlimited period and only should be returned to the slot coordinator if they were misused.

would be allowed to use them for other destinations. The two operators also agreed to form intermodal agreements with land transport companies.[111]

In the following years, Commission adopted other commitment decisions regarding the mergers in the airline industry. The first mergers that were reviewed by the Commission followed so-called umbrella model which meant that the merging parties kept relative independence under the same umbrella in order not to lose their traffic rights that were agreed under the nationality clauses in their respective bilateral agreements. In case of a merger, third countries could dispute this clause. Specifically, the umbrella merger models were mainly followed during the first decade of the century for example in a merger between KLM and Alitalia, Lufthansa and IAG. Later, the nationality clauses were substituted for Community air carrier clause.[112] Similarly to the KLM/Air France case, the competition concerns were usually connected to the congestion at particular airports. In the acquisition of slot portfolio of Air Berlin subsidiary LGW by Lufthansa, Commission assessed whether such increase in slot portfolio could lead to higher barriers to entry. It found out that such large portfolio of slots would lead to higher fares and lower choice of services.[113]

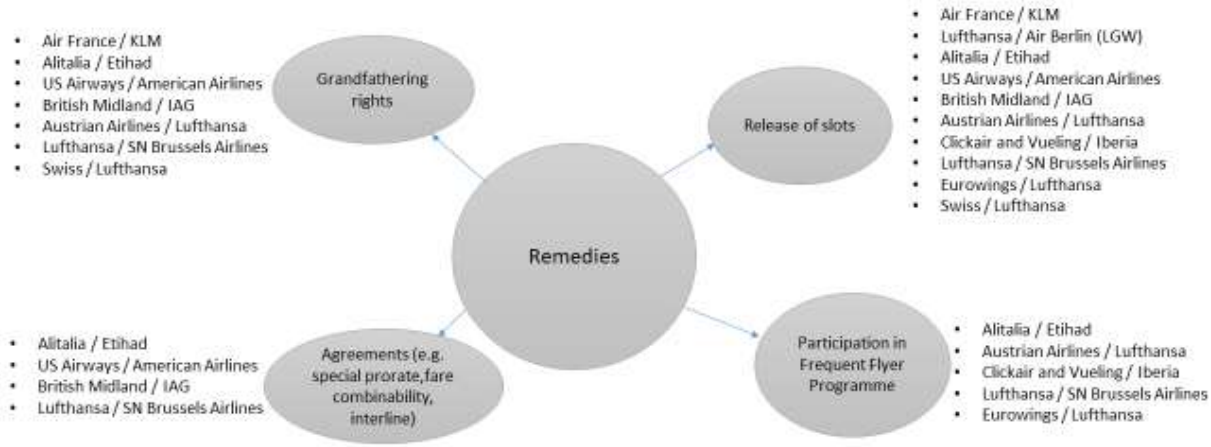
Remedies that are present in every airline merger case involve the release of particular slots to new entrants. The slot remedy should be designed to encourage competitors to enter the affected routes. They should also make the entry to the affected routes easier and it is argued that their aim is to replicate the competitive pressure the parties imposed on each other before the merger. In Air Berlin/Lufthansa case, Lufthansa proposed commitments that it would decrease the amount of acquired slots at Düsseldorf airport in order to alleviate the competition concerns.[114] Moreover, in the acquisition of Alitalia by Etihad in 2014, the parties promised to release slots to a new entrant at the Rome Fiumicino and Belgrade since they were the only competitors operating the services on these routes and thus the acquisition would lead to a creation of monopoly on Rome-Belgrade route. In addition, the slot release was accompanied by additional services such as access to

[111] The merger was also subject to approval by the US DoT which allowed it on 11 February 2014 and several countries also explicitly agreed with the merger going forward such as the Czech Republic, Poland, Romania or Brazil. See Burghouwt et al. (2005), Op.Cit.,p. 37.
[112] Ibid., p. 31, Gudmundson, S.V. (2014), *Mergers vs alliances. The Air France-KLM story,*pp 14-16 [online]. Available at http://ssrn.com/abstract=2142915 (visited on March 6, 2018).
[113] Commission Decision of 21/12/2017 declaring a concentration to be compatible with the common market, *Case No COMP/M.8633 - Lufthansa / Certain Air Berlin Assets*, C(2017) 9118 final.
[114] European Commission (2017), *Mergers: Commission approves acquisition by Lufthansa of Air Berlin subsidiary LGW, subject to conditions,* Press Release IP/17/5402, 21 December 2017, Brussels [online]. Available at http://europa.eu/rapid/press-release_IP-17-5402_en.htm (visited on February 19, 2018).

parking and gates.[115] The merger between US Airways and American Airlines would also lead to a monopoly situation on the transatlantic route from London to Philadelphia since both carriers were in a metal-neutral joint venture with British Airways and Iberia, the only operators providing non-stop flights on this route. The proposed remedies were thus the provision of slots at both airports to new entrants.[116]

Among other commitments submitted by the parties that were aimed to remedy the situation belong grandfathering rights, as they should serve as an additional incentive to enter the routes, increase the viability of the services offered and flexibility in the allocation of aircraft. Ancillary remedies usually involve enabling new entrants to conclude special agreements such as interlining agreements, prorate agreements or intermodal agreements. In the Alitalia/Etihad case, both types of commitments appeared in order to address the competition concerns. Another ancillary remedy represents the possibility for the new entrant to access the frequent flyer programme of the merged entity. The logic behind these ancillary remedies is that the competitor would gain access to connecting traffic of the parties and thus could fill its flights with their passengers in order to increase profitability. Figure 2 summarizes the remedies that are usually submitted in the airline merger procedures to remedy the potential anticompetitive effects of the merger.

Figure 2: Overview of remedies in the commitment decisions[117]



[115] Commission Decision of 14/11/2014 declaring a concentration to be compatible with the common market, Case *No COMP/M.7333 - Alitalia / Etihad*, C(2014) 8708 final, 14.11.2014, Brussels, paras. 406-409.
[116] Commission Decision of 05/08/2013 declaring a concentration to be compatible with the common market, *Case No COMP/M.6607 - Us Airways / American Airlines*, C(2013) 5232 final, 5.8.2013, Brussels, paras. 153-172.
[117] Author's own collaboration based on the inspection of the cases.

2.3.2 Prohibition decisions

Two prohibition decisions that Commission has adopted so far are the prohibition of the acquisition of Aer Lingus by Ryanair (2007 and 2013) and the prohibition of acquisition of Olympic Air by Aegean Airlines in 2011 that was later approved by the Commission due to financial problems of the Olympic Air. The Commission decisions in these cases are quite remarkable as their length is approximately 500 pages and the Commission uses econometric tools in its investigation together with large-scale customer surveys.[118]

2.3.2.1 Ryanair/Aer Lingus

The 2007 decision in Aer Lingus/Ryanair case was the first prohibition decision undertaken by the Commission under Merger regulation in the aviation sector and the first prohibition decision since December 2004 (when the Merger regulation was revised).[119] During a seven year period from 2007 to 2013, a series of decisions were undertaken by both the Court of Justice and the Commission regarding the acquisition of Aer Lingus by Ryanair. The transaction involved the acquisition of sole control of Aer Lingus by Ryanair by virtue of a public bid for all outstanding shares which was notified to the Commission. Before the announcement of the intention to acquire the sole control of Aer Lingus, Ryanair had already acquired a substantial number of shares, amounting to 25,17% of its capital. In figure 3 main decisions undertaken in this case at the European level can be seen.

[118] It was for the first time when Commission in its 2007 prohibition decision used quantitative tools. See Koch O. (2010), *Yes, we can (prohibit) – The Ryanair/Aer Lingus merger before the Court*, Competition Policy Newsletter No 3, pp. 1-5 [online]. Available at http://ec.europa.eu/competition/publications/cpn/2010_3_9.pdf (visited on February 20, 2018).

[119] Drauz, G., T. Chellingsworth and H. Hyrkas (2010), *Recent Developments in EC Merger Control*, Journal of European Competition Law & Practice, 2010, Vol. 1, No. 1, p.14.

Figure 3: Overview of the decisions undertaken in Ryanair/Aer Lingus case[120]

June 2007	October 2007	March 2008	July 2010	February 2013
First prohibition decision (M.4439)	Commission´s rejection decision regarding the divestment of Ryanair´s minority shareholding (M.4439)	Dismissal of application for interim measures with respect to minority shareholding by Court of Justice (T-411/07R)	Dismissal of action by Court of Justice for annulment regarding the 2007 prohibition decision (T-411/07) Dismissal of appeal against 2007 prohibition decision by Court of Justice (T-342/07)	Second prohibition decision (M.6663)

In contrast to other mergers in the aviation industry, the acquisition of Aer Lingus by Ryanair represents a different transaction in many ways. Previous merger cases usually involved network airlines operating on different routes and different airports while Ryanair and Aer Lingus were both 'low-frills' airlines that provided point-to-point air services within Europe and both had large bases at Dublin airport. After the merger, their market share would thus stand at 80% of European short-haul traffic which would make them by far the largest airline concentrated at one airport. In addition, Commission found out in the phase II investigation that Ryanair and Aer Lingus's services overlapped on 35 routes. The merger would thus lead to a monopoly situation on 22 routes and its combined market share would be significantly high on additional 13 routes.[121] Despite such a high market share, Commission decided to carry out investigation as in previous cases regarding the aviation industry in order to find out whether the concentration would represent a significant impediment to the effective competition.[122]

[120] Furse, M. (2017), *Testing the limits: Ryanair/Aer Lingus and the boundaries of merger control*, European Competition Journal, Volume 12, 2016 - Issue 2-3, pp. 462-483 [online]. Available at https://www.tandfonline.com /doi/pdf/10.1080/17441056.2017.1292719?needAccess=true (visited on March 2, 2018).
[121] Summary of Commission Decision of 27 June 2007 declaring a concentration to be incompatible with the common market and the EEA Agreement, *Case COMP/M.4439 — Ryanair/Aer Lingus*, Official Journal C 47, 20.2.2008, p. 9–20.
[122] Gadas, R., O., Koch, K. Parplies and H. Beuve-Méry (2007), *Ryanair/Aer Lingus: Even "low-cost" monopolies can harm consumers* Competition Policy Newsletter No 3, 2007, p. [online]. Available at http://ec.europa.eu/competition/publications/cpn/2007_3_65.pdf (visited on March 20, 2018).

After thorough investigation in the phase II of the merger procedure, Commission concluded that Ryanair and Aer Lingus represented close competitors since they monitored each other fares regularly and adjusted their prices as a reaction to the price change of each other. In addition, other carriers operating on the overlapping routes could not be viewed as competitors as they were either full-service network carriers or smaller regional airlines that focused on business customers. The close relationship between Ryanair and Aer Lingus was also confirmed by market survey conducted among the passengers as outcomes of the survey suggested that the passengers considered them as close substitutes. The merger would therefore remove existing competitive rivalry between those two on a number of overlapping routes which would in turn lead to higher prices. Commission also concluded that there were quite high barriers to entry to the affected markets which were connected to the congestion of the airport at Dublin and some other airports or to the downside of not having a regular base in Dublin. There also existed quite significant entry costs and it was quite risky for the new entrants to compete with airlines that were already well-established in Ireland.

The removal of Aer Lingus from the competition would thus lessen the competitive constraint for Ryanair on the Irish routes and the potential competitors would have to compete with strong and well-established merged entity that would benefit from cost advantages. Moreover, Commission added that the likelihood of a new competitor to enter the affected markets was only limited to some routes and the entry would not pose as significant competitive threat to the merged entity. Ryanair also suggested that the merger would bring efficiencies and submitted commitments in order to eliminate the competition concerns. Commission however concluded that efficiencies created by the merger would not justify it and the proposed commitments in the form of slot release were not enough to eliminate barriers to entry for other airlines.[123]

All of this considered, Commission concluded that the merger would lead to a significant impediment of the competition therefore, it issued a decision in which the merger was prohibited. In 2010, General Court of the European Union handed down two judgements in which it confirmed two Commission decisions regarding the finding that the acquisition of Aer Lingus by Ryanair is

[123] Ryanair suggested that it could apply its low-cost business model to Aer Lingus in case of the merger. The claimed efficiences however failed to comply with the applicability condition of the Horizontal Merger Guidelines (verifiability, merger specificity and benefit to consumers). According to Commission, the efficiencies were only general suggestion of Ryanair and were not merger specific as they could have been realized even without the merger. Moreover, Commission pointed out that merger that would create a monopoly situation on the market was unlikely to be justified by efficiencies it would create. See Rynair/Aer Lingus, Op.Cit., paras. 1099-1145.

incompatible with the common market and the decision refusing to order the divestment of Ryanair's minority shareholding in Aer Lingus.[124] Second attempt for the acquisition of Aer Lingus was withdrawn and in 2012 third attempt for the acquisition was notified to the Commission. The takeover was again blocked as the parties further increased their market share from 80% in 2007 to 87% in 2012 for short-haul flights out of Dublin and the number of routes increased to 46. The merger was further prohibited basically on the same grounds as in 2007.

The judgement in Aer Lingus's appeal is quite interesting as the question whether Ryanair should be ordered the divestment of its minority shareholding in Aer Lingus was not only subject to the Commission and Court's investigation pursuant to Article 8(4) of the Merger Regulation but it was also discussed in front of the UK courts with different results as under the Merger Regulation there is no obligation of alignment of national rules with the European ones. In line with the previous practice, Commission did not order the divestiture of minority shareholding that had been acquired before the bid and later accounted for 29,4%. It was argued that such share did not constitute the right of control over Aer Lingus and thus did not fall under the definition of concentration as set out in the Merger Regulation. UK authorities were free to apply UK competition provisions. According to UK authorities, Ryanair could block the disposal of slots at Heathrow airport as for that decision 75% votes were required and block the acquisition of Aer Lingus. It was thus proposed that the minority shareholding of Ryanair should be decreased to 5%. In response to the decision of UK authorities, Commission pointed out in its White Paper that they were able to conduct approach that would deal with one of the central theories of competitive harm which implied that even minority shareholding could enable the shareholder to raise competition concerns by influencing the competitive strategies of the target. This dispute gave impetus to the Commission's proposal to expand the scope of Merger Regulation. The problem with the minority shareholding was finally resolved in 2015 when Ryanair sold its stake to IAG that already previously acquired 25% stake in Aer Lingus from the Irish government.[125]

[124] The judgement in Ryanair´s appeal is particularly striking in its length of approximately 100 pages, great level of detail and the fact that it dealt with the extensive use of quantitative and econometric analysis used in the Commission prohibition decision. See Judgment of the General Court (Third Chamber) of 6 July 2010, *Ryanair Holdings plc v European Commission*, ECLI:EU:T:2010:280.

[125] Commission Decision of 14/07/2015 declaring a concentration to be compatible with the common market according to Council Regulation (EC) No 139/2004, *Case No COMP/M.7541 - IAG / Aer Lingus*, C(2015) 5026 final, 14.07.2015, Brussels.

2.3.2.2 Aegean Airlines/Olympic Air

Although, the proposed merger between Aegean Airlines and Olympic Air was prohibited in 2011, Commission eventually approved it in 2013 on the grounds of the failing firm argument which is interesting because the same argument for the merger was used by the parties in 2011. In 2011, the merger was prohibited as it would create quasi-monopoly on nine domestic Greek routes which would according to the Commission harm consumers as it would cause increase in fares for four out of six Greek and European consumers travelling on these routes. In the 2011 investigation of the financial situation of the two airlines, Commission found out that the situation and outlook for Aegean Airlines was positive irrespective of the transaction while in case of Olympic Air it admitted that the company was incurring losses. It, however, concluded that there were better solutions to the Olympic Air's financial situation. It pointed out that restructuring measures were already in force and the prospect of the company was positive thus it was not likely that the company would exit the market. Moreover, Commission stressed out that there existed less anticompetitive alternatives than the proposed merger and the attractiveness of the brand would probably attract potential buyer who would buy the assets of the company.[126]

Similarly to Ryanair and Aer Lingus case, this case also dealt with airlines that had base at the same 'home' airport. The investigation further showed that the potential of new entry by competitors that would serve as a competitive constraint to the merged entity was highly unlikely due to the presence of various barriers to entry. The conditions that the entrant would have to fulfil in order to pose as potential competitor would be the presence at the parties' home base in Athens and it would have to gain similar brand awareness as Olympic Air or Aegean Airlines on the market. Moreover, the competitors would have to cope with high fixed costs, ensure connectivity of their flights to the international and domestic traffic and develop a network of routes within Greece. This would not be according to the Commission timely or sufficient to pose as a threat to the merged entity.[127] Furthermore, unlike other merger cases investigated by the Commission, the problem with the anticompetitive nature of this merger could not be solved by the release of slots because Athens airport and majority of the Greek airports did not suffer from the lack of availability of slots. The assessment also took account of the crisis situation in Greece which did not alter the result of the decision adopted by the Commission. Commission thus concluded that

[126] Summary of Commission Decision of 9 October 2013 declaring a concentration compatible with the internal market and the functioning of the EEA Agreement, *Case COMP/M.6796 — Aegean/Olympic II*, Official Journal C 25, 24.1.2015, p. 7–15, paras. 59-64.
[127] Ibid., paras. 48-49.

the merger would significantly impede competition on the internal market and it highlighted the fact that it would mainly harm the customers which would not enjoy competitive environment.[128]

Following years after the adoption of the decision, the parties experienced a decreasing trend in the number of overlapping routes as Olympic Air withdrew from several routes.[129] Commission again investigated possible efficiencies of the merger and proposed commitments by the parties and concluded that the merger would again lead to significant impediment of competition on the affected routes. In addition, the failing firm defence was again tested in line with the Horizontal Merger Guidelines and the respective case law. In total three conditions had to be met in order for the failing firm argument to be justifiable. The first one was that Olympic would be forced to leave the market due to its financial problems, would not it be for Aegean Airlines. Moreover, despite its withdrawal from many routes, it was not able to return to profitability numbers. Commission also pointed out that Olympic Air was financially dependent on its parent company Marfin which had been experiencing losses and thus Olympic could not rely on financial help from Marfin as it had its own problems and it would be easier for Marfin to close down Olympic rather than keep it going. Second condition regarded presence of other less anticompetitive alternative that would purchase Olympic Air which was not the case as there had been no interest in purchasing the airlines since the first prohibition decision. Lastly, the third condition dealt with the exit of the Olympic Air's assets from the market and as Commission pointed out market investigation showed that there was no interest in purchasing the brand, the bilateral traffic rights or its leased aircraft.

Commission thus concluded that the merger should be approved when taking into account the arguments stated above, the financial crisis in Greece, the falling numbers in demand for the air services in the country and the negative future outlook of Olympic regarding its return to profitability figures and financial support from its parent company. Moreover, it pointed out that the market structure would not be different under the merger or in situation when Olympic Air would exit the market.

2.4 Discussion

From the analysis of Commission and Court's case law in chapter 2, it can be concluded that the Commission and Court's activity in enforcing competition rules in the airline sector was rather

[128] Ibid., paras. 65-72.
[129] When compared to 15 overlapping routes at the time of issuance of the 2011 prohibition decision, the parties´ operations would overlap only on 5 routes in 2014. See Ibid., para. 35.

rare. The little enforcement activity of the competition law in the airline industry might as well imply that the airlines learnt how to comply with the rules and thus there was little need for their application. In addition, there can be seen various economic aspects of the airline sector as a network industry that the Commission has taken into account when adopting the decisions. Such economic characteristics are high barriers to entry to the airline markets as there are high costs regarding the initial investment and majority of the airports in the EU are congested. Moreover, former flag carriers still benefit from big market shares which resulted in discriminatory practices.

In the earlier years of the liberalization, there was also anticompetitive conduct undertaken by the airports since they had close links with the national airlines due to the presence of state ownership. This anticompetitive conduct was investigated under the Article 102 of the TFEU and Commission found infringement in two cases, one was related to loyalty schemes and the second was refusal to interline. The refusal to interline was mainly interesting as it represented the first case in which the Commission used quasi-essential facility doctrine according to some authors stating the interlining agreements were standard practice in the airline industry. It can be however argued that this was the case in the pre-liberalization period and since then no such conduct was investigated by the Commission. There has been so far very little activity in enforcing the rules set in the Article 101 of the TFEU apart from two hard-core cartel cases, the early case of market-sharing agreement between SAS and Maersk Air and more recent case of price-fixing cartel.

The core of the Commission's activity in the airline sector forms the investigation of cooperation either in the form of airline alliances under the Article 101 of the TFEU or more integrated forms of cooperation that lead to concentrations inspected under the Merger Regulation. The motivation behind such cooperation is to lower the high barriers to entry, route expansion, overcome the congestion at many airports and gain market power in terms of the global airline market. Furthermore, the European air sector is experiencing an emerging trend in the recent years in order to be able to face the competition pressures from some major global airlines or to overcome financial difficulties. This could have been seen in the Aegean Airlines/Olympic Air case as the merger was firstly prohibited by the Commission however later Commission allowed the merger as the two companies experienced financial difficulties and Olympic faced the risk of exiting the market. It can be thus assumed that the nature of the industry with respect to global competitive pressures and limited availability of slots shows the tendency towards oligopolistic market structure or market with lower amount of competitors in order to be efficient which can be also seen in the decision making of the Commission. It can be seen that almost all the mergers and

alliances were allowed by the Commission. One exceptions is the merger between Ryanair and Aer Lingus which was prohibited. This merger however differed from all the other as the two undertakings operated their services from the same base and had similar business models.

The airline alliances and the cartels that have been so far investigated by the Commission were considered as restrictions by object. The hard-core cartels represent the most detrimental restriction of competition bringing efficiencies only to its parties and not to the consumers while airline alliances might be justified and also bring efficiencies to the customers through greater route expansion. The Commission has thus never prohibited airline alliances as always imposition of certain commitments was enough to make the alliances justifiable with respect to EU competition goals in the airline industry. The analysis of the mergers and alliances is quite similar as the Commission usually looks on the combined market shares, barriers to entry and the closeness of competition. In both cases, it also focuses on the efficiencies created by the cooperation.

The availability of slots represents major problem of the airline industry and from the inspection of the case law, it can be seen that the competition law is not equipped to address this problem. Competition law only tackles this problem in response to mergers under the Merger Regulation and airline alliances under the Article 101 of the TFEU. The only available competition policy tool to the airport congestion and a typical remedy used by the Commission in the past airline alliances and merger decisions is the slot divestures by incumbent carriers. The problem is that such remedy can be only applied when the Commission carries out the investigation of a merger or an alliance and only in cases when such concentrations represent competition threats. The question however is whether such remedy is successful in encouraging competition. Investigation of the past cases showed that initially, the remedies did not contribute to increased competition. Commission thus strengthened the remedies by imposing obligations on the parties to find new entrant in advance or advertising the release of slots.[130] As Airneth, however, shows the remedies did not have the outcomes as expected.[131] It is, however, a question whether better remedies could be developed.

[130] See Commission Decision of 09/01/2009 declaring a concentration to be compatible with the common market according to Council Regulation (EC) No 139/2004, *Case No COMP/M.5364 - Iberia/Vueling/Clickair*, Official Journal C 72, 26.3.2009, p. 23–23 and Summary of Commission Decision of 28 August 2009 declaring a concentration compatible with the common market and EEA Agreement, *Case COMP/M.5440 — Lufthansa/Austrian Airlines*, Official Journal C 16, 22.1.2010, p. 11–16.

[131] Airneth studied seven airline merger cases and found that on 36% of city-pairs the remedies led to the entry of new competitors however the number decreased after two years. See Airneth (2011), *Routes with Remedies*, European Aviation Club/Airneth Seminar, Brussels 9 December 2011.

In addition, prohibiting the alliance or merger straight away might lead to worse outcomes than permitting them as some level of consolidation is desired in the airline industry.[132]

Moreover, the access problem to the slots results from the fact that the incumbent operators possess the majority slots due to the grandfathered rights. The slot scarcity thus represents significant barrier to entry to the airline market and can result in restriction of competition benefiting the incumbent undertakings. Due to the reasons provided above, it could be thus also considered as a necessary input for the competitor to enter the airline market. Adequate regulation of the slot allocation however seems as a better solution to the access problems connected to the slots than establishing adequate competition rules which are usually applicable ex post and are used in solving situations where threats to competition are encountered. In this respect, competition policy should rather complement the regulatory framework regarding the slot scarcity.[133]

[132] Balfour, J. (2014), Op.Cit., p. 6.

[133] There has already been some proposals for creating the regulatory framework however the efforts have hindered since 2012. See Butcher, L. (2017), *Airport slots*, Briefing paper Number CBP 488, 12 June 2017, p. 2 [online]. Available at http://researchbriefings.files.parliament.uk/documents/SN00488/SN00488.pdf.

3 Application of competition rules to the rail transport sector – evidence from case law

Similarly to air transport, application of competition rules to the rail sector was initially subject to particular conditions. There were special procedural rules for enforcing the competition rules in the rail sector until Regulation 1/2003 came into force which incorporated rail transport under the general procedural rules.[134] Moreover, as with the air transport not all parts of rail transport are usually open to competition. It has also non-competitive and competitive segments due to its characteristics as a network industry. The overview of the segments which are likely to be non-competitive and which are potentially competitive can be seen in table 3.

Table 3: Overview of competitive and non-competitive segments in the air and rail sector[135]

Sector	Activities which may be non-competitive	Activities which are potentially competitive
Railways	Track and signalling infrastructure	Operation of trains, Maintenance facilities

Rail infrastructure serves as a typical example of an essential facility since the infrastructure requires very high fixed costs for the establishment and therefore its duplication or construction of alternative routes is considered to be economically inefficient. It is thus convenient to have one upstream market in which the infrastructure manager operates and provides services to the undertakings that compete in the downstream market. The competition problems encountered in the rail sector thus often stem from unfair price setting in the access to infrastructure or for the use of essential infrastructure. The overview of the competition problems with their economic characteristics is provided in table 4. It can be seen that similarly to air transport, there are also high barriers to entry to the market for provision of the rail services.

[134] The Regulation explicitly lays down: „*As the case-law has made it clear that the competition rules apply to transport, that sector should be made subject to the procedural provisions of this Regulation*." Before the Regulation came into force the specific procedural rules for rail transport were regulated in Regulation 1017/68. See Council Regulation (EC) No 1/2003, Op.Cit., para. 36 and Regulation (EEC) No 1017/68 of the Council of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway, Official Journal L 175, 23.7.1968, p. 1–12.

[135] OECD (2006), Op.Cit., p. 9.

Table 4: Overview of the Commission´s activity regarding the enforcement of competition in the rail sector[136]

Economic characteristics	Potential competition problems encountered	Legal instruments of the competition policy	Specific examples of the rail cases
Unique infrastructure with high costs	Practices of the dominant undertakings (incumbents) that lead to foreclosure of the market: • Margin squeeze • Refusal to supply • Essential facility doctrine	Article 102 of the TFEU (abuse of dominance)	• DB • Baltic rail • FS/GVG
High barriers to entry	Railway companies cooperate in order to overcome the barriers to entry: • Mergers that involve rail incumbents • Joint-ventures and agreements between railway undertakings	Article 101 of the TFEU and EU Merger Regulation	• DB/Arriva • FS/Cube/Arriva • Veolia/Trenitalia
Special role of the incumbent railway undertaking	Practices that aim at eliminating the competition on the market: • Predatory pricing • Tying or bundling of services	Article 102 of the TFEU	• No specific case dealt on the EU level yet • National cases (e.g. English Welsh & Scottish Railway Ltd[137])

3.1 Application of Article 101 of the TFEU to the rail sector

3.1.1 European Night Services v Commission

Judgement in European Night services (ENS) represents the first case that dealt with the doctrine of essential facilities. European Night Services was a joint venture created by railway companies in the United Kingdom, France, Germany and the Netherlands. The aim of ENS was to provide passenger services through the Channel Tunnel that connected United Kingdom and the rest of Europe. Operating agreement concluded between ENS and its parent companies ensured that ENS would be provided with locomotives and crew (traction) and with the railway paths through the Channel Tunnel (access to the infrastructure) by its parent companies.[138] Commission adopted a decision in which it stated that the agreement infringed the then equivalent Article 101 of the TFEU but it was granted an eight year period exemption under the then applicable Regulation No 1017/68.[139] In addition, the operating agreement was subject to conditions that the parties would

[136] Author's own elaboration based on OECD (2013), *Recent Developments in Rail Transportation Services,* Directorate for Financial and Enterprise Affairs, Competition Committee, December 2013, p. 83 [online]. Available at http://www.oecd.org/daf/competition/Rail-transportation-Services-2013.pdf (visited on December 13, 2017).

[137] The Office of Rail Regulation found out that English Welsh&Scottish Railway Ltd engaged in activities that led to abuse of its dominant position including predatory pricing. See Office of Rail Regulation decision of 17 November 2006 *English, Welsh and Scottish Railway Limited*, [2007] UKCLR 937.

[138] Commission Decision 94/663/EC of September 21, 1994, *European Night Services*, Official Journal 1994 L259/20 paras 12-21.

[139] At that time, Regulation No 1017/68 was in force which included special procedural rules for rail transport. According to its Article 3 and Article 5, agreements within the rail transport sector could have been exempted if they

provide the same rail services, crew and locomotives to any international grouping of undertakings or rail operator wishing to operate the rail services through the Channel Tunnel unless they were able to provide such services themselves.[140] The decision in the European Night Services case thus shows that the Commission considered the provision of locomotives as an essential facility under the condition that the parties were not able to provide them themselves.

Commission's decision in this case was then annulled by the Court of First Instance (CFI) as according to its opinion, Commission failed to prove the anticompetitive nature of the contested agreement. CFI disagreed with the Commission that the provision of the locomotives in the ENS case constituted an essential facility. According to the CFI, the provision of locomotives could have been considered as an essential facility if they were essential for the competitors. This would mean that the provision of locomotives would be necessary for the competitors in the sense that they would not be able operate services on the relevant market or it would prevent them from entering the relevant market. In addition, CFI argued that due to the fact that ENS did not have a dominant position on the market, it could not have exerted any influence on competitive environment on the market with respect to its structure or functioning and thus the provision of locomotives did not constitute an essential facility.[141]

Furthermore, CFI also pointed out several insufficiencies in the Commission's line of reasoning. Firstly, it criticised the Commission for not conducting thorough analysis whether competitors could have purchased or rented the locomotives from different sources to prove their essentiality.[142] Moreover, the decision adopted by CFI shows that it has adopted a stricter approach to the application of essential doctrine as it states that the obligation to supply the locomotives should be applied only in cases where there is an infringement of the then equivalent Article 102 of the TFEU. It points out that only in such cases, when the undertaking has a dominant position, the refusal to provide locomotives can create barriers to entry. Moreover, it points out that Commission is also required to prove that the dominant undertaking is the only supplier of the locomotives and that they cannot be obtained from different sources.[143]

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focused on technical improvements and cooperation or if they promoted economic progress. Creation of such joint venture in this case was likely to promote economic progress. See Ibid., paras. 55-70.

[140] Ibid., paras. 60-68.

[141] Judgement of the Court of First Instance of 15 September 1998, *European Night Services Ltd (ENS) v Commission of the European Communities*, Joined cases T-374/94, T-375/94, T-384/94 and T-388/94, ECLI:EU:T:1998:198, paras. 212-213.

[142] Ibid., paras. 215-220.

[143] Ibid., para. 213.

3.1.2 Blocktrains

On 28 March 2018, Kühne + Nagel (K+N) applied for immunity under the Leniency Notice. In its application, it revealed the existence of the cartel to the Commission. The parties to the alleged cartel were cargo train operators that operated so-called cargo block train services. The advantage of block trains over the traditional rail cargo services is that they are more time and cost efficient as they allow transportation of cargo from one hub to another without the need to separate the wagons or store them on the way. Moreover, they are used for transportation of cargo that belongs to the same customer. The block trains thus represent an economically more viable alternative mainly for high volume customers. Commission's decision in this case concerned block trains named Balkantrain and Soptrain that operated routes mainly between Central and South-Eastern Europe.[144]

Following the notice from K+N, Commission started investigating existence of the alleged cartel between K+N, Schenker and Express Interfracht (EXIF). It inspected the premises of Schenker and EXIF finding out that the parties formed a cartel with the aim to preserve certain customers and trade volumes and to coordinate prices. From the gathered evidence, it found out that the cartel was in operation since July 2004 till mid-2012. The cartel included several practices such as the sharing of private information about the customers, allocation of existing and new customers, the division of cargo volume between them and price fixing.[145] After the Commission confirmed that the parties formed cartel that constituted a single and continuous infringement of the Article 101 of the TFEU and stated that no efficiencies could have been found under the Article 101(3) of the TFEU, the case was finally resolved under the settlement procedure. The advantage of settlement procedure is that the proceedings before the Commission take less time, bring benefits in reduction of costs for the consumers and taxpayers and the parties can obtain 10% discount in the fine imposed on them.[146]

In this case, K+N was granted immunity because it applied for it under the Leniency Notice and the other two parties (EXIF and Schenker) had to pay a fine of €49 million after the 10% discount

[144] Commission Decision of 15.7.2015 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union, *Case AT.40098-Blocktrains*, C(2015) 4646 final, paras. 1-10.
[145] Ibid., paras. 13-19.
[146] Since the initiation of the settlement procedure in 2008 in total 20 cases were settled between the period 2008-2016 which meant that 56% of the cartel decisions were solved under the settlement procedure. See Snelders, R. *The EU Cartel Settlement Procedure: The First Years Experience and Challenges,* Cleary Gottlieb & Hamilton LLP, March 10, 2016, p. 5 [online]. Available at https://www.studienvereinigung-kartellrecht.de/sites/default/files/14h_30_snelders_sv_kartellrecht_-_cartel_settlements_final_0.pdf (visited on February 2, 2018).

because of their cooperation in the settlement procedure. Interestingly, the Commission also pointed out that the cargo rail operators also coordinated their behaviour for the upstream services such as the purchase of traction, trailers and other equipment from national undertakings. This upstream coordination was not, however, taken into account and covered by the decision as according to the Commission *"such coordination to create a 'blocktrain service' is not anticompetitive."* [147]

3.2 Application of Article 102 of the TFEU to the rail sector

Commission has so far investigated three cases under the Article 102 of the TFEU that led to the abuse of the dominant position. All of them were connected to vertically integrated incumbents that owned the infrastructure in the upstream market and provided access to it to competitors in the downstream market who in turn competed with the subsidiary of the vertically integrated firm in the downstream market. The competition concerns thus arise from unfair and discriminatory access to the infrastructure that in the network industries has usually the characteristics of a natural monopoly. In the earlier years, Commission used essential facility doctrine argument, later margin squeeze was discovered by the Commission and most recently it was ruled by the Commission that removal of the track can be also considered as an abuse of the dominant position.

3.2.1 Ferrovie dello Stato S.p.A. v Georg Verkehrsorganisation GmbH

On 25 October 1999, Georg Verkehrsorganisation (GVG) lodged a complaint with the Commission against Ferrovie dello Stato S.p.A. (FS), the Italian national railway carrier. In its complaint, GVG alleged that FS abused its dominant position and thus violated the then equivalent Article 102 of the TFEU by refusing to provide access to Italian railway infrastructure, to negotiate the creation of an international grouping and to provide traction on the Italian route.[148] GVG was a German railway undertaking that had operated international rail services since 1992 and from 2001 it had operated more than 200 trains in the international passenger rail transport. Simultaneously, it had tried to get access to the Italian railway market since 1991, specifically it wanted to start operating Domodossola-Milan route in Italy. This route was already operated by Cisalpino, which was a joint venture entity formed between FS and Swiss railway operators. FS was a main publicly-owned rail operator in Italy that underwent a restructuring process in 2001

[147] European Commission (2015), *Antitrust: Commission fines cargo train operators € 49 million for cartel,* Press Release IP/15/5376, July 15, 2015, Brussels [online]. Available at http://europa.eu/rapid/press-release_IP-15-5376_en.htm (visited on February 13, 2018).
[148] Commission Decision of 27 August 2003 relating to a proceeding pursuant to Article 82 of the EC Treaty, *Case COMP/37.685 GVG/FS*, C(2003) 3057, para. 1.

forming two companies, one that was responsible for the control and operation of the network infrastructure and the other that was responsible for the transport services.[149]

In order to be able to operate the services from various parts of Germany to Domodossola-Milan route via Basle, GVG needed to fulfil these criteria: a) get a license[150]; b) enter into an international grouping[151]; c) obtain a slot in the Italian infrastructure capacity; d) acquire a safety certificate and e) ensure the ability to provide traction services.[152] In its decision, Commission stated that FS abused its dominant position as its conduct led to the elimination of competition and infringed the then equivalent Article 102 of the TFEU. The Commission also pointed out that three different types of abuses of the dominant position were present in the GVG/FS case – a) refusal to grant GVG access to Italian infrastructure network; b) refusal to provide traction to GVG and c) not forming an international grouping with FS (more specifically RFI S.p.A.). In this decision, Commission used an essential facility doctrine argument as the FS's conduct created significant barrier to entry to the Italian railway market.[153] In the legal literature, the concept of essential facility as used by the Court of Justice was summarised as follows: a) the impossibility to duplicate the facility either due to its physical or legal impossibility or because it is not economically justifiable to have a second facility and b) the access to the facility must be indispensable for the competitor.[154]

In the first abuse of the dominant position (the refusal to access the Italian network by FS), Commission explicitly used essential facility doctrine in its decision as it stated that the network was impossible to duplicate and was indispensable for the provision of the rail services. In the

[149] The company that had been responsible for the Italian infrastructure since 2001 was called Rete Ferroviana Italiana SpA (RFI) and the company that had been operating the rail services was Trenitalia SpA. See Ibid., paras. 3-7.

[150] The conditions for obtaining a license to operate rail services were set out in Directive 95/18/EC. See Council Directive 95/18/EC of 19 June 1995 on the licensing of railway undertaking, Official Journal L 143, 27/06/1995, p. 0070 – 0074.

[151] The requirement to enter into an international grouping in order to be able to provide international rail services was established by Council Directive 91/440/EC and a group of at least two railway undertakings from different member states was required in order to form an international grouping. See Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways, Official Journal L 237, 24/08/1991, p. 0025 – 0028.

[152] Under the term traction, one can understand locomotives and drivers. See GVG/FS, Op.Cit., para. 25.

[153] The most important decision that deals with the conditions under which the competitor has the obligation to provide access to its essential facility is the Oscar Bronner case. The conditions are as follows: Firstly, the undertaking has to hold a dominant position and the facility has to be indispensable for other competitors. Secondly, it incorporates forward-looking test whether the refusal to deal would lead to creation of a monopoly on the market. See Judgment of the Court of 26 November 1998, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs*, Case C-7/97, ECLI:EU:C:1998:569, para. 45-46.

[154] Whish R. and D. Bailey (2012), Op.Cit., pp. 701-708.

second case, the need to form an international grouping in order to enter the Italian market for rail services was not regarded as an essential facility explicitly by the Commission. The line of Commission's reasoning however signals the application of essential facility doctrine in the second case as Commission argued that FS was the only Italian operator on the Domodossola-Milan route and therefore it was indispensable for GVG to form an international grouping with FS in order to enter on the respective route.[155]

Although, the Commission did not expressly apply the doctrine of essential facility to the third case of the abuse of the dominant position, it can be derived from its arguments as it included two components that are necessary for the application of essential facility doctrine – the non-duplicability condition and indispensability condition. Commission thus confirmed the view of the Court of Justice in European Night Services by implying that the traction can be an essential facility under certain circumstances.[156] Some authors however argue that the decision in FS/GVG case may lead to anticompetitive effects as Commission applied excessively broad definition of the essential facility.[157] Commission argued that due to different technical standards across the Member States, new operator would need to purchase new locomotives in order to be able to offer services in that state. In addition, Commission pointed out that FS was dominant in the market for rail traction and thus represented the only entity from which GVG could obtain locomotives that were compatible with the Italian technical standards.[158]

As Castaldo and Nicita argue the obligation of FS to provide traction to GVG could result in reduction of the capacity for the incumbent who could be even obliged to purchase new assets to substitute the ones provided to its competitor.[159] They add that the result of this decision is in opposition to the decision in case BP v Commission in which it was legitimate to refuse to deal when the company experienced shortages in its assets.[160] Moreover, as was pointed out in the

[155] GVG/FS, Op.Cit., paras. 147-152.
[156] Ibid., paras. 98-110.
[157] Castaldo, A. and A. Nicita (2005), *Essential Facility Access in Us and EU: Drawing a Test for Antitrust Policy* [online]. Available at https://ssrn.com/abstract=877135, Giannino, M. (2017), *The Application Of The Doctrine Of Essential Facilities In The European Rail Transport Sector: Has The 7th Cavalry Finally Arrive*d?, Diritto internazionale, pp. 9-11 [online]. Available at https://www.diritto.it/pdf_archive/23120.pdf (visited on December 15, 2017).
[158] In its decision, the Commission pointed out that it was impossible to rent locomotives from other sources than FS. It also adds that it was not economically viable for GVG to set up its own pool of Italian drivers and locomotives due to the impossibility to provide cabotage or compete for train services within Italy under the current Italian legislation. GVG/FS, Op. Cit., paras. 93-109.
[159] Castaldo, A. and A. Nicita, Op. Cit., p. 22.
[160] Judgment of the Court of 29 June 1978, *Case 77/77-Benzine en Petroleum Handelsmaatschappij BV and others v Commission of the European Communities*, ECLI:EU:C:1978:141.

Bronner case, the provision of locomotives to the competitor could mean subsidizing less efficient entrants and lowering the incumbent's incentives to invest into new equipment and innovation which could hamper the competition in the long run.[161] This approach is also supported by the US Supreme Court as in Verizon case, the Court ruled in favour of protecting the proprietary interests of the incumbent and it called for a careful application of the essential facility doctrine.[162]

Furthermore, Italian Competition Authority also disagreed with the qualification of the locomotives as an essential facility since they failed to fulfil the first criteria in order to be essential – the non-duplicability condition. It argued that if the locomotives would be classified as an essential facility, new competitors might have been compelled to free ride on the incumbent. It would also prompt them not to develop their own fleet of locomotives.[163] It can be also argued that if the competitor wants to enter on a route on which its entry is inefficient due to its scale and the expected performance of the business, the competitor should not enter the route in the first place. The essential facility doctrine in this case would rather mean the subsidization of the less efficient entry. It is argued that rather than classifying traction as an essential facility, which could have negative future consequences, the Commission should have classified the conduct as a standard refusal to deal since there is evidence that FS provided traction to other competitors in the past and thus it discriminated GVG against other competitors.[164]

The FS/GVG decision is interesting in many aspects. Firstly, it shows the complementary relationship between regulation and competition policy as it proves that the competition law is a necessary tool to even out the powers of the incumbent against the new entrants in the newly liberalized industry. As Slot argues the concept of the essential facility can ensure access to the market where sector regulation fails to fulfil its purpose or where the access remains impossible.[165] Furthermore, the decision in the FS/GVG case represents a landmark decision for competition in the European rail market. It serves as a good example how competition cases can contribute to liberalization process. In addition, it supports the view of complete institutional separation of the

[161] Opinion of Advocate General Jacobs delivered on 28 May 1998, *Case C-7/97*, ECLI:EU:C:1998:264, para. 56. For an account of the factors that need to be taken into consideration before granting access to an essential infrastructure, see also Motta, M. (2004), *Competition Policy, Theory and Practice*, Cambridge University Press Cambridge 2004, p. 57.
[162] Verizon Communications v. Law Offices of Curtis Trinko, LLP, 157 L.Ed. 2d 823 (2004).
[163] Giannino M., Op. Cit., p. 10.
[164] Castaldo, A. and A.Nicita, Op.Cit., p. 24.
[165] Slot P.J. (2004), *A View From the Mountain: 40 Years of Development in European Communities Competition Law*, Common Market Law Review 443, p. 453.

vertically integrated firm as in this case RFI did not undertake more proactive approach towards providing access to its infrastructure which could increase its revenue from obtaining infrastructure charges. It had rather undertaken more protectionist approach as it was part of the FS that also operated rail services in the downstream market where GVG could pose as a competitive threat to it.[166] Further development has happened since the Commission adopted the decision in the FS/GVG case as there are other companies on the market that provide leasing agreements for the locomotives to the competitors, the railway liberalization packages were adopted and thus it can be argued that the concept of essential facility for traction played role in the early stages of the liberalization process.[167]

3.2.2 Deutsche Bahn (margin squeeze)

The Commission started investigating Deutsche Bahn Group (DB) on the grounds of three consecutive complaints received between May 2009 and May 2011 from rail undertakings that competed with DB on the market for the provision of rail services.[168] In its preliminary assessment, the Commission suspected that the pricing system for the traction current as conducted by DB might have created margin squeeze in breach of the Article 102 of the TFEU and harm competitors on the market for rail freight services and rail long distance passenger services.[169] The case concerns two distinct features – the provision of traction current that is indispensable for the undertakings in the downstream market and possible creation of an anticompetitive strategy in the provision of the traction current called margin squeeze that is combined with excessive and predatory pricing and discrimination.

The supply of traction current is necessary to propel electric locomotives in Germany. It differs from the standard domestic electricity network by the specific frequency of 16.7 Hz that is required to propel locomotives as compared to 50 Hz that is supplied to the households. The traction current is thus supplied to the railway undertakings through a special separate network that connects the overhead catenary to the standard domestic electricity network (via converters) with 50 Hz

[166]Stehmann O. and I. Mackay (2003), *Liberalisation and competition policy in railways*, Competition Policy Newsletter No 3, p. 25[online]. Available at http://ec.europa.eu/competition/publications/cpn/2003_3_21.pdf.
[167] Ibid., p. 23.
[168] Deutsche Bahn Group consists of a parent company Deutsch Bahn AG and its subsidiaries - DB Schenker Rail Deutschland AG that provides rail freight transport services, DB Regio AG that is active in the regional rail transport services market, DB Fernverkehr AG that is responsible for the long distance rail passenger services. DB Netz AG, DB Station&Service AG and DB Energie are responsible for the infrastructure management. See Commission Decision of 18 December 2013 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union, *Case AT.39678/AT.39731 — Deutsche Bahn I/II*, OJ C 86, 18.12.2013, paras. 3-5.
[169] Ibid., para. 2.

frequency or to special power plants that have frequency 16.7 Hz. Specific role is played by DB Energie GmbH (DB Energie) as it manages the special electricity network for the distribution of traction current and by purchasing the electricity from energy providers, it also supplies the traction current to railway undertakings. The undertakings had two options on the market for the traction current as they could either apply for the 'all-inclusive' option and pay DB Energie for the consumption of traction current and for the use of the network or they could purchase the 50 Hz electricity themselves from the third party energy suppliers and pay DB Energie only the cost for using its network and the conversion cost of changing the normal electricity into traction current. Most of the undertakings chose the first option and the second option was only implemented shortly in 2005. All the above considered, it could be thus said that DB Energie had a dominant position on the market for the provision of the traction current.[170]

Margin squeeze is an anticompetitive behaviour which can take place when a dominant vertically integrated undertaking sells a product or a service on the upstream market to undertakings with which it competes on the downstream market where the service or product represents an input. The margin squeeze is then present when the spread between the price, the dominant undertaking charges for its services or products to its competitors on the upstream market and the price which is charged to its own customers on the downstream market is negative or not sufficient for the as-efficient competitors to cover their specific costs.[171] The case law has shown that although the competitor might be as efficient as the dominant undertaking, in the presence of margin squeeze such as-efficient undertaking is not able to cover its costs, which results in a loss or a reduced level of profitability for the as-efficient undertaking.[172]

Commission argued that the pricing practice conducted by DB Energie resulted in margin squeeze as DB Energie incorporated three types of rebates into its pricing policy that could in total reach up to 14%. The rebates were connected with the discount when certain volume of the annual consumption or duration of the contract would be reached or utilisation discount would be applied if the total consumption exceeded certain amount per annum. Although, the system of such rebates was in principle designed for all the undertakings present in the downstream market, in fact only DB subsidiaries, DB Schenker Rail Deutschland AG and DB Fernverkehr AG were able to fulfil

[170] Ibid., paras. 16-20.
[171] Ibid., para. 15.
[172] Judgment of the Court (First Chamber) of 17 February 2011, *Konkurrensverket v TeliaSonera Sverige AB*, Case C-52/09, CLI:EU:C:2011:83, para.33.

the conditions and could benefit from the full 14% amount of the rebate since its introduction in 2003. On the other hand, other competitors on the market were not able to reach the full amount of the discount, however they were at least successful in obtaining partial discounts as in rail freight market the discount represented 6% while in the rail passenger market the discount reached 7%.[173]

According to the Court of Justice, the presence of margin squeeze must also have anticompetitive effects usually in the form of higher entry costs or decrease in profitability in order to constitute an abuse with respect to the Article 102 of the TFEU.[174] In line with the guidance issued by the Commission on the application of the Article 102 of the TFEU, the Commission carried out the as-efficient competitor test in order to find out whether the as-efficient competitors would stay profitable on the market in case of higher prices for the traction current.[175] In contrast to previous cases that dealt with the margin squeeze, Commission assessed the profitability of the as-efficient competitors during a longer nine year period from 2003 to 2011 on average.[176] Such long period for the testing was used due to the specificity of the rail markets as the lifetime of the assets is quite long (up to 40 years) and the initial investments into the rolling stock are quite high but are indispensable for the market entry. Furthermore, revenues are variable across different business cycles and thus the undertakings are keen to make strategic decisions and plans that cover several years.[177] Nonetheless, such approach to assess the profitability over a longer period in time was confirmed by the General Court in Telefónica.[178]

After conducting the as-efficient competitor test, the Commission found out that the competitors would incur loss between 0.1%-0.2% of their average total revenues in both the rail freight market and the long distance passenger market. Commission's analysis showed that the negative levels of profitability were not able to remunerate shareholders who would be as a result prompted to move their investments to more profitable targets or would not invest at all. Such conditions on the market created by the pricing system of DB Energie might have therefore deterred potential as-efficient competitors from market entry (lower expected potential profits) or harm the existing as-

[173] Deutsche Bahn I,II., Op.Cit. para. 50.
[174]Ibid., para. 64.
[175] Communication from the Commission, *Guidance on the Commission´s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, Official Journal C 45, 24/02/2009, p. 7–20.
[176] In the previous case law the profitability of as-efficient competitors was investigated on a year-by-year basis. See Schmillen, M. (2014), *The Deutsche Bahn case – promoting the development of competition on the rail markets*, NZKart 7/2014, p. 261-263.
[177] Ibid., p.262.
[178] Judgment of the General Court (Eighth Chamber) of 29 March 2012, *Telefónica and Telefónica de España v Commission*, Case T-336/07, ECLI:EU:T:2012:172, paras. 212-265.

efficient competitors (higher capital costs than profits).[179] As pointed out above, DB Energie had a dominant position on the upstream market for the traction current and in fact no potential competition on the market existed thus undertakings on the downstream market would not be able to escape the pricing system as set out by DB Energie.

Commission pointed out that the existing pricing system could contribute to slow down in the growth of DB Energie's competitors or hinder the maintenance of the competition in the downstream market due to suffered losses or reduced profits and as Commission pointed out this was likely to be more pronounced in case of rail transport where economies of scale, economies of scope and network effects play an important role due to high fixed costs.[180] Moreover, the abusive nature of such conduct could be further evidenced by the intent of DB Energie to create such uneven conditions on the market.[181] After the Commission's notification about the result of its preliminary assessment, DB offered commitments to alleviate the competition concerns and open the market for the supply of traction current. The commitments included separate prices for the electricity (the price would be without rebates and uniform price would be charged) and access to the network for traction current. Moreover, the network for traction current would be opened for third party energy providers. One-time payment of 4% of their yearly invoice for traction current would be also paid to undertakings other than DB Group to compensate them until the new pricing system would be implemented.

This case shows that Commission prefers swift opening of the market for the traction current to competitors and has the intention to ensure that there is a fair level playing field. At the time, when rail liberalization had been in progress, such decision shows that Commission aims to tackle any competition problem that might arise to ease the liberalization process. In 2016, Commission announced that the commitments were successful in reaching the goal of opening up the market for traction current to competition. Originally, the commitments were supposed to last for 5 years but with the possibility to be terminated when 25% of the total traction current demand in Germany

[179] Deutsche Bahn I, II, Op. Cit., paras. 49-54.
[180] Deutsche Bahn, Op. Cit., para. 59.
[181] Intent is not a necessary condition for the conduct to be abusive however it represents one of the criteria which can be used for the assessment of the abusive nature of the conduct under the Article 102 of the TFEU. See Deutsche Bahn I, II, Op.Cit., para. 62. Internal documents of DB Group also showed that price differentiation on the downstream market was the key objective of the pricing system for the traction current: *"[The] objective [is to] secure a price differentiation in the supply of traction current for the transport companies of the Group"* or *"DB Energie would try to maximise the discounts for DB AG to the extent possible"*. Inspection document, *case AT.39678, ID 890 / EM52*, p. 3 and Inspection document*, case AT.39678, ID 841 / EM7*, p. 2.

would be supplied by undertakings other than DB Energie. The market opening was reached in 2015 and thus the commitments were not further necessary.[182]

3.2.3 Baltic Rail

On 2 September 2008, the Lithuanian railway undertaking and infrastructure manager, AB Lietuvos geležinkeliai (LG), claimed that deformation was discovered on a 40 metre long segment of the railway track. The track was used for the transport of refined oil products made by AB ORLEN Lietuva (OL), a major LG customer, from Lithuania to Latvia. Immediately after the discovery of the deformation, the removal of the whole 19 km long track was ordered by LG.[183] Prior to the removal of the whole track in September 2008, defects on five segments of the track already appeared in September 2004 therefore the speed limit was lowered on them. In following years, the speed limits were further lowered. In May 2008, another inspection of the track was carried out and the track was considered to be safe for the transport of oil products with the restriction put on maximum allowed speed on certain segments of the track. Interestingly, no special inspection was carried out in September 2008 that would justify the removal of the whole track.[184] On 14 July 2010, a complaint was lodged against LG by OL to the Commission. In its complaint, OL alleged that by removing the track LG wanted to prevent OL from switching the rail freight operator for the oil products to the Latvian railway company Latvijas dzelzceļš (LDZ).

Commission thus started investigating the case. In its investigation, Commission found out that LG held a dominant position in both the upstream market as it was entrusted with the management of the railway infrastructure that was exclusively owned by Lithuanian state and the downstream market as it found out that LG was the main railway operator for the transport of oil products to the Latvian seaports. In its investigation, the Commission found out that LG abused its dominant position as by removing the track it removed the possibility for the OL to use services of other rail operators. Prior to the removal, there was a great opportunity for LDZ, a competitor to LG, to provide services for OL which would encompass transporting the oil products from the OL's refinery to the three Latvian seaports by the most direct and shortest route that was available. The removal of the track thus meant that the rail operators wanting to transport the oil products to the

[182] European Commission (2016), *Antitrust: successful market opening allows early termination of commitments in Deutsche Bahn case,* Press Release IP/16/1322, 8 April 2016, Brussels [online]. Available at http://europa.eu/rapid/press-release_IP-16-1322_en.htm (visited on March 5, 2018).
[183] Commission Decision of 2 October 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union, *Case AT.39813 — Baltic Rail*, C(2017) 6544, OJ C 383, 14.11.2017, para. 1.
[184]. In September 2008, only two reports were issued that dealt only with the local deformation on the track and that claimed that the deformation could have been repaired locally. See Ibid., paras. 329-337.

Latvian seaports would have to use much longer route.[185] Commission also pointed out that LG failed to offer any objective justification for the removal of the track which led to the creation of barriers to entry in the downstream market for the transportation of oil products.[186] Commission found out that the removal of the track by LG happened just one day after the termination of the agreement, it had with OL. It also argued that there was no need for urgency to remove the track since there did not exist a decision that would allocate funds for the renovation of the track.

In addition, Commission also mentioned that the removal of the track was in contrast to the standard practice in the rail industry.[187] LG had also the option to cut prices or offer better services in order to keep OL as a customer instead it ensured that no competition would exist by dismantling the track. The Commission thus adopted a decision in which it stated that LG breached Article 102 of the TFEU since it abused its dominant position by removing the track connecting the OL's refinery with the three Latvian seaports. It imposed a fine on LG in the amount €27.9 million and due to the fact that the infringement was ongoing, it ordered LG to bring the infringement to an end and to refrain from conduct that has similar effect or object which means that the Commission wanted LG to rebuild the missing track.[188]

This decision shows clear abuse of the dominant position as there does not exist any objective justification for the LG's conduct nor any efficiency gains. It also demonstrates that there can be wide variety of conducts that can constitute an abuse of dominant position. This case also demonstrates a competition problem that the rail industry faces and that is having one firm that is responsible for the operation of the rail services and simultaneously the same firm owns or manages the infrastructure. Such vertically integrated incumbent will usually have the incentive to set up the market conditions in a way it serves its interests the best. This case also shows that the relationship between competition policy and regulatory measures is rather complementary as

[185] Baltic rail, Op.Cit., paras. 205-215.
[186] The Commission found out that by removing the short route, LDZ would have to offer its services to OL by operating the long route which was however far from its logistical base and the company would be thus fully dependent on the LG in terms of the infrastructure access and provision of additional railway services. Moreover, the short route was only operated for the purpose of transporting the OL´s oil products and thus the allocation of the capacity would be much easier than in the case of the busier longer route. The existence of significant barriers to entry in Lithuania was also confirmed by OL as it pointed out that it contemplated about starting its own rail undertaking that would transport its own oil products. It however analysed that such process would take three to four years and there were risks it would not be granted the required certificates due to the close link of VGI, entity that is responsible for the decision making, and LG and thus OL abandoned the project. See Ibid., paras. 287-300.
[187] There were several tracks in Lithuania on which the transport had been suspended however none of them was removed. See Ibid., paras. 180-196.
[188] Ibid., para. 397.

in its press release, the Commission points out that since the rail freight liberalization, there was need to ensure independent management of rail infrastructure from the operation of the rail services and sufficient investment into the infrastructure, mainly the international tracks that connect Member States and thus achieve the aim of the single market. Despite these aims, even eight years after the removal of the track and more than ten years since the liberalization of the rail freight market, there has been no competition for the transportation of OL's oil products. In addition, there also does not exist wider competition within the Lithuanian rail freight market.[189] According to the Commission, the competition policy is thus an efficient tool to ensure that the regulatory measures are not replaced by anticompetitive behaviour of the dominant incumbents which would in the end prevent the rail industry to move forward and achieve the ultimate goal set up for the rail transport.[190]

3.3 Merger control

Up to date, competition concerns regarding mergers in rail industry have been resolved by commitment decisions and no prohibition decision has been adopted by Commission yet.[191] In total six mergers were, subject to conditions, approved by Commission over the period 2007–2015. Commission argued that although the mergers would create potential threat to the competition on the rail markets, the imposition of commitments on the parties would resolve these concerns. Two of the commitment decisions dealt with the competition concerns on rail freight market (acquisition of MÁV cargo by Rail Cargo Austria and the acquisition of English Welsh & Scottish Railway Holdings (EWS) by DB and the same number of commitment decisions concerned competition on international rail passenger transport (Eurostar and New Eurostar decisions). The acquisition of Arriva by DB concerned both the rail freight and passenger market and the last commitment decision, the acquisition of Ermewa by Transport et Logistique Partenaires SA (TLP), dealt with specific part of the rail freight market which was the market for cereal rail transport commissioning and wagon hire market. The overview of commitment decisions adopted by Commission can be seen in table 5.

[189] Baltic Rail, Op. Cit., para. 323.
[190] European Commission (2017), *Antitrust: Commission fines Lithuanian Railways €28 million for hindering competition on rail freight market,* Press Release IP/17/3622, 2 October 2017, Brussels [online]. Available at http://europa.eu/rapid/press-release_IP-17-3622_en.htm (visited on March 14, 2018).
[191] See Appendix 7 for the overview of EU Merger Control in the rail sector.

Table 5: Overview of the Commitment decisions regarding merger control in the EU

Year	Parties	Market	Competition Concerns	Commitments
2007	Acquisition of EWS by Deutsche Bahn[192]	Rail freight market	Elimination of EWS from the French rail freight market via the transaction, the competitive pressure from EWS onto the national incumbent SNCF would be lessened. It argued that as DB was not active on the French market for rail freight and it had several cooperation agreements with SNCF, it would not have the same incentives for the promotion of the rail freight services in France as the EWS, absent the merger.[193]	Allowing other competitors, apart from the SNCF, to access maintenance facilities and certain training activities in order to decrease potential barriers to entry to the french rail market.
2008	Acquisition of MÁV Cargo by Rail Cargo Austria[194]	Rail freight market	Role of GySEV that had its own rail network	RCA was forced to remove its structural links from GySEV
2010	Acquisition of Arriva by DB[195]	Rail freight and rail passenger market	Restriction of competition on the German market	Divestiture of Arriva Deutschland by DB
2010	Acquisition of Ermewa by TLP[196]	Rail freight market for cereal rail transport commissioning and wagon hire market	The transaction would involve creating an unavoidable partner in the rail freight market for cereals and strengthening vertical links mainly between rail traction and rail transport commissioning	Divestiture of certain Ermewa's activities on regarding the rail transportation of cereals
2010 and 2015	New Eurostar (joint venture by SNCF + LCR) + Eurostar[197]	Rail passenger market	Creation of barriers to entry	Release of certain train paths

[192] Commission Decision of 06/11/2007 declaring a concentration to be compatible with the common market, *Case M.4746 - Deutsche Bahn/English Welsh & Scottish Railway Holding*s (EWS), Official Journal C 125, 22.5.2008, paras. 53-54.

[193] Commission also investigated the impact on competition in the UK and Germany concluding that the acquisition would not raise serious competition concerns on these markets since German market was liberalized in 1994 and since then several competitors entered the market thus elimination of EWS from the market would not impose significant competitive constraint on DB since other operators were active on the market. In the UK market, absent the merger, DB´s entrance into the market would be unlikely as it is already quite competitive and apart from the traditional barriers to entry, there are those that are specific for the UK market – the purchase of rolling stock that is suitable for the characteristics of the UK market, licences, certificates, etc. See Ibid., paras. 53-54.

[194] Commission Decision of 25/11/2008 declaring a concentration to be compatible with the common market, *Case M.5096 - RCA / MAV CARGO*, Official Journal C 29 5.2.2009.

[195] European Commission (2010), *Mergers: Commission clears proposed acquisition of Arriva by Deutsche Bahn, subject to conditions*, Press Release IP/10/1049, 11 August 2010, Brussels [online]. Available at http://europa.eu/rapid/press-release_IP-10-1049_en.htm (visited on March 13, 2018).

[196] European Commission (2010), *Mergers: Commission approves proposed acquisition of Ermewa by TLP (SNCF group), subject to conditions,* Press Release IP/10/44, 22 January 2010, Brussels [online]. Available at http://europa.eu/rapid/press-release_IP-10-44_en.htm (visited on March 13, 2018).

[197] See European Commission (2015), *Mergers: Commission gives conditional authorisation for SNCF to acquire sole control of Eurostar*, Press Release IP/15/4976, 13 May 2015, Brussels [online]. Available at http://europa.eu/rapid/press-release_IP-15-4976_en.htm (visited on March 13, 2018), European Commission (2010), *Mergers: Commission clears "New Eurostar" joint venture, subject to condition,* Press Release IP/10/755, 17 June 2010, Brussels [online]. Available at http://europa.eu/rapid/press-release_IP-10-755_en.htm, http://europa.eu/rapid/press-release_IP-10-1049_en.htm (visited on March 13, 2018).

The common feature of all the commitment decisions is that without the suggested remedies, the notified transactions would lead to lessening of competition in the rail transport either through strengthening the incumbent's already strong position on the market, removing its potential competitor from the market, lessening the competition constraint of the party to the merger on the market or creating potential barriers to entry. In all those cases, Commission, however, concluded that such impediments to competition could be resolved by commitments suggested by the undertakings. In its investigation of the commitments, Commission inspected whether the commitments were compatible with the goals of the common market and the aims of rail liberalization. The imposed commitments then aimed at removing the competition concerns by divestiture of their businesses and ensuring that new entrants could access the infrastructure.

Transaction regarding rail freight market was notified to the Commission in 2008. It concerned Rail Cargo Austria (RCA) in a consortium with GySEV that wanted to acquire MÁV Cargo of Hungary.[198] The competition concerns regarded the role of GySEV in the transaction as it had its own rail network for cross-border transport between Austria and Hungary. Although, it would only acquire minor non-controlling stake in MÁV Cargo, Commission argued that it would be more prompted not to act against interests of MÁV Cargo and RCA due to its strong structural links with them. Moreover, there were serious doubts regarding the compatibility with the common market as the transaction would strengthen the links between GySEV and the other parties to the acquisition and would lead to decrease in the number of potential entrants. Despite the rail freight markets liberalization in 2007, the cross-border rail freight markets can be still characterized by the strong position of incumbents on the market and limited competition. In light of the arguments provided above, Commission thus concluded that the transaction would likely impede the competition on the rail freight market. As Competition Commissioner Neelie Kroes pointed out such transaction could however also bring benefits to the consumers.[199] Commission thus accepted the commitments proposed by RCA to remove its structural links with GySEV by divestiture of its minority shareholding in it and to review the cooperation agreements between the two parties

[198] GySEV is an integrated rail and infrastructure company with its own rail network located both in Hungary and Austria. It is controlled by the Republic of Hungary and the Republic of Austria. RCA owns a non-controlling share in it. See MÁV Cargo/RCA, Op.Cit., paras. 4-6.

[199] "*I am aware that this deal is seen by the companies as important to improve their ability to develop these freight markets*", "*I welcome any positive developments for consumers, and I am very pleased that we have managed to address quickly the competition concerns that we had in this case*." See European Commission, *Mergers: Commission approves acquisition of MÁV Cargo by Rail Cargo Austria, subject to conditions,* Press Release IP/08/1769, 25 November 2008, Brussels [online]. Available at http://europa.eu/rapid/press-release_IP-08-1769_en.htm (visited on March 10, 2018).

in order to ensure the independent position of GySEV on the cross-border rail freight market and maintain its competitive position against the newly created merger.[200]

Regarding the rail freight market, recently an accelerating trend towards more consolidated rail freight market has appeared as several acquisitions took place. The transaction usually involves a national incumbent which is expanding its business through the acquisition of private rail freight companies.[201] Radstake, however, pointed out that rail freight operators that are privately-owned account only for minor share of the European rail freight market and the national incumbents still have major share of the market. The fact that Commission has approved all the mergers so far leads to the question whether such activity does not lead to the re-monopolization of the industry and as a result would hamper growth and liberalization goals.[202]

3.4 Discussion

Competition policy plays an important role in the rail transport sector as it can complement the regulatory measures or it can help the liberalization process where the regulatory measures are missing. This was mainly showed in the Commission's decision making regarding the Article 102 of the TFEU such as FS/GVG case that dealt with essential facility doctrine or in the Deutsche Bahn decision regarding margin squeeze. Moreover, the economic characteristics of the rail sector might make the intra-modal competition difficult and thus competition authorities can also complement the regulatory framework in helping the new entrants to overcome such difficulties that result from the specificities of this sector. The specificity of rail transport can be seen in the presence of natural monopoly in the ownership of the infrastructure due to high fixed costs and economic inefficiency in duplicating the infrastructure. Furthermore, competition problems also arise from national incumbents having strong position in the European rail markets and from high barriers to entry to the rail markets.

Competition policy can thus complement the requirement of non-discriminatory access to the rail infrastructure imposed by EU regulation. The rail infrastructure is considered to be indispensable

[200] MÁV Cargo/RCA, Op.Cit., paras. 110-130.

[201] This can be seen on the example of french incumbent SNCF that recently acquired non-French operations of Veolia Cargo, Ermewa and owns German Import Transport Logistik. It stared this series of acquisitions in response to the German incumbent DB that also expanded its activities through Netherlands Railways and Danish State Railways, British EWS or Spanish Transfesa. See Barrow, K. (2010), *8 big challenges for European railfreight,* International Railway Journal, 1 January 2010 [online]. Available at https://www.railjournal.com/index.php/freight/8-big-challenges-for-european-railfreight.html.

[202] Ibid.

for the operation of services and thus is usually connected with essential facility doctrine argument. The essential facility doctrine argument was mainly developed in the regulated network industries and the conditions for its application were formed by case law throughout the time. In the rail transportation, the essential facility doctrine usually relates to the infrastructure (see FS/GVG) and should be used with respect to conducts infringing Article 102 of the TFEU (which was ruled by the Court regarding European Night Services). There has been also dispute whether the traction could be considered as an essential facility which received opposing views (Court in European Night Services and Commission in FS/GVG). It can be seen that essential facility doctrine was mainly used in the earlier stages of the liberalization process when adequate regulatory framework had been still in the process of being developed. Moreover, another specificity of the rail transport was its diversity in the requirements put on drivers or locomotives regarding the licenses or technical standards across different Member States which contributed to the fact that traction could have been considered as an essential facility in the past as it was in the FS/GVG case.

There are also high barriers to entry to the rail services market which are related to high administrative (licensing), technical (signalling, gauge) or financial (high up-front investment) barriers. New competitors thus have incentives to cooperate with the established market players to lower these barriers to entry. The cooperation can take form of a simple agreement, it can lead to alliances or even to mergers. Such cooperation can be beneficial as it might create efficiencies and synergies, it can also lead to development of new services and foster new entry to the markets. In addition, such cooperation can bring economies of scale and scope which belong among the main defining characteristics of the network industries. The cooperation can however also lead to restriction of competition as it can remove potential competitors from the markets and as a result lead to decrease in incentives to innovate, to offer quality products or it can lead to increase in prices for consumers.

The concentrations are either inspected under the Article 101 of the TFEU or under the Merger regulation. Over the years, Commission prohibited two agreements under the Article 101 of the TFEU. The first one was ENS joint venture which was in the end approved by the CFI. The second one was cartel for Blocktrain services where the parties fixed prices and shared private information about the customers. It can be thus concluded that not much anticompetitive conduct has happened regarding the Article 101 of the TFEU with respect to rail transportation. Regarding the Merger regulation, there has been so far more cases that exerted anticompetitive effects however

Commission has not adopted any prohibition decision regarding the merger activity. All of the competitive concerns were resolved by imposing commitments on the parties.

Moreover, from the regulatory and competition point of view, vertical integration has been and is still a problem. This results from the historical roots of the rail sector as for a long time rail transport was in the hands of the national incumbents that owned both the infrastructure and operation of services. In addition, natural monopoly is a typical setting in the ownership of infrastructure due to the fact that it is not economically viable to duplicate the infrastructure and there are high sunk costs. Regulators thus have to solve the dilemma how to ensure the independence between rail infrastructure and operation of services since fair, non-discriminatory access to the infrastructure is the key to level playing field in the market and to the introduction of more competition. The case law supports this idea as the earlier case in the liberalization process shows how competitors can be disadvantaged when the infrastructure manager is still part of the company that is responsible for the operation of services and thus can lead to various abuses of the dominant position with respect to the access to infrastructure. In FS/GVG, RFI refused to provide GVG with access to the Italian rail infrastructure thus supporting the view of complete institutional separation. More recently, Deutsche Bahn example shows that such vertical integration might also result in margin squeeze or that the vertical integration will usually lead to conduct in which the vertically integrated company will act for its own benefit as it did in case of Baltic rail when LG removed the track to prevent its customer OL from contracting with another party.

4 Comparison of rail and air network industries in terms of liberalization and competition enforcement

In the past, both air and rail transport could have been characterized by a monopoly structure, limited access to the markets and by a restricted choice for consumers. Traditionally, these sectors were operated by national incumbents. There were various reasons to change the traditional settings in these industries as it was found out that some components of the sectors did not have to be in the hands of just one firm (such as the operation of services) and thus the sectors started to be deregulated and gradually prepared for opening to competition. The aviation sector was transformed through three aviation liberalization packages to a competitive sector, the process being concluded in 1997. In comparison to the air sector, rail sector was much more difficult to liberalize and the process was not uniform as the international and domestic rail freight transport was liberalized prior to the liberalization of the international rail passenger transport. In addition, domestic passenger transport is still in the process of being liberalized due to the presence of several public service obligations in the regional rail transport.

The liberalization of rail industry when compared to air industry was also much more difficult and slower due to more national characteristics of the market which resulted in the creation of barriers to entry to such markets. The problems have not been resolved yet and are connected with vertical integration of the infrastructure manager and operator of services and technical interoperability. Regarding vertical integration there were three types of vertical separation introduced throughout the years and several infringement procedures were carried out against several states for not complying with the respective measures. The air sector can thus serve as an example as the infrastructure and operation of services are not interlinked anymore and the competition is functioning quite well in this respect. Another big issue is technical interoperability as the national markets had different requirements for the rail tracks or for obtaining the licence for operation of the services which also contributed to the limitation of competition.

The general competition law framework had not been fully applicable to the rail and air transport and the competition rules were subject to particular conditions and exemptions. The judgement in Nouvelles Frontières case incorporated the air sector under the general competition law framework and with the adoption of Regulation 1/2003 rail transport was also incorporated. From the inspection of case law in chapter 2 and 3, it can be seen that the competition problems usually arise from the specificities of these networks. The major competition problems in these sectors are

connected with the creation of high barriers to entry which deter new competitors from entering the respective markets. In the rail sector, rail companies merge or form joint ventures in order to overcome the high costs that are required for starting and running the business. Such concentrations are then prone to create high barriers to entry. Similarly to the rail sector, airlines also merge and form alliances to lower the costs, however, the major motivation behind forming the concentrations is due to the fact that many airports in the EU are congested. Unlike the rail transport where the access problems to the infrastructure result from the vertically integrated incumbents and the presence of natural monopoly, the limited access to air markets can be contributed to the scarcity of the slots that are usually in the possession of major airlines.

The competition problems in the rail sector usually arise due to historically still strong position of the national incumbents in the industry and due to the fact that there are still present vertical links between the infrastructure owner and the operation of the services. This anticompetitive practices are usually attributable to the unique rail infrastructure that requires high fixed costs and the dominant undertakings conduct practices that lead to the foreclosure of the market. In the early years, the concept of essential facility regarding the access to the infrastructure was quite important and complemented the regulatory framework. On the other hand, the main competition focus in the air sector is directed towards mergers and alliances as the industry is experiencing a degree of consolidation. In both sectors, it seems that the Commission supports some level of consolidation. In the rail sector, it is however quite questionable whether the merger activity does not lead to the re-monopolization of the industry since there are not that many competitors present overall as in the airline sector which could set back the liberalization goals. On the other hand, in contrast to air transport, the activity towards higher consolidation of the sector and creation of alliances is quite low which might be due to the fact that the rail sector was not liberalized until recently and the number of competitors is still quite low since the industry still retains some drawbacks regarding the technical interoperability, high costs of starting the new business and the fact that the national incumbents have still high market shares and thus do not have such big incentives to expand.

It is, however, difficult to determine the right market setting in industries that possess such special characteristics as rail and air sector and require high up front investments. It can be argued that the efficient market setting in these industries will be neither the perfect competition in which the market is fragmented among many competitors nor a monopoly structure with just one firm. It is thus probable that the markets will tend to be oligopolistic as well-established market players with significant shares are able to ensure quality, safety, interoperability and simultaneously such

market setting is likely to ensure return on investment and long-term sustainability. More fragmented market would probably yield adverse results harming both the consumers and the industries.[203] On the other hand, monopoly structure contributes to market setting in which incentives for innovation are low, prices are high and the rail services are subsidized by the state.[204]

Overall, the liberalization in the air sector was quite a success with the emergence of low-cost carriers in the industry which led to the opening of the markets for competition, contributing to better consumer welfare as there is now greater choice for the passengers and the fares are lower. It seems that Commission handles the decision making regarding the competition threats in the airline industry quite well. The only problem that seems to be pronounced are quite high barriers to entry due to several airports being congested. This should not be, however, the issue of competition policy as it cannot ensure adequate slot allocation mechanism for everyone but rather it should be the goal of the regulators. The rail sector is, however, more complex in terms of enforcement of competition rules and the liberalization process. The industry is still dominated by national incumbents with some market players entering the market but still having minor market shares. The industry still retains certain specific characteristics that should be focused on in order to enable more competitors to enter the market. These issues are connected to vertical integration of the infrastructure management and operation of services and technical interoperability. Some of the issues can be also addressed by the competition policy however such issues are better addressed by the general regulatory framework that should be well established and the competition policy should rather complement it. It is also questionable whether the optimal setting of the rail industry is similarly to the air sector likely to be few dominant market players and thus there could be expected more Commission's activity regarding merger and alliance control. In this respect, adequate regulatory framework should be created to monitor the merger activity and the market shares of the undertakings in order to ensure also the presence of smaller operators on the market and support innovations.

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[203] The privatisation of the British rail in 1992 can serve as an example of a market that is fragmented and does not work as well as expected, there are signalling failures, lack of information or safety. Moreover, privatisation contributed to the situation in which competitor minds its own profitability and does not collaborate to improve the system as a whole. See Plimmer, G. and J. Ford (2018), *Rail: frustration grows with Britain's fragmented network,* Financial Times, January 29 2018 [online]. Available at https://www.ft.com/content/d82848ca-f7ba-11e7-88f7-5465a6ce1a00 (visited on April 17, 2018).

[204] This can be showed on a French example where SNCF is the only operator for passenger rail services. See Crozet, Y. (2016), Liberalisation of passenger rail services, Case Study – France, Centre on Regulation in Europe, 6 December 2016, p.30 [online]. Available at http://www.cerre.eu/sites/cerre/files/161206_CERRE_ PassRailComp _CaseStudy_France.pdf (visited on April 15, 2018).

The Commission has also pointed out the need to focus on the transport policy and prioritise the enforcement of antitrust, State aid and regulatory rules during the competition law conference in the transport sector. The conference uncovered and confirmed the points already stated above that the liberalization process of the rail sector was not that successful. There are still several problems that need to be tackled in the rail industry such as strong position of the national incumbents, high barriers to entry (difficult access to rolling stock) and the fact that the rules are not adequately implemented by the Member States. It suggests that Commission should be stricter in carrying out infringement procedures against the Member States and in enforcing the competition rules.[205] The outcomes of the competition conference are very similar to what Competition Commissioner Margrethe Vestager proposes and that is to attract more complaints and undertake more investigations into the anticompetitive practices in the rail industry. Moreover, the cooperation with national regulators and authorities should be supported. The Commission's ambition to uncover the anticompetitive practices in the rail sector can be evidenced by four dawn raids that were conducted over the period of six months.[206] Unlike many other network industries that faced similar challenges, the competition in the rail sector remains limited which might be due to strong position of the national incumbents that own the infrastructure and the undertakings are afraid to bring complaints against them.

[205] Levitt, M. and Citron, P. (2017), *Rail sector comes under EU antitrust and regulatory spotlight,* Kluwer Competition Law Blog [online]. Available at http://competitionlawblog.kluwercompetitionlaw.com/2017/02/20/rail-sector-comes-eu-antitrust-regulatory-spotlight/ (visited on April 3, 2018).

[206] The raids regarded exclusionary anticompetitive practices of the Austrian rail passenger operator OBB in 2015 and access issues such as refusal to sell the rolling stock or pricing strategies by OBB, Slovakian rail operator and Czech national incumbent – České dráhy. See Gibson Dunn (2016), *New EU Inspections to Introduce Competition in the Rail Sector*, August 19, 2016 [online]. Available at https://www.gibsondunn.com/new-eu-inspections-to-introduce-competition-in-the-rail-sector/ (visited on April 3, 2018).

Conclusion

Rail and air transport are typical representatives of the network industries that require high fixed costs, can be characterized by high barriers to entry and by natural monopoly structure. Traditionally, these sectors were operated by the national incumbents. This market structure started to change with the introduction of the EU transport policy, which belonged among one of the first common policies established in the EU. Despite the fact that the grounds for its development were established already by the Rome Treaty in 1957 and the fact that the Commission adopted numerous proposals on the goals and legal framework on the common transport policy, no action had been taken by the Council until 1985 when the European Court of Justice stated that the Council failed to act regarding the common transport policy. The judgement together with the Single European Act prompted the liberalization efforts of the air and later rail transport. The liberalization of the aviation sector was achieved via three aviation liberalization packages while in the rail sector there were four rail liberalization packages and the sector still experiences specific issues that need to be tackled by the regulators. The liberalization process introduced competition in the rail and air transport. The competitive environment of the airline and rail sector thus required adequate competition rules, which would prevent anticompetitive practices taking place. Furthermore, competition policy should have ensured that the outcomes of the liberalization process were not cancelled out by anticompetitive behaviour of the market players.

The focus of this thesis lies in the analysis of how the Commission and the Court of Justice of the EU manages to apply the competition rules regarding the specific nature of the transport sector. The main research question is then devoted to the analysis of the cases decided by the Commission and the Court of Justice of the EU in order to look for the specific aspects inherent in the application of competition rules to the transport sector, specifically the airline and rail industry, in the EU. The air and rail sector can be characterized by various economic aspects as network industries. In its decision making regarding the air sector, the Commission has taken into account mainly high barriers to entry to the airline markets as there are high costs regarding the initial investment and majority of the airports in the EU are congested. Moreover, former flag carriers still benefit from big market shares. The specificity of rail transport can be seen in the presence of natural monopoly in the ownership of the infrastructure due to high fixed costs and economic inefficiency in duplicating the infrastructure. Furthermore, national incumbents still have strong position in the European rail markets and there are high barriers to entry to the rail markets.

In the earlier years of the air sector liberalization, anticompetitive practices by both airlines and airports were reviewed by the Commission under the then equivalent Article 102 of the TFEU. Former flag carriers were investigated by the Commission regarding the application of discriminatory loyalty schemes to their travel agents and refusal to interline which was by some authors considered as quasi-essential facility since the interlining agreements were considered to be standard practice in the airline industry. In both cases, Commission found infringement of the Article 102 of the TFEU and prohibited these practices. Discriminatory practices were also investigated in relation to landing fees set up by the airports. It can be however argued that this was the case in the pre-liberalization period and since then no such conduct was investigated by the Commission. There has been so far very little activity in enforcing the rules set in the Article 101 of the TFEU apart from two hard-core cartel cases, the early case of market-sharing agreement between SAS and Maersk Air and more recent case of price-fixing cartel.

The focus of the Commission's activity in the airline sector nowadays is directed towards the compatibility of the airline alliances with the Article 101 of the TFEU and the proposed mergers with the Merger Regulation. There has however been only two prohibition decisions regarding the airline alliances and mergers as Commission has so far only prohibited the merger between Ryanair and Aer Lingus and merger between Olympic Air and Aegean Airlines, which was afterwards approved due to financial difficulties of the Olympic Air. The usual practice in both airline alliance and merger cases is that the Commission issues commitment decision by which the anticompetitive effects of the merger and airline alliance are resolved. The usual remedy used in these cases has been the slot divestiture by the incumbent airlines. In addition, congestion at many EU airports is the most pronounced problem of the airline sector today and thus adequate regulatory framework should be developed since the competition rules are not capable to address this problem entirely.

Competition policy in the rail sector regarding Article 102 of the TFEU dealt with so-called essential facility doctrine. In the rail transportation, the essential facility doctrine usually relates to the infrastructure as pointed out in FS/GVG case and should be used with respect to conducts infringing Article 102 of the TFEU as stated by the Court in the European Night Services. The cases decided by the Commission showed how competition policy implements the regulatory measures in ensuring fair and non-discriminatory access to rail infrastructure. This was also demonstrated in Deutsche Bahn case regarding margin squeeze. Vertical integration of the infrastructure manager and operator of services is another problem that also contributed to

anticompetitive practices that infringed Article 102 of the TFEU. This can be apart from the previous cases demonstrated on the recent Baltic Rail case in which vertically integrated company LG removed the track to prevent its customer OL from contracting with another party.

The rail sector can be also characterized by high barriers to entry. New competitors thus have incentives to cooperate with the established market players to lower these barriers to entry. The cooperation can then take form of an agreement that falls under the Article 101 of the TFEU or of a more integrated concentration that fall under the Merger Regulation. Over the years, Commission prohibited two agreements under the Article 101 of the TFEU. The first one was ENS joint venture which was in the end approved by the CFI. The second one was cartel for Blocktrain services where the parties fixed prices and shared private information about the customers. It can be thus concluded that not much anticompetitive conduct has happened regarding the Article 101 of the TFEU with respect to rail transportation. Regarding the Merger regulation, there has been so far more cases that exerted anticompetitive effects however, in contrast to air transport, Commission has not adopted any prohibition decision regarding the merger activity yet. All of the competitive concerns were resolved by imposing commitments on the parties.

The goal of the decision making of the Commission and Court of Justice of the EU is to ensure the creation of EU single transport market with efficient competition and enhanced consumer welfare in terms of greater choice, quality and lower prices for the consumers. The analysis of case law also showed that this should be done by ensuring fair and non-discriminatory access to the infrastructure, lowering the barriers to entry and by favouring some level of concentration on the transport markets while ensuring that it complies with the goals of the EU internal market. This thesis thus concludes that the Commission handles the decision making regarding the competition threats in the airline and rail industry quite well. It seems that it uses the competition law as an efficient tool in order to complement and support the liberalization process in both industries. Moreover, the thesis provides overview of the case law developed over the years in the air and rail transport and simultaneously tries to point out the specific aspects of these sectors that can be encountered in the decisions adopted by the Commission and the Court of Justice of the EU.

Bibliography

Articles

Alexandersson, G. and S. Hultén (2008), *The Swedish railway deregulation path*, Review of Network Economics, 7(1): 18-36 [online]. Available at https://www.researchgate.net/publication/24049786_The_Swedish_Railway _Deregulation_Path.

Balfour, J. (2004), *EC Competition Law and Airline Alliances*, Journal of Air Transport Management 10 (2004) 81–85, p.1 [online]. Available at https://www.sciencedirect.com/ science/article/pii/S0969699703000760_(visited on December 6, 2017).

Balfour, J. (2014), *Airline Liberalisation and Competition: the EU Experience,*Directorate For Financial and Enterprise Affairs, Competition Committee, OECD, DAF/COMP(2014)22, p.3 [online]. Available at www.oecd.org /officialdocuments/publicdisplaydocumentpdf/?cote=DAFCOMP(2014)22&doc Language=En

Burghouwt, G., P. Mendes de Leon and J. De Wit (2015), *EU Air Transport Liberalisation*, January 2015, p. 7 [online]. Available at https://www.itf-oecd.org/sites/default/files/docs/dp201504.pdf (visited on November 12, 2017).

Butcher, L. (2010), *Aviation: European liberalisation, 1986-2002*, SN/BT/182, May 2010 [online]. Available at http:// researchbriefings.files.parliament.uk/documents/SN00182/SN00182.pdf (visited on November 11, 2017).

Butcher, L. (2017), *Airport slots*, Briefing paper Number CBP 488, 12 June 2017, p.2 [online]. Available at http://researchbriefings.files.parliament.uk/documents/SN00488/SN00488.pdf.

Canelas, H. and Ramos, P. (2016), Consolidation in Europe's Airline Industry, Boston Consulting Group, August 2016, p. 1 [online]. Available at http://img-stg.bcg.com/BCG-Collaboration-and-Consolidation-in-the-European-Airline-Industry-Aug-2016_tcm9-53703.pdf (visited on March 3, 2018).

Castaldo, A. and A. Nicita (2005), *Essential Facility Access in Us and EU: Drawing a Test for Antitrust Policy* [online]. Available at https://ssrn.com/abstract=877135 (visited on March 5, 2018).

Dempsey P. (2001), *Competition in the Air: European Union Regulation of Commercial Aviation,* Journal of Air Law and Commerce 979 Volume 66, p. 1003 [online]. Available at https://scholar.smu.edu/cgi/viewcontent. cgi?article=1587&context=jalc (visited on April 14, 2018).

Drauz, G., T. Chellingsworth and H. Hyrkas (2010), *Recent Developments in EC Merger Control*, Journal of European Competition Law & Practice, 2010, Vol. 1, No. 1, p.14.

Eisenkopf, A. (2006*), Opening the Rail Freight Market in Europe – an Economic Assessment,* Forum on the Liberalisation of Rail Transport in the EU, DOI: 10.1007/s10272-006-0200-9, pp. 292-295 [online]. Available at https://link.springer.com/content /pdf/10.1007/s10272-006-0200-9.pdf (visited on November 13, 2017).

Eisenkopf, A., C. Kircher, G. Jarzembowski, J. Ludewig, W. Rothengatter and G. McCullough (2006), *The liberalisation of rail transport in the EU*, Intereconomics 41(6), November/December 2006, pp.309 – 310 [online]. Available at https://www.researchgate.net/publication /24055920_The_Liberalisation_of_Rail_Transport_in_the_EU (visited on March, 13, 2018).

Furse, M. (2017), *Testing the limits: Ryanair/Aer Lingus and the boundaries of merger control*, European Competition Journal, Volume 12, 2016 - Issue 2-3, pp. 462-483 [online]. Available at https://www.tandfonline.com/doi/pdf/10.1080/17441056.2017.1292719?needAccess=true (visited on March 2, 2018).

Giannino, M. (2017), *The Application Of The Doctrine Of Essential Facilities In The European Rail Transport Sector: Has The 7th Cavalry Finally Arrive*d?, Diritto internazionale, pp. 9-11 [online]. Available at https://www.diritto.it/pdf_archive/23120.pdf (visited on December 15, 2017).

Gudmundson, S.V. (2014), *Mergers vs alliances. The Air France-KLM story,*pp 14-16 [online]. Available at http://ssrn.com/abstract=2142915 (visited on March 6, 2018).

Chari (2015), *Mergers in the EU's Airline Sector: A Bumpy Ride?*, European Union Centre of Excellence Working Papers No 1, University of Alberta, Chapter 3 [online]. Available at https://cloudfront.ualberta.ca/-/media/eucentre/pdfs/raj-chari-working-paper2.pdf (visited on February 6, 2018).

Knieps, G., *Competition and the railroads: A European perspective*, 2013, Oxford University Press, Journal of Competition Law&Economics, 9(1), 153-169 [online]. Available at https://academic.oup.com/jcle/article/9/1/153/864671 (visited on November 13, 2017).

Koch O. (2010), *Yes, we can (prohibit) – The Ryanair/Aer Lingus merger before the Court*, Competition Policy Newsletter No 3, pp. 1-5 [online]. Available at http://ec.europa.eu/competition/publications/cpn/2010_3_9.pdf (visited on February 20, 2018).

Majewska M. (2014), *EUROPEAN UNION TRANSPORTATION POLICY FROM THE TREATY OF MAASTRICHT UP TO NOW,* Univeristy of Białystok, Faculty of Law, p. 76 [online]. Available at http://dfk-online.sze.hu/images/sjpj/2014/1/majewska.pdf (visited on April 13, 2018).

OECD (2014), Airline Competition, Directorate For Financial and Enterprise Affairs Competition Committee, DAF/COMP/WD(2014)28, 13 June 2014, p. 8 [online]. Available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2014)28&docLanguage=En (visited on April 15, 2018).

Schmillen, M. (2014), *The Deutsche Bahn case – promoting the development of competition on the rail markets*, NZKart 7/2014, p. 261-263.

Slot P.J. (2004), *A View From the Mountain: 40 Years of Development in European Communities Competition Law*, Common Market Law Review 443, p. 453.

Steer Davies Gleave (2007), *Competition Impact of Airline Code-Share Agreements,* Final Report, European Commission DG Competition, January 2007, p.1 [online]. Available at http://ec.europa.eu/competition/sectors/transport/reports/airline codeshare.pdf (visited on December 4, 2017).

Stehmann O. and I. Mackay (2003), *Liberalisation and competition policy in railways*, Competition Policy Newsletter No 3, p. 25[online]. Available at http://ec.europa.eu/competition/publications/cpn/2003_3_21.pdf.

Remetei-Filep A. (2013), *Strategic airline alliances and restrictions of competition by object under EU competition law*, King's College London, p. 40 [online]. Available at https://kclpure.kcl.ac.uk/portal/files/13554825/Studentthesis-%C3%81d%C3%A1m_Remetei-Filep_2013.pdf (visited on January 20, 2018).

Weinberg, S. (1991), *Liberalization of Air Transport: Time For The EEC To Unfasten Its Seatbelt*, University of Pennsylvania Law School, Penn Law: Legal Scholarship Repository, 2014, p.11 [online]. Available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1574&context=jil (visited on April 15, 2018).

Books

Jones, A. and B. Sufrin (2014), *EU Competition Law: text, cases and materials*, Oxford University Press, fifth edition, ISBN 978-0-19-966032-2.

Motta, M. (2004), *Competition Policy, Theory and Practice*, Cambridge University Press Cambridge 2004, p. 57.

Nikolinakos, N. (2006), *EU Competition Law and Regulation in the Converging Telecommunications, Media and IT Sectors*, Kluwer Law International, ISBN 9041124691, pp. 698.

Russo, F., M.P. Schinkel, M. Carree and A. Günster, (2010), *European Commission Decisions on Competition Economic Perspectives on Landmark Antitrust and Merger Cases*, Cambridge University Press, II. Title, ISBN 978-0-521-11719-7, pp. 185.

Whish R. and D. Bailey (2012), *Competition law,* Oxford University Press, 7th edition, p.162 [online]. Available at http://bem.law.ui.ac.id/fhuiguide/uploads/materi/hpu-ebook-competition-law_richard-wish.pdf.

Case-law

Bundeskartellamt (2002), Beschluss in dem Verwaltungsverfahren gegen Deutsche Lufthansa AG, Köln, B 9 – 144/01, Bonn.

Commission Decision of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty, *IV/31043 - Tetra Pak II,* Official Journal J L 72, 18.3.1992, p. 1–68.

Commission Decision of 26 February 1992 relating to a procedure pursuant to Articles 85 and 86 of the EEC Treaty, *IV/33.544 - British Midland v. Aer Lingus*, Official Journal L 96, 10.4.1992, p. 34–45, paras. 1-5.

Commission Decision 94/663/EC of September 21, 1994, *European Night Services*, Official Journal 1994 L259/20 paras 12-21.

Commission Decision of 28 June 1995 relating to a proceeding pursuant to Article 90 (3) of the Treaty, Official Journal L 216, 12.9.1995, p. 8–14.

Commission Decision of 16 January 1996 relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the EEA Agreement*, IV/35.545 - LH/SAS*, Official Journal L 54, 5.3.1996, p. 28–42, paras. 44-56.

Commission Decision of 10 February 1999 relating to a proceeding pursuant to Article 90 of the Treaty, *Case No IV/35.703 - Portuguese airports*, Official Journal L 69, 16.3.1999, p. 31–39.

Commission Decision of 10 February 1999 relating to a proceeding pursuant to Article 86 of the Treaty, *IV/35.767 - Ilmailulaitos/Luftfartsverket*, Official Journal L 69, 16.3.1999, p. 24–30.

Commission Decision of 14 July 1999 relating to a proceeding under Article 82 of the EC Treaty, *IV/D-2/34.780 - Virgin/British Airways*, Official Journal L 30, 4.2.2000, p. 1–24, paras. 7-10.

Commission Decision of 18 July 2001 relating to proceedings pursuant to Article 81 of the EC Treaty and Article 53 of the Agreement on the European Economic Area, *Case COMP.D.2 37.444 — SAS Maersk Air and Case COMP.D.2 37.386 — Sun-Air versus SAS and Maersk Air*, Official Journal L 265, 5.10.2001, p. 15–41, para. 15.

Commission Decision of 10 March 2003, *Case Comp/A.38.477/D2- British Airways / SN Brussels Airlines*, 10 March 2013, para. 42 [online]. Available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/38477 /38477 _19_3.pdf (visited on December 7, 2017).

Commission Decision of 27 August 2003 relating to a proceeding pursuant to Article 82 of the EC Treaty, *Case COMP/37.685 GVG/FS*, C(2003) 3057, para. 1.

Commission Decision of 06/11/2007 declaring a concentration to be compatible with the common market, *Case M.4746 - Deutsche Bahn/English Welsh & Scottish Railway Holding*s (EWS), Official Journal C 125, 22.5.2008, paras. 53-54.

Commission Decision of 25/11/2008 declaring a concentration to be compatible with the common market, *Case M.5096 - RCA / MAV CARGO*, Official Journal C 29 5.2.2009.

Commission Decision of 09/01/2009 declaring a concentration to be compatible with the common market according to Council Regulation (EC) No 139/2004, *Case No COMP/M.5364 - Iberia/Vueling/Clickair*, Official Journal C 72, 26.3.2009, p. 23–23.

Commission Decision of 14.07.2010 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, *Case COMP/39.596 – BA/AA/IB*, para. 32-33 [online], Available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39596/39596_4342_9.pdf (visited on December 7, 2017).

Commission Decision of 9.11.2010 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport, *Case AT.39258 — Airfreight*, C(2010) 7694 final, 9.11.2010, Brussels, paras. 103-110.

Commission Decision of 23 May 2013 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union, *Case AT.39595 — Continental/United/Lufthansa/Air Canada*, C(2013) 2836 final, 23.5.2013, Brussels, paras. 36-38 [online], Available at http://ec.europa.eu/competition/antitrust/cases/dec_docs /39595/39595_3012_4.pdf (visited on December 6, 2017).

Commission Decision of 05/08/2013 declaring a concentration to be compatible with the common market, *Case No COMP/M.6607 - Us Airways / American Airlines*, C(2013) 5232 final, 5.8.2013, Brussels, paras. 153-172.

Commission Decision of 18 December 2013 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union, *Case AT.39678/AT.39731 — Deutsche Bahn I/II*, OJ C 86, 18.12.2013, paras. 3-5.

Commission Decision of 14/11/2014 declaring a concentration to be compatible with the common market, Case *No COMP/M.7333 - Alitalia / Etihad*, C(2014) 8708 final, 14.11.2014, Brussels, paras. 406-409.

Commission Decision of 12 May 2015 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union, *Case AT.39964 — Air France/KLM/Alitalia/Delta*, C(2015) 3125 final, 12.5.2015, Brussels, paras. 39-42 [online]. Available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39964 /39964_1755_5. pdf (visited on December 6, 2017).

Commission Decision of 14/07/2015 declaring a concentration to be compatible with the common market according to Council Regulation (EC) No 139/2004, *Case No COMP/M.7541 - IAG / Aer Lingus*, C(2015) 5026 final, 14.07.2015, Brussels.

Commission Decision of 15.7.2015 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union, *Case AT.40098-Blocktrains*, C(2015) 4646 final, paras. 1-10.

Commission Decision of 2 October 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union, *Case AT.39813 — Baltic Rail*, C(2017) 6544, OJ C 383, 14.11.2017, para. 1.

Commission Decision of 21/12/2017 declaring a concentration to be compatible with the common market, *Case No COMP/M.8633 - Lufthansa / Certain Air Berlin Assets*, C(2017) 9118 final.

Judgment of the Court of 4 April 1974, *Commission of the European Communities v French Republic,* ECLI:EU:C:1974:35.

Judgment of the Court of 14 February 1978, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, ECLI:EU:C:1978:22, p. 290.

Judgment of the Court of 29 June 1978, *Case 77/77-Benzine en Petroleum Handelsmaatschappij BV and others v Commission of the European Communities*, ECLI:EU:C:1978:141.

Judgment of the Court of 13 February 1979, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECLI:EU:C:1979:36, p. 479.

Judgment of the Court of 22 May 1985*, European Parliament v Council of the European Communities – Common transport policy*, ECLI:EU:C:1985:220.

Judgment of the Court of 30 April 1986, *Criminal proceedings against Lucas Asjes and others, Andrew Gray and others, Andrew Gray and others, Jacques Maillot and others and Léo Ludwig and others,* ECLI:EU:C:1986:188.

Judgement of the Court of First Instance of 15 September 1998, *European Night Services Ltd (ENS) v Commission of the European Communities*, Joined cases T-374/94, T-375/94, T-384/94 and T-388/94, ECLI:EU:T:1998:198, paras. 212-213.

Judgment of the Court (Sixth Chamber) of 24 October 2002, *Aéroports de Paris v Commission of the European Communities*, Case C-82/01 P, ECLI:EU:C:2002:617.

Judgment of the Court of First Instance (Fourth Chamber, extended composition) of 27 September 2006, T-168/01 - *GlaxoSmithKline Services Unlimited v Commission of the European Communities*, ECLI:EU:T:2006:265, para. 147.

Judgment of the General Court (Third Chamber) of 6 July 2010, *Ryanair Holdings plc v European Commission*, ECLI:EU:T:2010:280.

Judgment of the Court (First Chamber) of 17 February 2011, *Konkurrensverket v TeliaSonera Sverige AB*, Case C-52/09, CLI:EU:C:2011:83, para.33.

Judgment of the Court (Second Chamber), 13 December 2012, *Expedia Inc. v Autorité de la concurrence and Others*, ECLI:EU:C:2012:795.

Judgment of the General Court (Eighth Chamber) of 29 March 2012, *Telefónica and Telefónica de España v Commission*, Case T-336/07, ECLI:EU:T:2012:172, paras. 212-265.

Office of Rail Regulation decision of 17 November 2006 *English, Welsh and Scottish Railway Limited*, [2007] UKCLR 937.

Opinion of Advocate General Jacobs delivered on 28 May 1998, *Case C-7/97*, ECLI:EU:C:1998:264, para. 56.

Summary of Commission Decision of 27 June 2007 declaring a concentration to be incompatible with the common market and the EEA Agreement, *Case COMP/M.4439 — Ryanair/Aer Lingus*, Official Journal C 47, 20.2.2008, p. 9–20.

Summary of Commission Decision of 28 August 2009 declaring a concentration compatible with the common market and EEA Agreement, *Case COMP/M.5440 — Lufthansa/Austrian Airlines*, Official Journal C 16, 22.1.2010, p. 11–16.

Summary of Commission Decision of 9 October 2013 declaring a concentration compatible with the internal market and the functioning of the EEA Agreement, *Case COMP/M.6796 — Aegean/Olympic II*, Official Journal C 25, 24.1.2015, p. 7–15, paras. 59-64.

Summary of Commission Decision of 17 March 2017 — Relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport, *Case AT.39258 — Airfreight*, Official Journal C 188, 14.6.2017, p. 14–19.

Verizon Communications v. Law Offices of Curtis Trinko, LLP, 157 L.Ed. 2d 823 (2004).

Legislation of the European Union

Air Transport Agreement (2007), Official Journal L 134/4, 25.5.2007, p. 4–41, Annex 4.

Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.4.2004, p. 18–24.

Consolidated Version of the Treaty of European Union and the Treaty on the Functioning of the European Union [2012], Official Journal 326, 26.10.2012, p. 13–390.

Council Decision of 14 December 1987 on the sharing of passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air-service routes between Member States, Official Journal L 374, 31.12.1987, p. 19–26.

Council Directive 83/416/EEC of 25 July 1983 concerning the authorization of scheduled inter-regional air services for the transport of passengers, mail and cargo between Member States, Official Journal L 237, 26.8.1983, p. 19–24.

Council Directive 87/601/EEC of 14 December 1987 on fares for scheduled air services between Member States, Official Journal L 374, 31.12.1987, p. 12–18.

Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways Art.5, Official Journal L 237, 24.8.1991, p. 25–28.

Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, Official Journal L 374, 31.12.1987, p. 0001 – 0008.

Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector, Official Journal L 374, 31.12.1987, p. 9–11.

Council Regulation (EEC) No 2342/90 of 24 July 1990 on fares for scheduled air services, Official Journal L 217, 11.8.1990, p. 1–7.

Council Regulation (EEC) No 2343/90 of 24 July 1990 on access for air carriers to scheduled intra-Community air service routes and on the sharing of passenger capacity between air carriers on scheduled air services between Member States, Official Journal L 217, 11/08/1990 P. 0008 – 0014.

Council Regulation (EEC) No 2344/90 of 24 July 1990 amending Regulation (EEC) No 3976/87 on the application of article 85 (3) of the treaty to certain categories of agreements and concerted practices in the air transport sector, Official Journal L 217, 11.8.1990, p. 15–16.

Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers, Official Journal L 240, 24.8.1992, p. 1–7.

Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, Official Journal L 240 , 24/08/1992 P. 0008 – 0014.

Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services, Official Journal L 240, 24/08/1992 P. 0015 – 0017.

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, Official Journal L 1, 4.1.2003, p. 1–25.

Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Official Journal L 24, 29.1.2004, p. 1–22.

Regulation (EEC) No 1017/68 of the Council of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway, Official Journal L 175, 23.7.1968, p. 1–12.

Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) Art. 3, Official Journal L 293, 31.10.2008, p. 3–20.

Single European Act Art.59, Official Journal L 169, 29.6.1987, p. 1–28.

Treaty establishing the European Community (Consolidated version 2002), Official Journal C 325, 24.12.2002, p. 33–184, Article 82(c) of the Treaty.

Treaty Establishing the European Coal and Steel Community and Annexes I-III, Paris, 18 April 1951.

Treaty establishing the European Economic Community, 15 March 1957.

Guidelines and other documents of the European Union

Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis), Official Journal C 368, 22.12.2001, p. 13–15.

Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, Official Journal C 101, 27.4.2004, p. 65–77.

Commission staff working document (2014), *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives*, COM/2014/0453 final.

Commission Notice on the Conduct of Settlement procedures, Official Journal L171, 1.7.2008, p. 3.

Commission of the European Communities (2006), *Report from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions on the implementation of the first railway package*, Brussels, 3.5.2006, COM(2006) 189 final.

Commission White Paper of 30 July 1996, *A strategy for revitalising the Community's railways*, COM(96) 421, p. 1-40.

Communication from the Commission to the Council and the European Parliament on the implementation and impact of Directive 91/440/EEC on the development of the Community's railways and on access rights for rail freight, COM (1998) 202 final, 31.3.1998, Brussels [online]. Available at https://publications.europa.eu/en/publication-detail/-/publication/7efb9273-72a3-45c0-9ca6-3e7f904cffaa (visited on April 14, 2018).

Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty, Official Journal C101/08, 27.4.2004, p. 97–118.

Communication from the Commission (2009), *Guidance on the Commission´s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, Official Journal C 45, 24/02/2009, p. 7–20.

Court of Justice (2002), Commission v United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, Germany (Judgments in Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98), Press Release No 89/02, 5 November 2002 [online]. Available at https://curia.europa.eu/en/actu /communiques /cp02/aff/cp0289en.htm (visited on April 15, 2018).

European Commission (1961), *Memorandum on the General Lines of the Common Transport Policy*, COM (61) 50 final, 10 April 1961.

European Commission (1962), *Programme d'action en matière de politique commune des transports,* VII/COM (62) 88 final of 23 May 1962.

European Commission (1999), *Commission sets out its policy on commissions paid by airlines to travel agents*, Press Release IP/99/504, 14 July 1999 [online]. Available at http://europa .eu/rapid/press-release_IP-99-504_en.htm?locale=en (visited February 4, 2018).

European Commission (2003), *The Court of First Instance upholds the Commission's decision to fine Michelin for practices which are unfair to its dealers*, Press Release, CJE/03/80 [online]. Available at http://europa.eu/rapid/press-release_CJE-03-80_en.htm.

European Commission (2008), *Mergers: Commission approves acquisition of MÁV Cargo by Rail Cargo Austria, subject to conditions,* Press Release IP/08/1769, 25 November 2008, Brussels [online]. Available at http://europa.eu/rapid/press-release_IP-08-1769_en.htm (visited on March 10, 2018).

European Commission (2009), *Mergers: Commission clears proposed takeover of Austrian Airlines by Lufthansa, subject to conditions,* Press Release IP/09/1255, 28 August, 2009, Brussels [online]. Available at http://europa.eu/rapid/press-release_IP-09-1255_en.htm (visited on February 10, 2018).

European Commission (2010), *Mergers: Commission approves proposed acquisition of Ermewa by TLP (SNCF group), subject to conditions,* Press Release IP/10/44, 22 January 2010, Brussels [online]. Available at http://europa.eu/rapid/press-release_IP-10-44_en.htm (visited on March 13, 2018).

European Commission (2010), *Mergers: Commission clears "New Eurostar" joint venture, subject to condition,* Press Release IP/10/755, 17 June 2010, Brussels [online]. Available at http://europa.eu/rapid/press-release_IP-10-755_en.htm (visited on March 13, 2018).

European Commission (2010), *Mergers: Commission clears proposed acquisition of Arriva by Deutsche Bahn, subject to conditions*, Press Release IP/10/1049, 11 August 2010, Brussels [online]. Available at http://europa.eu/rapid/press-release_IP-10-1049_en.htm (visited on March 13, 2018).

European Commission (2015), *Mergers: Commission gives conditional authorisation for SNCF to acquire sole control of Eurostar*, Press Release IP/15/4976, 13 May 2015, Brussels [online]. Available at http://europa.eu/rapid/press-release_IP-15-4976_en.htm (visited on March 13, 2018).

European Commission (2015), *Antitrust: Commission fines cargo train operators € 49 million for cartel,* Press Release IP/15/5376, July 15, 2015, Brussels [online]. Available at http://europa.eu/rapid/press-release_IP-15-5376_en.htm (visited on February 13).

European Commission (2016), *Antitrust: successful market opening allows early termination of commitments in Deutsche Bahn case,* Press Release IP/16/1322, 8 April 2016, Brussels [online]. Available at http://europa.eu/rapid/press-release_IP-16-1322_en.htm (visited on March 5, 2018).

European Commission (2017), *Mergers: Commission approves acquisition by Lufthansa of Air Berlin subsidiary LGW, subject to conditions,* Press Release IP/17/5402, 21 December 2017, Brussels [online]. Available at http://europa.eu/rapid/press-release_IP-17-5402_en.htm (visited on February 10, 2018).

European Commission (2017), *Mergers: Commission approves proposed acquisition of parts of Air Berlin by easyJet*, Press Release, IP/17/5244 [online]. Available at http://europa.eu/rapid/press-release_IP-17-5244_en.htm (visited on February 17, 2018).

European Commission (2017), *Antitrust: Commission fines Lithuanian Railways €28 million for hindering competition on rail freight market,* Press Release IP/17/3622, 2 October 2017, Brussels [online]. Available at http://europa.eu/rapid/press-release_IP-17-3622_en.htm (visited on March 14, 2018).

European Commission (2017), *Mergers: Commission approves acquisition by Lufthansa of Air Berlin subsidiary LGW, subject to conditions,* Press Release IP/17/5402, 21 December 2017, Brussels [online]. Available at http://europa.eu/rapid/press-release_IP-17-5402_en.htm (visited on February 19, 2018).

European Commission and the United States Department of Transportation (2010), *Report on Translatlantic Airline Alliances: Competitive Issues and Regulatory Approaches*, 16 November 2010, para. 13 [online]. Available at http://ec.europa.eu/competition/sectors/transport/reports/joint_alliance_report.pdf (visited on December 6, 2017).

European Commission (2016), *Fifth Report to the Council and the European Parliament on monitoring developments of the rail market*, COM(2016) 780 final.

European Commission (2017), *Report From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions,* Report on Competition Policy 2016, COM(2017) 285 final, 31.5.2017, Brussels [online]. Available at http://ec.europa.eu/competition/publications/annual_report/2016/part1_en.pdf (visited on February 16, 2018).

General Court of the European Union, Press Release No 147/15, 16 December 2015, Luxembourg [online]. Available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-12/cp150147en.pdf (visited on December 16, 2017).

White Paper From The Commission To The European Council, *Completing The Internal Market*, COM/85/0310 FINAL, MILAN, 28-29 JUNE 1985.

White Paper submitted by the Commission on 12 September 2001, *European transport policy for 2010: time to decide*, COM(2001) 370 final.

Other sources

Airneth (2011), Routes with Remedies, European Aviation Club/Airneth Seminar, Brussels 9 December 2011

Almunia, J. (2010), *Competition v Regulation: where do the roles of sector specific and competition regulators begin and end?*, 23 March 2010, Brussels, SPEECH/10/121.

Barrow, K. (2010), *8 big challenges for European railfreight,* International Railway Journal, 1 January 2010 [online]. Available at https://www.railjournal.com/index.php/freight/8-big-challenges-for-european-railfreight.html (visited on March 20, 2018).

European Commission (2013), *Fact Sheet - Competition: Merger control procedures* [online]. Available at http://ec.europa.eu/competition/mergers/procedures_en.html (visited on November 27, 2017).

European Commission (2014), Liberalisation of passenger rail services: Situation in different member states, Fourth report on monitoring the development of the rail market COM(2014) 353 final, part 2/2, p. 1 [online]. Available at http://www.europarl.europa.eu/resources/library/media/20160420RES24185/20160420RES24185.pdf (visited on November 14, 2017).

European Commission (2014), *The EU explained: Transport*, Directorate-General for Communication, European Union 2014, p. 3 [online]. Available at https://europa.eu/european-union/topics/transport_en (visited on April 13, 2018).

European Union (2014). *EU transport in figures, Statistical pocketbook* [online]. Available at http://ec.europa.eu/ transport/sites/transport/files/factsfundings/statistics/doc/2014/pocketbook2 014.pdf (visited on April 29, 2017).

European Union (2014), *EU transport in figures, Statistical pocketbook* [online]. Available at http://ec.europa.eu/ transport/sites/transport/files/factsfundings/statistics/doc/2014/pocketbook2 014.pdf (visited on April 29, 2017).

Gadas, R., O., Koch, K. Parplies and H. Beuve-Méry (2007), *Ryanair/Aer Lingus: Even "low-cost" monopolies can harm consumers Competition* Policy Newsletter No 3, 2007, p. [online]. Available at http://ec.europa.eu/competition/publications/cpn/2007_3_65.pdf (visited on March 20, 2018).

Gibson Dunn (2016), *New EU Inspections to Introduce Competition in the Rail Sector*, August 19, 2016 [online]. Available at https://www.gibsondunn.com/new-eu-inspections-to-introduce-competition-in-the-rail-sector/ (visited on April 3, 2018).

International Civil Aviation Organization (ICAO), Convention on Civil Aviation ("Chicago Convention"), 7 December 1944, (1994) 15 U.N.T.S. 295 [online]. Available at: http://www.refworld.org/docid/3ddca0dd4.html (visited on March 28, 2018).

Levitt, M. and Citron, P. (2017), *Rail sector comes under EU antitrust and regulatory spotlight,* Kluwer Competition Law Blog [online]. Available at http://competitionlawblog.kluwercompetitionlaw.com/2017/02/20/rail-sector-comes-eu-antitrust-regulatory-spotlight/ (visited on April 3, 2018).

OECD (2006). *Report on experiences with structural separation*, Competition Committee, June 2006, p. 9 [online]. Available at www.oecd.org/regreform/sectors/45518043.pdf (visited on November 19, 2017).

OECD (2013), *Recent Developments in Rail Transportation Services,* Directorate for Financial and Enterprise Affairs, Competition Committee, December 2013, p. 83 [online]. Available at http://www.oecd.org/daf/competition/Rail-transportation-Services-2013.pdf (visited on December 13, 2017).

Plimmer, G. and J. Ford (2018), *Rail: frustration grows with Britain's fragmented network,* Financial Times, January 29 2018 [online]. Available at https://www.ft.com/content/d82848ca-f7ba-11e7-88f7-5465a6ce1a00 (visited on April 17, 2018).

Ratcliff, Ch. (2018), *Common transport policy: overview,* Fact Sheets on the European Union, European Union 2/2018 [online]. Available at www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.4.1.html (visited on April 15, 2018).

Snelders, R. *The EU Cartel Settlement Procedure: The First Years Experience and Challenges,* Cleary Gottlieb & Hamilton LLP, March 10, 2016, p. 5 [online]. Available at https://www.studienvereinigung-kartellrecht.de/sites/default/files/ 14h_30_snelders_sv_kartellrecht_-_cartel_settlements_final_0.pdf (visited on February 2, 2018).

Tomboy, CH. and O. Stehmann (2003), *Commission closes probe into major EU airlines' incentive schemes for travel agents*, Competition Policy Newsletter No 2, Directorate-General Competition, pp. 65-67 [online]. Available at http://ec.europa.eu/competition/publications/cpn/2003_2_65.pdf (visited on February 6, 2018).

List of Abbreviations

BA	British Airways
CFI	Court of First Instance
Commission	European Commission
ENS	European Night Services
EU	European Union
EXIF	Express Interfracht
FS	Ferrovie dello Stato S.p.A.
FSC	Fuel surcharge
SSC	Security surcharge
GVG	Georg Verkehrsorganisation
K+N	Kühne + Nagel
LDZ	Latvijas dzelzceļš
LG	Lietuvos geležinkeliai
MAs	Marketing Agreements
OL	ORLEN Lietuva
PRS	Performance Reward Scheme
PSO	Public Service Obligation
RFI	Rete Ferroviana Italiana SpA
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom

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Appendix 1: General overview of the EU competition rules

Over the time, competition policy evolved and so did its main objectives. The core rules of competition policy were established under the Treaty of Rome in 1957 and at that time the main objective of the competition policy was the creation of the common market which was supposed to be done by integration of the national markets and their opening. The competition rules, created under the Treaty of Rome, form part of the core competition rules enforced in the EU today – the Articles 101 and 102 of the TFEU. Apart from the original objective of promoting the common market, the goals of the competition policy nowadays are to promote free and undistorted competition for the EU internal market, economic welfare and progress.[207] Recently, policy statements started to stress out efficiency, consumer welfare and competitiveness as the major aims of the competition policy.[208] The competition rules can be encountered in various legal instruments. The two main binding sources for the competition rules represent TFEU and the regulations of the Council of the EU. The Commission can also issue Guidelines (Communications and Notices) which can provide the undertakings with the understanding of the steps that the Commission takes when dealing with certain issues and how the competition rules are applied. Moreover, it can serve as a mean for clarification of the substantive law or it can set out general principles for the fulfillment of Commission's tasks.[209]

The respective rules can be then distinguished with regards to the type of subject they apply to as the subject can be represented either by private undertakings or the State. Accordingly, the rules to which the private undertakings are subject to are contained in the Articles 101 and 102 of the

[207] Jones, A. and B. Sufrin (2014), *EU Competition Law: text, cases and materials*, Oxford University Press, fifth edition, ISBN 978-0-19-966032-2.

[208] In addition, consumer welfare was also the main objective of several decisions regarding the air and rail industry. See for example Mergers in rail industry – acquisition of MÁV Cargo by Rail Cargo Austria or the consumer welfare was stressed out in a number of airline alliances – for example code share agreements contribute to the consumer welfare. See chapters 4.1 (air) and 5.3 (rail).

[209] The guidelines however do not have legislative force and are sometimes referred to as soft law. They can also represent a powerful instrument for the Court of Justice of the European Union when deciding cases and controlling whether the Commission followed or applied its Guidelines properly. The example of Guidelines issued by the Commission can be Notices issued for the right implementation of Regulation 1/2003. See Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, Official Journal C 101, 27.4.2004, p. 65–77.

TFEU and in the Merger Regulation, 139/2004.[210] The substance of the EU competition law is represented by the Articles 101 and 102 of the TFEU which deal with the restrictive practices and abuse of dominant position, respectively. Specifically, Article 101 of the TFEU restricts anticompetitive agreements between undertakings which can take form either of a horizontal agreement (agreement between undertakings from the same level of the economy – among competitors, for example between two or more airlines) or of a vertical agreement (agreement between undertakings at different levels e.g., between the rail operator and infrastructure manager). The agreements between undertakings have to take form of a joint conduct and require a collusion between the parties which can be either explicit – airlines conclude an agreement about fares or tacit – airlines decide not to compete against each other in a geographical area leaving the respetive market to their competitor.[211] Moreover, the agreements should restrict or distort the competition either by its object or by its effect. If the agreement restricts the competition by its object, it is automatically considered as an infringement of the provisions set out in the Article 101 of the TFEU.[212]

The prohibition as set out in Article 101(1) of the TFEU is however not absolute and legal exceptions from it exist. Firstly, the conduct can be exempted from the application of Article 101(1) of the TFEU if it falls under the paragraph 3 of the same Article. The company is obliged to make its own assessment if it fullfills the conditions set out in the Article 101(3) of the TFEU. The exception covers cases which on one hand limit the competition however on the other hand the resulting benefits from such agreements overweigh the negative impacts on competition and thus it is not efficient to prohibit such agreements directly. For the validity of such agreements four conditions have to be met simultaneously as the agreements have to be beneficial for the production or distribution of goods or help in technical or economic development, the consumers

[210] The rules dealing with the conduct of the State are contained in the Article 37 and Articles 106–109 of the TFEU. See Consolidated Version of the Treaty of European Union and the Treaty on the Functioning of the European Union [2012] art.37 and 106-109, Op.Cit.

[211] According to Article 101(1) of the TFEU following agreements should be prohibited: „*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".* The article then further lists possible prohibited agreements such as agreements that have as their object or effect fixing of selling or purchasing prices, sharing of markets or limitation of production, investment or technology development. See Consolidated Version of the Treaty of European Union and the Treaty on the Functioning of the European Union [2012] art.101, Op.Cit.

[212] It was held in Expedia judgement that even though the parties to the agreement had very little market share, if the agreement was considered as a restriction by object, it would be always considered as an infringement of Article 101 of the TFEU. See Judgment of the Court (Second Chamber), 13 December 2012, *Expedia Inc. v Autorité de la concurrence and Others*, ECLI:EU:C:2012:795.

are allowed a fair share of such benefits and which do not enable to eliminate competition on a substantial part of the given products. In addition to the general exception set out in Article 101(3) of the TFEU, specific block exemptions exist which are contained in special regulations issued by the Commission. If the agreements thus fall under the provisions of these regulations, they are automatically valid and enforceable. Moreover, some agreements might also fall under the De Minimis agreements and thus the Article 101(1) does not apply to them either.[213] Article 102 of the TFEU deals with the abuse of dominant position. It is always necessary to determine whether an undertaking holds a dominant position or not for proper application of this article.[214] The determination of a dominant position is a necessary step but not sufficient as the undertaking has to also pose threat to competition on the market which usually means that the undertaking enjoys economic strength and thus can act independently from other competitors, customers or consumers.[215]

The legal and procedural basis for the enforcement of rules incorporated in the Articles 101 and 102 of the TFEU represents Regulation 1/2003. Two types of decision exist for the enforcement of rules by the Commission which are laid out in the provisions of Article 7 and 9 of the Regulation 1/2003. The first one is applied when there is found an infringement of Articles 101 or 102 of the TFEU pursuant to Article 7 of the Regulation 1/2003. Under this Article, the Commission might impose remedies which can be distingiushed on structural (for example divestment order or companies break up) and behavioural with the behavioural remedies having priority over the structural ones. The structural remedies apply only if it is not possible to use the behavioural ones or the equally effective behavioural remedy would pose a greater burden on the undertaking.

Article 9 of Regulation 1/2003 then introduces the commitment decision as the second type of the decision undertaken by the Commission. In contrast to the prohibition decision, the commitment decision enables the Commission to express competition concerns before there is an infringement.

[213] Certain thresholds were established by the Commission‘s notice on minor agreements that do not appreciably restrict competition and are automatically exempted. See Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de Minimis), Official Journal C 368, 22.12.2001, p. 13–15.

[214] A dominant position has been defined by the ECJ in Hoffmann-La Roche and United Brands. The main aspects of the definition are the independence of the dominant undertaking and its ability to prevent effective competition on the market. See Judgment of the Court of 13 February 1979, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECLI:EU:C:1979:36, p. 479 and Judgment of the Court of 14 February 1978, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, ECLI:EU:C:1978:22, p. 290.

[215] Jones A. and B. Sufrin (2014), Op.Cit., p. 346.

The parties themselves can show willingness to give commitments to the Commission about their future conduct in order to prevent the Commission finding an infringement. If the Commission finds the commitments sufficient, it can make them legally binding on the undertakings. Similarly to the remedies, the commitments can be also divided into structural and behavioural. The commitments are not suitable to be used in the cases of hardcore cartels and whether there is the possibility for the Commission to impose a fine. In case of non-compliance with them, Commission may take measures in the Article 9(2).[216] Since the cancellation of notification in 2004, Article 9(1) decisions have started to replace Article 7(1) decisions in case of Article 101 application such as the airline alliance cases except for the area of cartels.[217] According to Article 23(2) of the Regulation 1/2003, the Commission may impose fines on the undertakings up to 10% of the total turnover of the preceding year if they infringe Article 101 or 102 of the TFEU or they fail to comply with the commitments imposed under Article 9. Under Article 24 of the Regulation 1/2003, the Commission may impose periodic penalty payments. Moreover, if the parties admit their participation in the cartel and their liability for it, so-called settlement procedure can take place.[218] Under the settlement procedure, the parties can then get reduced fine by 10% and the proceedings are faster and less burdensome.

Apart from the competition provisions in TFEU, Merger Regulation 139/2004 exists which represents the main instrument for the control of mergers, acquisitions and other concentrations (for example it applies to creation of full-function joint venture). The concentration falls under the Merger Regulation if it satisfies the condition of having EU dimension and reaches a certain turnover threshold.[219] Mergers that do not meet the turnover criteria and EU dimension fall under the jurisdiction of the respective Member State. There however exists so-called referral procedure

[216] See 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, Official Journal L 1, 4.1.2003, p. 1–25.

[217] Through the period 2004-2013, 78 prohibition decisions and 33 commitments decisions had been undertaken by the Commission. If cartels are excluded from the prohibition decisions, the commitments decisions exceed the prohibition decisions over the past years. See Commission staff working document, *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives*, COM/2014/0453 final.

[218] See Article 10(a) of Regulation 773/2004 which enables the parties to the cartel and the Commission settle the case and also the Commission Notice on the Conduct of Settlement procedures if the cartel case is decided pursuant to Articles 7 and 23 of Regulation 1/2003. See Commission Notice on the Conduct of Settlement procedures, Official Journal L171, 1.7.2008, p. 3 and Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.4.2004, p. 18–24.

[219] For the specific turnover thresholds see Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Op.Cit., Art.1(3).

which allows either the Member State or the Commission to transfer the case between themselves upon the request of either the respective company or the respective Member State.[220]

If the concentration satisfies the EU dimension, it has to be always notified to the Commission before it takes place and consequently must be delayed until the Commission's decision. Subsequently, the Commission investigates whether the concentration poses a threat to the competitive environment. The investigation consists of two phases. In the first phase, Commission analyzes whether the concentration falls under the scope of the Merger Regulation and if so whether it poses a threat to the common market setting. After the first phase investigation, the mergers can be either allowed or allowed with the requirement to comply with certain remedies or it can be stated that there might exist significant threat to the competition on EU market and the investigation goes into the second phase. Usually, in the first phase more than 90% of the cases are dismissed or resolved.[221] In the second phase, more thorough analysis is conducted whether the concentration is incompatible with the common market or not and the investigation usually requires more time than in the first phase. After the second phase investigation, the Commission can either allow the merger without further conditions or it can allow the merger subject to certain remedies. In case, the parties did not suggest any adequate remedies, Commission can prohibit the merger.

[220] Such referral procedures were for example used regarding the mergers in the rail industry. See Appendix 7 Overview of the EU Merger Control in the rail sector.

[221] European Commission (2013), *Fact Sheet - Competition: Merger control procedures* [online]. Available at http://ec.europa.eu/competition/mergers/procedures_en.html (visited on November 27, 2017).

Appendix 2: Overview of the important milestones in the creation of EU Common Transport Policy[222]

Year	Event
1951	Treaty of Paris
1957	**Treaty of Rome**
1961	Commission's Memorandum on the General Lines of the Common Transport Policy
1962	Commission's Action Programme for the implementation of a Common Transport Policy
1973	Enlargement of the European Economic Community (UK, Denmark and Ireland)
1974	French Seamen case
1979	A Transport Network for Europe. An outline of Policy
1981	Enlargement of the European Economic Community (Greece)
1983	Directive 83/416/EEC on the liberalization of inter-regional air services
1985	Ruling of the Court of Justice against the Council for failure to act
1986	Enlargement of the European Economic Community (Spain and Portugal)
1986	Nouvelles Frontières judgement
1987	**Single European Act**
1987	First aviation liberalization package
1990	Second aviation liberalization package
1991	Directive 91/440 on the separation of infrastructure and rail services
1992	**Maastricht Treaty (TEC and TEU)**
1992	Whitebook on Transport Policy
1993	Third aviation liberalization package
1995	Enlargement of the EU (Austria, Finland, Sweden)
1996	Commission's Action Programme to promote Combined transport
1996	Commission's White Paper on restructuring of the rail sector
1997	**Amsterdam Treaty**
2001	First rail liberalization package
2001	Commission's White Paper European transport policy for 2010: time to decide
2001	Treaty of Nice
2004	Second rail liberalization package
2004	Enlargement of the EU (10 other countries)
2007	Third rail liberalization package
2007	Enlargement of the EU (Bulgaria and Romania)
2009	**Treaty of Lisbon (TFEU)**
2011	White Paper: Roadmap to a Single European Transport Area
2012	Recast of the first railway package Directive 2012/34/EU
2013	Enlargement of the EU (Croatia)
2016	Fourth rail liberalization package

[222] Ratcliff, Ch. (2018), *Common transport policy: overview,* Fact Sheets on the European Union, European Union 2/2018 [online]. Available at www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.4.1.html (visited on April 15, 2018).

Appendix 3: Overview of the aviation liberalization packages

1st package:		
	Regulation 3975/87/EEC	It regulates the procedure for the application of the rules on competition to undertakings in the air transport sector.
	Regulation 3976/87/EEC	It sets out how Article 85(3) of the EC Treaty would apply to certain categories of agreements and concerted practices in the air transport sector.
	Directive 87/601/EEC	It provides rules on fares for scheduled air services between Member States.
	Decision 87/602	It sets down rules on the sharing of passenger capacity between air carriers on scheduled services between Member States on access for air carriers to scheduled air service routes between Member States.
2nd package:		
	Regulation 2342/90/EEC	It includes rules on fares for scheduled air services, revoking Directive 87/601/EEC.
	Regulation 2343/90/EEC	It sets down access for air carriers to scheduled intra-Community air service routes and rules on the sharing of passenger capacity between air carriers on scheduled air services between Member States, revoking Decision 87/602/EEC.
	Regulation 2344/90/EEC	It amends Regulation 3976/87/EEC on the application of Article 85(3) of the EC treaty to certain categories of agreements and concerted practices in the air transport sector.
3rd package:		
	Regulation 2407/92	Air carrier licensing
	Regulation 2408/92	Access to intra-Community routes
	Regulation 2409/92	Fares

Appendix 4: Overview of the rail liberalization packages

First railway package:		
	Directive 2001/12/EC	It regulates the development of the Community´s railways.
	Directive 2001/13/EC	It regulates licensing of railway undertakings.
	Directive 2001/14/EC	It deals with the allocation of railway infrastructure capacity and levying of charges for the use of the railway infrastructure and safety certification.
	Directive 2001/16/EC	It deals with the interoperability of the rail systems.
Second railway package:		
	Directive 2004/49/EC	It includes measures on safety on the Community´s railways and amends Council Directive 2001/14/EC.
	Directive 2004/50/EC	It amends Directive 2001/16/EC and 96/46/EC regarding the interoperability issues to cover the whole EU. It also introduces requirement for setting up of European Railway Agency.
	Directive 2004/51/EC	It amends Council Directive 91/440/EEC on the development of the Community´s railways.
	Regulation 881/2004	It establishes a European Railway agency.
Third railway package:		
	Directive 2007/58/EC	It amends Council Directive 91/440/EEC and Directive 2001/14/EC.
	Directive 2007/59/EC	It deals with the certification of train drivers operating locomotives and trains on the railways system in the Community.
	Regulation 1370/2007	It regulates passenger transport services by rail and by the road.
	Regulation 1371/2007	It deals with passenger´s rights and obligations.
	Regulation 1372/2007	
Fourth railway package:		
Technical pillar:		
	Regulation 2016/796	It incorporates European Union Agency for Railways.
	Directive 2016/797	It deals with the interoperability of the rail system within the EU.
	Directive 2016/798	It regulates railway safety.
Market pillar:		
	Regulation 2016/2338	It regulates the award of public service contracts for domestic passenger transport services by rail.
	Regulation 2016/2370	It amends Directive 2012/34 that regulates opening of the domestic passenger rail transport and the governance of railway infrastructure.
	Regulation 2016/2337	It repeals Regulation 1192/69 on the normalisation of accounts of railway undertakings.

Appendix 5: Overview of liberalization in the domestic passenger transport in the EU[223]

Cluster	Conditions	Countries
Fully liberalized markets	All PSCs are competitively tendered or all rail pkm are in open access	Sweden, United Kingdom
Largely liberalized markets	More than 33% of pkm in open access or subject to competitively tendered PSCs	Austria, Germany, Italy
Partially liberalized markets	Less than 33% of pkm in open access or subject to competitively tendered PSCs	the Czech Republic, the Netherlands, Portugal
Quasi-liberalized markets	The open access is developed on the whole market however no effective competition takes place, all PSCs are directly awarded	Bulgaria, Denmark, Estonia, Latvia, Lithuania, Poland, Romania and Slovakia
Non-liberalized markets	The market is dominated by the incumbent which operates the commercial services and PSCs	Belgium, Finland, France, Greece, Hungary, Ireland, Luxembourg, Slovenia and Spain

[223] European Commission (2014), *Fourth report on monitoring the development of the rail market*, COM(2014) 353 final, part 2/2 [online]. Available at www.europarl.europa.eu/resources/library/media/20160420RES24185/20160420RES24185.pdf.

Appendix 6: Overview of the EU Merger Control in the aviation sector[224]

Year	Transaction	Decision
2017	Acquisition of parts of Air Berlin by easyJet	Approved
2017	Acquisition of Air Berlin subsidiary LGW by Lufthansa	Approved subject to commitments
2017	Acquisition of joint control over Meridiana by Quatar Airways and Alisarda	Approved
2015	Acquisition of Aer Lingus by IAG	Approved subject to commitments
2014	Acquisition of joint control of Alitalia by Etihad	Approved subject to commitments
2014	Acquisition of joint control over Czech national carrier České aerolinie by Travel Service and Český Aeroholding	Approved
2013	Joint acquisition of Virgin Atlantic by Delta and Virgin Group	Approved
2013	Aquisition of Greek airline Olympic Air by Aegean Airlines (Aegean / Olympic II)	Approved
2013	Takeover of Aer Lingus by Ryanair (Aer Lingus / Ryanair III)	Prohibited
2013	Merger between US Airways and American Airlines	Approved subject to commitments
2012	Acquisition of British Midlands by IAG subject to conditions	Approved subject to commitments
2011	Merger between Aegean Airlines and Olympic Air	Prohibited
2010	Merger between United Airlines and Continental Airlines	Approved
2010	Merger between British Airways and Iberia	Approved
2009	Takeover of Austrian Airlines by Lufthansa	Approved subject to commitments
2009	Acquisition of British Midland by Lufthansa	Approved
2009	Takeover of SN Brussels Airlines by Lufthansa	Approved subject to commitments
2008	Acquisition of Clickair and Vueling by Iberia	Approved subject to commitments
2008	Acquisition of Northwest Airlines by Delta Airlines	Approved
2008	Takeover of Martinair by KLM	Approved
2007	Takover of Aer Lingus by Ryanair (Ryanair / Aer Lingus)	Prohibited
2006	Acquisition of control over Eurowings by Lufthansa	Approved subject to commitments
2005	Acquisition of Swiss by Lufthansa	Approved subject to commitments
2004	Merger between Air France and KLM	Approved subject to commitments

[224] Own inspection of the Commission's merger cases directory on its webpage. See

Appendix 7: Overview of the EU Merger Control in the rail sector[225]

Year	Market	Transaction	Decision
2017	Passenger transport	Acquisition of the South Western rail franchise by First MTR South Western Trains Limited	Referred to the United Kingdom
2016	Passenger transport	Acquisition of Northern Franchise by Arriva Rail North (that is owned by DB)	Referred to the United Kingdom
2015	Passenger transport	Acquisition of Scotrail franchise by Abellio Scotrail Limited	Approved
2015	Passenger transport	Acquisition of sole control of Eurostar by SNCF	Approved subject to commitments
2014	Passenger transport	Acquisition of TSGN franchise by Govia and GTRL	Referred to the United Kingdom
2014	Passenger transport	Acquisition of Thalys JV by SNCF and SNCB	Approved
2013	Freight transport	Acquisition of CRT by SNCF and Comsa-Emte Spain	Approved
2011	Passenger transport	Acquisition of Rail Holding AG by SNCF, HFPS and Wehinger GmbH	Approved
2011	Passenger transport	Acquisition of JV by Veolia Transport and Trenitalia	Approved
2011	Passenger transport	Acquisition of Arriva Deutschland by Ferrovie dello Stato and Cube	Approved subject to commitments
2010	Freight and passenger transport	Acquisition of Arriva by DB	Approved subject to commitments
2010	Passenger transport	New Eurostar joint venture	Approved subject to commitments
2010	Freight transport	Acquisition of Ermewa by TLP	Approved subject to commitments
2008	Freight transport	Acquisition of MÁV Cargo by Rail Cargo Austria	Approved subject to commitments
2007	Freight transport	Acquisition of EWS by Deutsche Bahn	Approved subject to commitments
2004	Passenger transport	Joint venture between Serco and NedRailways	Approved

[225] Own inspection of the Commission's merger cases directory on its webpage. See http://ec.europa.eu/competition /elojade/isef/index.cfm (visited on March 28, 2018).

Abstracts

Abstract (EN)

This thesis deals with the EU competition law enforcement in the transport sector towards private undertakings. Specifically, air and rail transport are focused at as they represent convenient examples on which it can be demonstrated how the EU manages to cope with the liberalization process and apply the competition rules to these sectors. The main research question of the thesis is what specific features can be observed in the decision making of the Commission and Court of Justice of the EU regarding the competition rules in the transport sector, specifically air and rail industry.

This thesis is structured as follows. In total, it includes six chapters, introduction, four main chapters and the conclusion. The first main chapter is devoted to the EU transport policy as the goals of the transport policy, the liberalization process and its main characteristics are described. Specifically, the main milestones in the creation of single European transport policy in the transport sector are presented and the main obstacles in the liberalization process in the airline and rail sector are discussed. Moreover, the chapter also deals with the relationship of ex ante regulation and ex post competition rules.

The second chapter focuses on the analysis of the competition rules enforcement in the air sector. More specifically, it focuses on the analysis of aspects that the Commission and the Court of Justice of the EU take into account when applying the competition rules to the air sector. It also reviews the case law in terms of the goals of the EU competition policy and the liberalization process. Similarly, in the fourth chapter the analysis of competition rules enforcement in the rail sector is done.

In the last chapter, specific features in the application of competition rules in the air and rail industry are summarized. The conclusion is that the Commission handles the decision-making regarding the competition threats in the airline and rail industry quite well. It seems that it uses the competition law as an efficient tool in order to complement and support the liberalization process in both industries.

Key words: competition law, air and rail transport, liberalization of air and rail transport

Název práce: Ochrana hospodářské soutěže ve vybraných síťových odvětvích: Případ liberalizované železniční a letecké dopravy v Evropské unii

Abstrakt (ČJ)

Tato práce se zabývá prosazováním soutěžněprávních norem EU vůči podnikům v sektoru dopravy. Konkrétně je pozornost práce věnována letecké a železniční dopravě, neboť tyto dva sektory představují vhodné příklady, na nichž může být ukázáno, jak Evropská unie zvládá prosazovat normy soutěžního práva v kontextu probíhající liberalizace těchto sektorů. Hlavní výzkumnou otázkou této práce je, jaká specifika je možné pozorovat v prosazování hospodářské soutěže EU vůči podnikům v letecké a železniční dopravě.

Po obsahové stránce je práce rozdělena do 6 kapitol, úvodu, 4 hlavních kapitol a závěru. První kapitola je zaměřena na společnou dopravní politiku Evropské unie. Tato kapitola popisuje hlavní cíle, formování a charakteristické znaky této dopravní politiky. Dále se zejména zaměřuje na významné milníky, které byly při vytváření jednotné dopravní politiky dosaženy a překážky, kterým tyto trhy v průběhu liberalizace čelily. Kapitola dale pojednává o vztahu soutěžněprávních norem a předpisů regulace.

Druhá kapitola provádí analýzu prosazování soutěžního práva v letecké dopravě. Konkrétně se zaměřuje na specifika, které Komise a Soudní dvůr Evropské unie berou v potaz při svém rozhodování. Dále jsou jednotlivé případy hodnoceny z hlediska cílů soutěžního práva EU a jednotlivých liberalizačních procesů. Podobná analýza je potom provedena v třetí kapitole vzhledem k sektoru dopravy.

V závěru práce jsou shrnuty výsledky práce. Konkrétně jsou porovnány specifika letecké a železniční dopravy při prosazování soutěžního práva EU. Závěr práce je, že Komise jako hlavní orgán prosazování soutěžního práva EU, zvládá svou roli v letecké a železniční dopravě celkem dobře a soutěžní právo využívá jako efektivní nástroj k doplnění a urychlení liberalizačních snah v těchto sektorech.

Klíčová slova: soutěžní právo, letecká a železniční doprava, liberalizace letecké a železniční dopravy

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