The ‘legalisation’ of European airport slot exchange: abuses of dominance in slots?

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1) BACKGROUND

As the demand for air travel and consequently air traffic steadily increase, there is a corresponding, continuously growing demand for capacity at many already congested airports. The ‘airport slot’, a permission given by a coordinator to use the full range of airport infrastructure necessary to operate an air service at a coordinated airport on a specific date and time for the purpose of landing or take-off, is an essential tool in the operation of the airline industry.

The primary objective of the European Union (EU) framework for the regulation of airport slots is to ensure the fullest and most efficient use of existing capacity at congested Union airports while maximising consumers’ benefits and promoting competition. There are two key airport categories that require regulation of landing and take-off slots where capacity is deemed insufficient: schedules facilitated airports\(^1\) and coordinated airports\(^2\).

The allocation of slots at schedules facilitated airports and coordinated airports in the Union have been regulated since 1993. The first piece of EU legislation in this area, Council Regulation (EC) 95/93 laid down common rules for the allocation of slots at Union airports\(^3\), or Allocation of Airport Slots Regulation (‘Slots Regulation’). The legislation formed part of the third of three packages of liberalisation of the EU single market for air transport. The Slots Regulation is relevant for European Economic Area, and so extends to cover Iceland, Liechtenstein and Norway, too.

A block exemption from the EU competition rules for scheduling and slot allocation consultations via the International Air Transport Association (‘IATA’) was in place between 1988—2006. A proposal by the European Commission (‘Commission’) led to modernisation and simplification of the legal framework for the internal air transport market in 2006. Since

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\(^1\) This is defined as ‘an airport with a potential for congestion at some periods and where a schedules facilitator has been appointed to facilitate the operations of air carriers operating or intending to operate at that airport’. (See Article 2(i), as amended, Regulation (EC) No 793/2004 of the European Parliament and of the Council of 21 April 2004, [2004] OJ L138/52).

\(^2\) This is defined as ‘an airport with a high level of congestion where demand exceeds capacity during the relevant period and where, in order to land or take off, it is necessary for an air carrier to have a slot allocated by a coordinator’. (See Article 2(g), as amended, Regulation (EC) No 793/2004 of the European Parliament and of the Council of 21 April 2004, [2004] OJ L138/52).

then, the EU competition rules apply to all players in the air transport sector, including IATA consultations.

The aim of the Slots Regulation is ‘to ensure that where airport capacity is scarce, the available landing and take-off slots are used efficiently and distributed in an equitable, non-discriminatory and transparent way’. 4 It also required Member States responsible for coordinated (now ‘schedules facilitated’) or fully coordinated (now ‘coordinated’) airports to appoint a coordinator or schedules facilitator, and set out the role of the coordinator.5 In brief, the role of the coordinator or schedules facilitator is to distribute airport slots through equitable, non-discriminatory and transparent means.

The slot allocation rules were amended four times: in 20026, 20037, 20048 and most recently in 2009.9 It can be said that these amendments to the Slots Regulation represent a gradual, comprehensive revision process towards developing a more flexible system of airport slot allocation. For instance, in response to the economic crisis and its impact on air carriers, the ‘use it or lose it’ rule10 was suspended temporarily in 2008 and 2009, allowing air carriers to keep the same slots for the summer season of 2010 as attributed to them for the summer season of 2009.

Article 8 of the 2004 Slots Regulation11 sets out the current process of slot allocation, including slot mobility12. In short, ‘slots are allocated from the slot pool to applicant carriers as permissions to use the airport infrastructure for the purpose of landing or take-off for the scheduling period for which they are requested, at the expiry of which they have to be returned to the slot pool’ (in line with the provisions of Article 10). Air carriers may continue to use the same allocated series of slots so long as the series ‘has been operated, as cleared by the coordinator, by that air carrier for at least 80 % of the time during the scheduling period for which it has been allocated’13 – a so-called ‘use it or lose it’ rule.

Further requirements to retain an allocated series of slots include that air carriers must provide required information to the coordinator (Article 7), adhere to the rules governing slot

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10 Also known as ‘grandfather rights’. This point is discussed in further detail below.
12 Regulation (EC) No 793/2004, introduced slot mobility as a system of slot trading. After one year (two years for new entrant slots), the air carrier has grandfather rights to trade the slot under Article 8a.
13 Ibid, Article 8(2), para.2.
mobility (Article 8a), ensure all new slots are placed in the pool (Article 10(1)), and not misuse allocated slots, which amounts to ‘slot abuse’ (Article 14).

STUDIES

From 2004—2011, the EU commissioned studies on the system of airport slot allocation. Three studies are particularly noteworthy. They are:

- 2004: the NERA study to assess the effects of different slot allocation schemes
- 2006: the Mott MacDonald study on the impact of the introduction of secondary trading at Community airports
- 2011: the Steer Davies Gleave study on the impact assessment of revisions to Regulation 95/93

The conclusions offered by these studies suggest, to varying degrees, that although the system is working, it still ‘prevents optimal use of the scarce capacity at busy airports’. The reports are all very comprehensive and quite lengthy. The points most relevant to this paper are discussed below:

NERA Economic Consulting, in conjunction with the Faculty of Law at the University of Leiden and Consultair Associates, completed a study in 2004 – ‘Study to Assess the Effects of Different Slot Allocation Schemes’ – which considered the introduction of market mechanisms for airport slots. The study considered how customers might be affected in the short term where air carriers charged to access airport infrastructure, including landing fees. Of particular relevance were airports where demand exceeded supply (capacity).

The study also found that, in the longer term,

... there may be further effects stemming from changes in competitive conditions in airline markets provoked by the redistribution of slots between different carriers and market segments. In principle, the use of market mechanisms to allocate scarce airport capacity might affect conditions of competition in airline markets in two ways: first, through its effects on the level of concentration in the relevant markets; second, through its effects on market entry conditions in the relevant markets.

In the main, the NERA report examined ‘the need for regulatory intervention in the markets for slots at congested airports over and above the powers already available under existing EU competition policy legislation’ (Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), and the Merger Regulation), ‘and the types of regulatory...

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19 Ibid.
intervention that might be applied’. The study also queried briefly the application of Article 102 TFEU to the control of slots by an airport operator and an airline holding a dominant position at a Union airport.

A subsequent study entitled ‘Study on the impact of the introduction of secondary trading at Union airports’ by Mott MacDonald and others was completed in 2006.

In that study, whilst there is no reference made to Article 102 TFEU (Article 82 of the Treaty Establishing the European Community (TEC)), there is quite some discussion on potential yet speculative changes to market conditions following introduction of secondary trading at Union airports. In that regard, the study specifically finds a likely effect on market share.

One of the likely effects is an increase in the market share of existing dominant incumbent airlines, particularly if they have developed a strong interlining hub. Although this can possibly be viewed as a deterioration in competition at any one airport, a broader view can be taken whereby – for example – a strengthened oneworld Alliance (BA and partner airlines) at London-Heathrow will be competing with a strengthened Star Alliance (Lufthansa and partners) at Frankfurt, and a strengthened Skyteam Alliance at Paris-Charles de Gaulle and Amsterdam (Air France, KLM and partners). As a result, decreased levels of competition at each individual airport may be accompanied (even compensated) by increased levels of competition between alliances at different airports.

Between the completion of the report and today, we have seen evidence of these effects on market share at key Union airport hubs. It goes without saying that tactical and strategic alliance partners align their schedules with one another to provide more seamless travel to customers wherever possible. The effect of this on hub-and-spoke networks is that, in this author’s view, six key airports in the EU emerge as ‘alliance hubs’: London Heathrow (LHR) and Madrid (MAD) for oneworld Alliance; Paris Charles de Gaulle (CDG) and Amsterdam (AMS) for Skyteam Alliance; and Frankfurt (FRA) and Munich (MUC) for Star Alliance (with mini-hub at LHR). Owing to a focus on alliance traffic, it is likely that the most profitable routes sought by business and luxury travellers will be best delivered at each separate alliance hub, and therefore attract frequent flyers from the respective programmes to them. Taking these EU airports as case studies, one can argue that the global alliance frequent flyer networks and schedules becomes of paramount importance to market share.

Steer Davies Gleave concluded an ‘Impact assessment of revisions to Regulation 95/93’ and report in 2011. The study provides an evaluation of the current operation of the Slots Regulation and, through an analysis of a sample of 15 airports, including all large EU hubs and other most congested airports, as well as a cross-section of other large airports, an impact assessment of various options for revision to the Slots Regulation.

Of particular relevance to this paper, the Steer Davies Gleave report provides a review of the

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23 This paper aims to continue that discussion below.
26 It has been argued elsewhere that the situation elsewhere, e.g. at US hub airports, differs.
Airport Charges Directive. It finds that the Directive ‘imposes relatively few obligations, mostly relating to non-discrimination between users and requirements for consultation and provision of information. Even if a carrier tried to claim that it was unfairly discriminated against by a slot reservation fee, Article 3 specifically allows modulation of charges for reasons of public and general interest, and therefore there should be no issue’.  

Also, in terms of incumbent airlines enjoying ‘grandfather rights’, the report concluded:

Despite significant new competition in the European air transport market, including the growth of low cost airlines such as easyJet and Ryanair, the system of historical preference means that it is very difficult for new entrants to challenge the dominant position of the traditional incumbent airlines at the most congested airports. At these airports, the mobility (turnover) of slots is very low. Incumbent carriers have little incentive to give up slots, even when other carriers could use them more effectively than they could.  

The Steer Davies Gleave report was published in March 2011. This report recognises, interestingly, a Progress Report of the Air Traffic Working Group on Slot Trading done by the European Competition Authorities in 2005, which ‘identified a potential problem of “slot hoarding” – airlines holding slots, even though they cannot use them profitably, with the primary objective of preventing other airlines from entering the market or from expanding’. According to the Steer Davies Gleave report, ‘This problem could be exacerbated by secondary trading, as it provides a means for dominant incumbents to acquire more slots. However, secondary trading also increases the opportunity cost of slot hoarding, so it is not clear whether it would make the problem better or worse’.  

Following publication of the results from the three studies, and after carrying out of a public consultation on the impact assessment for a possible revision of the Slots Regulation, the European Commission adopted a comprehensive set of measures vis-à-vis the ‘Better Airports’ Package in December 2011. The package consists of a policy summary document and three legislative measures on ground handling, noise and airport slots. The legislative proposals were discussed and approved by the European Parliament and the Council and are

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29 Ibid, p.3.
33 The Steer Davies Gleave report was published in March 2011, and in December 2011 the Commission adopted its Better Airports Package, including the Proposed Recast (Slots Regulation). It is highly likely that feedback on the Slots Regulation and the Airport Charges Directive provided by Steer Davies Gleave was instrumental in highlighting these points to the Commission and contributory to the drafting of the Proposed Recast. It is interesting, however, that ‘slot hoarding’ is not addressed in the text of the Proposed Recast.
34 It should be noted that before being adopted, the Commission’s proposals must be approved by the European Parliament and the Member States under the co-decision procedure.
now provisional (Provisional Recast\textsuperscript{35}). The Commission also adopted a Communication on ‘Airport policy in the European Union – addressing capacity and quality to promote growth, connectivity and sustainable mobility’.\textsuperscript{36}

\section*{2) FROM PROPOSED TO PROVISIONAL RECAST (Slots Regulation)}

According to the Commission,

\begin{quote}
It has been estimated that by revising the current allocation system up to 24 million additional passengers would be accommodated each year at European airports meaning more than €5 billion in economic benefits and up to 62,000 jobs by 2025 thanks to a more resource efficient allocation system.\textsuperscript{37}
\end{quote}

At the centre of the Better Airports Package is the Commission’s Proposed Recast\textsuperscript{38}, now legislative Provisional Recast (Slots Regulation\textsuperscript{39}). At first glance, it would seem that the Provisional Recast drives further liberalisation of the internal air transport market on the one hand, and re-regulation of it on the other.

The three key changes in the Proposed Recast are:

1) Integration of slot allocation with the reform of the European air traffic management system (Single European Sky)
2) Amendment of the 80/20 ‘use it or lose it’ rule and definition of a series of slots and resort to the airport charge system to discourage the late return of slots to the pool
3) Introduction of the possibility for secondary trade in slots and increased competition

This paper considers the first two changes above under the heading ‘streamlining the regulation’ and the third change as ‘introduction of slot exchange’.

\section*{STREAMLINING THE REGULATION}

According to the Commission, the objective of the Slots Regulation was ‘to ensure that access to congested airports is organised through a system of fair, non-discriminatory and

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transparent rules for the allocation of landing and take-off slots so as to ensure optimal utilisation of airport capacity and to allow for fair competition’.40

In 1993, when the first Slots Regulation was introduced, national (‘flag’) carriers still dominated the EU air transport market; most of these were also state owned. The succeeding amendments to the Slots Regulation have moved in sync with progress in the sector towards a larger, more diverse and competitive market.

In its 2011 Airports Package Communication, the Commission appears to attribute some of the sector’s ‘success’ in this regard in reflecting on whether ‘such progress could have been achieved without a system to ensure that slots at busy airports are allocated free of any undue influence from government, national carriers or airports’.41 The Commission also questions then whether, for instance, the introduction of market mechanisms for allocation and use, and transparency objectives would be the most helpful proposals.

In the context of growing airport congestion and the limited development of major new airport infrastructure, the slots are a rare resource. Access to such resources is of crucial importance for the provision of air transport services and for the maintenance of effective competition.42

Also, in terms of so-called historical slots, the Commission ‘recognises the importance for airlines in terms of stability of schedules ... but questions whether market mechanisms could be introduced to withdraw or auction historical slots’.43

‘LEGALISATION’ OF SLOT EXCHANGE AND INTRODUCTION OF MBMs

At present, secondary trading, which is defined by the Commission as ‘the exchange of slots for financial or other compensation’44, is ‘legal’, yet un-regulated.

The Provisional Recast aims ‘to allow for the introduction of market-based mechanisms [MBMs]45 across the EU provided that safeguards to ensure transparency or undistorted competition are established, including greater independence for slot coordinators’.46 The expectation is that this will help to ensure a more optimal allocation of airport slots by ensuring that slots go only to those air carriers able best to utilise them.

Additionally, the Proposed Recast:
   • adds Article 106 TFEU47;

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41 Ibid, p.3.
42 Ibid, p.12.
43 Ibid.
45 This has been amended in the Provisional Recast (see below) to ‘slot exchange’.
47 Proposed Recast, Recital 28. ‘The application of the provisions of this Regulation should be without prejudice
removes the power to require transfers of slots by public authorities;  
strengthens the coordinator role and independence, and requires Member States to ensure coordinators have necessary resources;
increases the series of slots length from 5 to 15 slots;
adds sanctions for the late handing back of slots; and
changes the ‘use it or lose it rule’ to 85/15.  

Whilst the 1993 Slots Regulation, as amended, is silent on the question of exchanges for monetary and other consideration, the Commission adopted a Communication in 2008 that explained ‘how the rules with respect to the independence of the slot coordinator, new entry, local guidelines and exchange of slots for monetary and other consideration should be interpreted’. Effectively, this Communication clarified that ‘for the first time that secondary trading is an acceptable way of allowing slots to be swapped among airlines’. It is of interest to note that UK High Court ruled in 1999 that a slot exchange between British Airways (BA) and KLM was consistent with national and EU law.

Some more recent examples of buying and selling of slots in the UK include:

- 2004: FlyBe sold six pairs of slots to and from London-Heathrow (LHR) for approximately £40 million  
- 2007: BA bought 102 Heathrow slots from British Midland (bmi) for approximately £30 million  
- 2007: the Bland Group sold four pairs of slots at LHR after it sold GB Airways to easyJet  
- 2009: it was confirmed that Lufthansa had bought BMI in a £223 million deal including 11 per cent share of LHR slot market, giving Lufthansa just over 16 per cent  
- 2012: BA (now IAG) acquired BMI from Lufthansa, including more than 40 pairs of slots at LHR; IAG gave commitments to release 12 pairs of slots at LHR, which Virgin Atlantic won as ‘remedy slots’, arguing all the slots should be given to one competitor to create more competitive markets.

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48 Proposed Recast, Article 14. Article 14: ‘This Regulation shall not affect the powers of public authorities to approve [formerly require] the transfer of slots between air carriers and to direct how these are allocated pursuant to national competition law or to Articles 101, 102 or 106 of the Treaty or Council Regulation (EC) No 139/2004.’ The following sentence was deleted: ‘These transfers can only take place without monetary compensation.’ Thus, the power to require transfer of slots has been transferred to the Commission. 
49 Proposed Recast, Article 14.
51 Ibid.
54 Press reports in 2007 estimated that LHR slots could be fetch a price of between £5-12 million depending on the timing. See for instance, Financial Times, 26 October 2007.
2013: FlyBe, which is struggling financially, sold all of its slots at LGW to easyJet for approximately £20 million.\(^{59}\)

It is likely that the number of ‘successful’ swaps at London airports following the entry into force of the EU-US Open Skies Agreement\(^{60}\) prompted the 2008 Communication\(^{61}\), which was the first step in creating a market to allocate scarce capacity at Union airports through the introduction of secondary trade in slots and increased competition. The Proposed Recast aimed to adopt the current slot allocation system to development of market mechanisms, such as with the London experience.

Revision of the existing legislation, however, is not only required for competition, but for other reasons, too. For instance, discrimination could remain where a Member State favours its national carrier, or an airport favours a particular airline such as the one with the majority of customers. Additionally, the Commission stated in its Proposed Recast that since secondary trading in airport slots ‘does not benefit from a uniform and consistent legislative framework, including guarantees of transparency and competitive safeguards. It is therefore necessary to regulate secondary trading in slots in the European Union’.\(^{62}\)

The European Council (‘Council’) reported on the Commission’s Proposed Recast in October 2012, and the European Parliament adopted a legislative resolution after significant amendment, the Provisional Recast, in December 2012.\(^{63}\)

**PROVISIONAL RECAST**

In December 2012, the European Parliament voted on the ‘Better Airports’ Package, in particular the Commission's proposals for the introduction of secondary trading in slots, ‘which goes to the heart of the slot proposals. It added additional measures to strengthen the Commission's proposals on the independence of the slot coordinators across Europe and higher transparency of information regarding slot allocation’.\(^{64}\)

The adopted legislative resolution (Provisional Recast) has incorporated the following six key amendments to the text proposed by the Commission (Proposed Recast):

1) Rather than introducing ‘market mechanisms’ for the more efficient allocation and use of slots, the EU will introduce ‘slot exchange mechanisms’.\(^{65}\)

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60 It is possible this conclusion was reached only on the basis that the previous UK—US bilateral (Bermuda II) was extremely prescriptive and restrictive.


65 Provisional Recast, Recital 4
2) A ‘series of slots’ will comprise 5 slots, which have been requested for the same time on the same day of the week regularly in the scheduling period, rather than the proposed 15.\textsuperscript{66}

3) The following proposed paragraph has been deleted: ‘The determination of the coordination parameters shall not affect the neutral and nondiscriminatory character of the slot allocation.’\textsuperscript{67}

4) The position on local rules has been clarified: ‘Local rules shall concern the allocation and monitoring of slots. Those rules may be applied only where it can be proved that an airport reaches an alarming level of congestion and that performance or throughput improvements can therefore be delivered through locally applied rules. Such local rules shall be transparent and non-discriminatory, and shall be agreed on in the coordination committee referred to in Article 8(3).’\textsuperscript{68}

5) The provision in Article 11 (Proposed Recast) on slot reservation has been deleted.

6) The Commission’s proposed amendment of the 80/20 ‘use it or lose it’ rule to 85/15 has been reverted. The Provisional Recast retains the 80/20 rule.\textsuperscript{69}

The Provisional Recast incorporates the following three relevant points as new text:

1) ‘The relevant theory and case law have not yet advanced sufficiently to produce an exhaustive legal definition of airport slots. As of now it is expedient to be able to work on the assumption that the use of slots in the public interest – hence not in any strict sense a public good - may serve as a guideline for a legal definition thereof. It is therefore appropriate to formulate a definition of slots which establishes that they may become subject to rights and governs the allocation thereof.’\textsuperscript{70}

Seemingly, this is a call for development of legal and (relevant) market definitions of slots. If we view airport slots as property rights – disregarding for a moment the fundamental question of ‘who are the owners?’ – a thought is whether we could use the EU competition rules as a sort of ‘can opener’ ex post – or whether that is prevented by Article 345 TFEU, which provides: ‘The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership…’. But is there an interference with property rights? The Provisional Recast makes the exchange of airport slots valid and promotes the ‘trade-able’ nature of these (property? contractual?) rights under EU law.

In a similar vein, we might consider the Strasbourg court on protection of contractual rights with respect to compensation payments following forced divesture or transferring of slots, and in the EU following International Fruit Company III.\textsuperscript{71} By way of comparison, it should be noted that US law does not recognise slots as property rights: ‘Slots do not represent a property right but represent an operating privilege subject to absolute FAA control…’\textsuperscript{72}

Returning to the question of airport slot ownership, Frankfurt Airport (Fraport)

\textsuperscript{66} Provisional Recast, Article 2, point 13.
\textsuperscript{67} Proposed Recast, Article 4, para.3.
\textsuperscript{68} Provisional Recast, Article 9, para.8.
\textsuperscript{69} Provisional Recast, Article 18, para.4(2).
\textsuperscript{70} Provisional Recast, Recital 5a.
\textsuperscript{71} Joint cases 21-24/72, [1972] ECR 1219.
\textsuperscript{72} FAA Federal Aviation Regulations (FAR) Part § 93.223, 14 CFR.
considers, unsurprisingly, that airports are owners of airport slots and that the DFS (German Navigation Services) is the owner of what they call ‘airway’ slots. The leading international accountancy firm, Deloitte & Touche LLP, forecasted as early as May 2008 that ‘airlines would start to value landing slots as assets on balance sheets.’ Clearly everybody wants to claim ownership, but there is a discernible lack of clarity on the legal definition and effect.

2) ‘In order to increase airport capacity, this Regulation should cover the possibility of Member States being able to use the proceeds of the sale of time slots following secondary trading for the purpose of optimising air traffic and developing new infrastructure.’

3) ‘Member States may adopt measures to allocate a portion of the revenue generated from the slots trading to a fund in order to cover the costs of developing airport infrastructure and optimizing related services. In the interests of complete transparency, the fund in question shall be determined and approved by an independent supervisory authority as referred to in Directive 2009/12/EC. The fund must at all times be managed in such a way as to ensure that the principles of separate accounting are followed, so that the financial amounts to be allocated from the fund to each airport can be established. The revenues generated from the slot trading at one airport shall be reinvested at the same airport.’

Points (2) and (3) above appear to direct a longer-term financing the development of Union air transport infrastructure via proceeds from slot exchanges collected by each Member State. This might take the form of future taxation on such exchanges.

3) AIRPORT FAVOURITISM?

ACCESS

On control of slots and access to airport infrastructure, citing the special case of Holyhead II following Sabena’s bankruptcy and applying three cases relating to access to seaports mutatis mutandis to airports, the report suggested that:

The abuse of a dominant position is liable to arise in cases where the operator of an

75 Provisional Recast, Recital 26a.
76 Article 13, para.3.
77 [1994] OJ L 55/52; In this case, following Sabena’s bankruptcy in 2001, all of its slots were transferred to its subsidiary (100 per cent), DAT. In liquidation it was agreed that DAT could make full use of the slots. Whilst DAT did not sell the slots, the Commission approved the transaction but required DAT progressively to return some of the slots; See also Commission's Report on Competition (1992), para. 219.
airport seeks to alter slots to the benefit of its main customer-airline. Hence, the operator would infringe Article 82 EC [Article 102 TFEU]. The fact that the allocation of a slot to the airline would involve the reorganisation of other slots would not constitute a valid justification of such a refusal because the operator of the airport as the operator of an “essential facility” is expected to go to provide market access, that is, airport access, on a fair and non-discriminatory basis. The operator of the essential facility must carry the burden of proof that it provided equal access to all users of the facility. The operator of an essential facility is deemed to go far in order to accommodate the requests for access made by its users. The above flows from cases, which have been decided upon in the context of access to ports.

Other relevant cases relating to access to seaports are: Rødby-Puttgården\textsuperscript{79}, Elsinore\textsuperscript{80} and Roscoff.\textsuperscript{81}

**CHARGES/FEES/ALLOCATION OF SLOTS**

Under EU law, the ‘essential facilities’ doctrine imposes on owners of ‘essential facilities a so-called ‘duty to deal’ with competitors. Under Article 102 TFEU, a refusal to deal can constitute an abuse of a dominant position.\textsuperscript{82}

It is necessary to consider the ‘essential facilities’ doctrine in the light of the Bronner\textsuperscript{83} case, which concerned the refusal of a media undertaking holding a dominant position in the territory of a Member State to include a rival daily newspaper of another undertaking in the same Member State in its newspaper home-delivery scheme. In that case, the question for the Court was whether a home-delivery scheme constituted a separate market or whether this was interchangeable with sales in shops and kiosks.\textsuperscript{84}

\textsuperscript{79} Commission Decision 94/119/EC, [1994] OJ L055/52 (concerning a refusal to grant access to the facilities of the Port of Rødby, Denmark)

\textsuperscript{80} COMP/A.36.568 and COMP/A.36.570. ‘These two parallel complaints related to alleged abuses within the meaning of Article 82 EC involving excessive port fees charged by the port of Helsingborg for services provided to ferry operators active on the Helsingborg–Elsinore route between Sweden and Denmark. After extensive investigation, the Commission came to the conclusion that the available evidence was insufficient to demonstrate to the requisite legal standard that the prices at issue were excessive. The decisions point to more general difficulties in applying Article 82 EC to excessive pricing cases, particularly in cases where no useful benchmarks are available. Given that existing case-law on this issue is rather limited, the decisions may provide useful guidance when determining the economic value of a service and whether a price is excessive/unfair and thus constitutes an abuse of a dominant position within the meaning of Article 82 EC [Article 102 TFEU].’ (Source: European Commission, Report on Competition Policy, Volume 1, 2004, SEC(2005) 805 final).


\textsuperscript{82} It has been argued by Evrard that, following Commercial Solvents (Joined Cases 6/73 and 7/73, [1974] ECR 223, [1974] 1 CMLR 309), in which the CJEU first dealt with the ‘essential facilities’ in all but using that terminology, the Court’s decision in Bronner (Case C-7/97, [1998] ECR I-7791, [1999] 4 CMLR 112) was a catalyst for limiting the doctrine’s application to where the facility is indispensable and for imposing the application of a forward-looking test (Source: Evrard, SJ, ‘Essential Facilities in the European Union: Bronner and Beyond’, 10(3) Columbia Journal of European Law (Summer 2004), pp.491—526).


\textsuperscript{84} Case C-7/97, [1998] ECR I-7791, [1999] 4 CMLR 112, para.34.
The Court, in deciding whether an undertaking in a dominant position has a duty to deal with its competitor, appears to impose a stricter test of the essential facilities doctrine *Bronner*. According to Evrard (2004):

> It seems that if a facility is *indispensable* for the requesting undertaking, the refusal to grant access to it will inevitably prevent that undertaking from competing on the market and, thus, will eliminate it. Alternatively, if the refusal to use the facility is not likely to eliminate all competition of on the part of the requesting undertaking, it inevitably means that the facility is not essential.85

Thus, the effect on the ‘essential facilities doctrine’ in EU law post-*Bronner*86 is that the fact that facility has dominant position is no longer sufficient; the facility must also be indispensable as well.

A scholarly review of key decisions by Evrard (2004)87 reveals that the Court of Justice of the European Union (CJEU) has been consistent in its application of the *Bronner* doctrine in subsequent cases. By way of comparison, we consider the post-*Bronner* case of *Aéroport de Paris*.88

*Aéroport de Paris* involved airline catering services and two competitors at Paris-Orly Airport. The CJEU confirmed Commission’s Decision that the legal monopoly running Paris airports, ADP, had abused its dominant position at Orly Airport by requiring one groundhandler (AFS) to pay a higher fee than another (OAT), which was discriminatory. The Court held that ‘the relevant market is that for the management of airport facilities, which are indispensable for the provision of groundhandling services and to which ADP provides access’.89 With reference to the application by the Commission and Court of First Instance (CFI; now General Court) of *British Leyland*90 to the situation in ADP, the CJEU agreed that the relevant market was both the management of and access to the airport facilities.

In this judgment, the CJEU strengthened that definition of the relevant market (product) in providing that ‘a licence from ADP is also a prerequisite for access to the market for the services offered by ADP and such access is *indispensable* for the supply of groundhandling services to airlines’.91

It follows that ADP’s authorisation to access the airport was indispensable to carry out the groundhandling services it requested. The Court confirmed that the owner of an essential facility may not impose discriminatory conditions on requesting undertakings.92 It is also worth noting that ADP was not present on downstream market but the Court found this was irrelevant. The *effect* on the downstream market was enough to constitute abuse.93

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Whilst no infringements nor jurisprudence have been located on abuse of a dominant position in slots, the Aéroport de Paris\(^94\) case and others (e.g. airport charges at Finnish airports\(^95\), landing fees at Brussels Airport\(^96\), and landing charges in use at Portuguese airports\(^97\)) may provide useful lessons on the application of Article 102 TFEU to the system of airport charges and landing fees to market regulation of secondary trade in slots.\(^98\) Airports are indispensable to civil aviation, yes, but are airport slots also indispensable to airlines? If the answer is in the affirmative then by definition the airport slot is an essential facility, too.

One of the foremost aims of the Proposed Recast is transparency; this is also referred to nine times in the draft text. It is likely that greater transparency in the system of slot allocation and trading in the Union will result in less opportunity for airport, or even Member State, favouritism of airlines.

Also, on an airline holding or being led to acquire a dominant position at a Union airport, the NERA report referred inter alia to the case on landing charges in use at Portuguese airports.\(^99\) In that case, the Commission found an infringement of Article 101 TFEU in conjunction with Article 106(2).\(^100\) This is of particular interest where the airport in question is state-owned.\(^101\)

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\(^95\) [1999] OJ L 69/24-30; Commission Decision 1999/198 of 10 February 1999, relating to a procedure pursuant to Article 8(2) of the EC Treaty, regarding airport charges at Finnish airports. ‘At Finnish airports, domestic flights benefited from a discount of 60 per cent as compared with intra-Community flights, for no objective reason. The Commission held that Article 8(2) EC applied to airport operations through Regulation 17/62/EEC rather than through Regulation 3975/87 as amended. There is no justification for the imposition of differentiated landing charges because that would result in applying dissimilar conditions for equivalent landing and take-off services. The Finnish system is therefore discriminatory and distorts competition on the relevant markets, contrary to Article 8(2) EC’ (Source: NERA, p.251).
\(^96\) [1995] OJ L 216/8-14; Commission Decision 95/364/EC of 28 June 1995 regarding landing fees at Brussels airport. ‘This airport applied a system of stepped discounts, which increases with a high volume of traffic. The charging system at Brussels airport favours airlines with high volume of traffic at Brussels Airport, and places small airlines at a competitive disadvantage. Hence, Brussels Airport abused its dominant position in the relevant market by introducing the above system of stepped discounts’ (Source: NERA, p.251).
\(^98\) It should be noted that, in a number of cases, the Commission has required airlines to give up (‘divest’) slots in the context of alliances (e.g. Increase of frequencies on the route London (Heathrow) – Brussels, Commission Decision 92/552 of 21 October 1992, [1992] OJ L 353/32 (1992); Lufthansa/SAS, Commission Decision 96/180 of 26 January 1996, [1996] OJ L 54/28-42; and Austrian Airlines/Lufthansa, See Commission notice concerning the alliance between British Airways and American Airlines, [1998] OJ C239/10, and also in respect of mergers or take-overs as well (e.g. Case IV/M.0019 – KLM/Alitalia, Case M.2041 – United Airlines/US Airways).
\(^99\) [1999] OJ L 69/31-39; Commission Decision 1999/199/EC of 10 February 1999. This case ‘also related to a system of discounts on landing charges in use at Portuguese airports, and the differentiation of those charges according to the origin of flights. The Commission argued that the Portuguese charging system is incompatible with Article 86(2) read in conjunction with Article 8(2) EC’ (Source: NERA, pp.251-252). It should also be noted that CJEU dismissed an action brought by Portugal for annulment of this decision (See C-163/99, [2001] ECR I-2613).
\(^100\) It may be significant to note that the CJEU dismissed an action brought by Portugal for annulment of this decision (See Case C-163/99, Portuguese Republic v Commission of the European Communities, [2001] ECR I 2613).
\(^101\) It is worth querying here, with reference to the pending appeal to the Court of Justice in Greek Lignites, whether the rarely used Article 106 TFEU (read together with Article 102 TFEU) might offer the Commission yet more discretion to intervene in this area.
4) FUTURE APPLICATION: ABUSES OF DOMINANCE IN SLOTS?

The application of Article 101 TFEU to airport slot transactions (e.g. sales, transfers or exchanges) might present difficulties. Individual slot transactions may have only an appreciable effect on competition either on the upstream or downstream markets, and therefore be deemed de minimis.102 Certainly, if a series of slot transactions are made together then a greater effect on competition is possible.103

Furthermore, non-compete clauses would likely lead to market sharing and constitute a violation of Articles 101 and 102 TFEU, and Articles 53 and 54 of the EEA Agreement.104

Turning to Article 102 TFEU, one might query whether the introduction of market-based measures to the slot allocation system vis-à-vis legalisation of ‘slot exchange’, which will enable the highest bidder to purchase slots, generate the first cases of abuse of dominance in slots? Or will an undertaking’s dominance in slots at Union airports simply lead to a strengthened competitive advantage for hub carriers? Efficient hub use is not in itself anti-competitive; indeed this would in theory lead to benefits to consumers through increased capacities at better timings. What is unclear is whether the airfares on respective routes will increase. Fares will not necessarily increase simply through a hub carrier’s exercise of market power in slots, and therefore on the airport in question, but perhaps an increased opportunity for abuse is present in those environments.

With respect to access to slots, noting of course that air carriers are subject to the EU competition rules, including the Merger Regulation, it is likely that the acquisition by one carrier of another will continue to lead to Article 9 ‘commitments’105 such as divestiture of slots and/or return of some of the acquired slots to the pool.

On the one hand, one might question whether these types of commitment decisions are changing the ‘regulatory nature’ of competition law. On the other hand, the novel situation has arisen insofar as air carriers now buy slots outright. In other words, in the absence of a requirement to report the resulting concentration in slots to the Commission and no investigation as such in cases where there is no merger or acquisition, or other joint venture, but purely a purchase of slots, how should this be handled? The Merger Regulation is useless in this instance as it cannot be used ex ante. Is this not then a ‘grey market’, which should be particularly concerning with reference to dominance and the theory of refusal to supply (slot hoarding) when applying the competition rules?

In terms of access to airport infrastructure, which it is now clear is indispensable to the operation of an air service; it is ‘very difficult for new entrants to challenge the dominant position of the traditional incumbent airlines at the most congested airports. At these airports, the mobility (turnover) of slots is very low’.106 This is, it is submitted, almost entirely owing

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102 Commission Notice on agreements of minor importance, which do not appreciably restrict competition under Article 81(1) TEC (de minimis), OJ C36/13, 22.12.2001.
103 UK Civil Aviation Authority and Office of Fair Trading, ‘Competition issues associated with the trading of airport slots’, OFT832 (June 2005), pp.15, 49.
to the current system of historical preference that is grandfather rights under the 80/20 ‘use it or lose it’ rule discussed above.

As the Impact Assessment accompanying the Proposed Recast explains:

Dominant carriers are reluctant to give up slots and they are impeding access to the market by hoarding or babysitting slots. The report by the European Competition Authorities on slot trading identified as a potential problem the fact that airlines are holding slots, even though they cannot use them profitably, with the primary objective of preventing other airlines from entering the market or from expanding (slot hoarding). These airlines could alternatively proceed to babysitting, by leasing slots to other airlines, but here also competition concerns could arise: the lessor could restrict the use of the slots by the lessee, it could choose to lease the slots only to airlines that are not considered to be strong competitors, it could ask for excessive prices etc.\(^\text{107}\)

Whilst the issue is recognised, this area appears to remain largely under-regulated or not at all.

A further hurdle perhaps, applying even a conservative theory of harm, is showing how reservation of slots, or ‘slot hoarding’, constitutes manipulation of the downstream market.\(^\text{108}\)

Arguing the airport slot as upstream is potentially problematic. What exactly is the downstream market? Whilst an airport may be pricing excessively, a good defence might be built citing issues with market definition and lack of legal certainty.

5) CONCLUSIONS

Article 6 of the Provisional Recast requires that, ‘On an annual basis, the coordinator or schedules facilitator shall submit to the Member States concerned, to the Commission and to all parties involved in their financing at their request, an activity report describing the general slot allocation and/or schedules facilitation situation ... [which] shall also contain aggregate and individual data on financial compensation derived from the sale of slots ...’.\(^\text{109}\)

It is unclear whether the reporting, though ensuring some transparency of the process of slot allocation and exchange, will lead to price control or price speculation. Exclusionary behaviour, overbidding and predatory pricing could ensue. The parties involved in the financing of the coordinator or scheduling facilitator will tend to include a relatively small group of airlines, which are likely to be the dominant carriers on the airport(s) concerned. It is questionable, therefore, whether limiting open access to the financial compensation data will create true liberalised, ‘open market’ conditions for the sale and exchange of airport slots. Indeed, the small group of airlines will become ‘privileged’ to the ‘market price’ for slots at the airport and may be in a position to influence this price to squeeze out competitors.

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\(^\text{107}\) Ibid, para. 49.


\(^\text{109}\) Provisional Recast, Article 6, para.1.
Furthermore, in the absence of a formal notification requirement on the sale or exchange of slot with respect to market share and the competition rules, there is a significant risk of only piecemeal economic scrutiny of those exchanges.

One way around this might be caps on slot holdings. In 2005, the UK Civil Aviation Authority (CAA) and Office of Fair Trading (OFT) considered ‘controls aimed at limiting the actions of specific airlines, for example a cap on slot holding’,\textsuperscript{110} but were not clear how this should be implemented. The CAA/OFT contemplated whether applying a cap on slot holdings only at hub airports might be the way forward. In conclusion, however, the CAA/OFT felt that ‘imposing caps across the board would seem too blunt an instrument, would risk adverse outcomes, and would be particularly onerous to implement effectively’.\textsuperscript{111} Therefore they did not recommend caps in the end.

In any case, it is quite probable that the spirit of liberalisation (and some re-regulation), there will continue to bring with it a slow, gradual introduction of market mechanisms in this area (e.g. the withdrawing and auctioning of historical slots). In the meantime, issues arising shall be taken on a case-by-case basis. So the Provisional Recast appears to be just another step in the liberalisation of the internal air transport market with more powers moving towards the Centre, but how the slot exchange market will deal with dominance or abuse will be defined remain to be evidenced.

\textsuperscript{110} UK Civil Aviation Authority and Office of Fair Trading, ‘Competition issues associated with the trading of airport slots’, OFT832 (June 2005), p.20.

\textsuperscript{111} Ibid, p.25.