

REMEDIES IN AIRLINE MERGERS IN THE EUROPEAN UNION

Szymon Murek*

This paper aims at proposing suitable solutions for dealing with airline mergers in the European Union in the future, with focus on the types of remedies which are likely to precisely tackle any anticompetitive effects of concentrations. In the first part, the business of air transport will be described. Then, the merger control regime in the EU be presented. In the next part, several past airline merger cases will be critically discussed, with the aim of separating effective from ineffective solutions. The last part will discuss the current situation of the airline market in the EU and try to predict its future situation to describe the environment in which mergers are likely to appear prospectively and factors that the European Commission should take into consideration in assessing those mergers. In the concluding part, several solutions aimed at improving the process of clearing mergers in the European Union will be presented.

I. Introduction

Airline sector has always been considered a crucial part of the domestic economy in the majority of countries around the world. Historically, it was not widely accessible and many people, due to inflated prices and limited level of comfort, were forced to use alternative means of transport. Modern, civil aviation, close to today's standards originated in the 1960s in the US, especially due to implementation of jet engines to civil aircrafts (with the notable example of Boeing 707). Transportation of people and cargo has become much faster, cheaper and safer. With the revolution in civil aviation, various new business opportunities emerged, as travellers or goods were able to reach practically any place on earth within 24 hours. However, majority of people in Europe and in the US still were not able to benefit from these changes in civil aviation. Almost all airlines were state-owned, the whole sector was immensely regulated, with high barriers to entry making it almost

* LL.M. (University of Warsaw), LL.M. (Queen Mary University of London), Legal trainee at the Warsaw Bar Association, associate at the law firm Sołtysiński Kawecki & Szlęzak.

impossible for any new player to enter the market. Due to the lack of effective competition on the market, air carriers had no incentive to reduce prices or improve quality of services, therefore until late 1970s prices of tickets remained on significantly high level.¹

The lengthy, but necessary process of deregulation commenced in 1978 in the US.² In 1982 provisions on price regulation were annulled, and in 1984 a sector regulator - Civil Aeronautics Board, was phased out, which shifted the control over airline sector from the political to market sphere.³ Between 1978 and 1985 number of air carriers in the US increased from 36 to 120 and prices on certain routes dropped up to 80%.⁴

Similar transition commenced in the European Communities with a minor delay, partially because of the transnational character of the body (as, unlike in the United States Congress, different countries needed to consent to any proposed changes). Moreover, because majority of European airlines at the time were state-owned, Member States had an evident conflict of interest, as they were commercially involved in business activity of air carriers regulating them via administrative laws at the same time, which **disincentivised** them from changing the status quo by allowing new entities to enter the market.⁵ Eventually, between 1987 and 1992, several pieces of legislation deregulating the airline industry were passed.⁶ Barriers to entry were significantly lowered in the spirit of free movement of people and goods within the Communities.

¹ Jagdish Sheth, Fred Allvine, Can Uslay, Ashutosh Dixit, *Deregulation and Competition: Lessons from the Airline Industry*, (Sage Publications 2007), 23.

² Airline Deregulation Act, Pub.L. 95-504 92 Stat. 1705.

³ Fred L. Smith Jr., Braden Cox, *The Concise Encyclopedia of Economics: Airline Deregulation*, 1. < www.econlib.org/library/Enc/AirlineDeregulation.html > accessed on 30 October 2017.

⁴ Peter Belobaba, Kari Hernandez, Joe Jenkins, Robert Powell, William Swelbar, *Productivity Trends in the US Passenger Airline Industry 1978-2010*, (Massachusetts Institute of Technology 2011), 19. <http://engineeringfiles.mit.edu/downloads/transportation/MIT_Airline_Productivity_Study_2011_Final1.pdf> accessed on 30 October 2017.

⁵ Sean Barrett, *Deregulation and the Airline Business in Europe: Selected Readings*, (Routledge, London, New York 2009), 15.

⁶ Council Regulation 3975/87, 1987 O.J. (L 374); Council Regulation 3976/87, 1987 O.J. (L 374); Council Decision 87/602, 1987 O.J. (L 374); Council Directive 87/601, 1987 O.J. (L 374); Council Regulation 2342/90, 1990 O. J. (L 217); Council Regulation 2343/90, 1990 O.J. (L 217); Council Regulation 2344/90, 1990 O.J. (L 217); Council Regulation 2407/92, 1992 O.J. (L 240); Council Regulation 2408/92, 1992 O.J. (L 240); Council Regulation 2409/92, 1992 O.J. (L 240).

As a result, multiple state-owned carriers were privatised and various new air carriers entered the market of air transport in European Communities.⁷ The process of liberalisation stimulated fierce competition, which resulted in lower prices of tickets, better quality of service, establishment of new airports and air routes, and finally significant rise in the number of passengers.⁸

With the liberalisation of the markets tough competition between air carriers began. Multiple airlines became insolvent, many air carriers required financial support from the government, some were restructured and a few companies merged. Under current competition regime, European Commission was involved in several mergers in airline sector, with some resulting in major problems with achieving a result satisfactory both to the authority and merging parties. The approach of the Commission has been shifting throughout the years with various types of remedies being tested in practice, producing different and sometimes undesirable results. As the situation in the airline market in the EU is likely to change in the future, mainly because of competitive pressure from non-EU airlines, the authorities should already start to think of the approach to possible future mergers and their impact on the European airlines and ultimately the consumers.

II. The business of air transportation

The business of air transportation is considered sophisticated and highly unpredictable due to quantity of often unrelated aspects. It normally has stiff competition and high barriers to entry. Key factors causing the market to be relatively closed to potential entrants include:

- a) Gigantic costs of commencing and continuing business activity – mainly cost of purchasing or lease of the aircrafts (brand new Boeing 737, one of the most popular modern airplanes for short-haul flights, costs between \$82-125mln),⁹ high costs of jet fuel, establishing the distribution network, market analysis, marketing costs and salaries of highly qualified professionals;

⁷ Jack Hirshleifer, Amihai Glazer, David Hirshleifer, *Price Theory and Applications. Decisions, Markets and Information*, (Cambridge University Press 2005), 231–238.

⁸ Communication from the Commission - *Community guidelines on financing of airports and start-up aid to airlines departing from regional airports*, 2005/C 312/01.

⁹ Official pricing list of Boeing from 2017, <www.boeing.com/company/about-bca/> accessed on 30 October 2017.

- b) The multitude of licenses needed to be obtained to assure that only entities capable of maintaining high safety standards are allowed to engage in the airline business;
- c) High requirements regarding the quality of services – especially considering safety standards: even low-cost airlines which obviously aim at lowering their operational costs to maximum by unifying their fleet, choosing cheaper airports, offering lower standard of in-flight entertainment or catering, do not reduce their costs which might potentially affect travel safety, for example crew training, aircraft maintenance etc.;
- d) Regulatory restrictions - despite significant liberalisation in the sector, airlines are not able to fully benefit from it, as multiple Member States keep their bilateral agreements with the third countries in force;
- e) Access to distribution channels and satisfactory landing slots at popular airports;
- f) The need to attract potential customers with significantly lower price (often predatory) than the airlines already present on the market.¹⁰

1. Cost structure

Extremely high costs of air transport are dependent on multiple factors. In 2008, a study of International Air Transport Association was published. Researchers collected data from the biggest air carriers in the world.¹¹ According to the study, main components of cost structure of air transport include:

- Fuel – 32.3%;
- Labour – 20.1%;
- Depreciation and amortisation – 5.9%;

¹⁰ See eg Joos Stragier, 'EC Competition Policy In The Aviation Sector: State Of Play And Outlook, Annual Conference of the Guild of European Business Travel Agents (GEBTA)', (Lisbon, 22 March 2002), <http://ec.europa.eu/competition/speeches/text/sp2002_009_en.pdf> accessed on 30 October 2017.

¹¹ IATA, 'Economic Briefing on Airline fuel and Labour Cost Share' (February 2010) <www.iata.org/whatwedo/Documents/economics/Airline_Labour_Cost_Share_Feb2010.pdf> accessed on 30 October 2017.

- Aircraft rentals – 3.5%.

Undoubtedly, fuel is the main cost item in airline transport industry. Its relevance is growing with time, as between 2001 and 2008 its share in the total cost structure rose from 13.6% to 32.3% and reached 33.3% in 2014.¹² Rapidly changing oil prices in the market, and high level of dependence of jet fuel prices from it, to a great extent affect the financial stability of the airline industry and cause perpetual fear of the CEOs of the air carriers of financial turmoil or even insolvency caused by sharp rise of value of the main cost component.

It must be underlined that air transport has become much cheaper in general – the air tickets (after inflation adjustments) were on average 60% less expensive in 2011 than in 1970.¹³ It encouraged more people to travel, as airlines became able to reach a wider customer base and attract more price-sensitive customers, who previously would have opted for alternative, cheaper means of transportation. This resulted in the lowering of the airline's profit margins significantly, as the companies needed to meet the demand of passengers for lower prices.

2. Black Swan Events

Another crucial factor affecting the financial stability of the airline industry is the “Black Swan Events” phenomenon. This term describes highly unpredictable, very rare, but extremely impactful events. The worst Black Swan Events from the airline's perspective are, undeniably, the terrorist attack on World Trade Centre on 11 September 2001 (when, between 2001 and 2005 profits of the airline industry in the US dropped by \$40bln)¹⁴ and Severe Acute Respiratory Syndrome (SARS) epidemic in 2003 (as a result of

¹² See eg Klemen Ferjan, ‘Airline Cost Management Group’, (Airline Cost Conference, Geneva, 26-27 August 2014) <www.iata.org/whatwedo/workgroups/Documents/ACC-2014-GVA/aocf-dev-FY2013-report_IATA.pdf> accessed on 30 October 2017.

¹³ McKinsey Report for IATA, ‘Profitability and the air transport value chain’ (2014) <www.iata.org/whatwedo/Documents/economics/profitability-and-the-air-transport-value%20chain.pdf> accessed on 30 October 2017, 9.

¹⁴ Paul Clark, *Stormy Skies. Airlines in Crisis*, (Ashgate, Farnham 2010), 1–20.

which Asian airlines lost around 8% of annual passenger traffic, which is estimated to have cost \$6bln in lost revenues).¹⁵

3. Yield management

Profits of airlines are even less predictable because of the industry-specific way of calculating fare prices, based on yield management. In practice, it results in a situation in which passengers on the exact same flight pay completely different prices based on numerous factors, even when travelling on the same travel class (economy, business etc.). What is more, some passengers are paying the price which is below the unit cost of the airline, however other customers (especially “premium” corporate passengers or those booking their flights on the last minute) are charged a price exceeding the unit cost multiple times. Generally, if the flight reaches a certain load factor (ratio of number of seats offered to passengers who bought the ticket), it is then able to make a profit from a particular flight even by offering a fraction of the tickets at a dumping price. This forces airlines to only serve the routes with a steady flow of customers and immediately close even slightly unprofitable destinations.¹⁶

4. Competition on the market

Another important factor with huge impact on an airline’s financial stability is the increasing competition in the market, arising mainly from three sources:

- a) The appearance and fast growth of low cost airlines in 1980s in the US and 2000s in Europe, offering “no-frills” service at very competitive price level;
- b) Increasing development of a hub-and-spoke model, allowing passengers to travel via intermediate airport – therefore, for example, the competitors of LOT Polish Airlines on a route between London and Warsaw are not only British Airways, Ryanair, Wizzair and

¹⁵ IATA, ‘Economic Briefing on Avian flu’, (2006) <www.iata.org/publications/economic-briefings/Avian-Flu-Impact.pdf> accessed on 30 October 2017.

¹⁶ See eg Janakiram Subramanian, Shaler Stidham, Jr., Conrad J. Lautenbacher, ‘Airline Yield Management with Overbooking, Cancellations, and No-Shows’, (1999), Volume 33, Issue 2, Transportation Science <<https://trid.trb.org/view.aspx?id=504184>> accessed on 30 October 2017.

Norwegian, which are offering a direct connection, but in fact other European airlines as well, including KLM, Lufthansa or Air France, which are often able to offer potential customers a slightly longer journey (around 4 hours instead of 2.5 hours) with a short transfer at one of their hubs (Amsterdam, Frankfurt, Paris accordingly), at a competitive price.¹⁷ Stiffer competition in absence of anticompetitive agreements normally results in lower profit margins of the market players;

- c) Growing popularity of internet search engines, which completely revolutionised the distribution of the airline tickets. Those websites (notable examples include tripsta.com, kayak.com and expedia.com) allow customers to instantly compare offers of multiple service providers on a particular route and choose the most suitable (presumably the cheapest) option, which undeniably increases the market transparency and forces the air carriers to aggressively respond to price reductions of their competitors.

5. Financial stability of the airlines

All the factors presented in this section affect the financial stability of the businesses active on the air transport market. It results in a relatively high risk associated with air transport, as it earns lower return on capital compared to, for example, other levels of the air transport supply chain including airports, freight forwarders, ground handling services etc.¹⁸ Due to vulnerability of airlines operating in uncertain environment, their dependence on the outside shocks and relatively high level of competition, they normally rely only on meagre profit margins. It appears to be nearly impossible, however, that in 2012 airlines, on average, made profits of around \$4 for every passenger.¹⁹ Considering the tremendous costs of activity of the airlines, it seems relatively easy to turn such a minimal profit into a loss in the next fiscal year. This

¹⁷ See eg Gerald N. Cook, Jeremy Goodwin, 'Airline Networks: A Comparison of Hub-and-Spoke and Point-to-Point Systems Airline Networks: A Comparison of Hub-and-Spoke and Point-to-Point Systems', (2008) Winter, Volume 17, Number 2, Journal of Aviation/Aerospace Education & Research.

¹⁸ McKinsey Report for IATA.

¹⁹ 'Why airlines make such meagre profits', *The Economist*, (23 February 2014), <www.economist.com/blogs/economist-explains/2014/02/economist-explains-5> accessed on 30 October 2017.

constitutes one of the main reasons why airlines are often eager to merge and grow bigger. It allows them to mitigate the risk and be better prepared for potential problems, including Black Swan Events or rising costs of jet fuel. Other benefits include reduction of costs of activity (especially on joint procurement, IT, common marketing) and possibility of delivering a better service, tailored to the needs of the customers.²⁰ Those benefits are usually recognised by the European Commission. However, allowing the companies to merge and reach market power has its side effects too as airlines can easily approach a dominant position. Therefore, competition authorities around the world assess the cases of airline mergers with great caution, even if they acknowledge the potential benefits arising from them at the same time.

III. Merger regime in the European Union

Merger regime in the European Union undoubtedly is highly influential to other merger review systems around the world. Although legal provisions similar to those existing in the EU have been over the years immensely adopted do legal systems of non-EU legislations around the world (with notable examples of India and Malaysia)²¹, uniqueness of the EU system arises mainly from the fact, that concentrations with effects existing within the EU can be assessed by the European Commission or independently by national competition authority of a particular Member State, depending mainly on the size of the merging parties.

1. The European Union Merger Regulation

The European Union Merger Regulation of 2004²² provides a mechanism for the assessment of mergers and acquisitions in the European Union. It obliges the merging parties to notify the planned concentration before it reaches the

²⁰ Franz Fichert, 'Remedies in Airline Merger Control – The European Experience', (16th International Conference of Hong Kong Society for Transportation Studies Hong Kong, 17-20 December 2011) <http://userpage.fu-berlin.de/~jmueller/gaprojekt/downloads/SS2012/Fichert_Remedies_GAB.pdf> accessed on 30 October 2017.

²¹ Prof. Richard Whish QC (Hon) guest lecture at the Latvian Law Institute, (Riga, Latvia, 30 May 2014) <www.youtube.com/watch?v=x_JtCQwIxKs> accessed on 30 October 2017.

²² Council Regulation (EC) No. 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings, 2004 O.J. (L 24) (EUMR).

final stage.²³ Transactions which have to be notified need to meet two criteria. They have to be:

- a) concentrations – defined as pure mergers of two or more previously independent undertakings, the acquisitions of direct or indirect control of the whole or parts of the undertaking or the establishment of a full-function joint ventures.²⁴ The concept of control in EU merger regime is widely defined and consists of rights, contracts or any other means which confer the possibility of exercising decisive influence over an undertaking;²⁵
- b) with EU dimension – based on purely jurisdictional criteria of worldwide and EU-wide turnover of the undertakings concerned.²⁶ Issues regarding the country of origin of the undertakings, place where the transaction takes place or law applicable to the transaction are of no relevance.

2. Powers of the European Commission

The EU merger regime is designed to assess a plethora of mergers, as both concepts described above cover wide spectrum of transactions. Vast majority of large, transnational mergers of non-EU companies, with their registered offices on other continents will have to be assessed by the European Commission, as long as the undertakings concerned generate at least some part of their profit within the European Union, even if this region is not of their particular concern. It increases the importance of EU merger control system, as its application is, to a certain extent, transnational. Undertakings concerned have to take into account the powers of the European Commission, even if they are based and mostly active in other regions. Notable example of the boldness of the Commission in exercising its rights in a cross-border manner is the merger of *GE/Honeywell*.²⁷ The transaction was cleared in the US and Canada, but blocked in the European Union, even though both

²³ EUMR, Art. 4.

²⁴ EUMR, Art. 3.

²⁵ EUMR, Art. 3.

²⁶ EUMR, Art. 1.

²⁷ Case No COMP/M.2220 *General Electric/Honeywell* [2001], OJ L48.

undertakings in question were based on the other side of the Atlantic Ocean and generated majority of their turnover there.²⁸

The assessment of mergers in the European Union consists of up to two phases and can (despite certain exceptions, mainly referrals of the cases to national competition authorities of the Member States) have three different outcomes:

- a) Unconditional clearance – when merger does not significantly impede effective competition and is fully approved by the European Commission;²⁹
- b) Conditional clearance – when merger will not significantly impede effective competition if certain conditions (remedies) aimed at mitigating the risk of anticompetitive outcome are met by the merging parties;³⁰
- c) Prohibition decision – when merger causes significant impediment to effective competition and its outcomes cannot be cured with remedies, it is blocked by the European Commission.³¹

The remedies of the air transport sector in the European Union become the main issue in practice, as airlines tend to struggle with obtaining unconditional clearance from the Commission and usually rely on certain conditions which they have to fulfil to be granted at least with conditional clearance. The relevant market in these cases is very narrowly defined by the authorities – usually it consists of only one route between two cities. Rarely, if other means of transportation can be regarded as close substitutes, they will be included in the market definition. It is especially relevant on busy, short-haul routes, when the duration and the standard of journey are comparable – for example between Paris and London, where Eurostar trains actively compete with airlines operating on this route.³² However, normally the relevant market can be even narrowed down, for instance where multiple

²⁸ Donna E. Patterson, Carl Shapiro, 'Transatlantic Divergence in GE/Honeywell: Causes and Lessons' (2001), Volume 16, Number 1, Fall 2001, *Antitrust Law Journal* <<http://faculty.haas.berkeley.edu/shapiro/divergence.pdf>> accessed on 30 October 2017, 22-23.

²⁹ EUMR, Art. 2(2).

³⁰ EUMR, Art. 6.

³¹ EUMR, Art. 2(3).

³² Franz Fichert, '*Remedies in Airline Merger Control – The European Experience*', 2.

airports serve one city or passenger traffic to a particular destination can be clearly divided into several unrelated segments (business and holiday, price-sensitive and corporate travellers, cargo etc.).³³

Due to the fact that in majority of mergers in aviation sector the relevant market is indeed narrowly defined, it is relatively easy for the companies to approach or even reach dominant position (as the competition on the market is weak or, in extreme situations, even non-existent), hence the analysis of a merger between airlines is quite unique, as the companies can be active on dozens, or even hundreds of relevant markets. In most cases of airline mergers only a small percentage of the markets will be affected by anti-competitive effects, but in majority they will be absent. Therefore, the anticompetitive effects arising from the merger of airlines can be either horizontal in nature (when two companies active on the same market merge directly diminishing rivalry on the relevant market) or conglomerate (when parallel markets are indirectly affected with the merger and merged entity can take advantage of portfolio effects). Due to the specificity of the sector, designing the correct remedies capable of precisely targeting the problematic part of the activity of the merged entity is of a particular importance in the sector in question.

IV. Remedies in mergers in the European Union - introduction

As outlined in the previous section, the European Commission is obliged to prohibit the merger when it considers that the transaction would significantly affect effective competition. In some cases, however, parties are able to address the concerns of the Commission by taking certain commitments, in order to eliminate the risk of jeopardising effective competition on the market. Parties are allowed to offer commitments at both stages of the merger review process. The obligations cannot be imposed unilaterally by the authorities - they have to be fully based on what has been offered by the parties.³⁴ In majority of cases the Commission has cleared mergers subject to

³³ Jakub Kociubinski, 'Relevant Market in Commercial Aviation in the European Union', (2011), Volume 1, Issue 1, Wroclaw Review of Law, Administration and Economics, 16-18.

³⁴ Case T-210/01 *General Electric v Commission* [2005] ECR II-05575, para 52.

commitments rather than prohibited them outright, which clearly shows the practical importance of this tool.³⁵

According to the Merger Regulation, the European Commission should clear a notified concentration where the undertakings concerned offer commitments aimed at rendering the transaction compatible with the common market.³⁶ Remedies are considered to be sufficient to allow clearance of the whole merger if they are capable of eliminating the identified competition problem, restoring effective competition and are proportionate to the competition concerns.³⁷

1. Notice on remedies

Main source of guidance on the types of remedies likely to be accepted by the Commission is the Notice on remedies from 2008.³⁸ The purpose of the document is to codify existing case law and provide merging parties with an insight on how the European Commission will approach the commitments offered. The document sets out general principles regarding remedies and requirements for the implementation of commitments.

2. Types of remedies

Traditionally, remedies have been divided into two main categories – structural and behavioural, with structural remedies having as their object restoration of the post-merger structure of the relevant market to its pre-merger shape. Most common examples of structural remedies include divestiture of brands, assets etc. On the other hand, behavioural remedies are based on a promise of the merged entity not to abuse its market power, which might be a result of the concentration. Naturally, there is a strong preference of the European Commission for structural remedies, as they are faster and easier to implement - they require less effort in the future from the Commission. It can “close the case” right after issuing its decision, without

³⁵ Ioannis Kokkoris, Howard Shelanski, *The EU Merger Control – A legal and Economic Analysis*, (Oxford University Press 2014), 515.

³⁶ EUMR, recital 30.

³⁷ EUMR, Art. 30.

³⁸ Commission Notice on Remedies Acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004 (2008) (Remedies Notice).

the ongoing need of monitoring the merged entity and its activity on the market.³⁹ Therefore, behavioural remedies are normally not accepted under the EUMR.⁴⁰

The more modern classification of remedies in the European Union can be found in a study performed by the European Commission in 2005:

- a) Transfer of a market position:
 - i) Divestiture of a controlling stake in a company;
 - ii) Divestiture of a business unit;
 - iii) Divestiture of mix-and-match assets;
 - iv) Divestiture or grant of a long-term exclusive license;
- b) Exit from a joint venture;
- c) Granting access to a market or to other areas:
 - i) Access to infrastructure or technical platforms;
 - ii) Access to technology via licences of IPRs;
 - iii) Termination of exclusive vertical agreements;
- d) Other remedies.⁴¹

The modern approach is undoubtedly more complex and include variety of possibilities of remedial actions which could be taken, however, to a certain extent, it is based on the traditional classification with category ‘a’ representing structural remedies and category ‘c’ representing behavioural (non-structural) remedies.⁴²

Nowadays merging parties are well equipped with different options regarding commitments which they are able to offer to ensure that, on the one hand, they address the competitive concerns of the authorities, and on the other that they are practical, proportionate and do not go beyond what is necessary,

³⁹ Remedies Notice paras 15-17.

⁴⁰ Jonathan Faull, Ali Nikpay, *The EC law of competition*, (Oxford University Press 2014), 6.

⁴¹ Directorate-General for Competition of the European Commission, *Merger Remedies Study*, (October 2005), <http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf> accessed on 30 October 2017.

⁴² Ioannis Kokkoris, Howard Shelanski, *The EU Merger Control*, 521.

which can result in harming the whole transaction and forcing the undertakings concerned to withdraw their initial intention to merge.⁴³

V. Remedies in airline mergers

The European Commission acknowledges the fact that certain sectors require specific remedies, tailored in a way which maximises their chances success. Over the years, the aviation sector has produced its unique range of remedies used in practice, mainly because the competition assessment in those cases is generally very complex compared to other industries, especially due to its network nature, exceptionally narrow definition of the relevant market, large number of routes and importance of the sector to consumers. Traditional, structural remedies are usually extremely difficult to apply and are not necessarily able to tackle potential problems with competition.⁴⁴

Normally, the first stage of the competitive assessment of any concentration is defining the relevant market. As previously mentioned, in the aviation sector authorities tend to separate the activity of the undertakings into numerous markets. Usually the European Commission takes into account a slightly wider picture and includes potential entrants to the relevant market in its assessment. It allows for correct application of the potential remedies in the future and provides a suitable framework which allows the Commission to assess all concentrations on a case-by-case basis.⁴⁵

1. Common types of remedies

As rightly argued by Scharpenseel, “One of the most significant obstacles to successful liberalization is airport congestion resulting in slot allocation

⁴³‘Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches, A Report by the European Commission and the United States Department of Transportation’ (16 November 2010), 109-114, <http://ec.europa.eu/competition/sectors/transport/reports/joint_alliance_report.pdf> accessed on 30 October 2017.

⁴⁴ Miglena Rahova, ‘Remedies in Merger Cases in the Aviation Sector: Developments in the European Commission's Approach’, (2013), Volume 12, Issue 3, *Issues in Aviation Law and Policy*, 508.

⁴⁵ European Competition Authorities, Report of the ECA Air Traffic Working Group, Mergers and Alliances in Civil Aviation - An Overview of the Current Enforcement Practices of the ECA Concerning Market Definition, Competition Assessment and Remedies (2003) <<http://ec.europa.eu/competition/publications/eca/report.pdf>>, accessed on 30 October 2017.

problems, because the absence of attractive slots is the main barrier to entry for competitors on high-density”.⁴⁶ Therefore, packages of remedies usually offered by the airlines in merger review process were slot divestitures.⁴⁷ At practically every airport in the world, scheduled flights depart and land at a specified time during the day which is assigned to them. At busier airports, especially those with high ratios of time-sensitive and premium passengers, time slots positioned at strategic parts of the day (when the demand is at its peak) are extremely valuable, as they allow airlines to generate more profit from their activity.⁴⁸

Slot divestitures appeared to be a simple yet proper solution, theoretically capable of solving all potential competition problems, as they decrease the chances of the merged entity to dominate the relevant market and encourage existing competitors to engage in tougher rivalry, or potential entrants to enter the market by giving them access to attractive time slots at busy airports. The idea seemed to be satisfactory and its use however did not require much effort from the airlines – they were not obliged to find a new market entrant. In fact, successful market entry after slot divestiture rarely happened in practice and the barriers to engage other airlines in effective competition remained at high level. Therefore, this approach did not necessarily succeed at fully addressing the competition concerns of the European Commission, as ultimately undertakings remained relatively free to gain or abuse market power.⁴⁹

2. Approach of the European Commission

Due to this fact, the European Commission started to change its approach to slot divestitures and ceased to treat them as an ultimate solution to competition problems in airline mergers. The Remedies Notice explicitly address this issue – in the document it is stated that “In air transport mergers,

⁴⁶ Moritz Ferdinand Scharpenseel, ‘Consequences of E.U. Airline Deregulation in the Context of the Global Aviation Market’, (2001), Volume 22, Issue 1, Fall, *Northwestern Journal of International Law & Business*, 108.

⁴⁷ Miglena Rahova, *Remedies in Merger Cases in the Aviation Sector*, 511.

⁴⁸ James D. Reitzes, Brendan McVeigh, Nicholas Powers, Samuel Moy, ‘Competitive Effects of Exchanges or Sales of Airport Landing Slots’, (2015), *Review of Industrial Organization*, Volume 46, Issue 2, March, 95-96.

⁴⁹ Joos Stragier, ‘Airline Alliances and Mergers - The Emerging Commission Policy’, (3th Annual Conference of the European Air Law Association, Zurich, 9 November 2001) <http://ec.europa.eu/competition/speeches/text/sp2001_040_en.pdf>, accessed on 30 October 2017.

a mere reduction of barriers to entry by a commitment of the parties to offer slots on specific airports may not always be sufficient to ensure the entry of new competitors on those routes where competition problems arise and to render the remedy equivalent in its effects to a divestiture.”⁵⁰ After several problematic airline mergers in the early 2000s, the Commission decided not to accept slot divestitures as a sole solution to competition problems in airline mergers anymore. Undertakings concerned had to create new, workable packages of remedies. Their efforts and the approach of the European Commission towards them will be analysed in the following part of the paper in the form of several case studies, where the types of remedies accepted and refused in the past will be presented in pursuance of depicting the evolution of the Commission’s policy.

VI. Case studies

1. *Air France/KLM*⁵¹

The merger of the national carriers of France and the Netherlands is still considered as the biggest and presumably one of the most controversial in history of the EU. The concentration required extensive effort of the undertakings concerned, as their market position in Europe was particularly strong, and as a result of the transaction the merged entity became the biggest airline group by turnover in the world (with €19.2 billion).⁵² Public opinion, as well as competitors of the airlines, widely expressed their concerns as they feared that the planned transaction would result in reduced capacity and higher prices of tickets.⁵³ Clearing the merger was dependant on numerous commitments offered by the parties during the process, however eventually the merging parties received the European Commission’s blessing.

The merger of Air France and KLM was notified on 18 December 2003. In the notification, parties claimed that the proposed concentration would bring

⁵⁰ Remedies Notice, par. 63.

⁵¹ Case COMP/M.3280 *Air France/KLM* [2004], OJ C60/5.

⁵² Internal corporate report of Air France/KLM – ‘Air France – KLM, a Global Airline Market Leader’, <http://corporate.airfrance.com/uploads/media/airfrance_klm_a_global_airline_market_leader_01.pdf> accessed on 30 October 2017.

⁵³ John Tagliabue, ‘Air France and KLM to Merge, Europe’s No. 1 Airline’, *The New York Times* (1 October 2003) <www.nytimes.com/2003/10/01/business/air-france-and-klm-to-merge-europe-s-no-1-airline.html> accessed on 30 October 2017.

benefits to consumers in form of cost reduction, improvement of the quality of service and establishment of new routes. The European Commission, however, expressed its concerns, as on 14 routes (both Intra-European and intercontinental) the airlines were considered as actual or potential competitors, therefore allowing those companies to merge would significantly reduce or even eliminate competition on those markets. Additional factors endangering the pro-competitiveness of the concentration were extremely valuable landing slots at both hubs (Paris and Amsterdam), and existence of national regulatory restrictions in France and the Netherlands.

Because of competition concerns of the European Commission, undertakings submitted a substantial package of proposed commitments. Firstly, parties offered to surrender 94 landing and take-off slots per day, which in practice equalled up to 31 new return scheduled flights that could emerge. It allowed establishing, for example, around 6 new daily flights between Paris and Amsterdam which would undoubtedly result in improvement of services and more competitive prices on a given route. Secondly, the landing slots were secured from being misused, as they were ultimately surrendered, for an unlimited duration and would not be returned to the merged entity even if their competitors showed no interest in taking them over. It created an additional increase in value of the slots surrendered and diminished the chances of lack of new entry.⁵⁴ Thirdly, the parties committed to refrain from increasing their offers on affected routes (“frequency freeze”) in order to allow their competitors to truly access the relevant market and give them a fair chance to compete, especially at the beginning of their activity.

Additionally, undertakings concerned agreed to enter into intermodal agreements with companies providing land transport services, in order to establish a common service so that, for example, passengers using Thalys railway link between Paris and Amsterdam could “mix-and-match” their travel choices by taking a plane on outward trip and a train on a bound trip. Finally, the national authorities of France and the Netherlands assured the European Commission that they would give traffic rights to airlines wishing

⁵⁴ Carsten Bermig, Oliver Stehmann, Michele Lamalle, ‘New Developments in the Aviation Sector, Consolidation and Competition: Recent Competition Cases’, (2004), Summer, 69, Competition Policy Newsletter
<http://ec.europa.eu/competition/publications/cpn/2004_2_66.pdf> accessed on 30 October 2017.

to stop over in Paris or Amsterdam en route to other, non-EU countries, which guaranteed access to the market to air carriers from outside the EU and undoubtedly increased competition on long-haul flights, especially transatlantic. Moreover, the authorities promised not to regulate prices on long haul flights.⁵⁵

Eventually, the transaction was cleared in Phase I of the investigation, subject to commitments outlined above. The Commission, despite its initial doubts, openly admitted that it predicts that the impact of the concentration will be positive. During the press conference following the merger, Competition Commissioner Mario Monti underlined that: "The outcome of this case shows that the long-awaited consolidation of the European airline sector can be done in full respect of competition rules. The merger between KLM and Air France will provide air passengers with a greater choice of destinations and services without having to pay a higher price on those routes where their presence is the strongest"⁵⁶.

However, the success of remedies can be questioned, as only in regards to two affected routes (Amsterdam – Milan and Amsterdam – Rome) market entry was eventually observed.⁵⁷ This means that in the vast majority of potentially problematic relevant markets parties did not face any new competitive pressure, which was the primal goal of the slot divestiture offered. Therefore, after the merger of Air France and KLM, the European Commission acknowledged that the approach to remedies offered by the parties in airline merger cases presumably has to shift, in order to guarantee that the commitments will in fact result in new market entry. This clearly proves that slot divestiture might constitute a credible solution to anticompetitive problems, but only under very specific market conditions and if they are accompanied by additional commitments.⁵⁸

Interestingly, despite the forecasts of the management before the merger, the concentration did not lead to major cost savings and synergy effects. As for 2016, Air France/KLM had one of the highest unit costs (available seat

⁵⁵ Press Release, European Commission, *Commission Clears Merger between Air France and KLM Subject to Conditions*, (11 February 2004) <http://europa.eu/rapid/press-release_IP-04-194_en.htm> accessed on 30 October 2017.

⁵⁶ *ibid.*

⁵⁷ Franz Fichert, *Remedies in Airline Merger Control – The European Experience*, 5.

⁵⁸ Jonathan Parker, 'Air France/KLM: an assessment of the Commission's approach to consolidation in the air transport sector', (2005), *European Competition Law Review*, 131.

kilometre) in Europe – more than 3 times bigger than Ryanair.⁵⁹ Because of the structure of the merged entity, in which both Air France and KLM were allowed to remain to a certain extent autonomous (in terms of branding, hubs etc.), some level of tension continues to arise between the Dutch and the French arm of the company, especially due to strong trade unions in Air France, which are not willing to accept the inevitable cost cutting and presumed lack of innovation damaging the whole enterprise.⁶⁰ The ultimate split of the company might be the only solution to the rising issues between the two branches. It would be an extremely interesting and quite cynical outcome of the biggest airline merger in the European Union, which was supposed to result in substantial savings and cheaper air tickets, but on the other hand, according to some specialists, should have not been cleared in the first place.⁶¹ The example of Air France/KLM clearly shows that the traditional approach to defining the relevant market in airline sector might need to be reconsidered and liberalised, as even in an event of insufficient remedies putting the merging entity in an advantageous position, companies are not able to exercise its strong market position and harm competition.

2. *Lufthansa/SN Airholding*⁶²

Acquisition of stakes by German national carrier – Lufthansa, in SN Airholding, the holding company of Brussels Airlines, constitutes another example of an important concentration in the airline sector in the European Union. The transaction was notified on 26 November 2008 and eventually cleared, subject to commitments, on 22 June 2009.

During the investigation, the European Commission acknowledged that in the initially proposed form, the transaction would lead to a significant impediment to effective competition on several passenger routes within the European Union, mainly on the routes: Brussels-Hamburg, Brussels-Munich (where the merged entity would even reach monopoly), Brussels-Frankfurt

⁵⁹ Michael Stothard, 'Air France struggles to make big cost cuts', *The Financial Times*, (20 October 2015) <<https://next.ft.com/content/3e42fc0e-6dd9-11e5-8171-ba1968cf791a>> accessed on 30 October 2017.

⁶⁰ Elco Van Groningen, Andrea Rothman, 'The Dutch Half of Air France-KLM Isn't Happy with the French Half', *Bloomberg* (4 July 2016) <<https://skift.com/2016/07/04/the-dutch-half-of-air-france-klm-isnt-happy-with-the-french-half/>> accessed on 30 October 2017.

⁶¹ See eg Jonathan Parker, 'Air France/KLM: an assessment of the Commission's approach to consolidation in the air transport sector', (2005), *European Competition Law Review*, 128.

⁶² Case COMP/M.5335 *Lufthansa / SN Airholding* [2009], OJ C295/11.

and Brussels-Zürich. Because of the high probability of anticompetitive problems, the European Commission decided to open an in-depth investigation. Considering the seriousness of the situation, Lufthansa submitted a comprehensive package of remedies aimed at reducing the barriers to entry and facilitating a possibility of entry for a new market player on the routes affected. Firstly, the German carrier offered to divest slots in all four routes, which would allow new entrants to operate their flights. The proposed divestiture provided for an efficient and timely slot allocation mechanism. Moreover, rights of companies which would eventually take over those slots were amplified as they would receive the so-called “grandfather rights”⁶³ to those slots if they had operated on the route for a certain pre-determined period of time. Additional remedies, designed to supplement the main ingredient of the remedies package offered, were special code-share agreements and the participation in Lufthansa’s frequent flyer programme.

The European Commission welcomed the package offered by the undertakings concerned and cleared the merger in Phase II, subject to conditions. In the opinion of the Commission, the commitments “not only target the problem of slot congestion, which is an important entry barrier on the problematic routes, but generally enhance the attractiveness for new entry on these routes”.⁶⁴ Unfortunately, the divestiture did not result in market entry creating a sufficient degree of competitive pressure on the merged entity.⁶⁵

Time has proved that the acquisition was considered a success from Lufthansa’s perspective, as currently it decided to buy the remaining 55% shares of SN Airholding (initially it bought only 45% of shares, however due to the fact that the transaction guaranteed Lufthansa decisive influence over business decisions of SN Airholding, it constituted a notifiable transaction).

⁶³ The rule commonly used on the market of landing slots, according to which the airline which has been actively using the allocated slots during a given season is automatically entitled to use them in the next one. See eg Gernot Sieg, ‘Grandfather rights in the market for airport slots’, (2008), Technische Universität Braunschweig, Economics Department <https://www.tu-braunschweig.de/Medien-DB/vwl/wp04_grandfather.pdf> accessed on 30 October 2017.

⁶⁴ Press Release, European Commission, *Mergers: Commission clears proposed takeover of SN Brussels Airlines by Lufthansa, subject to conditions* (22 June 2009) <http://europa.eu/rapid/press-release_IP-09-974_en.htm> accessed on 30 October 2017.

⁶⁵ Michele Giannino, ‘The European Commission Appraisal of Airline Mergers: The Rise of a New Generation of Slot Remedies’, (2012), Issue 52, Airlines Magazine <https://aerlinesmagazine.files.wordpress.com/2012/03/52_giannino_eu_slot_remedies.pdf> accessed on 30 October 2017.

The transaction was approved by the board of Lufthansa in September 2016 and is expected to be completed by the end of 2017.⁶⁶ The acquisition of the remaining shares is supposed to help Lufthansa to fold Brussels Airlines into Eurowings – its low cost unit, to better engage in a rivalry with its biggest competitors – Ryanair and EasyJet.⁶⁷

3. Lufthansa/Austrian Airlines⁶⁸

Another stage of Lufthansa's business expansion was the acquisition of stakes in the national carrier of Austria – Austrian Airlines. Interestingly, the transaction was notified before the European Commission granted Lufthansa with a conditional clearance in the acquisition of SN Airholding, on 8 May 2009. Moreover, both companies have already cooperated, to a certain extent, as they were members of Star Alliance, one of the biggest airline alliances in the world. The merger was subsequently cleared on 28 August 2009, subject to commitments.

During the assessment of the concentration, the European Commission identified risk of significant impediment to effective competition and decided to open the in-depth investigation, during which it narrowed down its concerns to the routes (relevant markets) of Vienna-Frankfurt, Vienna-Munich, Vienna-Stuttgart, Vienna-Cologne and Vienna-Brussels, where consumers would be likely to face reduced choice and higher prices. In Phase II, Lufthansa submitted a set of remedies, which was very similar to the one already proposed in SN Airholding. It included the divestiture of slots, with the option of grandfathering rights and some ancillary measures, mainly the participation in Lufthansa's Frequent Flyer Programme. The Commission was satisfied with the remedies offered and concluded that the merger will not lead to significant impediment to effective competition if the conditions are met. Unsurprisingly, the decision was contested by the main rival of the Austrian Airlines in Austria – Niki Lufthart, which decided to challenge the approval of the European Commission before the General Court, focusing in

⁶⁶ 'Lufthansa board approves Brussels Airlines takeover', *Reuters* (28 September 2016) <<https://www.reuters.com/article/us-lufthansa-m-a/lufthansa-board-approves-brussels-airlines-takeover-idUSKCN11Y1IK>> accessed on 30 October 2017.

⁶⁷ Richard Weiss, 'Lufthansa to Add Brussels Airline to Eurowings Low Cost Arm', *Bloomberg* (28 April 2016) <www.bloomberg.com/news/articles/2016-04-28/lufthansa-to-add-brussels-airline-to-eurowings-low-cost-arm> accessed on 30 October 2017.

⁶⁸ Case COMP/M. 5440 *Lufthansa/Austrian Airlines* [2009], OJ C16/11.

its motion on the fact that remedies offered by Lufthansa were not proportionate to the scale of anticompetitive impact of the merger.⁶⁹ The action however, along with the other claim brought by Niki Lufthart challenging the restructuring aid granted by the state, was dismissed by the General Court, which stated that the claimant failed to provide sufficient evidence to justify the action.⁷⁰

4. *KLM/Martinair*⁷¹

The merger of these airlines can serve as an example of the reserved approach of the European Commission to remedies, provided they are not essential to address the anticompetitive concerns. Both airlines were active on the market of transporting passengers and cargo from Amsterdam to multiple destinations worldwide, with Martinair being particularly focused on serving intercontinental routes. At the time of notifying the concentration to the Commission on 17 July 2008, KLM had already owned 50% of shares in Martinair and was attempting to buy the remaining part of the company to become a sole shareholder.

In the initial part of the investigation, the Commission concluded that the transaction raises serious doubts regarding its compatibility with the common market and decided to open an in-depth investigation. Competition concerns were identified mainly in relation to passenger routes of Amsterdam-Aruba and Amsterdam-Curacao. To remove the competition concerns, the parties offered a commitments proposal. The submitted remedies were unique, as they did not contain usual set of commitments (slot divestiture), but rather focused on benchmarking the price of the ticket in economy class on affected routes to the price evolution of the ticket prices on comparable routes. The Commission however found this mechanism far too complicated and difficult to establish and monitor in the future. Therefore, the commitment was refused because it failed to effectively address the competition concerns identified.

Surprisingly, despite the refusal of commitments offered by the parties, the European Commission decided to unconditionally clear the merger in Phase

⁶⁹ Case T-162/10 *Niki Luftfahrt GmbH v Commission*, [2015], C 213/44.

⁷⁰ General Court of the European Union, Press Release No 54/15, Judgments in Cases T-511/09 and T-162/10 *Niki Luftfahrt GmbH v Commission*, 13 May 2015 <<http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-05/cp150054en.pdf>> accessed on 30 October 2017.

⁷¹ Case COMP/M.5141 *KLM/Martinair* [2008], OJ C51/4.

II, mainly because of the results of the survey conducted at Amsterdam's airport. It indicated that the majority of potential passengers on the affected routes would rather switch their destination, or even abandon the trip, in an event of sustained price increase. It clearly showed that the market was too narrowly defined, as the passengers were willing to switch the type of service offered by the airlines if they found it to be too expensive. The merged entity would have no incentive to significantly raise the prices on the affected routes, therefore there was no risk of consumer harm. Moreover, the Commission found out that market entry was highly likely, decreasing the incentives of KLM to elevate the prices even more.⁷²

KLM/Martinair is an important example of a case in which unbiased approach of the European Commission to mergers in aviation sector in the EU is clearly visible. Despite its initial concerns, which triggered the commitments proposal of the undertakings concerned, the Commission admitted that the transaction in its initially notified shape would not lead to significant impediment to effective competition and refused to accept remedies, clearing the merger without any conditions. The approach of the Commission appears to be bold and fair, focused on full understanding of the concentration and its potential effects, rather than "prosecuting" the merging entities and giving them additional, unnecessary hurdles through the process. It confirms that the European Commission, to a certain extent, truly believes in the consolidation of the sector and warmly welcomes airline mergers, especially of transnational character.

5. Ryanair/Aer Lingus⁷³

Despite its generally positive approach to airline mergers in the EU, in certain cases the European Commission considered anticompetitive effects to prevail over potential benefits arising from the concentration. The acquisition of stakes in Aer Lingus by Ryanair was notified on 30 October 2006. During the investigation, the European Commission questioned the competitors of the merging parties, slot allocation authorities, transport authorities, and civil aviation authorities. The Commission acknowledged that both airlines were

⁷² Press Release, European Commission, *Commission clears proposed take-over of Martinair by KLM* (17 December 2008) <http://europa.eu/rapid/press-release_IP-08-1995_en.htm> accessed on 30 October 2017.

⁷³ Case COMP/M.4439 *Ryanair/Aer Lingus* [2007], OJ C47/9; Case COMP/M.6663 *Ryanair / Aer Lingus III* [2013], OJ C 308/3.

close competitors in the Irish market (especially on Dublin airport), as they operated on similar routes, offered comparable (low-cost) quality of service and that customers regarded their offers as highly substitutable. Therefore, the prevailing dimension of merger was horizontal, unlike in other airline mergers in the EU, where usually conglomerate effects are analysed. It undoubtedly increased the potential anticompetitive effects of the concentration, as the merged entity would gain monopoly or dominant position on 35 routes. Moreover, after the merger, companies would operate around 80% of the short-haul passenger traffic from Dublin. Naturally, to address the concerns of the Commission, Ryanair offered a comprehensive package of remedies. It included an extensive slot divestiture in relation to affected routes, supplemented with an “upfront buyer” solution (where Ryanair committed to find a suitable airline to take over the divested slots, and therefore enter the market), “frequency freeze” obligation and a mechanism of calculating fares of Aer Lingus guarantying their acceptable level. At the beginning of Phase II, where merging parties already understood the critical view of the Commission regarding the concentration and remedies proposed, the package offered was extended with additional slot divestitures, and eventually amended at the end of Phase II.⁷⁴

After two phases of investigation and three packages of remedies offered by Ryanair, the Commission concluded that the transaction would significantly impede effective competition and decided to block the merger. The market test performed by the Commission showed that the commitments offered were insufficient to erase the risk of anticompetitive effect caused by the concentration. Promptly after the Commission’s decision, both merging parties decided to appeal to the General Court, however their actions were dismissed.⁷⁵

The significance of the failed concentration of Ryanair and Aer Lingus to the EU merger control cannot be overlooked, as it was the first airline merger blocked by the European Commission in its history.⁷⁶ The prohibition of this

⁷⁴ Press Release, European Commission, *Mergers: Commission Prohibits Ryanair's proposed takeover of Aer Lingus*, IP/07/893 (27 June 2007) <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/893>> accessed on 30 October 2017.

⁷⁵ Case T-342/07, *Ryanair v. Commission*, [2010] OJ C 221/55; Case T-411/07, *Aer Lingus v. Commission*, [2010] OJ C221 56.

⁷⁶ Miglena Rahova, *Remedies in Merger Cases in the Aviation Sector*, 516.

concentration is particularly interesting because of the generally positive disposition of the Commission towards consolidation of the airline sector in the European Union.⁷⁷ It clearly marks the slight shift of approach of the Commission to remedies in airline mergers towards a more rigorous approach, potentially caused by the relative failure of commitments approved in previously mentioned merger of KLM and Air France, where slot divestitures practically did not result in market entry. Another factor, which undeniably affected the Commission's decision, was the fact that both Aer Lingus and Ryanair were based in Ireland, therefore breaking down of national markets and strengthening bonds between the Member States did not occur.

On the other hand, however, in its assessment the Commission presumably should have put more emphasis on the fact that Aer Lingus is a traditional, national carrier of Ireland and Ryanair is a relatively young, modern and dynamic airline, with noticeable merits regarding improved passenger traffic in European Union and market integration and without any history of abusing its dominant position by raising prices. Allowing the merger with Aer Lingus might have potentially helped Ryanair with achieving its business goals without causing any consumer harm. After the blocked concentration, Ryanair planned another attempt to acquire Aer Lingus, however it was ceased due to lack of interest from its shareholders.⁷⁸

The third, and yet final attempt of Ryanair to acquire control over Aer Lingus, took place in 2013. During the investigation, the European Commission concluded that the transaction would lead to creating a monopoly or a dominant position on 46 routes, where currently both airlines are competing vigorously. Since Ryanair has already experienced rejection from the Commission, it instantly offered a comprehensive set of remedies, presumably one of the biggest in history of airline mergers in the EU. It contained slot divestitures on all affected routes supplemented with the upfront buyer solution, meaning that Ryanair has already found airlines willing to take over the divested slots and operate on the routes for at least three years. Nonetheless, the European Commission considered the remedies

⁷⁷ Peter Alexiadis, Daniel Kanter, 'The European Commission consents to the Consolidation of Europe's skies: The Air France/KLM Merger', (2004) *Gibson Dunn & Crutcher LLP, Brussels* <www.gibsondunn.com/fstore/documents/pubs/Alexiadis-AirFrance_KLM_Merger_0205.pdf>, accessed on 30 October 2017.

⁷⁸ Miglena Rahova, *Remedies in Merger Cases in the Aviation Sector*, 516.

offered to be insufficient to erase the risk of anticompetitive effects on the affected routes, and decided to block the concentration on 27 February 2013.⁷⁹

The prohibition decision was not warmly welcomed by Ryanair's executives, who accused the Commission of being politically influenced.⁸⁰ During the final concentration attempt, parties submitted presumably the most adequate and the biggest package of remedies which could have been offered. Moreover, an unprecedented upfront buyer solution was proposed, which created an additional guarantee for the entrance of a new competitor to the relevant market.⁸¹ It appears that, according to the European Commission, remedies in airline mergers are suitable only in relation to certain transactions, where potential anticompetitive effects are minor. In cases of bigger and more hazardous concentrations of airlines, the Commission remains conservative and is not willing to accept any commitments from the parties, even if they are generous and well designed.

6. *IAG/Aer Lingus*⁸²

Eventually, the Irish national carrier became a part of International Consolidated Airlines Group (IAG), the holding company of British Airways, Iberia and Vueling Airlines. The concentration was notified to the Commission on 27 May 2015 and received the conditional clearance, after a fairly short investigation, on 14 July 2015.

In the initial stage of its investigation, the European Commission acknowledged that the transaction in the proposed form would lead to high market shares on Belfast-London, Dublin-London and Dublin-Chicago routes. IAG promptly submitted a set of commitments addressing those concerns. The package consisted of two main components. First of them was a traditional slot divestiture on the affected routes, however the second was

⁷⁹ Press Release, European Commission, *Mergers: Commission prohibits Ryanair's proposed takeover of Aer Lingus* (27 June 2013) <http://europa.eu/rapid/press-release_IP-07-893_en.htm?locale=en> accessed on 30 October 2017.

⁸⁰ See eg Aoife White, 'Ryanair Bid for Aer Lingus Blocked by EU Antitrust Agency', *Bloomberg*, (27 February 2016) <www.bloomberg.com/news/articles/2013-02-27/ryanair-s-aer-lingus-bid-blocked-by-eu-over-monopoly-concerns> accessed on 30 October 2017.

⁸¹ Eoin Kelly, 'Ryanair / Aer Lingus III – A Reflection on Remedies', (2013), Volume 17, Issue 1, *Irish Journal of European Law*, 128.

⁸² Case COMP M.7541 *IAG/Aer Lingus* [2015], OJ C314/01.

far more innovative and, surprisingly, purely behavioural in its nature, as IAG obliged to enter into agreements with its competitors, which operate long-haul flights from London-Heathrow, London-Gatwick, Manchester, Amsterdam, Dublin and Shannon.⁸³ The agreements in question forced Aer Lingus to provide those airlines with connecting passengers, in order to avoid the risk of foreclosure and guarantee a choice to use other airlines on transcontinental flights. The remedies offered by the parties in acquisition of Aer Lingus by IAG mark the inauguration of a tendency of the Commission to accept wider range of commitments, not only of mainly structural character.

7. Olympic/Aegean⁸⁴

Concentration of the two biggest air carriers in Greece naturally caused a heated public debate and tremendous controversy. The merger was notified for clearance on 24 June 2010. After a month, an in-depth investigation was opened, as the Commission acknowledged that the merger raised serious concerns regarding its compatibility with the common market. After a lengthy investigation, extended mainly because of two packages of remedies offered by the parties, the European Commission decided to block the proposed transaction on 26 January 2011.

Main concerns of the authorities regarded nine domestic routes, where the two airlines before the merger held around 90% of the market share, therefore the merged entity would have reached a quasi-monopoly because of the concentration. Undertakings failed to convince the Commission that the relevant market was too narrowly defined and alternative means of transport, mainly ferries, should have been included. Two packages of remedies offered by the parties contained an extensive slot divestiture on affected routes, however the study performed by the Commission showed that the availability of the slots in Greek airports, including Athens, was at sufficient level and potential entrants would not face difficulties with arranging landing slots. The real problem was the lack of potential entrant as such, which could exert a

⁸³ Press Release, European Commission, Mergers: *Commission approves acquisition of Aer Lingus by IAG, subject to conditions* (14 July 2015) <http://europa.eu/rapid/press-release_IP-15-5371_en.htm> accessed on 30 October 2017.

⁸⁴ Case COMP/M.5830 *Olympic Aegean Airlines* [2011], C174/08; Case No COMP/M.6796 *Aegean Airlines/Olympic II* [2013], C124/01.

credible competitive constraint to the merged entity. Even if the companies had given out their landing slots, there would have been no airline to take them over and the situation on the market would have not been likely to change. Therefore, the Commission concluded that the proposed concentration would significantly impede effective competition on the internal market.⁸⁵

The fact that after having received the prohibition decision from the Commission undertakings continue to make attempts to eventually acquire the desired company is not uncommon, however receiving a clearance decision for the same transaction in less than 3 years should be regarded as a rare event. The proposed merger of Olympic and Aegean was notified on 28 February 2013. Unsurprisingly, the European Commission in its assessment came to similar conclusions as two years before, opening an in-depth investigation in April 2013, because of the serious doubts regarding compatibility of the merger with the common market. This time however, merging parties did not focus on arguing that the market would not be affected because of the transaction, but rather claimed that Olympic, mainly because of the ongoing financial crisis in Greece, was a failing firm and was going to become insolvent and leave the market soon in any event, therefore Aegean might become a dominant firm on the affected routes anyway. The Commission's in-depth investigation has clearly demonstrated that Olympic is highly unlikely to become profitable in the future under any business plan. Moreover, there was no other entity willing to acquire the failing firm other than Aegean. On the other hand, however, both airlines had around 90% of the market share of domestic flights in Greece, with Aegean having around 52%, Olympic 38% and next biggest competitor – Astra Airlines, only around 3% of the market share.⁸⁶ Therefore the merger of the two main Greek carriers constituted a de facto two to one merger, the most problematic from the

⁸⁵ Press Release, European Commission, *Mergers: European Commission blocks proposed merger between Aegean Airlines and Olympic Air* (26 January 2011), <http://europa.eu/rapid/press-release_IP-11-68_en.htm> accessed on 30 October 2017.

⁸⁶ Centre for Aviation (CAPA), 'Aegean Airlines' acquisition of Olympic: approved by European Commission, but questions remain' (2013) <<http://centreforaviation.com/analysis/aegean-airlines-acquisition-of-olympic-approved-by-european-commission-but-questions-remain-133583>> accessed on 30 October 2017.

competition law point of view, as it nearly destroys any existing competitive pressure.⁸⁷

Merger of Aegean and Olympic to this day remains the only case in aviation sector, where the European Commission has accepted the failing firm defence. It cannot be doubted that Olympic indeed was a nearly broke entity at the time of the concentration, therefore the bold decision of the Commission appeared to be correct, especially because of the appearance of a new, strong entrant to the market of Greek domestic flight – Ryanair, which decided to open two operational bases in Athens and Thessaloniki in 2014 and increased its seat capacity by 50%.⁸⁸ As of 2017, competition on the market of domestic flights in Greece, despite the merger of the two biggest carriers in 2013, remains at a significantly high level (mainly because of several successful market entries) and the benefit of consumers remains unharmed.⁸⁹ What is more, the previously loss-making Aegean has recently started to be profitable.⁹⁰ It clearly indicates that failing firm defence constitutes a viable solution in airline mergers in the European Union, and can be successfully implemented under conducive conditions.

8. *Etihad/Alitalia*⁹¹

For years, non-EU airlines did not invest their money within the European Union, mainly because of the European legislation protecting the ownership of airlines, allowing the foreign entities to invest only up to a level, where they would reach decisive influence over the airline. However, in recent years, some tentative attempts to acquire assets in Europe were made by Etihad – one of the biggest airlines in Gulf region. Firstly, Etihad purchased

⁸⁷ Press Release, European Commission, *Mergers: Commission approves acquisition of Greek airline Olympic Air by Aegean Airlines*, (9 October 2013) <http://europa.eu/rapid/press-release_IP-13-927_en.htm> accessed on 30 October 2017.

⁸⁸ Centre for Aviation (CAPA), 'Ryanair's growth in Greece threatens Aegean's turnaround only months after Olympic acquisition' (2014) <<http://centreforaviation.com/analysis/ryanairs-growth-in-greece-threatens-aegeans-turnaround-only-months-after-olympic-acquisition-149078>> accessed on 30 October 2017.

⁸⁹ Alexandra Kassimi, 'Greek air market proves very attractive to foreign carriers', *Kathimerini* (16 May 2016) <www.ekathimerini.com/208704/article/ekathimerini/business/greek-air-market-proves-very-attractive-to-foreign-carriers> accessed on 30 October 2017.

⁹⁰ Aegean – Financial Results for 2016 <<https://en.about.aegeanair.com/investor-relations/financial-results/financial-results/>> accessed on 30 October 2017.

⁹¹ Case No COMP/M.7333 *Alitalia/Etihad* [2014], OJ C31/01.

a 29% stake in Air Berlin⁹² and continued its expansion in Europe with the acquisition of a 49% stake in Jat Airways (rebranded to Air Serbia soon after the purchase).⁹³ Because neither of the transactions amounted to gaining decisive influence over the acquired undertaking by Etihad, they were not notified to the European Commission. Nonetheless, the impact of Etihad over strategic decisions of Air Serbia, in which the majority of equity is still owned by the Serbian government, caused some degree of controversy and even encouraged the Commission to open an investigation into Air Serbia's ownership structure in 2014.⁹⁴ After a two-year investigation, the European Commission finally acknowledged that Air Serbia was fully in line with European rules on foreign ownership and that Serbian government held the decisive influence over the strategic behaviour of the company.⁹⁵ This case, however, clearly shows the serious attitude of Etihad towards its business expansion in Europe, which inevitably is going to strengthen in the future.⁹⁶

The third, yet major step of Etihad's expansion in Europe, was the acquisition of joint control over Alitalia, the national carrier of Italy. The transaction was notified on 29 September 2014 and cleared, subject to conditions, after a short investigation on 14 November 2014. The proposed transaction established New Alitalia (the completely new undertaking), jointly controlled by Alitalia Compagnia Aerea Italiana S.p.A. (the 'old' Alitalia), and Etihad Airways, with the latter acquiring the maximum permissible 49% of the equity.

In its investigation, the European Commission expressed its concerns regarding one of the routes, namely Rome-Belgrade, where the newly formed

⁹² Kerry Reals, 'Etihad acquires 29% stake in Air Berlin', *Flight Global* (19 December 2011) <www.flightglobal.com/news/articles/etihad-acquires-29-stake-in-air-berlin-366143/>, accessed on 30 October 2017.

⁹³ Haseeb Haider, 'Etihad Airways acquires 49% stake in Jat Airways' *Khaleej Times* (2 August 2013) <www.khaleejtimes.com/business/aviation/etihad-airways-acquires-49-stake-in-jat-airways> accessed on 30 October 2017.

⁹⁴ As of 2017 Serbia is not a member of the European Union, however as a candidate state it is obliged to adhere to the pre-accession guidelines and policies.

⁹⁵ 'EC clears Air Serbia after investigation', *EX-YU Aviation News* (16 July 2016) <www.exyuaviation.com/2016/07/ec-clears-air-serbia-after-investigation.html> accessed on 30 October 2017.

⁹⁶ Nicola Clark, 'Upstart Abu Dhabi Airline Becomes Ally to European Carriers', *The New York Times* (4 October 2013) <www.nytimes.com/2013/10/05/business/international/upstart-abu-dhabi-airline-becomes-ally-to-european-carriers.html?_r=0> accessed on 30 October 2017.

entity would have gained a monopoly, because the only carriers operating this route were Alitalia and Air Serbia (already owned in 49% by Etihad). The concerns were dispelled by the merging parties with the package of commitments offered, containing mainly slot divestitures.⁹⁷ Merger of Alitalia and Etihad is a clear example of two trends in airline mergers in the European Union: firstly, that in cases of minor competition concerns of the Commission, slot divestiture remains a key commitment capable of solving the problem of potential monopoly on a given route; secondly that non-EU airlines (mainly Gulf) which are interested in the European airline market, and will most probably continue their expansion in Europe in different forms.⁹⁸

VII. Remedies in airline mergers in the European Union - remarks

The approach of the Commission to remedies in aviation sector has been shifting throughout the years. With every merger cleared or blocked, new experience was gained by the authorities and undertakings willing to merge, especially when the Commission needed to face the challenges of the “merger mania” in aviation sector soon after the financial crisis of 2008, and correctly assess multiple concentrations at very short period of time. The Commission rightly had to examine the mergers proposed, and even slightly guide the parties in the direction of proposing the right commitments. The persistent need to strike a correct balance between the rights of the undertakings and protection of the markets (and, eventually, the final consumers), resulted in establishing a consistent, to a certain extent, approach of the Commission to concentrations of airlines. Historically, the emphasis was put on the very narrow definition of the relevant market (air routes between two cities, sometimes narrowed even more to divide, for example, different types of passengers using the same route), to which slot divestitures were considered the ultimate solution. After the relative failure of this approach in Air France/KLM merger, where practically no airline entered the market after the

⁹⁷ Press Release, European Commission, *Mergers: Commission approves Etihad's acquisition of joint control over Alitalia, subject to conditions* (14 November 2014) <http://europa.eu/rapid/press-release_IP-14-1766_en.htm> accessed on 30 October 2017.

⁹⁸ Vernon Silver, Deena Kamel Yousef, ‘Etihad Seals \$2.4 Billion Deal to Buy 49% of Ailing Alitalia’, *Bloomberg* (8 August 2014) <www.bloomberg.com/news/articles/2014-08-08/etihad-seals-2-4-billion-deal-to-acquire-49-of-ailing-alitalia> accessed on 30 October 2017.

concentration, focus has shifted to the assessment of network competition, rather than very narrow interpretation of the relevant market and strict examination of the effects of the merger on multiple point-to-point routes.⁹⁹ After several waves of mergers in the airline sector in the European Union, several types of remedies appear to be most commonly proposed by the undertakings and accepted by the Commission:

- 1) Structural remedies – mainly slot divestitures; despite their flaws and historical examples of situations when they do not solve the problem of monopolised routes, divestiture of landing slots remains the most commonly offered and accepted commitment in airline mergers, as it is relatively easy to implement and monitor. The rationale behind this solution is to lower the inflated barriers to entry, and encourage market entry of competitors to generate competitive pressure;
 - a) Upfront buyer solution – a solution supplementary to slot divestitures, aimed at guarantying that the undertaking willing to take over the divested slots exists and is genuinely willing to operate on the given route (offered for example by Ryanair during the final attempt to purchase Aer Lingus, but eventually declined by the European Commission);
 - b) Grandfathering of slots – another additional solution used along with slot divestiture, aimed at strengthening the rights of the undertakings taking over the divested slots, commonly proposed and widely accepted by the European Commission;
- 2) Behavioural remedies – they are gradually becoming more important in airline mergers, however only as a tool ancillary to slot divestiture. The most common include:
 - a) Participation in frequent flyer programmes – tool allowing the passengers of new entrants to participate in millage collection programmes of the merging entities, in order to enhance the attractiveness of switching the airline by loyal customers of the airline offering commitments, commonly proposed and widely accepted by the European Commission;
 - b) Prorate agreements – supporting the alternative means of transportation, to mutually assist and supply each other with a

⁹⁹ Peter Alexiadis, Daniel Kanter, *The European Commission consents to the Consolidation of Europe's skies: The Air France/KLM Merger*.

- steady flow of passengers, used mainly on popular, rather short-haul routes (for example Paris-Amsterdam in Air France/KLM);
- c) Code-share agreements – sharing the seats on a plane between the airlines by supplying each other with passengers, especially relevant in relation to hub-and-spoke business model, where steady flow of passengers is essential to operate a successful network of long-haul routes.

An interesting tool, of a rather procedural character, is appointing a monitoring trustee, which is supposed to overlook the behaviour of the merged entity after the merger and report any incompliance, in order to guarantee the correct application of commitments undertaken by the parties. This solution has not always been used in airline mergers in the European Union, however recently it was successfully adopted in several concentrations of air carriers, for example in Air France/KLM, Lufthansa/SN Airholding, Lufthansa/Austrian Airlines etc.¹⁰⁰

VIII. Situation on the air transportation market in the European Union

The airline sector in the EU has faced numerous challenges over the years. Multiple factors caused financial difficulties of multiple airlines, which needed to consolidate in order to avoid insolvency. Firstly, airlines were deeply affected by the economic crisis of 2008, which caused the wave of mergers in airline sector in the European Union in 2008 and 2009.¹⁰¹ Secondly, the rise of low-cost carriers resulted in stiff competition in the market and lowering their profit margins to the level of balancing on the brink of operating below costs. Thirdly, establishing alternative means of transport (bullet trains, extensive network of highways) encouraged more passengers, even corporate, to cease the use of airplanes in favour of those, especially

¹⁰⁰ Gordon Blanke, Phillip Landolt, *EU and US Antitrust Arbitration: A Handbook for Practitioners*, (Kluwer Law International 2011), 1710.

¹⁰¹ Lucia Bonova, Dagmara Koska, Axel Specker, 'Consolidation of the EU airline industry: How the Commission kept seatbelts fastened in the 2009 airline merger wave', (2009), Number 3, Competition Policy Newsletter <http://ec.europa.eu/competition/publications/cpn/2009_3_10.pdf> accessed on 30 October 2017.

because the growth of level of security at the airports increased the average travel time and noticeably lowered the comfort of air travel.

All those factors, combined with the generally positive approach of the Commission to consolidation of air carriers in the European Union, encouraged (or even forced) airlines to concentrate in order to be prepared for surviving the turbulent times. While assessing mergers in airline sector in the EU, despite numerous declarations of its officials,¹⁰² the Commission took a rather conservative approach, with a track record of two major concentrations blocked and most concentrations cleared subject to conditions, sometimes painful to the merging parties. In general, however, the Commission managed to avoid major mistakes, causing a detrimental effect to the market and consumers.

IX. Future of the airline market in the European Union

As previously mentioned, the airline industry is extremely susceptible to the external factors, which cannot be controlled or foreseen. In past epidemics, financial crises or terrorist attacks had a huge impact on the airline industry, and those kinds of events will inevitably continue to cause trouble to air carriers. Although the precise future of the airline industry is impossible to be foreseen, certain trends are already present on the market in the European Union, and indicate the wind of change in the airline industry.

The main threat to profitability (or even mere existence) of the traditional airlines in the European Union, especially those active on the international routes comes from the east, come mainly from the Gulf region, where at least three extremely successful and expansive air carriers – Emirates Airlines, Qatar Airways and Etihad are based. Those carriers could increase their seat capacity from 18 million in 2005 to 46 million in 2013.¹⁰³ Gulf airlines are able to offer customers a very competitive, good quality and often reasonably-priced service, especially on the routes from Europe to Asia, Australia, Africa and the Middle East. Business model of Emirates, Qatar and Etihad is based purely on the hub-and-spoke model, with only a small number of passengers

¹⁰² See eg Philip Lowe, Mel Marquis, *European Competition Law Annual 2012: Competition, Regulation and Public Policies* (Oxford: Hart, 2014), 84-85.

¹⁰³ Mark Scourse, 'Market Update: The Big Three Gulf Airlines', *Aviation Economics* (16 September 2013) <www.aviationeconomics.com/NewsItem.aspx?title=Market-Update:-The-Big-Three-Gulf-Airlines> accessed on 30 October 2017.

reaching their destination in the hub, and the majority of the customers treating the hub only as an intermediate point on the way to their final destination.¹⁰⁴

The success of these airlines is a combination of multiple factors:

- 1) The extremely efficient and modern management system, allowing the airlines to survive, or even benefit from the turbulent situation on the market;¹⁰⁵
- 2) Geographic location of the Gulf region – approximately halfway between Europe and East Asia, allowing the passengers to conveniently use a connection flight on their way to the final destination;
- 3) Access to large cash reserves of the Gulf states, coming mainly from oil and gas;
- 4) Access to cheaper, in comparison with Europe and the US, workforce (mainly migrants from India and Pakistan) and jet fuel;
- 5) Large fleet of cutting-edge, mostly wide-body aircraft, allowing the airlines to carry more passengers on a single flight and therefore reduce their unit costs;
- 6) Lack of restrictions on night flights in the Gulf region, allowing the airlines to operate nearly 24 hours per day, lowering the amount of time when aircrafts are not being used;
- 7) Deregulation in the European Union and the US, allowing the airlines to smoothly enter the biggest markets in the world;
- 8) Exceptional quality of service (in 2017 Qatar Airways has been voted “The best airline in the world” by Skytrax, Emirates Airways won the award in 2016);¹⁰⁶
- 9) Stiff competition within the Gulf region, naturally forcing the reduction of costs and maintaining the exceptional quality of service – even for the economy passengers.¹⁰⁷

¹⁰⁴ John F. O’Connell, ‘The rise of the Arabian Gulf carriers: An insight into the business model of Emirates Airline’ (2011) Volume 17, Issue 6, November, *Journal of Air Transport Management*, 339–346.

¹⁰⁵ Donald Sull, Sumantra Ghoshal, Felipe Monteiro, ‘Hub of the World’, (2005), Volume 16, Issue 1, Spring, *London Business School Business Strategy Review*, 36-37.

¹⁰⁶ The top 100 Airlines, Skytrax <www.worldairlineawards.com/Awards/world_airline_rating.html> accessed on 30 October 2017.

¹⁰⁷ Mark Scourse, *Market Update: The Big Three Gulf Airlines*.

Additionally, certain allegations have been made in the past regarding the unfair business practices of the Gulf airlines. They were facing accusations of being subsidised by the government and evading taxes on a regular basis, naturally mostly by their competitors in the US and the EU who, unlike the Gulf airlines, needed to comply with strict laws of their jurisdictions on competition and state aid, causing the alleged uneven playing field on the aviation market.¹⁰⁸ For a long period of time, those allegations did not materialise into an irrefutable proof, however in 2015 a detailed report was published by a group of airlines. It disclosed evidence of massive government subsidies amounting to \$42bln, mostly in form of “loans” with no repayment obligation, airport fee exemptions, etc.¹⁰⁹ The competitors of the Gulf airlines claimed that they were in fact branches of government, created and supported with an aim of building the national economies, not for the benefit of the undertakings themselves. It allegedly caused massive job losses in the European Union and the US, directly harming their economies.¹¹⁰

Those accusations were rebutted in great detail by the airlines (mostly by Emirates), nonetheless their statements were in fact mostly defending the brand image, because even if Emirates, Qatar Airways and Etihad did confess to receiving massive support from the governments of United Arab Emirates and Qatar, European or American authorities would have no direct jurisdictional power to condemn those actions.¹¹¹

Even if the assumption can be made that those accusations are far-fetched and based on no convincing evidence, the aggressive expansion of the Gulf airlines on the European market is a matter of fact, and the European air

¹⁰⁸ ‘Rulers of the new silk road’, *The Economist* (3 June 2010) <www.economist.com/node/16271573> accessed on 30 October 2017.

¹⁰⁹ ‘Airline subsidies in the Gulf: Feeling the heat’, *The Economist* (6 March 2015) <www.economist.com/blogs/gulliver/2015/03/airline-subsidies-gulf> accessed on 30 October 2017.

¹¹⁰ Afshin Molavi, ‘The Arab Battle for U.S. Skies’, *Foreign Policy* (4 May 2015) <<http://foreignpolicy.com/2015/05/04/dubai-qatar-etihad-emirates-fair-skies-open-skies-american-delta-united/>> accessed on 30 October 2017.

¹¹¹ Emirates Group, ‘Emirates’ response to claims raised about state-owned airlines in Qatar and the United Arab Emirates’, (29 June 2015) <http://content.emirates.com/downloads/ek/pdfs/openskies_rebuttal/EK_Response_Main.pdf> accessed on 30 October 2017.

carriers are undeniably going to be affected with their business plans.¹¹² Persian Gulf airlines are expanding their network at an enormous pace.¹¹³ The passenger traffic of Emirates, for example, rose by 43% between 2012 and 2014, while the main airlines of the European Union (British Airways, Lufthansa and Air France) could barely reach 12% level of growth of passenger traffic in that time.¹¹⁴ This can be illustrated with an example of routes between the US and India. Currently there are no direct flights between both countries, therefore passengers are forced to connect at one of the airports on the way. In 2008, only 3% of passengers flying from Dallas to Mumbai used the services of Gulf airlines, and 81% booked their flights with the carriers from the EU or the US. Only 6 years later, the situation on this route changed drastically, as Gulf carriers held the 70% of the market share, meaning that they managed to increase their share by nearly 2300% in only 6 years, on a very competitive market.¹¹⁵

Due to the anticipated changes, the approach of the European Commission to remedies and consolidation in airline sector as such, will inevitably have to change, in order to better address the potential anticompetitive concerns and reach certain goals aimed at ultimately benefiting the consumers. The authorities of the European Union and the Member States will not avoid the debate about the future shape of aviation business in Europe, because the traditional, European air carriers are starting to lose the market and are not able to compete with the giants of the Middle East on equal footing, no matter if the allegations of government subsidies are true or not.¹¹⁶

¹¹² Scott Mayerowitz, 'The rise of Middle East aviation hubs is a feat of geography', *Associated Press* (4 March 2013) <<https://skift.com/2013/03/04/the-rise-of-middle-east-aviation-hubs-is-a-feat-of-geography/>> accessed on 30 October 2017.

¹¹³ Richard Maslen, 'Emirates Airline Reveals Network Expansion and Route Capacity Growth', *Routes Online* (5 May 2012) <www.routesonline.com/news/29/breaking-news/155570/emirates-airline-reveals-network-expansion-and-route-capacity-growth/> accessed on 30 October 2017.

¹¹⁴ Scott McCartney, 'Emirates, Etihad and Qatar Make Their Move on the U.S.' *The Wall Street Journal*, (6 November 2014) <www.wsj.com/articles/emirates-etihad-and-qatar-make-their-move-on-the-u-s-1415226589> accessed on 30 October 2017.

¹¹⁵ Michael Scaturro, 'EU carriers battle Gulf airlines' expansion', *Deutsche Welle* (28 May 2015) <www.dw.com/en/eu-carriers-battle-gulf-airlines-expansion/a-18482670>, accessed on 30 October 2017.

¹¹⁶ Sean Cronin, 'Rapid expansion of Gulf airlines squeezes out European rivals', *The National* (14 July 2014) <www.thenational.ae/business/industry-insights/aviation/rapid-expansion-of-gulf-airlines-squeezes-out-european-rivals> accessed on 30 October 2017.

The EU is inevitably moving towards the direction of further market integration into one organism and removing barriers between the Member States. As Neelie Kroes, Member of the European Commission in charge of Competition Policy once said:

“Europe thrives from breaking down barriers between Member States not by erecting them. Open and competitive markets are key drivers for growth and jobs in Europe. Companies that are successful players in the European market are also well placed to compete globally. The Commission will always look with concern at any attempt by national governments, directly or indirectly, to interfere unduly in the process of cross-border corporate restructuring in Europe.”¹¹⁷

Therefore, the idea of allowing the existence of national champions might be relevant not only on the level of a particular Member State, but on the level of the whole European Union as well. The traditional European airlines are gradually losing the market of long-haul flights from Europe to the foreign carriers, mainly from the Gulf region, therefore some degree of tolerance to dominance in the European market and potential anticompetitive effects arising from it, might be unavoidable to save the airlines of the European Union from becoming insolvent in the long run.

X. Concept of a national champion

In general, concept of a national champion means supporting private undertakings by the government in order to create a powerful company ready to become a strong international player, for the benefit of the country. In context of merger control, it relates to a government intervention aimed at allowing the creation of a large entity, which normally would be prohibited due to potential anticompetitive effects. The reasons for allowing a creation of a national champion differ between the countries, however normally governments want to secure employment, create the economies of scale for the merged entity (allowing the reduction of a unit cost), or take into account

¹¹⁷ Neelie Kroes, ‘Introductory remark on Mergers in the internal market’, Speech delivered at European Parliament plenary session, Strasbourg, 15 March 2006 <http://europa.eu/rapid/press-release_SPEECH-06-172_en.htm?locale=en> accessed on 30 October 2017.

national security considerations.¹¹⁸ Countries may strategically apply (or disapply) their competition laws in order to reach wider economic goals, even at a price of sacrificing the competition on the domestic market.¹¹⁹ In the European Union, the tendency to support the national champions was mostly prominent in 1970s, mostly used in order to better engage in rivalry with bigger American corporations, who dominated multiple sectors.¹²⁰

XI. The need of rethinking the concept of a national champion in the EU

Due to progressive integration of the European market, and the attempts of the EU officials to create a genuinely common market of all the Member States, the concept of national champion in the European Union needed to be reformulated, as establishing a national champion in only one Member State would be contrary to the interests of the whole Union. A number of successful companies were officially (or unofficially) supported by the governments in order to elevate their chances for international success.¹²¹ The notable example of a fruitful cooperation between the Member States in such manner is establishing Airbus in the late 1960s – the British/French enterprise producing aircrafts.¹²² After more than 30 years on the market, Airbus is arguably the biggest producer of commercial jet aircrafts in the world, generating €67.5 billion in revenue (2016), producing around 500 airplanes yearly, and employing more than 133.000 people (2016).¹²³ Other examples of successful transnational mergers within the European Union, which could

¹¹⁸ Jonathan Galloway, ‘The pursuit of national champions: the intersection of competition law and industrial policy’, (2007), *European Competition Law Review*, 1-2.

¹¹⁹ Maher M. Dabbah, *International and Comparative Competition Law*, (Cambridge University Press 2010), 585-586.

¹²⁰ Emmanuelle Maincent, Lluís Navarro ‘A Policy for Industrial Champions: From picking winners to fostering excellence and the growth of firms’, (2006), *Industrial Policy and Economic Reforms Papers*, <<http://ec.europa.eu/DocsRoom/documents/1923/attachments/1/translations/en/renditions/native>>, accessed on 30 October 2017, 21-24.

¹²¹ Abel Moreira Mateus, Teresa Coelho Moreira, *Competition Law and Economics: Advances in Competition Policy Enforcement in the EU and North America*, (Edward Elgar Publishing, 2010), 353.

¹²² Airbus Group, History of early days (1967-1969) <www.airbus.com/company/history/the-narrative/early-days-1967-1969/> accessed on 30 October 2017.

¹²³ Airbus Group, Full-year results 2016 <www.airbusgroup.com/int/en/investors-shareholders.html> accessed on 30 October 2017.

be considered as the “European champions” include Alstom (Switzerland/Sweden/UK/France), AstraZeneca (Sweden/UK), Aventis (Germany/France) and many others.¹²⁴

The only merger in airline sector in the EU, which could possibly be considered as influenced by the concept of European champion, is the consolidation of KLM and Air France – the merger of two national carriers of the Netherlands and France, allowing them to create the biggest airline in the world at the time. Nonetheless, as previously mentioned, the aviation market is changing rapidly, therefore further consolidation of the airline sector in the European Union is inevitable. The market of aviation is truly global, many potential passengers of the European airlines are foreign and they are willing to spend their money on a good quality air transport. The airlines of the EU are about to face one of the biggest challenges in the history of their existence, and the role of the European Union (mainly the European Commission) is to support them in the turbulent times, even at a cost of potential and interim anticompetitive problems in the internal market, which represents only a fraction of the revenues generated by those airlines. It is in the best interest of the whole European Union to create a true global champion airline, well-equipped to compete on equal footing with the Gulf carriers. Therefore, the time has come to reevaluate the priorities and slightly shift the approach to consolidation in airline sector in the EU. It can be done with a number of ways, nonetheless the correct application of remedies, carefully tailored to mitigate the risk of potential anticompetitive effects, is undoubtedly one of the critical factors in creating the European champion.

XII. Conclusion

As already outlined, in the past, the approach of the Commission to consolidation in airline sector was rather conservative – several mergers were blocked and multiple packages of remedies offered by the parties during the investigation were not accepted. It is clear that the current approach of the European Commission to remedies in airline sector, even if it was appropriate during the last ‘merger wave’ of 2008 and 2009 and should not be fully condemned, will have to be reevaluated in the future due to anticipated crisis of the air transport industry in the European Union. Although the slot

¹²⁴ Peter Nolan, *China and the Global Economy: National Champions, Industrial Policy and the Big Business Revolution*, (Palgrave Macmillan 2001), 132-133.

divestiture should presumably maintain the main ingredient of the packages of commitments proposed, some additional factors should be taken into account by the Commission. They include:

- 1) The extremely narrow definition of the relevant market (city pair air routes, sometimes narrowed down even further) did not allow the Commission to notice the “bigger picture” and take into account wider implications of the notified transaction. The European Commission should not be excessively concerned with interim anticompetitive effects on short-haul routes, mainly because of the geography of the region (relatively short distance between the countries and permanent possibility to use alternative means of transportation – trains, coaches, cars etc.) and the real possibility of market entry – especially from the fast-growing low cost carriers, which managed to encourage even corporate passengers to use their services (for example the introduction of “Business plus” tariff by Ryanair in 2014);¹²⁵
- 2) The dynamic aspects of the market, and therefore wider acceptance of the failing firm defence - as the “traditional” European air carriers are very likely to become insolvent in the near future because of the extensive expansion of Gulf airlines;
- 3) The evidence of market behaviour of the particular airline from the past should be included in the assessment of the concentration. If there is evidence that the company, even at periods of being dominant on the relevant market, managed to maintain competitive level of prices and good quality of service, it should be taken into account by the Commission (for example Ryanair sticks to its philosophy of reasonable pricing of air fares, even at routes where it does not face noticeable competitive pressure from its rivals);
- 4) Up-front buyer solution should be regarded as an ultimate solution in majority of the situations, because it is capable of directly eliminating the anticompetitive risk. If the airline is able to encourage its competitor to take over the divested slots on the affected routes and operate the route for a reasonable period of time, the European Commission should be obliged to accept this remedy.

¹²⁵ Christopher Williams, ‘Ryanair introduces business class’, *The Telegraph* (27 August 2014) <www.telegraph.co.uk/finance/newsbysector/transport/11057948/Ryanair-introduces-business-class.html>, accessed on 30 October 2017.

The Commission undoubtedly is the guardian of the competition on the European market and its main goal is to eliminate any anticompetitive behaviour, capable of harming the consumers. On the other hand, however, it should not intervene automatically in every merger, without considering the wider considerations and the ultimate benefits which could be achieved, even despite some degree of interruption to the market. As rightly argued by Kokkoris, “The competition authorities should adopt a different approach towards remedies in periods of crises”.¹²⁶ The crisis in air transport sector in the European Union is not a distant future - perhaps the time has come to change the method assessment of mergers in airline sector in the European Union.

¹²⁶ Ioannis Kokkoris, Howard Shelanski, *The EU Merger Control*, 554.