Flexing the slot regime: airport slot coordination in light of evolving market realities: a regulatory perspective

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4 CHAPTER FOUR

Slot coordination in selected jurisdictions

4.1 Objectives and application of EU Regulation 95/93, as variously amended

4.1.1 The specific background and raison d'être of the EU regime on slot coordination

The reason for including dedicated sections on European Union [hereinafter: EU] regulation for slot coordination is primarily because of the impact of EU law on European and international aviation since the 1980's, with the fall of the "iron curtain".[586] The EU began to be particularly active in air transport as of 1987,[587] when the EU demonstrated how States can establish a fully integrated cross-border air transport market "with regulatory convergence without foregoing their sovereignty", an occurrence which has not been seen anywhere in the world before.[588] In other words, creating the internal air transport market is the result of the sovereign decision of individual Member States to attribute powers to the EU as the regional regulator and accept a common regulatory framework replacing national regulations.[589]

EU Regulation 95/93, as amended,[590] [hereinafter: the Slot Regulation] constitutes an essential element of the European legislation underpinning the completion of the internal air transport

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[586] *See* Haanappel, *supra* note 356, at 36.
[587] *Id.,* at 37.
[588] *See* Dettling-Ott, *supra* note 362, at 232. *See* also Chapter 3, section 3.1.4.2 on the principle of complete and exclusive aerial sovereignty.
[589] The EU is a customs union and free trade area, *id est* the free movement of goods, people, companies and capital across State borders, comprised of – now – 27 Member States. Through the Treaty on European Union (Maastricht, 7 Feb. 1992), 92/C 191/01 [hereinafter: TEU] signed in 1992, the European Economic Community [hereinafter: EEC] – which was established by the Treaty establishing the European Economic Community (Rome, 25 Mar. 1957) in 1957 – was renamed the European Community [hereinafter: EC]. From 1 December 2009 on, the Treaty on the Functioning of the European Union, OJ C 326 [hereinafter: TFEU] replaced the TEU and the 'common market' became the 'internal market'. Article 119 TFEU provides the following: "The activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives and conducted in accordance with the principles of an open market economy with free competition." The EEC initially comprised of 6 Member States and has expanded to include a total of 27 EU Member States as of 1 January 2021. Members include Belgium, France, Germany, Italy, Luxembourg, Netherlands, Denmark, Ireland, Greece, Spain, Portugal, Austria, Finland, Sweden, Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, Bulgaria, Romania and Croatia. *See*, among others, Milligan, *supra* note 14, at 3-7 and Dettling-Ott, *supra* note 362, at 224.
[590] EU Regulation 95/93, as amended, *supra* note 47. Since its inception in 1993, the Slot Regulation was amended by EU Regulation 894/2002 with the aim of temporarily suspending the use-it-or-lose-it rule following the terrorist attacks of 11 September 2001 in the US, EU Regulation 1554/2003 with the aim of temporarily suspending the use-it-or-lose-it rule following the Iraq war and the outbreak of the SARS epidemic, EU Regulation 793/2004, EU Regulation 545/2009 with the aim of temporarily suspending the use-it-or-lose-it rule following the financial recession, EU Regulation 2020/459 with the aim of suspending the use-it-or-lose-it rule following the outbreak of

market in 1997. Since the establishment of the internal air transport market, the Slot Regulation has provided the EU with a legally binding system for slot coordination to give substance to the freedom to provide intra-European air services.[591]

The subject of slot coordination is not dealt with directly by any other provisions in EU law,[592] although EU Regulation 1008/2008 makes references to the coordination of slots.[593] The only other EU legislation referenced by the Slot Regulation's Preamble is competition legislation, in particular Articles 101 and 102 of the Treaty on the Functioning of the EU[594] [hereinafter: TFEU] and EU Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings[595] [hereinafter: the Merger Regulation].[596] Prominent authors have commented on the Slot Regulation and its application in practice, including Odoni (2020), Finger et al (2019), Guiomard (2018), Haylen and Butcher (2017), European Parliamentary Research Service (2016), Gillen and Starkie (2015), Kociubínski (2014), Mendes de Leon (2013), García-Arboleda (2013), Naumann (2012), Brecke (2011), Steer Davies Gleave (2011), NERA (2004), and Haanappel (1994). The below sections discuss the legal basis, application and objectives of the Slot Regulation.

4.1.2 The legal basis and application of EU Regulation 95/93

Air transport retains a unique position within the legal framework of the EU. Article 100(2) TFEU[597] mentions that measures on air transport policy are to be taken as and when the EU Council so decides:

> "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport. They shall act after consulting the Economic and Social Committee and the Committee of the Regions."[598]

Hence, the Council has discretionary powers when it comes to air transport, which should be exercised in accordance with the general rules of the TFEU.[599] All air transport legislation in

COVID-19 and EU Regulation 2020/1477 and EU Regulation 2021/250 to further address the consequences caused by the COVID-19 pandemic, the latter of which also empowers the European Commission to adopt delegated acts to extend the period of application of the slot relief rules until 21 February 2022. EU Regulation 793/2004 was the only amendment to introduce structural changes to the Slot Regulation not comprising of a temporarily amended use-it-or-lose-it rule.

[591] *See* European Commission, *supra* note 26, at 2.

[592] *Id.,* at 4.

[593] *See infra* Chapter 4, section 4.4 (discussing EU Regulation 1008/2008 and its components relevant to slot coordination).

[594] TFEU, *supra* note 589.

[595] EU Regulation 139/2004, *supra* note 28.

[596] EU Regulation 95/93, as amended, *supra* note 47, recital 17 still refers to Articles 81 and 82 of the Treaty establishing the European Economic Community of 1957 and EU Regulation 4064/89, both predecessors to Articles 101 and 102 TFEU and EU Regulation 139/2004 respectively. *See infra* Chapter 5, section 5.7 (providing concise analysis on the relationship between slot allocation and Articles 101 and 102 TFEU and the Merger Regulation).

[597] Previously Article 80(2) of the Treaty establishing the European Economic Community of 1957, and Article 84(2) TEU.

[598] TFEU, *supra* note 589, Article 100(2).

[599] The Council is to be distinguished from the European Council, which does not negotiate or adopt EU laws, but sets the EU's policy agenda and priorities. The EU has its own legal system and institutions for law-making, law enforcement and judicial protection. Regarding the division of powers between other EU bodies, the Commission is the EU's politically independent executive arm, whose role is to propose legislation for adoption by the Parliament and the Council, for example in the field of competition law. The Commission is also tasked with ensuring that EU law is properly applied in all the EU's Member States. As such, the Commission also legislates, however only on the basis of a mandate from the European Council and the European Parliament. In areas of trade policy and the

the EU, including legislation on slots, is based on Article 100(2) TFEU and this legal basis has neither been changed nor challenged. Correspondingly, the European Parliament [hereinafter: the Parliament] and the Council confirmed this provision to be the legal basis for EU Regulation 793/2004, amending EU Regulation 95/93, in the Regulation's preamble.[600]

At the time of the adoption of the Slot Regulation, Member States were anxious to preserve the continuity and practical efficiency of the current Worldwide Airport Slot Guidelines [hereinafter: WASG] and were unwilling to dilute 'grandfather rights', in particular because of the advantages offered to national carriers.[601] Hence, the guidelines and procedures laid down in the WASG served as the basis for the original version of the Slot Regulation, which entered into force on 18 January 1993. It follows that the Slot Regulation draws on the key principles enshrined in the WASG, which have been addressed in multiple sections of Chapter 2.[602] Also, because of diverging views of Member States, the Slot Regulation was "drafted in a deliberately ambiguous fashion, so that the rules meant different things to different people", as mentioned by a former partner of PwC, a consultancy firm which performed a study for the European Commission [hereinafter: the Commission] in 2000 on certain aspects of the Slot Regulation.[603]

Also, to mitigate concerns on the side of the Commission that the framework of grandfather rights could be deemed anti-competitive, the Internatioanl Air Transport Association [hereinafter: IATA] modified its then Scheduling Procedures Guide to introduce the requirement that a portion of available slots should go to new entrant airlines, widely known as the new entrant rule today.[604] The current WASG guidelines have since then required a proportion of available slots to be set aside for use by new entrant carriers.[605]

The Slot Regulation is directly applicable to slot-controlled airports in the European Economic Area, which comprises the now 27 EU Member States and Iceland, Norway and Liechtenstein. It is also, for the greater part, applicable in Switzerland pursuant to the provisions of the EU-Switzerland Agreement of 1999, as variously amended.[606] In the 2002 '*Open Skies*-judgments', the Court of Justice of the EU [hereinafter: CJEU] confirmed that it is undisputed that the Slot Regulation also applies, subject to reciprocity, to non-EU carriers accessing EU airports. Thus, the Slot Regulation also has an external dimension and is liable to affect the bilateral relationship between EU Member States and non-EU States.[607]

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negotiation of international agreements such as ASAs with third countries on behalf of the EU, the Commission represents the EU internationally. *See* Milligan, *supra* note 14, at 8.

[600] EU Regulation 95/93, as amended, *supra* note 47, Preamble.

[601] *See* Boyfield et al., *supra* note 13, at 33. The principle of 'grandfather rights', also referred to as 'historic precedence', is introduced in Chapter 2, section 2.2.3.

[602] *See* European Commission, *supra* note 26, at 2; Odoni, *supra* note 61, at 20; Balfour, *supra* note 92, at 1030; Boyfield et al., *supra* note 13, at 33; Jörg Bauer, 'Do Airlines Use Slots Efficiently?', in Achim I. Czerny, Peter Forsyth, Hans-Martin Niemeier et al. (eds), *Airport Slots: International Experiences and Options for Reform* (2008); Tom Bass, 'The role of market forces in the allocation of airport slots' in Keith Boyfield, David Starkie, Tom Bass et al. (eds), *A market in airport slots* (2003), at 81.

[603] *See* Boyfield et al., *supra* note 13, at 34; PricewaterhouseCoopers, *supra* note 93.

[604] At the time, the WASG guidelines were collected in the so-called 'IATA Scheduling Procedures Guide', as to which *see* Chapter 3, section 3.4.2. *See infra* Chapter 5, section 5.5 (providing further analysis as to whether the new entrant rule is still fit for purpose).

[605] *See* Gillen and Starkie, *supra* note 59, at 153.

[606] Agreement between the European Community and the Swiss Confederation on Air Transport (Luxembourg, 21 Jun. 1999), OJ L 114, *entered into force* 1 Jun. 2002.

[607] The external dimension of the Slot Regulation has been acknowledged by the CJEU in its 2002 '*Open Skies* judgments', *supra* note 461, where the court held the following in paragraph 120: ". . . Regulation No. 95/93 on common rules for the allocation of slots at Community airports applies, subject to reciprocity, to air carriers of non-member countries, with the result that, since the entry into force of that regulation, the Community has had exclusive

The CJEU furthermore held that the conclusion of air services agreements [hereinafter: ASAs] with third States related to the allocation of slots is a matter of exclusive external competence and that Member States are no longer free to negotiate this matter with third States.[608] Practical experience shows that this exclusive external competency has not been used by the EU in its external air transport relations.[609]

4.1.3 Aims and objectives of EU Regulation 95/93

Although the Slot Regulation does not explicitly include a list with objectives, the Explanatory Memorandum to the 2011 proposal for an amendment of the Slot Regulation mentions a "strengthened and effectively implemented slot allocation and use" at airports for which demand exceeds supply of capacity as a clear objective that the Slot Regulation strives to fulfill.[610] The Commission deems said objective essential to give substance to the freedom for European airlines to provide intra-EU air services.[611]

In the context of the imbalance between the supply and demand of airport capacity as extensively elaborated in Chapter 2, sections 2.3. and 2.4, the Slot Regulation defines the rules for the allocation of scarce slots at EU airports. It ensures that scarce airport capacity is used in the "fullest and most efficient way" and that slots are distributed in an "equitable, non-discriminatory and transparent" way.[612]

Depending on the local situation, the Slot Regulation may require further specification in national laws of the EU Member States through the adoption of local operational rules pursuant to Article 19(1) of EU Regulation 1008/2008, local guidelines and/or local procedures, although it is imperative that the non-discrimination, or national treatment, principle as embodied in the Convention are complied with by national authorities.[613] The leeway given to Member States and coordinators to adopt local operational rules, local guidelines and/or local procedures illustrates that the allocation of slots is only a matter of exclusive external competence of the EU in the conclusion of ASAs, and not so much a matter of exclusive internal competence, as to which *see* section 4.3.5 below. Local guidelines and local procedures are subject to extensive analysis in section 4.3.

An overview of the legislative history of the Slot Regulation and perspectives for reform is given in section 4.1.4, below. Furthermore, examples of local guidelines and local procedures adopted under the Slot Regulation are provided in section 4.3.3, as well as an analysis of the Regulation's principles and contents and how these compare to the guidelines and contents of the WASG in section 4.2.

4.1.4 The legislative history of EU Regulation 95/93 and perspectives for reform

The Slot Regulation has been amended several times. Over a decade since its entry into force, the Slot Regulation was amended in several important respects by EU Regulation 793/2004.[614]

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competence to conclude agreements in that area with non-member countries". *See*, inter alia, Case C-467/98 *Commission v. Kingdom of Denmark,* ECLI:EU:C:2002:625 [2002] at paragraph 106. *See* also Mendes de Leon, *supra* note 48, at 560.

[608] *See*, *inter alia*, Case C-471/98, Commission of the European Communities v. Kingdom of Belgium, ECLI:EU:C:2002:628, at paragraph 120.

[609] *See* Mendes de Leon, *supra* note 48, at 561.

[610] *See* European Commission, *supra* note 26, paragraph 13.

[611] *Id.*, paragraph 38.

[612] *See* European Parliamentary Research Service, *supra* note 115, at 13.

[613] *See* Mendes de Leon, *supra* note 48, at 560.

[614] *Id.*, at 554.

The amendments were aimed at improving the efficient use of scarce capacity at congested airports in the EU, while at the same time not fundamentally changing the principles built around grandfathered slots on which the existing system for slot allocation was based.[615] Other amendments, primarily relating to a temporary suspension of the use-it-or-lose-it rule explained in Chapter 2, section 2.2.3, are set out in footnote 161.

The Preamble to EU Regulation 793/2004, amending EU Regulation 95/93, reads that "[e]xperience has shown that Council Regulation (EEC) No 95/93 should be strengthened to ensure the fullest and most flexible use of limited capacity at congested airports". Eventually, the 2004 amendment only brought minor corrections with regard to definitions and did not introduce groundbreaking novelties. The introduction of sanctions for slot misuse constituted one of the most notable changes observed in 2004.[616] Moreover, the term "capacity available" was changed to "coordination parameters" in Article 6(1) and should take note of all "technical, operational and environmental constraints". Hence, the term "available capacity" is not restricted to physical capacity only.[617] The 2004 amendment has been described as being "largely housekeeping in nature, with some tightening on language, roles and requirements".[618]

Nevertheless, Commission proposals for additional amendments did exist, but were not endorsed. One proposed amendment that did not make it into the 2004 version of the Slot Regulation was to explicitly allow Member States to impose restrictions on the minimum size of aircraft that is used for a slot in order to allow for a more efficient use of capacity.[619] Moreover, in line with European policy on revitalizing railways, it was proposed to introduce additional criteria whereby applications for intra-EU routes would receive lower priority where other satisfactory modes of transport exist. The striking of a balance between short and long-haul operations were also part of the proposed additional criteria that were not adopted.[620]

The Commission asserted that more fundamental reforms with regard to the coordination process itself, including the introduction of secondary slot trading, were being reserved for a 'second stage' of modifications.[621] After several rounds of consultations between 2007 and 2009, however, a consolidated text, not comprising any changes to the provisions of the Slot Regulation, was the only thing that was published.[622] In 2011, a more in-depth proposal to revise the Slot Regulation was tabled as part of the Commission's "Better Airports" Package[623] based on research done by consultancy firm Steer Davies Gleave (2011), leading up to a formal proposal to amend the Slot Regulation by the Parliament on 12 December 2012 and repealing the regulations referred to above.[624] A few main changes included, *inter alia,* the introduction

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[615] *See* European Commission, *supra* note 208, at 2.
[616] *See* Brecke, *supra* note 491, at 200.
[617] EU Regulation 95/93, as amended, *supra* note 47, Article 6(1).
[618] *See* C. Smith, *Killing the Golden Goose: Assessing the Benefits and Pitfalls of Airport Slot Auctions, and the Consequences for Hub Development in Europe.* Presentation for the 11th Global Airport Development conference (2004).
[619] *See* European Commission, *supra* note 54, paragraph 13.
[620] *Id.,* paragraph 16.
[621] *See* European Commission, *supra* note 54, paragraph 12; Mott MacDonald, *supra* note 63, at 2-2.
[622] *See* Haylan and Butcher, *supra* note 116, at 22.
[623] The "Better Airports" Package refers to a comprehensive set of measures to help increase the capacity of EU airports so as to reduce delays and help improve the quality of service offered. *See* European Commission, "Better Airports" Package Launched, *available at* https://ec.europa.eu/commission/presscorner/detail/en/IP_11_1484 (last visited November 11, 2021).
[624] In its first reading of the 2011 proposal to revise the Slot Regulation, the Parliament concluded that "[t]he slot allocation system established in 1993 does not ensure the optimum allocation and use of slots and thus of airport capacity". The Parliament also concluded that "[i]t is therefore necessary to modify the slot allocation system at the Union's airports", *see* European Parliament, Legislative Resolution of 12 December 2012 on the Proposal for a Regulation on Common Rules for the Allocation of Slots at EU Airports (Recast), 2011/0391(COD), Preamble.

of secondary slot trading at EU airports to encourage slot mobility, a broadened definition of the new entrant rule to allow more airlines to fall into its scope and amendments to the 80/20 rule by increasing the usage threshold.[625]

Despite its potential in remedying to some extent the mismatch between demand and supply of airport capacity at EU airports, the 2011 proposal remained deadlocked in the Council since 2013 until 2020 pending resolution of the disputed question over Gibraltar's status[626] and has yet to be adopted.[627] Alternatively, the Commission may consider drafting a new proposal in light of the fact that a decade has passed since the 2011 proposal first saw the light of day.

Regardless of whether the Commission decides to move forward with the existing proposal or to start anew, the need for a revision is widely supported by EU institutions. For instance, in its 2015 Aviation Strategy for Europe, the Commission urged the Council and the Parliament to swiftly adopt the 2011 proposal to the Slot Regulation to enable the optimal use of airport capacity and provide clear benefits to the EU economy.[628]

In turn, the Parliament reiterated the need to the Council and the Member States to make swift progress on, among others, the revision of the Slot Regulation in its resolution of 16 February 2017, designed to ensure an efficient use of capacity at congested airports, as well as to enhance fair competition and the competitiveness of operators.[629] Therefore, the Council is urged to take steps to move forward with existing revision plans. This urgency has been reinstated by the Commission in 2020 following the drafting of a second report by Steer Davies Gleave,[630] indicating that the debate on airport slots is still moving.

The need to keep pushing for amendments is emphasized by three major studies towards the effects of the EU slot rules and proposed amendments, which have all been conducted for the Commission over the years. All three studies – NERA (2004), Mott MacDonald (2006) and Steer Davies Gleave (2011) – had a different scope of analysis and their estimated impacts vary considerably. The common denominator is that they all identify shortcomings in the current administrative slot regime, under which slots are allocated by a slot coordinator rather than being market-determined by transactions between airlines, and pinpoint market-based mechanisms as the preferred method for slot coordination going forward.[631]

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[625] Other proposed changes include an increased focus on the transparency and independence of the slot coordination process in order to make the market work better, linking slot coordination to Single European Sky trajectory for smoother airspace and airport capacity management, increasing the minimum series length from 5 to 15 for the winter season and a removal of so-called 'local guidelines' allowing for tailored regimes for slot coordination taking into account local circumstances at the airport in question. *See* Steer Davies Gleave, *supra* note 69, at 223-277.

[626] A dispute between the UK and Spain over the sovereignty of Gibraltar, including the airport located in Gibraltar, continued to block all EU air transport legislation, including slot reform, until the issue was solved when the UK left the EU as a Member State.

[627] *See* European Parliament, *supra* note 74.

[628] *See* Communication from the Commission on an Aviation Strategy for Europe, COM(2015) 598 final, at 7.

[629] *See* European Parliament, *supra* note 74.

[630] The 2020 Steer Davies Gleave report is an updated version of their previous study in 2011 on how the current EU Slot Regulation is working and how the coordination system could be improved. Both studies were carried out under the supervision of the Commission. A broad range of stakeholders have been consulted in the process. At the time of writing, the updated Steer Davies Gleave report has not been released yet. It was set to be published in 2020 but was delayed due to the impacts of COVID-19 on the air transport industry.

[631] *See* Guiomard, *supra* note 70, at 130; Erwin von den Steinen, 'Formal Ownership and Leasing Rules for Slots' in Achim I. Czerny, Peter Forsyth, Hans-Martin Niemeier et al. (eds), *Airport Slots: International Experiences and Options for Reform* (2008), at 311. *See infra* Chapter 5, section 5.6 (concisely analyzing secondary slot trading as an instrument to flex the slot regime).

In keeping with current market realities, the European Parliamentary Research Service also stated in 2016 that the slot rules are deemed to be inadequate in view of current and future traffic, in particular because it is unlikely to see any major capacity upgrades at the majority of EU airports.[632] In the context of growing airport congestion and limited scope for airport capacity expansions, slots are a rare resource. The Parliament already acknowledged that access to such resources is of crucial importance for the provision of air services and to preserve competition within the internal air transport market.[633] The need for revision is reinforced through growing environmental concerns and the Green Deal as Europe's flagship initiative with the overarching aim of climate neutrality by the year of 2050, as to which *see* also Chapter 2, section 2.3.3.

4.1.5 The use and application of the non-discrimination principle 'in general' under EU Regulation 95/93

An important principle underpinning the Slot Regulation is that of non-discrimination on grounds of nationality or identity of air carriers. As the Commission has indicated in relation to national measures adopted under Article 19(2) of EU Regulation 1008/2008,[634] any restrictions adopted under that provision must comply with the general principles governing the freedom to provide air services as spelled out in CJEU case law, *see* also sections 4.4.2 and 4.4.3 on Traffic Distribution Rules [hereinafter: TDR's].[635] Those general principles go beyond the mere prohibition of any discrimination on grounds of nationality of the air carrier or as between destinations inside the EU.

When the Air Transport Package was completed in 1992, the Council considered that the absence of discrimination on grounds of nationality of the air carrier was not sufficient in view of the structure of the air transport sector in the Community to ensure the satisfactory working of the internal market in civil air transport and to ensure compliance with the principle of free market access. Consequently, the Council added the principle of non-discrimination on the basis of the identity of the air carrier, which was expressly referred to in the *Air Inter*-case.[636]

Thus, the principle of non-discrimination not only prohibits any form of discrimination based on the air carrier's nationality, but also any form of discrimination based on the identity of the air carrier. These two prohibitions are expressions of the general principle of equal treatment. According to consistent jurisprudence of the CJEU, this principle requires that comparable situations not be treated differently and different situations not be treated alike unless such treatment is objectively justified.[637]

Although this is not said with so many words in the Slot Regulation, the principle of non-discrimination also applies to the nationality or identity of the air carriers requesting slots. The prohibition of 'non-discrimination' should thus be understood as obliging the slot

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[632] *See* European Parliament, *supra* note 74. The growing 'Capacity Crunch' at EU airports has been addressed in Chapter 2, sections 2.3 and 2.4 of this dissertation.
[633] *See* European Parliament, *supra* note 624, recital 4.
[634] *See* European Commission, Commission Decision of 14 March 1995 on a procedure relating to the application of Council Regulation (EEC) No 2408/92 (Case VII/AMA/9/94 – *French traffic distribution rules for the airport system of Paris*), OJ L 162, paragraph 25.
[635] Case C-288/89, *Mediawet* [1991] ECLI:EU:C:1991:323; Case C-76/90, *Säger v. Dennemeyer* [1991] ECLI:EU:C:1991:331.
[636] Case T-260/94, *Air Inter v. Commission* [1997] ECLI:EU:T:1997:89, paragraph 112.
[637] Case C-133/09, *József Uzonyi v. Mezőgazdasági és Vidékfejlesztési Hivatal Központi Szerve* [2010] ECLI:EU:C:2010:563, paragraph 31; European Commission (the establishment of TDR's for the airports Amsterdam Schiphol and Amsterdam Lelystad), *supra* note 278, paragraph 87.

coordinator to apply national treatment.[638] Where a third country does not abide by the principles of non-discrimination and national treatment, "appropriate action may be taken to remedy the situation in respect of the airport or airports concerned", as to which see also Article 12 of the Slot Regulation.

The principle of non-discrimination holds that no discrimination between 'like' products from different trading partners may take place. In the words of the Commission: "Discrimination means differentiation of any kind without objective justification".[639] Thus, non-discrimination applies to like or competing products, as well as to non-like products to the extent that they are mutually substitutable. Applied to slot allocation, the principle of non-discrimination holds that the slot coordinator, who holds the exclusive and independent responsibility to allocate slots at EU airports, cannot discriminate between similar air services offered by different airlines.

Non-discrimination may also be secured by means of the harmonization of laws and by the principle of reciprocity, which holds that the same level of market access is specifically conceded between States.[640] The Slot Regulation is an example of where the EU has provided harmonized conditions for access to airports in terms of slots in the EU, although slot coordination is not regulated exclusively by the EU, as to which see section 4.3.5 below. Article 4(b), under 2, of the Slot Regulation requires that slots are coordinated in a "neutral, non-discriminatory and transparent way".[641] Moreover, the principle of reciprocity is vested in Article 12 of the Slot Regulation, which reads that a Member State may take measures against third States if that State does not grant EU air carriers treatment comparable to the treatment granted by the Slot Regulation in order to remedy the discriminatory situation.[642]

When slot coordination measures differentiate between air services, for instance as to traffic segments, it needs to be demonstrated that the measure is suitable and feasible, and that less intrusive alternatives are not reasonably available pursuant to the proportionality principle, as demonstrated in sections 4.4.2 and 4.4.3 below on the application and use of TDR's in the EU. In other words: there needs to be a proper relationship between ends and means.[643] The principle of non-discrimination is also opposed to any measure which produces, even indirectly, discriminatory effects in practice, even if they do not explicitly distinguish between nationality or identity.[644]

Moreover, even if national measures restricting the freedom to provide air services apply without distinction as to nationality or identity, they still need to be warranted by mandatory requirements in the public interest.[645] The Commission considered that the same reasoning

[638] *See* Mendes de Leon, *supra* note 48, at 555.
[639] Trade and Cooperation Agreement between the EU and the European Atomic Energy Community, *supra* note 485, at 222.
[640] *See* Matthias Oesch, *Commercial Treaties* (2014), paragraph 8.
[641] EU Regulation 95/93, as amended, *supra* note 47, Article 4(2)(a).
[642] EU Regulation 95/93, as amended, *supra* note 47, Article 12.
[643] *See*, for further information on the topic, Thomas Cottier and Matthias Oesch, *Direct and Indirect Discrimination in WTO Law and EU Law*, Working Paper (April 2011); Case C-292/97, *Karlsson and Others* [2000] ECLI:EU:C:2000:202, paragraph 45.
[644] *See* European Commission (French TDR's for the airport system of Paris), *supra* note 634, under VI; European Commission, Commission Decision of 27 April 1994 on a procedure relating to the application of Council Regulation (EEC) No 2408/92, (Case VII/AMA/II/93 – *TAT – Paris (Orly) – London*), OJ L 12, paragraph 28; European Commission, Commission Decision of 27 April 1994 on a procedure relating to the application of Council Regulation (EEC) No 2408/92, (Case VII/AMA/IV/93 – *TAT – Paris (Orly) – Marseille and Paris (Orly) – Toulouse*), OJ L 127, paragraph 35.
[645] *See* European Commission, *supra* note 224, recital 24; European Commission, Commission Decision of 16 September 1998 on a procedure relating to the application of Council Regulation (EEC) No 2408/92 (Case

must be applied, *mutatis mutandis*, to any local operational rules applied by Member States under Article 19(1) of Regulation 1008/2008.[646]

4.1.6 Case law referring to EU Regulation 95/93, as amended

The author is aware of only one case brought to the CJEU under EU Regulation 95/93, *id est* a 2016 case between the Commission and the Portuguese Republic over the independence of the coordinator. In this case, the CJEU held that the coordinator must be both functionally and financially independent.[647] The functional and financial independence of the coordinator is subject to further discussion in Chapter 5, section 5.4.

Several cases relating to EU Regulation 95/93 have been brought before national courts. For instance, to secure the independence of the coordinator, the Italian Constitutional Court had in 2009 already prevented the regional government of Lombardy from upholding a law which allowed the regional government to participate in slot allocation decisions at airports in Lombardy.[648]

In the United Kingdom [hereinafter: UK], a judgment related to the provisional suspension of Monarch Airlines' AOC and the subsequent decision of UK-based coordinator Airport Coordination Limited [hereinafter: ACL] to deny Monarch Airlines slots for the Summer 2018 season was passed by the UK Court of Appeal in 2017,[649] as to which *see* Chapter 5, section 5.3.3. A related judgment was issued by the Dutch Council of State in 2019 in a case brought by KLM Royal Dutch Airlines against Airport Coordination Netherlands [hereinafter: ACNL] following the ceasing of operations by Malaysia Airlines at Amsterdam Airport Schiphol and the requirement ACNL imposed upon Malaysia Airlines to return the slots it held back to the slot pool.[650] This case is addressed further in Chapter 5, section 5.3.2.

In relation to secondary slot trading, which is subject to further discussion in Chapter 5, section 5.6 as a means to increase slot mobility, two cases are relevant: the 1999 *Guernsey*-case[651] by the UK High Court and a 2001 case issued by a Dutch court in summary proceedings between Dutch Bird and Transavia.[652] Whereas the judge in the former case ruled that slots may be traded as between carriers and accompanied by financial considerations, the Dutch court adopted a less liberal view on the meaning of Article 8(4) of the Slot Regulation, stating that private exchanges of slots would undermine the objectives of the slot coordination process and the position of new entrant carriers.[653] Deliberations on the legality of secondary slot trading are provided in Chapter 5, section 5.6.3.

In a judgment delivered by the Reyjkavík District Court in 2014 between Wow air and the Icelandic Competition Authority, Isavia and Icelandair, the Court clarified that complaints based on competition law considerations, in this specific situation relating to the transfer of slots between carriers, may be submitted directly to national competition authorities pursuant to Article 11 of the Slot Regulation. However, intervention from national competition

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VII/AMA/11/98 – *Italian traffic distribution rules for the airport system of Milan*), OJ L 337, under VII; Case C-288/89 (Mediawet), *supra* note 635, paragraphs 10-15.

[646] *See* European Commission, *supra* note 224, recital 24.

[647] Case C-205/14, *European Commission v. Portuguese Republic* [2016] ECLI:EU:C:2016:393, paragraph 62.

[648] Corte Costituzionale, Sentenza n. 18/2009, in tema di trasporto aereo nella Regione Lombardia *(in Italian)*.

[649] *Monarch Airlines v. Airport Coordination Limited*, *supra* note 45.

[650] *KLM v. Airport Coordination Netherlands* [2019], *supra* note 558.

[651] High Court of Justice, Queen's Bench Division, *Regina v. Airport Coordination Ltd ex parte The States of Guernsey Transport Board* [1999] All ER (D) 347.

[652] District Court of North Holland, 75565/KG ZA 01-349, *Dutch Bird v. Transavia Airlines* [2001] ECLI:NL:RBHAA:2001:AB2727.

[653] *Id.*

authorities, for instance through the imposition of remedies as addressed in Chapter 5, section 5.7, must be supported by "specific competition concerns based on restrictive practices, abuse of a dominant position or merger rules".[654]

Cases relating to the imposition of remedial commitments by the European Commission in, *inter alia,* merger, alliance and State aid cases are analyzed in Chapter 5, section 5.7.

4.1.7 Concluding remarks

The Slot Regulation follows closely the slot regime described in the WASG, the latter being more detailed and of a more practical nature compared to the Slot Regulation.[655] The WASG are not legally binding and also acknowledge in their Preface the right of each national regulator to derogate or regulate differently from the guidelines set in the WASG.[656] In the EU, since the establishment of the internal air transport market in 1997, the Slot Regulation has provided the EU with a legally binding system for slot coordination to give substance to the freedom to provide intra-European air services based on the principles of neutrality, non-discrimination and transparency.[657]

Mounting pressure of increased capacity shortfalls experienced at EU airports[658] has driven the Commission on several occasions to arrange amendments of the slot regime. The last substantial amendment dates back to 2004 when EU Regulation 793/2004 amended EU Regulation 95/93 in several respects.[659] An in-depth and formal proposal to revise the Slot Regulation on multiple structural levels was tabled in 2012 by the Parliament.[660] The proposal was eventually stalled in the Council pending resolution of the dispute between the UK and Spain over the sovereignty of Gibraltar.[661] The urgency to move forward with existing or new revision plans, including a revision of the Slot Regulation, has been reinstated by the Commission in 2020 and 2021 by labelling the revision of the Slot Regulation as a 'priority pending proposal' in the Commission's 2020 and 2021 Work Programme, illustrating that the debate on airport slots is still moving.[662]

4.2 A comparative analysis of similarities and differences between the formulation and practice of WASG principles vis-à-vis EU Regulation 95/93

4.2.1 Preliminary remarks

As previously mentioned in section 4.1.2, the administrative system for slot coordination provided by the Slot Regulation largely reflects the guidelines laid down in the WASG. The incorporation of the WASG into the Slot Regulation also came with certain adjustments, especially with regard to the way coordinated airports should be designated and, subsequently, the appointment of the coordinator. Moreover, there are differences in how both the supply-side and demand-side of slot coordination are approached.[663] The contents of the WASG have

[654] Judgment in Case E-18/14 *Wow air ehf. V. The Icelandic Competition Authority, Isavia ohf. And Icelandair ehf.* (Press release 18/2014).
[655] *See* European Commission, *supra* note 26, at 2; Odoni, *supra* note 61, at 20; Bauer, *supra* note 602.
[656] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, Preface.
[657] *See* European Commission, *supra* note 26, at 2.
[658] *See* Chapter 2, sections 2.3 and 2.4.
[659] *See* section 4.1.4 for a brief overview of amendments.
[660] *See* European Parliament, *supra* note 624.
[661] *See* European Parliament, *supra* note 74.
[662] *Id.*
[663] The rules prescribing the capacity declaration (supply-side) and allocation (demand-side) process have been generally examined in Chapter 2, sections 2.2.2 and 2.2.3.

been introduced in multiple sections of Chapter 2, followed by a discussion of the legal status and governance structure of the WASG in Chapter 3, section 3.4.

The following sections provide an overview of differences in legal status of the WASG and the Slot Regulation as well as the level of detail contained in them, followed by an overview of similarities and differences of a few highlighted guidelines and principles set forth by respectively the WASG and the Slot Regulation.

4.2.2 Exemplification of legal status

As discussed in section 4.1.2, the provisions of the Slot Regulation are obviously directly applicable and therefore binding for all Member States, as opposed to the mere guidelines set forth in the WASG. The Slot Regulation was designed to give legal force to existing custom and practices provided by the WASG.[664] Therefore, the WASG serves *de facto* and *de iure* as a reference document for the slot coordination process at EU airports, with the exception of provisions that are in conflict with the EU Regulation.

Article 8(5) of the Slot Regulation provides the basis for this practice by stating that "the coordinator shall also take into account additional rules and guidelines established by the air transport industry worldwide or Community-wide". This provision can be understood as a reference to the WASG.[665] Application of the WASG is not possible when there is a conflict with the EU Regulation, which takes legal precedence.

4.2.3 Level of detail of substantive provisions

Another main difference between the provisions of the WASG and the Slot Regulation concerns the level of detail of the substantive provisions of the WASG, which is far greater than that of the Slot Regulation. The WASG includes relatively 'easy-to-follow' slot coordination rules and is, in some instances, resemblant of a handbook.[666] Where the Slot Regulation reflects the spirit in which the Slot Regulation was written in its Preamble as well as includes provisions on key aspects of slot coordination, the WASG take it a step further. For instance, the WASG explain what is understood by airport coordination in paragraph 1.1 and set forth general and specific objectives in paragraph 1.2. The WASG also provide an overview of relevant stakeholders in paragraph 1.3 and describe the presumed circumstances at the three categories of airports in paragraph 1.4.

As opposed to the Slot Regulation, the WASG include a calendar of coordination activities for two upcoming seasons,[667] which is to be followed by coordinators, airports and airlines worldwide. After all, slots at both ends – that is, airports – of a route are linked to one another, hence the coordination timelines at airports around the world are best set in parallel. The Slot Regulation only briefly refers to some of the coordination milestones in Article 10(3), but does not clarify them any further nor does it provide an overview of all activities on the calendar, such as the season start and end dates, when the Slot Conferences are taking place and when unused slots need to be returned for the purposes of calculating grandfather rights.

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[664] *See* Konstantinos Zografos, Yiannis Salouras and Michael A. Madas, *Dealing with the efficient allocation of scarce resources at congested airports*, 21 Transportation Research Part C: Emerging Technologies 1 (2012), at 247.
[665] *See* NERA Economic Consulting, *supra* note 5, at 6; Odoni, *supra* note 61, at 20.
[666] Though the WASG provides an extensive overview of the capacity declaration and slot allocation processes, it does not address all slot-related matters, for instance slot trading and procedures for reducing historic slots in case an airport's declared capacity were to fall short of the number of allocated (historic) slots. *See* Odoni, *supra* note 61, at 20.
[667] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 2.

The same approach is taken through the remainder of the documents. Where the WASG explain in detail how airports are designated, by whom and on the basis on which considerations,[668] the Slot Regulation only states that airports should be designated by the Member State in Article 3 after a capacity analysis has been carried out based on "commonly recognized methods", without specifying how the coordination parameters should be set.[669]

The WASG also address slot management at Level 1 and Level 2 airports, whereas the Slot Regulation is specifically tailored to slot coordinated Level 3 airports.[670] Indeed, the intention of the drafters is to organize the WASG in a way to allow "easy access to the policies principles and processes that support the allocation and management of airport slots at congested airports worldwide".[671]

The next sections discuss the similarities and differences between the WASG and the Slot Regulation with special reference to three highlighted concepts: primary allocation criteria, secondary allocation criteria, and the use of slots by airlines.

4.2.3.1 Primary criteria for slot allocation

The principle of historic precedence is upheld as backbone of the allocation system in both the WASG and the Slot Regulation, as to which see Articles 8(2) and 10(2) of the Slot Regulation and paragraphs 1.7.2(f) and 8.6 of the WASG.[672] The demand-side of slot allocation, including all primary criteria for slot allocation, have been introduced in Chapter 2, section 2.2.3.

The WASG provide that historic slots are the first priority of slot allocation, followed by an equal allocation of changes to historic slots, for example a change in timing, new entrant requests and non-new entrant requests.[673] Previous versions of the WASG, then known as the Worldwide Slot Guidelines [hereinafter: WSG], as to which see Chapter 3, section 3.4.2, placed requests for changes to historic slots ahead of new entrant requests.[674] Up to 50% of the slots contained in the pool must be allocated to new entrant requests, unless demand is less than 50%, while the remaining 50% must be allocated to non-new entrant requests.[675] The WASG also provide that, where this 50/50 balance is not achievable in one and the same season, the coordinator should strive to correct this imbalance over the next equivalent season or seasons to ensure an equitable slot allocation.[676] Following the WSG Strategic Review leading to the adoption of the WASG, all airlines operating into airports that have adopted the WASG now have equal access to slots which remain available following the allocation of historic slots.

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[668] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 1.5 and 6.1.

[669] Whereas paragraph 6.1.2 of the WASG provides that the capacity analysis used to declare the capacity of an airport (potentially preceded by the designation of said airport as Level 3 coordinated) should take into account queue times, levels of congestion, delay, airspace limitations and all relevant capacity limits of the runways, apron, terminals and other airport facilities, Article 6(1) of the Slot Regulation only provides that "all relevant technical, operational and environmental constraints" should be taken into account in the determination of the coordination parameters.

[670] Chapter 3 of the WASG addresses the definition of and relevant stakeholders at Level 1 airports, Chapter 4 of the WASG addresses the definition of and relevant stakeholders, including the facilitator, at Level 2 airports and Chapter 5 of the WASG addresses the definition of and relevant stakeholders, including the coordinator and the coordination committee, at Level 3 airports.

[671] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 1.

[672] The principle of historic precedence has been discussed in Chapter 2, section 2.2.3.

[673] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 8.3.2.1 and 8.3.3.2.

[674] IATA, *Worldwide Slot Guidelines (WSG) Edition 10* (2019), *supra* note 8, at 8.3.2.1.

[675] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 8.3.3.3 and 8.3.4.

[676] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 8.3.3.4.

Within each category of slot requests, *id est* changes to historic slots, new entrant requests and non-new entrant requests, extensions of year-round operations, *id est* requests to extend an existing operation into the subsequent, equivalent season should have priority over new slot requests. [677]

The primary criteria for slot allocation listed in the Slot Regulation largely resemble the process incorporated in the WASG. Equal to the WASG, the Slot Regulation recognize the holders of historic rights as receiving first priority in the slot allocation process.[678] Changes to historic slots, also commonly known as 'retimings', shall only be accepted for operational reasons and/or if it would improve slot timings of the applicant carrier, and may then take precedence before the allocation of slots to new entrants,[679] the latter of which will be distributed among new entrant requests up to a maximum of 50%.[680] The position of changes to historic slots ahead of new entrant slots differs from the WASG, where changes to historic slots and new entrants are placed on equal footing. Again, equal to the WASG, preference to year-round services shall be given in a situation where not all slot requests can be accommodated.[681]

With the coming into existence of the WASG, the definition of a 'new entrant' airline has changed to mean "an airline requesting a series of slots at an airport on any day where, if the airline's request were accepted, it would hold fewer than *7* slots at that airport on that day . . ." [italics added].[682] Before 2020, the 'new entrant' provision in the document required airlines to hold fewer than five slots at an airport on a given day in order to get accorded new entrant priority.[683] The Slot Regulation of today still proceeds from the definition that, in order to obtain new entrant priority, an airline should hold fewer than 5 slots at an airport on a given day if the carrier's request were accepted.[684]

4.2.3.2 Secondary criteria for slot allocation

As concisely elaborated upon in section 2.2.3 of Chapter 2, the WASG provide that coordinators may make use of additional criteria for slot allocation when slots cannot be allocated using the primary criteria alone. In order to assist the coordinator in his or her decision-making process, paragraph 8.4.1 of the WASG provide several factors that coordinators should give consideration to, including but not limited to, *exempli gratia,* curfews, the balance of the different types of services and markets, connectivity and competitive factors. Whatever the approach taken, "coordinators should not simply allocate any remaining slots pro-rata among all requesting airlines".[685] Accordingly, paragraph 8.4.1 of the WASG effectively encourages coordinators to have additional criteria in place at airports where demand is greatest, since they are not expected to 'simply' allocate slots on a *pro rata* basis between requesting airlines.

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[677] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 8.3.5.1.
[678] EU Regulation 95/93, as amended, *supra* note 47, Articles 8(2) and 10(2).
[679] EU Regulation 95/93, as amended, *supra* note 47, Article 8(4).
[680] EU Regulation 95/93, as amended, *supra* note 47, Article 10(6).
[681] EU Regulation 95/93, as amended, *supra* note 47, Article 8(3).
[682] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, Terms and Abbreviations.
[683] IATA, *Worldwide Slot Guidelines (WSG) Edition 10* (2019), *supra* note 8, Amendments to WSG Edition 9.
[684] EU Regulation 95/93, as amended, *supra* note 47, Article 2(b)(i). In EU Regulation 2021/250, which incorporates temporary relief measures into the Slot Regulation in response to the COVID-19 crisis, a broadened new entrant definition is included. This revised definition sets the maximum number of daily slots held by a new entrant at an airport at seven, or nine for a non-stop intra-EU service which is operated by at most two other carriers.
[685] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 8.4.1.

Additional criteria are typically used for 'tie-breaking' purposes between competing slot requests. As an increasing number of airports are declared to be congested, among which are the world's most congested airports, more and more coordinators are faced with excess demand. Thus, they will have to make decisions what slot requests to accommodate and decline. Examples of local procedures introduced by Airport Coordination Germany [hereinafter: FLUKO], ACL and ACNL based on paragraph 8.4.1 of the WASG are provided in section 4.3.3.2 below.

The Slot Regulation does not explicitly identify any such allocation criteria for competing requests, which is especially interesting given that the capacity crunch is mainly prevalent in Europe as discussed in Chapter 2, sections 2.3 and 2.4. Should the requirement that any local guidelines must aim at improving the efficient use of airport capacity discussed in section 4.3.1 be read in purely operational terms, coupled with the absence of a list of secondary criteria resembling the one in the WASG, the Commission appears to have, perhaps unintentionally, adopted a two-track policy of excluding legitimate policy aims to be reflected in local procedures and local guidelines affecting coordination decisions.[686]

As evidenced by current coordinator practice, an increasing number of EU coordinators do apply additional allocation criteria by reference to paragraph 8.4.1 of the WASG. However, in section 4.3.4, it is concluded that the extent to which these additional criteria are an effective tool to influence coordination decisions appears to be fringe for two main reasons:

1) allocation criteria are only applied to new slot requests, if any;
2) slots are not route-specific or aircraft type-specific, hence their use may be flexibly changed by airlines depending on market developments and/or commercial considerations.

Chapter 6 provides recommendations on 'slot earmarking' to effectively influence coordination decisions in the longer run should new slots become available.

4.2.3.3 Provisions on the use of slots by airlines

This section highlights provisions relating to the use of slots by airlines after these slots have been allocated to them by the coordinator. Building on what has been provided in section 4.2.3 on the WASG more or less resembling a handbook, the WASG are abundant in their provisions on the use of slots.

For instance, the WASG provide that "[a]irlines may only hold slots that they intend to operate, transfer, swap, or use in a shared operation" in paragraph 8.5.1. However, as indicated above, "[a]irport slots are not route, aircraft, or flight number specific and may be changed by an airline from one route or type of service to another" pursuant to paragraph 8.10.1. With regard to instances where slots are operated in a way contrary to their proper use, the WASG provide that "[a]irlines and other aircraft operators must not intentionally operate services at a significantly different time or intentionally use slots in a significantly different way than allocated by the coordinator".[687] Yet, ". . . [c]onfiscation of slots for any reason other than proven intentional slot misuse is not permitted". [688]

Where slot misuse can be proven to be intentional, coordinators may seek recourse to Chapter 9 of the WASG. Chapter 9 saw the light of day in 2020, when the WASG first came

[686] *See infra* Chapter 6 (describing the appropriateness of this rather narrow approach in light of today's market realities).
[687] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 8.1.1(d).
[688] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 8.1.1(g).

into existence. It provides comprehensive principles and guidance on slot monitoring including roles, responsibilities and suggested enforcement actions.[689] Conversely, the Slot Regulation merely requires Member States to "ensure that effective, proportionate and dissuasive sanctions or equivalent measures are available" to remediate instances of slot misuse in Article 14(3), and provides no detailed rules or restrictions on how slots may be used and by whom apart from listing primary criteria for slot allocation. A variance of provisions to combat slot misuse have been incorporated into national laws.[690]

The WASG explicitly encourage slot swapping between airlines on a one-for-one basis.[691] Slot swaps or transfers for compensation or consideration may only take place where they are not prohibited by the laws of the relevant country.[692] The Slot Regulation does not use the terminology "slot swaps" or "slot swapping", but does acknowledge that slots may be "exchanged" on a one-for-one basis between carriers.[693] Slots may also be transferred within the portfolio of the same carrier, between parent and subsidiary companies or between subsidiaries of the same parent company, as part of the acquisition of control over the capital of an air carrier, and/or in the case of a total or partial take-over when the slots are directly related to the air carrier taken over.[694] Slots allocated to one carrier may also be used by another carrier if the two carriers are participating in a joint operation.[695] The Slot Regulation is silent on whether slot exchanges and slot transfers may or may not take place for compensation or consideration.

Last, and in anticipation of a discussion in Chapter 5, section 5.3 on the role and valuation of slots in financial proceedings and/or in cases where airlines cease operations, it is notable that EU provisions on this matter are conspicuous by their absence. This seems ill-considered, in particular with COVID-19 as a contributory factor to developments regarding airline insolvency and bankruptcies. The WASG does not provide comprehensive guidance for the role of slots in financial proceedings either, although paragraphs 8.14 and 8.15 of the WASG are designed to inform the coordinator and industry stakeholders on what could be done when an airline loses its operating license and/or when it ceases to operate at an airport. For instance, paragraphs 8.14 and 8.15 provide for the 'freezing' of slots until the financial difficulties have been overcome, an assumption that is not covered by the Slot Regulation.[696] Further analysis on the matter can be found in Chapter 5, section 5.3.

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[689] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, Chapter 9.
[690] For instance, Spanish Law 21/2003 of 7 July 2003, Aviation Safety, supplementing Royal Decree 15/2001, Article 49, defines offences in relation to slot coordination. Corresponding fines are listed in Article 55. The failure to return unused allocated slots by the deadlines established by the Slot Regulation may be fined with €6000-€90,000 for each series of slots. The operation without a slot may be sanctioned with a fine of €3000-€12,000 per flight. Airlines that operate intentionally and regularly at times different to those allocated may be fined with €3000-€30,000 per flight operated off-slot. Airlines which undertake slot transfers not permitted by the Slot Regulation may be sanctioned with a fine ranging from €18,000 to €60,000 for each series of slots. Furthermore, the German Decree to Regulate Airport Slot Coordination (FHKV) of 2005 implements the provisions of the Slot Regulation in German law. Regarding late slot handbacks, it prescribes that slots that are held without the intention to use them have to be returned immediately. Violations are regarded as administrative offences punishable with fines of up to €50,000.
[691] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 8.11.1.
[692] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 8.11.5 and 8.12.1.
[693] EU Regulation 95/93, as amended, *supra* note 47, Article 8a(1)(c).
[694] EU Regulation 95/93, as amended, *supra* note 47, Article 8a(1), under a and b.
[695] EU Regulation 95/93, as amended, *supra* note 47, Article 10(8).
[696] *See infra* Chapter 5, section 5.3 (specifying that administrators can request the coordinator to 'freeze' slots until the financial difficulties of the slot holding airline have been overcome or pending formal acquisition of the company's activities by third parties per paragraph 8.15.3 of the WASG. Slots may be frozen even if the slots are not used in practice). As such, the 'freezing' of slots is a different concept than the revocation or the reallocation of slots due to the non-use or non-compliant use thereof in accordance with the 80% threshold, as discussed in Chapter 2, section 2.2.3.

4.2.4 Concluding remarks

The primary criteria for slot allocation listed in the Slot Regulation by and large resemble the guidelines laid down in the WASG. This comes as no surprise, given that the WASG guidelines served as the basis for the original version of the Slot Regulation, which entered into force in 1993 as mentioned above in section 4.1.2.

Considering that the WASG comprise a living document that is reviewed and revised continuously by the Worldwide Airport Slot Board to remain up to date with industry and regulatory changes,[697] structural amendments to the Slot Regulation are significantly harder to come by as discussed in section 4.1.4. This may be reflective of the legally binding status of the Slot Regulation, meaning that 27 Member States have a duty to comply with any revised provisions of the Slot Regulation, subjecting any amendments to potentially fierce political discussions, whereas the WASG are intended as best practice from which States may deviate in national laws and regulations.[698] Examples of such national regulations in Mexico, China and Australia are explored in section 4.6 below, whereas the next sections explore the adoption of local guidelines by Member States and local procedures by coordinators under the Slot Regulation.

4.3 The adoption of local guidelines and local procedures under EU Regulation 95/93

4.3.1 Preliminary remarks

Pursuant to Article 8(5) of the Slot Regulation, the coordinator shall take into account local guidelines proposed by the coordination committee and approved by the Member State, provided that such guidelines "do not affect the independent status of the coordinator, comply with Community law and aim at improving the efficient use of airport capacity".[699] Hence, it is a task of the coordination committee "to make proposals concerning or advise the coordinator and/or the Member State on . . . local guidelines for the allocation of slots or the monitoring of the use of allocated slots, taking into account, inter alia, possible environmental concerns, as provided for in Article 8(5). . .".[700]

The adoption of local procedures relating to the allocation and use of slots is not specifically foreseen under the Slot Regulation. However, coordinator practices as analyzed in section 4.3.3.2 below show that local procedures are used by coordinators at EU airports, for example in keeping with paragraph 8.4.1 of the WASG. An explanation of the distinction between local guidelines and local procedures is provided in section 4.3.2. An analysis of national measures on slot coordination in the context of the general principles of supremacy, pre-emption and subsidiarity is found in section 4.3.5. The adoption of local operational rules by Member States is foreseen under Article 19(1) of EU Regulation 1008/2008 and is thus concisely addressed in section 4.4.

4.3.2 The distinction between local guidelines and local procedures

It is important to distinguish between local guidelines and local working procedures, henceforth also referred to as 'local procedures'. Both instruments have the potential to add more flexibility to the slot allocation process at the local level, as they can be adapted to local circumstances.

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[697] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, Preface. *See* Chapter 3, section 3.4.2 for an overview of the governance structure of the WASG.
[698] *Id.* at Preface.
[699] EU Regulation 95/93, as amended, *supra* note 47, Article 8(5).
[700] EU Regulation 95/93, as amended, *supra* note 47, Article 5(1)(a).

Local guidelines may be initiated by any member of the coordination committee,[701] whereas local working procedures are introduced by coordinators on their own as part of their discretionary powers underpinning the independence of the coordinator.[702] As such, they do not require involvement of the coordination committee and/or the Member State. Conversely, local guidelines adopted under the Slot Regulation have to be approved by the Member State, which in turn notifies the Commission.[703] The Member State is not in the position to propose local guidelines but is dependent on the coordination committee for proposals, since they are not a member of the coordination committee but hold observer status.[704]

Both instruments are limited to using local specifications for situations not regulated by the Slot Regulation, which is legally binding for all Member States and takes precedence over local solutions as evidenced by section 4.1.2 above. Moreover, Article 8(5) explicitly requires local guidelines to ". . . comply with Community law".[705] When the so-called 'Local Rule 2A' was introduced by London Gatwick's coordination committee to extend the minimum series length from 5 to 15 weeks in the summer season, it was withdrawn because it lacked consistency with the definition of a slot series in the WASG and the Slot Regulation.[706] Yet, the local guideline was deemed to be appropriate given the specific situation at the airport, where short series in the peak summer periods prevent other airlines from launching year-round services.[707]

Hence, local guidelines and local procedures in the EU may only fill in the gaps left by the Slot Regulation. Examples of the application of local guidelines and local procedures are studied below.

4.3.3 The application of local guidelines and local procedures

4.3.3.1 Local guidelines

Despite failure of 'Local Rule 2A', as discussed above, London Gatwick has five other local guidelines in place which were still adopted under the EU Slot Regulation after discussion in the coordination committee, since the UK was still considered an EU Member State at the time. The local guidelines are administered by ACL, which provides allocation services across several jurisdictions, including the UK. The local guidelines relate to:

1) the allocation and distribution of night movements and night noise quota;
2) procedures with respect to time-critical operations that are exempted from acquiring slots at coordinated airports such as State flights, emergency landings, humanitarian flights and recovery flights;
3) the consequences of the late handback of slots;
4) the allocation of ad-hoc slots;

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[701] *Id,* Article 5(3).
[702] *See infra* Chapter 5, section 5.4 (analyzing the functional and financial independence of the coordinator).
[703] EU Regulation 95/93, as amended, *supra* note 47, Article 8(5).
[704] *See* International Transport Forum, *supra* note 162, at 59; EU Regulation 95/93, as amended, *supra* note 47, recital 7.
[705] EU Regulation 95/93, as amended, *supra* note 47, Article 8(5).
[706] *See* London Gatwick, Making the best use of existing capacity in the short and medium term (16 May 2013), *available at* https://www.gatwickairport.com/globalassets/publicationfiles/business_and_community/all_public_publications/transforming_gatwick/gatwick_airport-short_and_medium_term_options_paper-16_may_13.pdf (last visited August 25, 2020). At the time, the UK was still an EU Member State.
[707] *See* Steer Davies Gleave, *supra* note 69, at 250.

5) the use of secondary criteria for initial allocation.[708]

London Heathrow's five local guidelines provide for:

1) the allocation and distribution of night movements and night noise quota;
2) *ad hoc* operations;
3) the administration of London Heathrow's movement cap of 480,000 movements;
4) procedures for temporarily reduced capacity;
5) the management of a temporary reduction in available capacity as a result of COVID-19 related sanitary measures.[709]

Equal to London Gatwick and with the exception of the fifth local guideline, these local guidelines were all still adopted under the EU Slot Regulation.[710]

With regard to London Heathrow's third local guideline, London Heathrow's movement cap is scheduled in excess of 494,000 movements – the limit being 480,000 movements – to compensate for any slot cancellations throughout the season. This scheduling flexibility, more commonly known as 'overbooking', allows the airport to achieve maximum utilization. Combined with a slot compliance scheme, the government and residential communities may be given comfort that a significant breach of the limit will not occur.[711] The mentioned local guideline also includes an 'overrun provision', which holds that, in case of an exceedance, the number of air traffic movements permitted in the following year shall be reduced by twice the amount of the overrun.[712]

Local guidelines have also been adopted at, including but not limited to, Amsterdam Airport Schiphol,[713] Dublin Airport[714] and Warsaw Airport.[715]

4.3.3.2 Local procedures

Despite the apparent possibility to take into account the specific functions of an airport and the objectives it pursues in allocation decisions through paragraph 8.4.1 of the WASG, coordinators have indicated that many of the additional criteria incorporated in paragraph 8.4.1 lack specificity and complicate the allocation process significantly. It is difficult to apply them

[708] The local guidelines in place at London Gatwick can be accessed via Airport Coordination Limited (ACL), London Gatwick Airport (LGW), *available at* https://www.acl-uk.org/airport-info-details/?aid=9 (last visited July 27, 2021).
[709] *See* Guillaume Burghouwt and Wouter de Wit, *On the mechanisms that can potentially influence connectivity outcomes in the UK* (2015), at 2.
[710] The local guidelines in place at London Heathrow can be accessed via Airport Coordination Limited (ACL), London Heathrow Airport (LHR), *available at* https://www.acl-uk.org/airport-info-details/?aid=1 (last visited July 27, 2021).
[711] *See* Airport Coordination Limited (ACL) International, *Airport Coordination Ltd Submission to the Sydney Airport Demand Management Discussion Paper* (2020).
[712] *See* Airport Coordination Limited (ACL), Local Rule 3 – Administration of the Heathrow Air Transport Movement Cap, *available at* https://www.acl-uk.org/wp-content/uploads/2016/09/Airportinfolink_LHR_localrule3.pdf (last visited July 27, 2021).
[713] Amsterdam Airport Schiphol's two local guidelines on slot allocation for general aviation and the determination of historic rights and the ad-hoc allocation of slots can be accessed via Airport Coordination Netherlands (ACNL), Local Rules, *available at* https://slotcoordination.nl/slot-allocation/local-rules (last visited July 27, 2021).
[714] Dublin Airport's two local guidelines on time critical operations and the management of temporary reductions in capacity following COVID-19 sanitary measures can be accessed via Airport Coordination Limited (ACL), Dublin Airport (DUB), *available at* https://www.acl-uk.org/airport-info-details/?aid=7 (last visited July 27, 2021).
[715] Warsaw Chopin Airport's two local guidelines on procedures for obtaining slots in the night period and the management of temporary reductions in capacity following COVID-19 sanitary measures can be accessed via Airport Coordination Limited (ACL), Warsaw Chopin Airport (WAW), *available at* https://www.acl-uk.org/airport-info-details/?aid=7 (last visited July 27, 2021).

consistently because of the lack of clarity in hierarchy and the meaning of and behind the criteria. They also frequently give rise to questions with regard to the transparency of slot allocation decisions[716] and an increasing risk of legal scrutiny because the legally binding Slot Regulation does not contain a list of secondary criteria. Despite the concerns, multiple coordinators have reflected the additional criteria in more specific local procedures as illustrated below. Moreover, the European Airport Coordinators Association [hereinafter: EUACA] have also issued procedures which may be used as a source of reference.[717]

Germany-based FLUKO applies its own set of additional criteria proceeding from its discretionary power in the 'Guideline for the allocation of scarce slots at coordinated German Airports'[718] in order to ensure allocation decisions are consistent with policy towards the promotion of Fraport as an international hub.[719] The safeguarding of public transport interests, including the significance of the service for the national and European location, the competitive situation in individual markets and the consolidation of the airlines operating in the market are also taken into account.[720] If available, alternative offers are made to non-hub airlines in case of competing requests, usually within an hour from the requested slot time.[721]

Although the name of the document may mislead one to think it concerns a local guideline, the FLUKO document is in fact a product of coordinator discretion alone and should therefore be regarded as a local procedure. The elements taken into account partially mirror the additional allocation criteria provided for by the WASG in paragraph 8.4.1, which include factors such as the development of the airport route network and domestic, short-haul and long-haul markets, competition, curfews and the environment.

Moreover, the guidelines specifically target the preservation and/or improvement of "the hub function".[722] From the perspective of national treatment, though the document does not specify the term "hub function", it is clear that Fraport functions as the primary hub to national carrier Lufthansa. It follows that the national carrier may be in the best position to benefit more from the reference to "hub function" as part of the airport's secondary criteria in comparison with foreign carriers. However, nothing precludes a foreign carrier from providing services that may be equally beneficial for the airport's hub function or that are eligible to get accorded priority on the basis of another feature.

FLUKO indicates that there is no order of precedence for the individual allocation criteria:

> "Depending on slot supply and demand, and current number of transport connections at this moment in time, as well as of the airlines operating them, the criteria shall be weighed up in an individual case."[723]

According to an analysis of the International Transport Forum, the Frankfurt-case is an example of a certain flexing of the slot regime through locally specified guidelines that build on existing WASG guidelines and the Slot Regulation.[724] ACL has also deployed a wide range of allocation

[716] *See* Odoni, *supra* note 61, at 35.
[717] *See* European Airport Coordinators Association (EUACA), EU Slot Guidelines, *available at* https://www.euaca.org/FPage.aspx?id=79 (last visited: July 27, 2021).
[718] *See* Airport Coordination Germany (FLUKO), *Guideline for the allocation of scarce slots at coordinated German airports* (2011).
[719] *See* International Transport Forum, *supra* note 162, at 57.
[720] *See* FLUKO, *supra* note 718, paragraph 4.11.
[721] *See* International Transport Forum, *supra* note 162, at 58.
[722] *See* FLUKO, *supra* note 718, paragraph 4.11
[723] *Id.,* paragraph 4.12.
[724] *See* International Transport Forum, *supra* note 162, at 58.

criteria for which they are receiving competing requests, including market type and size, the frequency, as well as local guidelines agreed by the sector parties and approved by the UK government, some of which have been discussed previously in this section.[725]

Similar local procedures targeting competing slot requests have been adopted by Netherlands-based ACNL in the Summer of 2021. ACNL mentions it used to allocate new slots from the slot pool on a *pro rata* basis, a practice which is explicitly discouraged in the per 2020 revised paragraph 8.4.1 of the WASG. As part of the 'Policy Rule Additional Allocation Criteria', ACNL focuses on strengthening the intercontinental and European connections network for Amsterdam Airport Schiphol, and the provision of connections to the benefit of the regional economy for Rotterdam The Hague Airport and Eindhoven Airport. To assist ACNL in applying the additional criteria, ACNL requests the airport managing bodies to provide a list of destinations, provided this list is transparent, neutral and non-discriminatory. Should competing requests still exist after application of the list of destinations, ACNL takes into account the frequency of operations, the effective period of operation and aircraft noise emissions.[726] ACNL has also adopted local procedures in the area of slot transfers following total or partial take-overs and the calculation of *force majeure* related to the use-it-or-lose-it rule.[727]

In October 2021, IATA launched legal action in The Netherlands against ACNL's 'Policy Rule' targeting competing slot requests, stating that the procedure would have "significant negative effects on the globally functioning system of slot allocation" and would result in commercial damage for IATA members globally. The procedure would also contravene EU Regulation 1008/2008 and the Slot Regulation by allowing the respective airport managing bodies to "directly influence all future new slot allocation for their airports", and harm the independent and impartial role of slot coordinators in the EU "by requiring priority to be given in their decision-making to a list of destinations".[728] In preliminary relief proceedings on 29 October 2021, IATA was joined by KLM Royal Dutch Airlines, Transavia Airlines, TUIfly and the Air Transport Association of America.[729]

With the Slot Conference for the Summer 2022 season in view, the District Court of North Holland was asked to deliver a preliminary injunction within five days of the court hearing. However understandable from the viewpoint of adherence to the international calendar of coordination activities discussed in section 4.2.3, a challenging time limit for a case with this level of technical complexity and potential international precedent setting. On 3 November 2021, the District Court of North Holland issued an abbreviated judgment in which it prohibited ACNL from applying its 'Policy Rule', including the use of any destination list, with immediate effect in slot allocation decisions for the Summer 2022 season. At the time of writing of this dissertation, a detailed judgment motivating the court's decision had not been issued yet.[730]

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[725] *See* UK Competition and Markets Authority, *supra* note 117, at 7.
[726] *See* Airport Coordination Netherlands (ACNL), Policy Rule Additional Allocation Criteria (5 July 2021), *available at* https://slotcoordination.nl/wp-content/uploads/2021/07/210705-ACNL-Policy-Rule-Additional-Allocation-Criteria-v1.0.pdf (last visited August 14, 2021). Furthermore, paragraph 5.4.3 of the WASG provides the following: "The airport managing body or other competent body should provide relevant information to the coordinator in order to assist in applying the additional criteria for slot allocation given in 8.4.1 (…)".
[727] *See* Airport Coordination Netherlands (ACNL), Allocation Process, *available at* https://slotcoordination.nl/slot-allocation/allocation-process (last visited July 27, 2021).
[728] *See* International Air Transport Association (IATA), IATA Legal Challenge to Urgently Halt Dutch Slot Rule (15 October 2021), *available at* https://www.iata.org/en/pressroom/2021-releases/2021-10-15-01 (last visited November 11, 2021).
[729] District Court of North Holland, C/15/321219/KG ZA 21-540 IATA, TUI Airlines Nederland, KLM and Transavia Airlines v. Airport Coordination Netherlands [2021], ECLI:NL:RBNHO:2021:9830.
[730] *Id.*

4.3.4 Conclusions as to the effective influence of local guidelines and local procedures on allocation decisions

The local procedures discussed above appear to indicate that the use of the coordinator's discretionary powers offers more scope for legitimate policy aims to be included in allocation decisions as compared to proposals for local guidelines. Existing local guidelines, some of which are set out above, appear to be mostly of an operational nature, and not so much policy-oriented. This may be a result of the requirement that local guidelines aim at improving the "efficient use of airport capacity".[731]

It could be argued, however, that policy solutions supported by legitimate policy aims may also lead to increased efficiency in terms of optimal capacity use and should thus be able to affect allocation decisions. It is nowhere stated in the Slot Regulation that the "efficient use of airport capacity", as to which see section 4.3.1 above, should be understood as purely operational efficiency, nor is it prescribed that efficiency can only be achieved by introducing operational solutions with which airport throughput is maximized.

Nonetheless, although procedures for competing slot requests at initial allocation are certainly helpful for coordinators in their allocation decisions, they are no game changer in a system where slots can be freely exchanged within airlines' slot portfolios after they have been allocated. Because the principle of historic precedence is at the core of the slot system provided by the WASG and the Slot Regulation, the procedures used by FLUKO, ACL and ACNL only apply to newly allocated slots, and not to existing slots. Even where newly allocated slots are involved, airlines may apply for a slot with a certain intended use but can and often do change this intention or exchange the slot with another airline once the slot has been awarded to them. Provided the limits given by the capacity declaration allow for it, such changes are determined unilaterally by the airline as the slot holder, without involvement of the coordinator, airport or government.[732]

The fact that slots cannot be earmarked or reserved for a certain use, apart from services covered by Public Service Obligations [hereinafter: PSO's][733] and two-year usage restrictions for new entrant slots, may constitute a potential barrier to local guidelines and local procedures as potential instruments to effectively influence allocation decisions. This is reinforced by the government's position as a party that cannot initiate local guidelines or local procedures, but instead depends on the coordination committee to launch initiatives.[734] Moreover, IATA's successful legal action against ACNL's 'Policy Rule' for competing slot requests for the Summer 2022 season shows that local solutions may fall prey to legal action in national jurisdictions.

4.3.5 An analysis of national measures in the context of the principles of supremacy, pre-emption and subsidiarity

4.3.5.1 Preliminary remarks

In the EU, the principles of supremacy, pre-emption and subsidiarity are relevant when exploring the scope that Member States realistically have to include local public interest considerations in the slot rules. The next sub-sections analyze each of these principles in light of their influence on national measures on slot coordination. Moreover, any rules need to comply with the non-discrimination principle, one of the cornerstones of the internal air transport market, as discussed in section 4.1.5.

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[731] EU Regulation 95/93, as amended, *supra* note 47, Article 8(5).
[732] *See* International Transport Forum, *supra* note 162, at 58.
[733] *See infra* section 4.4.4 for an analysis of PSO's.
[734] *See* Burghouwt and De Wit, *supra* note 709, at 5.

4.3.5.2 The principles of supremacy and pre-emption applied to slot coordination

The EU is supranational rather than intergovernmental in nature. It has unique supranational powers in the field of legislation, jurisdiction, enforcement and competition, and acts through regulations, directives and decisions that are directly applicable in all 27 Member States. The judgments and opinions of the CJEU are equally directly enforceable.[735] The supremacy of EU law found its way through decisions made by the CJEU but has not been confirmed in the EU treaties.[736]

In 1962, the CJEU set out the concept of *direct effect* of EU law, which means that individuals – either undertakings or national persons – are entitled to invoke EU law in their national courts.[737] To the extent that they are compatible with EU law, Member States are permitted to adopt national measures they see fit given the local circumstances.[738] The principle of supremacy holds that, in case of a normative conflict between EU law and national law, EU law prevails.[739]

National law may also be set aside by EU law for two other reasons:

1) because the extension of the national rules affects a matter with which the EU has dealt exhaustively, and national measures are thus 'pre-empted',[740] or
2) because the national rules interfere with the proper functioning of the common organization of the market.[741]

Drawing on the *pre-emption* criterion, national measures in situations where there may not exist a specific EU provision, all national measures in an 'occupied' or exhaustively regulated field will automatically be considered invalid, even when such measures are not contrary to or do not obstruct the objectives of Community legislation in any way.[742] The economic rationale

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[735] *See* Haanappel, *supra* note 356, at 37.

[736] Cases in which the CJEU affirmed the supremacy of EU law include Case C-6/64, *Costa v. ENEL* [1964] ECLI:EU:C:1964:66 and Case-106/77, *Simmenthal II* [1978] ECLI:EU:C:1978:49.

[737] Case-C26/62, *Van Gend en Loos* [1963] ECLI:EU:C:1963:1.

[738] *See* Aurelien Portuese, *The principle of subsidiarity as a principle of economic efficiency*, 17 Columbia Journal of European Law 2 (2012), at 252.

[739] In areas which do not fall within the exclusive competence of the EU, the principle of *subsidiarity* only allows the EU to act "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States . . .", *see* Article 5(3) TFEU. *See* also Case-106/77, *Simmenthal II* [1978] ECLI:EU:C:1978:49.

[740] Article 2 TFEU clarifies the notion of pre-emption: "(1) When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts; (2) When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence." *See* also Case 255/86 (Simmenthal II), *supra* note 736.

[741] Case 218/85, *Association comité économique agricole regional fruits et legumes de Bretagne (CERAFEL) v. Albert Le Campion* [1986] ECLI:EU:C:1986:440, at 13; Eugene Daniel Cross, *Pre-emption of Member State law in the European Economic Community: a framework for analysis*, 29 Common Market Law Review 3 (1992), at 450.

[742] In the *Amsterdam Bulb*-case, CJEU interpreted the absence of an express mention of pre-emption as equivalent to an authorization for Member States to act. *See* Case 50/76, *Amsterdam Bulb BV v. Produktschap voor Siergewassen (Ornamental Plant Authority)* [1977], ECLI:EU:C:1977:13. This reasoning was, however, not followed by the CJEU in the *Officier van Justitie*-case, in which the CJEU ruled that, even in absence of the EU legislator mentioning the ability of Member States to act after the EU has intervened in a particular field, Member States were pre-empted from acting because the contested directive was already in force, *see* Case 111/76, *Officier van Justitie v. Beert van den Hazel* [1977], ECLI:EU:C:1977:83, as well as Cross, *supra* note 741, at 459.

behind centralization at EU level lies in the efficiency of harmonizing legal norms and standards.[743]

When EU law is found to be exhaustive or to constitute "a complete system",[744] all national legislation in that field is superseded, except in cases where EU law expressly provides to the contrary. In the *Prantl*-case, the Court cited the following:

> "[O]nce rules on the common organization of the market may be regarded as forming a complete system, the Member States no longer have competence in that field unless Community law expressly provides otherwise."[745]

According to the Commission, the harmonization of conditions for access to airports in the EU remains preferable to prevent barriers due to conflicting national practices. Nonetheless, although the EU has the exclusive external competence to negotiate the matter of slot coordination in ASAs with third States as stipulated in section 4.1.2, the EU has logically not been attributed such exclusive powers within the internal market given the existence of the internal air transport market pursuant to the provisions of EU Regulation 1008/2008.[746]

The lack of exclusive powers is furthermore evidenced by, *inter alia,* the fact that the Slot Regulation awards national competence to Member States in the field of airport designation (Article 3), the setting up of a coordination committee (Article 5), ensuring that an airport's coordination parameters are determined (Article 6), the imposition of Public Service Obligations (Article 9), the protection of coordinators with regard to claims for damages (Article 11) and ensuring that effective, proportionate and dissuasive sanctions or equivalent measures are available to deal with slot non-compliance (Article 14). Hence, Member States are to a large extent responsible for the organization of slot coordination at airports within their territories.[747]

Applying the principle of pre-emption to slot coordination furthermore conflicts with existing practice of Member States adopting their own national laws on slot coordination, often as a way of implementing the Slot Regulation and not limited to provisions which explicitly attribute Member States the power to act, to the extent that they are compatible with the Slot Regulation.[748] For instance, the Netherlands have adopted the so-called *Besluit slotallocatie* (Dutch Decree on Slot Allocation), as amended, in 1997.[749]

The authorization by Member States of local guidelines and their subsequent application by coordinators, as well as the adoption of local procedures by coordinators under the Slot Regulation, would also conflict with the line of reasoning that the EU slot rules are exhaustive and should be regarded as forming a 'complete system'. The leeway offered by Article 19(1) of EU Regulation 1008/2008 for Member States to introduce local operational rules on slot allocation as well as TDR's and PSO's relating to the allocation of slots as discussed in sections 4.4.2, 4.4.3 and 4.4.4 provides further evidence that slot coordination is not

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[743] *See* Michele G. Giuranno, *Pooling sovereignty under the subsidiarity principle*, 26 European Journal of Political Economy 1 (2010), at 125; Portuese, supra note 738, at 239 and 261.
[744] Case 16/83, *Karl Prantl* [1984] ECLI:EU:C:1984:101, at 13.
[745] *Id.*
[746] It is the EU as a regional organization having its own legal personality, which in turn entrusts one of its institutions – in this case, the Commission – to exercise the competence to negotiate the matter of slot coordination in ASAs with third States. However, the EU cannot enforce such competence without the Member States, thus opening the way for local or national rules.
[747] *See* NERA Economic Consulting, *supra* note 5, at 259.
[748] *See* Portuese, supra note 738, at 252.
[749] Dutch Decree on Slot Allocation of 1997 (*Besluit slotallocatie*), as amended.

regulated exclusively at EU level. In other words: the EU rules cannot be regarded as forming a complete system per the *Prantl*-reasoning.

Hence, observing the above two grounds for invalidation from the perspective of the Slot Regulation yields that Member States are free to adopt national measures on slot coordination, including national laws, local guidelines and local procedures, provided they do not "interfere with the proper functioning of the common organization of the market".

4.3.5.3 The EU principles of supremacy and pre-emption vis-à-vis the principle of complete and exclusive sovereignty

By extension from the principle of complete and exclusive sovereignty vested in Article 1 of the Convention, the Convention expressly recognizes the jurisdiction of each contracting State, including the 27 EU Member States, to apply on a non-discriminatory basis its own air laws and regulations to the aircraft of all contracting States pursuant to Article 15 of the Convention.[750]

Since Article 15 of the Convention on access to airports also applies to the coordination of slots,[751] and in absence of an obligation resting upon Member States to neglect the Convention in favor of EU law on slot coordination, it cannot reasonably be concluded that the EU's powers in the field of slots are truly exhaustive. Since the EU Member States were all party to the Convention before they became EU Member States, they have all retained their State features. Pre-existing rights and obligations arising from the Convention, including the jurisdiction of States to adopt laws and regulations for the users of its airspace as discussed in Chapter 3, section 3.1.4.2, were also acknowledged in the *ATAA*-case.[752] It is deemed unlikely that the principle of complete and exclusive sovereignty, of which jurisdiction forms an essential element, will be passed on to the EU, as this principle is also regarded as a principle of customary international law.[753]

4.3.5.4 The principle of subsidiarity applied to slot coordination

The subsidiarity principle holds that, if it can be shown that the objectives of EU law can be better achieved by national measures, the Court should presume in favor of the validity of such national measures. The subsidiarity principle forms the basis of a key argument by parties who seek to preserve national measures in the face of competing EU law. The subsidiarity principle thanks its existence to the widespread assumption that Member States are better equipped to take into consideration the heterogeneity of local preferences existing within their relevant jurisdictions.[754]

Applying the above reasoning regarding the principle of subsidiarity to slot coordination, it is typically conceded that Member States, via the independent coordinator appointed by the Member State, are better placed to optimize the allocation of available slots from the perspective of the subsidiarity principle. Allocative efficiency increases because local regulators choose the regulation that best suits their needs and preferences.[755]

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[750] Case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change* [2011] ECLI:EU:C:2011:864, at 9.
[751] *See* Chapter 3, section 3.3.1 of this dissertation for an analysis of Article 15 of the Convention.
[752] Case C-366/10 (Air Transport Association of America), *supra* note 750, at 55.
[753] Judgment of 27 June 1986, *Nicaragua v. United States of America*, ICJ Reports 1986; Case C-366/10 (Air Transport Association of America), *supra* note 750, at 103-104.
[754] House of Lords, *R v. London Boroughs Transport Committee ex parte Freight Transport Association Ltd and Others* [1991] 3 All ER 916. *See* also Portuese, supra note 738, at 236; Cross, *supra* note 741, at 470-471; Giuranno, *supra* note 743, at 125.
[755] *See* Havel and Sanchez, *supra* note 233, at 233-236.

In line with the considerations underpinning the principle of subsidiarity, Chapter 6 of this dissertation provides recommendations aimed at providing States with increased discretionary powers in the field of slot coordination, whilst particularly taking note of the specific challenges faced by super-congested airports.

4.3.6 Concluding remarks

Myriad local guidelines and local procedures have been introduced under the Slot Regulation in Germany, The Netherlands and also in the UK in the pre-Brexit period. Yet, although local guidelines and/or local procedures may be able to influence allocation decisions at the margin, section 4.3.4 has illustrated that they are no game changer. Chapter 6 argues that a new approach is needed to reflect the growing need for tailor-made rules at coordinated airports given their highly diverse functions to society and variances with respect to size, the nature of the capacity constraints and prevailing competitive conditions, as discussed in Chapter 2, sections 2.3 and 2.4, and provides recommendations.

The effectuation of such a tailor-made approach is supported by analysis in section 4.3.5, which has shown that slot coordination is not regulated exclusively at EU level and that Member States are thus free to adopt national measures on slot coordination insofar as these do not conflict with EU provisions. Until the next formal revision of the Slot Regulation, regulators, coordinators and industry stakeholders rely on local guidelines and local procedures to fill in the gaps left by the Slot Regulation.

4.4 EU Regulation 1008/2008, governing the operation of intra-EU air services

4.4.1 Legal basis and key principles of EU Regulation 1008/2008 relevant for slot coordination

EU Regulation 1008/2008 on common rules for the operation of air services in the Community,[756] repealing EEC Council Regulations 2407/92, 2408/92 and 2409/92 sets forth the fundamental EU principle of the freedom to provide air services within the EU while ensuring a level playing field for all EU air carriers operating in the internal market for air transport.[757] It aims to prevent discrimination between European airlines and competitive distortions between air carriers, therewith meeting EU goals of contributing to market efficiency and consumer interest.[758] In principle, it is up to the air carriers to decide "the optimum allocation of their resources, according in particular to the needs and wishes of their customers".[759] Equal to the Slot Regulation, the legal basis of EU Regulation 1008/2008 is Article 100(2) of the TFEU. It is also applicable in Iceland, Norway and Liechtenstein and, for the greater part, in Switzerland pursuant to the provisions of the EU-Switzerland Agreement signed in 1999,[760] as variously amended.

EU Regulation 1008/2008 is relevant for slot coordination in the EU since it refers to the allocation of slots as a prerequisite for getting access to an airport in Article 19(1) – the so-called 'operational link' as addressed in Chapter 3, section 3.3.2. Accordingly, the entitlement to operate intra-EU air services is subject to the availability of slots. Besides slots, EU Regulation 1008/2008 also subjects traffic rights to EU-wide, national, regional and local operational rules

[756] EU Regulation 1008/2008, *supra* note 39.
[757] *Id.,* Article 15(1).
[758] *See* European Commission, Commission Staff Working Document – Evaluation of the Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community, SWD(2019) 295 final, at 5.
[759] *See* European Commission (TAT – Paris (Orly) – London), *supra* note 644, under X.
[760] Agreement between the European Community and the Swiss Confederation on Air Transport, *supra* note 606.

relating to safety, security and the protection of the environment.[761] EU Regulation 1008/2008 furthermore lays down rules on substantial ownership and effective control, which becomes relevant when we speak of the concept of designated carriers under ASAs as discussed in Chapter 3, section 3.2.1.

Besides the acquisition of traffic rights and compliance with any local operational rules, EU Regulation 1008/2008 hosts two exceptions to the free operation of air services to and from EU airports relevant to slot allocation. Member States are handed a role in the process leading up to the allocation of slots where TDR's and PSO's are concerned. Both concepts are analyzed, among other things by means of specific examples of their practical application, in sections 4.4.2, 4.4.3 and 4.4.4 below.

4.4.2 The rationale for and the application of Traffic Distribution Rules

The freedom of market access generally includes the right of airlines to choose between the different airports serving the same conurbation. In most cases, these airports are not equally attractive to carriers in economic terms.[762] Notwithstanding, EU Member States may restrict the freedom of market access and impose TDR's to regulate the distribution of air traffic between airports located close to one another in their territories based on Article 19(2) of EU Regulation 1008/2008, provided that no discrimination among destinations inside the Community or on grounds of nationality or identity of air carriers takes place.[763]

Thus, EU Regulation 1008/2008 upholds the non-discrimination and national treatment principles as discussed in Chapter 3, section 3.1.4.3. An analysis of the application and use of the non-discrimination principle in the EU is provided in section 4.1.5 above. Due to the 'operational link' mentioned above, even when a TDR imposed under EU Regulation 1008/2008 forces an airline to use a specific airport, the airline still needs to acquire a slot through the regular slot allocation procedure at that airport.

The Slot Regulation does not make a general reference to the use and application of TDR's by coordinators, save for Article 10(6) in which it states the following:

> "Without prejudice to . . . Article 8(1) of Regulation (EEC) No 2408/92, slots placed in the pool shall be distributed among applicant air carriers."

Article 10(6) of the Slot Regulation thus indicates that the allocation priorities mentioned in the Slot Regulation and discussed in Chapter 2, section 2.2.3 should be observed, unless TDR's provide otherwise.

Whereas the increasing airport capacity shortfalls in the EU tends towards an increased relevance of TDR's, Member States have not yet made widespread use of TDR's. However, where they have been applied, they have sparked great controversy among regulators and industry stakeholders due to their perceived discriminatory effects, for instance because they may *de facto* force air carriers to give up slots at sought-after airports in favor of competitors.[764] TDR's are criticized at super-congested airports in particular, given the considerable slot scarcity and thus slot value at these airports.[765]

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[761] EU Regulation 1008/2008, *supra* note 39, Article 19(1).
[762] *See* European Commission (Italian TDR's for the airport system of Milan), *supra* note 645, under V and VII.
[763] EU Regulation 1008/2008, *supra* note 39, Article 19; European Commission (Viva Air), *supra* note 496, at 51.
[764] *See* European Commission, *supra* note 758, at 99.
[765] *Id.,* at 99. The UK raised objections against the Paris TDR, as to which *see* section 4.4.3.1. The Milan TDR discussed in section 4.4.3.2 was criticized by airlines.

Under the old EU Regulation 2408/92, TDR's were approved for the Paris, Rome, Lyon and Milan airport systems.[766] EU Regulation 1008/2008, as amended, has only seen one approved TDR so far, *id est* for the Amsterdam-Lelystad airport system.

TDR's in London were introduced in 1977, before EU Regulation 1008/2008 came into force, with the aim of limiting international operations at London Gatwick and London Heathrow. These restrictions were later amended to exclude full freighter flights and general aviation from using London Gatwick and London Heathrow at peak hours.[767]

4.4.3 Requirements related to the public interest, proportionality and transparency applied to Traffic Distribution Rules

In its assessment of the Paris TDR upon objections raised by the UK, as to which see section 4.4.3.1 below, the Commission emphasized that, even if national measures such as TDR's are compliant with the non-discrimination and national treatment principle, "they are still unacceptable if they are not warranted by mandatory requirements in the public interest, or if the same result can be obtained by less restrictive rules (the proportionality principle)".[768] Hence, the adaptation of a TDR needs to be confined to what is strictly necessary to achieve the objective of the TDR in question.[769] Any TDR must furthermore be carefully and objectively framed and observe the condition of transparency.[770] When it comes to the precise rules intended to further legitimate objectives in the public interest, the principles of non-discrimination and national treatment, transparency and proportionality need to be complied with.[771]

The objective of most TDR's is to stimulate certain types of traffic to use an alternative airport serving the same conurbation for environmental concerns, *inter alia* noise nuisance at airports located in densely populated areas, or for reasons of network development.[772] The requirements set out in Article 19(2) of EU Regulation 1008/2008 imply that the traffic can only be distributed among airports on the basis of legitimate objectives, without however limiting the Member States' choice to any more specific objective.[773] In this context, Commission decisions in the Paris, Milan and Amsterdam-Lelystad airport systems clarified that Article 19(1) of EU Regulation 1008/2008 acknowledges the legitimacy of an active domestic airport planning policy, as long as it complies with the general principles of EU law.[774]

Member States have a wide range of discretion in identifying the factors considered to have priority with respect to the distribution of traffic. These factors may also differ from one

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[766] *See* International Transport Forum, *supra* note 162, at 62.
[767] *See* International Transport Forum, *supra* note 162, at 63; Renato Redondi, *Traffic Distribution Rules in the Milan Airport System: Effects and Policy Implications*, 47 Journal of Transport Economics and Policy 3 (2013), at 499.
[768] *See* European Commission (French TDR's for the airport system of Paris), *supra* note 634, under V; European Commission (TAT – Paris (Orly) – London), *supra* note 644, under X.
[769] *See* European Commission (the establishment of TDR's for the airports Amsterdam Schiphol and Amsterdam Lelystad), *supra* note 278, paragraphs 75 and 98.
[770] *See* European Commission (TAT – Paris (Orly) – London), *supra* note 644, under IX; European Commission, *supra* note 758, at 7-8.
[771] *See* European Commission (the establishment of TDR's for the airports Amsterdam Schiphol and Amsterdam Lelystad), *supra* note 278, paragraph 77.
[772] *See* International Transport Forum, *supra* note 162, at 63.
[773] *See* European Commission (the establishment of TDR's for the airports Amsterdam Schiphol and Amsterdam Lelystad), *supra* note 278, paragraph 75.
[774] *See* European Commission (the establishment of TDR's for the airports Amsterdam Schiphol and Amsterdam Lelystad), *supra* note 278, paragraph 77; European Commission (French TDR's for the airport system of Paris), *supra* note 634, under VI; *See* European Commission (Italian TDR's for the airport system of Milan), *supra* note 645, under VIII; European Commission, *Communication from the Commission on the EU's External Aviation Policy – Addressing Future Challenges*, COM(2012) 556 final.

airport to another. For instance, a Member State may legitimately wish to promote the development of one airport at the expense of another airport located within its territory. In such cases, any implementing measures may constitute reasonable means of restricting to some extent access to individual airports within the system.[775] In this regard, the Commission has recognized the importance of the operation of hub-and-spoke networks.[776]

We can thus deduce five requirements that need to be observed for the successful implementation of a TDR:

1) non-discrimination and national treatment;
2) transparency;
3) warranted by mandatory public interest requirements;
4) proportionality;
5) measures need to be objective and constant over a certain period.

The next sections dive into decisions by the Commission in relation to TDR's for the Paris, Milan and Amsterdam-Lelystad airport systems and aim to provide insight into the specific considerations underlying decision-making regarding TDR's by Member States and the Commission. The five requirements mentioned above form part of the analysis.

4.4.3.1 The Paris airport system

After a first attempt towards the introduction of a TDR failed to receive Commission approval in 1993 after a challenge by TAT European Airlines,[777] the French authorities introduced a modified TDR within the Paris airport system via a decree of 15 November 1994. The aim of the TDR was to limit traffic to Paris Orly for congestion and environmental reasons, and to promote the use of Paris Charles de Gaulle as international gateway in order to guarantee the optimal utilization of Parisian airport infrastructure.[778] As opposed to Paris Orly, where the number of slots is restricted for reasons of environmental protection, Paris Charles de Gaulle has the potential for a sizeable expansion of slot capacity.[779] The TDR has been fully applicable since 1 January 1995.[780]

Among others, the TDR introduced a maximum on the number of frequencies between Paris Orly Airport and any other airport (system) in Article 4. The frequency limitation does not apply to air services operating at peak hours as long as the requirement to employ a minimum size of aircraft is observed pursuant to Article 5 between the Paris airport system and other airport systems.[781]

The TDR has soonest been disputed by the UK by letter of 5 December 1994, arguing, *inter alia,* that the decree does not "bring about a genuine distribution of traffic between the various Paris airports, but simply to limit the exercise of traffic rights into Orly airport" by requiring a maximum of four daily frequencies per day between Paris Orly and any other airport (system). The UK furthermore held that "the decree discriminates against carriers operating

[775] *See* European Commission (the establishment of TDR's for the airports Amsterdam Schiphol and Amsterdam Lelystad), *supra* note 278, paragraph 77; European Commission (French TDR's for the airport system of Paris), *supra* note 634, under VI.
[776] *See* European Commission (the establishment of TDR's for the airports Amsterdam Schiphol and Amsterdam Lelystad), *supra* note 278, paragraph 88.
[777] *See* European Commission (TAT – Paris (Orly) – London), *supra* note 644; *See* European Commission (Italian TDR's for the airport system of Milan), *supra* note 645, under VIII.
[778] *See* International Transport Forum, *supra* note 162, at 63; European Commission (French TDR's for the airport system of Paris), *supra* note 634, under I and III; Redondi, *supra* note 767, at 499.
[779] *See* European Commission (French TDR's for the airport system of Paris), *supra* note 634, under III.
[780] *Id.,* under I.
[781] *Id.,* under I and VI.

out of airport systems" by requiring the employment of a minimum aircraft size for air services between Paris Orly and an airport belonging to an airport system, "even if the traffic between those two airports does not in itself justify the use of aircraft of such size".[782]

At the time, the UK put forward that airport systems existed in only four Member States other than France,[783] which – according to the UK – made the presence of discrimination all the more apparent, particularly for air carriers operating small and medium-sized aircraft. Hence, the UK authorities consider that the TDR restricts competition "by favoring large carriers over smaller ones and potential newcomers". In particular, competition between air carriers on the Paris-London routes is affected by the aircraft size requirement, since the London airports Heathrow, Gatwick and Stansted also already formed part of an airport system at the time.[784]

In its assessment of the Paris TDR, the Commission explicated that by allowing Member States to distribute traffic between airports, European legislation essentially acknowledges the legitimacy of a domestic airport planning policy. Thus, a Member State may legitimately wish to promote the development of one airport at the expense of another airport serving the same conurbation. Member States may, at their discretion, have regard to a large range of factors they consider to have priority.[785] Evidence of the saturation of facilities may also be regarded as "general overriding requirements such as may warrant traffic allocation measures".[786]

As to the principles of non-discrimination and national treatment, the Commission takes the view that, although the decree treats services operating out of an airport system less favorably compared to services operated out of any other airport, "this difference in treatment results from the fact that the size of the aircraft to be used during peak hours, should the carrier wish to fly more than four frequencies, is determined by reference to the annual traffic between Paris and the entire airport system". Since airport systems exist in seven Member States of the European Economic Area, the Commission is not convinced that the TDR discriminates on the grounds of nationality or identity in favor of French carriers.[787]

The Commission, however, did find one exception to the TDR's compatibility with EU Regulation 1008/2008. It asserted that the minimum aircraft size requirement obstructs the freedom of market access established by EU Regulation 1008/2008 to an appreciable extent, because the requirement affects the "ability of air carriers to operate an unlimited number of services to and from Orly in accordance with their own commercial preferences".[788] Neither is the Commission convinced that the measure, in so far that it restricts frequencies to airports part of an airport system, is proportionate to the objectives sought. The Commission finds all the other elements, however, to be objective and proportionate means of pursuing an active airport planning policy, which is a legitimate objective justifying the Paris TDR.[789] France agreed to introduce a revised TDR in March 1996.[790]

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[782] *Id.,* under I and II.
[783] According to the Commission, airport systems existed in seven EEA Member States as opposed to four, *see* European Commission (French TDR's for the airport system of Paris), *supra* note 634, under VI.
[784] *See* European Commission (French TDR's for the airport system of Paris), *supra* note 634, under II.
[785] *Id.,* under VI.
[786] *See* European Commission (TAT – Paris (Orly) – London), *supra* note 644, under X.
[787] *See* European Commission (French TDR's for the airport system of Paris), *supra* note 634, under VI.
[788] *Id.*
[789] *Id.*
[790] *See* European Commission, Commission resolves question of traffic distribution at Orly Airport (Press release, 14 March 1995), *available at* https://ec.europa.eu/commission/presscorner/detail/en/IP_95_237 (last visited November 11, 2021).

Hence, save for one exception, all five requirements identified in section 4.2.2 have been complied with by the French authorities. Provided that the minimum aircraft size shall, on future occasions, be determined by reference to individual airports and not by reference to airport systems, the Commission considered the Paris TDR compatible with EU Regulation 1008/2008.[791]

4.4.3.2 The Milan airport system

A first attempt to a TDR for the Milan airport system was challenged before the Commission in 1998 by British Airways, Iberia, Lufthansa, Olympic Airways, Sabena, Scandinavian Airlines System and TAP Air Portugal.[792] The complaints lodged were multi-faceted: first, the carriers point out that the TDR gives Alitalia competitive advantage over non-Italian Community air carriers, because the application of the TDR results in Alitalia still being able to rely on its Rome Fiumicino hub and its medium-haul and long-haul destinations which it will still be able to serve from Milan Linate, whereas other Community air carriers will have to operate those services from Milan Malpensa. Second, Malpensa's geographical location is far less convenient compared to Milan Linate, especially given the absence of adequate transport links to Malpensa.[793] In this context, the air carriers argued that the primary objective of Decree No 46-T[794] was not to distribute traffic, but to grant a competitive advantage to Alitalia instead. They furthermore pointed out that the TDR is not proportionate to the objective sought.[795]

In its legal assessment of the first proposed TDR, the Commission indeed considered that the TDR was not compatible with Article 8(1) of EU Regulation 1008/2008 "in so far as their application is contrary to both the principle of non-discrimination and the principle of proportionality".[796]

The so-called 'Bersani Decree' introduced a revised TDR for Milan's airports in 2000, with the objective of steering "a sufficient amount of traffic" away from the "overutilized" Milan Linate airport to the "underutilized" Milan Malpensa airport to ensure the viability of the hub function of Milan Linate airport and turn it into a second hub for Alitalia.[797] Since market forces alone would not guarantee the transferring of traffic to Milan Malpensa because of Linate's location close to the city center, a TDR was deemed necessary by the Italian authorities to ensure a substantial transfer of traffic.[798]

The TDR limited frequencies from Milan Linate airport to each airport (system) according to the size of the destination in terms of passenger traffic in 1999. The TDR did not limit the total number of slots available at Milan Linate.[799] Frequencies were limited to one daily return service to destinations with traffic between 350,000 and 700,000 passengers, two daily return services to destinations with traffic between 700,000 and 1.4 million passengers, three daily return services to destinations with traffic between 1.4 million and 2.8 million passengers and no limit for services to destinations with traffic exceeding 2.8 million

[791] *See* European Commission (French TDR's for the airport system of Paris), *supra* note 634, under VIII.
[792] *See* European Commission (Italian TDR's for the airport system of Milan), *supra* note 645, under I.
[793] *Id.*, under III.
[794] Italian Decree No 46-T of 5 July 1996 lays down the TDR for the airport system of Milan. On 13 October 1997, the authorities adopted Italian Decree No 70-T of 13 October 1997, which provides that the TDR as referred to in Italian Decree No 46-T are to enter into service on 25 October 1998.
[795] *See* European Commission (Italian TDR's for the airport system of Milan), *supra* note 645, under III.
[796] *Id.*, under VIII.
[797] *Id.,* under II; International Transport Forum, *supra* note 162, at 63.
[798] *See* European Commission (Italian TDR's for the airport system of Milan), *supra* note 645, under II.
[799] *See* Redondi, *supra* note 767, at 494-495.

passengers. Carriers operating from Linate to EU airports with annual traffic numbers exceeding 40 million passengers in 1999 were allowed two daily return services.[800]

Although the Commission considered the amended TDR to be compatible with EU Regulation 1008/2008,[801] the Milan TDR turned out not to be effective in practice, since the most important objective of the TDR, *id est* steering traffic away from Milan Linate airport in favor of turning Malpensa into a hub, was not met.[802] Remarkably, passenger numbers at Linate have been steadily increasing since 2011 against a corresponding decrease at Malpensa.

By using multiple carrier prefixes, similar to the loopholes in the new entrant rule subject to discussion in Chapter 5, section 5.5.2, airlines were able to circumvent the TDR and still increase their frequencies from Milan Linate airport. Alitalia was able to increase its frequencies to London Heathrow and Paris Charles de Gaulle by using carrier prefixes given to subsidiaries and carriers it had previously acquired, including Air One, Volare Airlines and Alitalia Express. In a similar fashion, Lufthansa increased its frequency to Frankfurt above the limit of two daily frequencies by using its subsidiary Air Dolomiti.[803] The carriers' perseverance to return to Milan Linate airport evidences that market forces will use all available means to sidestep any limitations provided by TDR's, for instance through the exploitation of loopholes or lax interpretations.[804]

4.4.3.3 The Amsterdam-Lelystad airport system

In order to preserve Amsterdam Airport Schiphol's hub function and allow for a balanced development between the growth of the aviation sector in an environmentally viable and safe way, The Netherlands have proposed a TDR in 2019 against the background of Article 19(2) of EU Regulation 1008/2008 so as to alleviate the severe capacity constraints at Schiphol.[805] The objective of the TDR is to privilege transfer flights at Schiphol Airport and distribute point-to-point traffic coming from Schiphol Airport to Lelystad Airport, since Schiphol's extensive network of intercontinental destinations, which the Dutch authorities consider to be a vital public interest, could not be served without Schiphol's continental and intercontinental hub function.[806] At the core of the TDR is the following provision:

> "Without prejudice to the Slot Regulation, an air carrier obtains priority to require slots at Lelystad Airport to take off or land in so far as that air carrier
> - Has transferred historical slots at Schiphol Airport to another air carrier or returned it to the slot coordinator; or
> - Commits to henceforth use historical slots at Schiphol Airport to operate transfer flights."[807]

The allocation priority applies to two tranches of slots made available at Lelystad Airport, namely up to and including 10,000 slots and from 10,001 to 25,000 slots.[808] Parent companies and their subsidiary companies, as well as all subsidiaries of the same parent company, shall be considered as a single carrier for the purposes of acquiring slot allocation priority.[809] The

[800] *Id.*
[801] *See* European Commission (Italian TDR's for the airport system of Milan), *supra* note 645.
[802] *See*, for more information on the practical effects of the TDR: Redondi, *supra* note 142 at 497-499.
[803] *See* International Transport Forum, *supra* note 162, at 64; Redondi, *supra* note 767, at 498.
[804] *See* Redondi, *supra* note 767, at 499.
[805] The TDR was adopted at the national level through a Draft Ministerial Decree and a Draft Order of the Minister for Infrastructure and Water Management for notification to the Commission.
[806] *See* European Commission (the establishment of TDR's for the airports Amsterdam Schiphol and Amsterdam Lelystad), *supra* note 278, paragraphs 22, 25 and 28.
[807] *Id.*, paragraph 5(b).
[808] *Id.*, paragraph 11.
[809] *Id.*, paragraph 10(4).

TDR will only apply in case of conflicting slot requests following the application of the primary criteria for slot allocation set out in the Slot Regulation.[810]

Observations submitted to the Commission by interested parties expose concerns related to the alleged discriminatory nature of the TDR because it makes a distinction between 'transfer flights' and 'point-to-point flights'. They also claim that KLM Group, its SkyTeam alliance and codeshare partners are the *de facto* main beneficiaries of the TDR, since almost 86% of KLM Group destinations are designated as 'transfer flights'. The TDR can therefore not be regarded as objective and proportionate.[811] Interested parties have also argued that TDR's cannot create slot allocation priorities, and that the Slot Regulation does not allow slots to be linked to destinations.[812]

According to the Commission, the Amsterdam-Lelystad TDR is compatible with Article 19(2) of EU Regulation 1008/2008.[813] The TDR is based on objective criteria, and does not entail any direct or indirect discrimination between air carriers on grounds of nationality and identity or between destinations. The difference between destinations does not entail discrimination, as the difference can be objectively justified on the basis of the legitimate aims of the network quality and promotion of Schiphol's hub functions.[814] Moreover, the measure does not go beyond what is necessary to achieve its objectives, hence the proportionality principle is complied with.[815] This shows that a TDR can intervene in the way slots are used, as has also been apparent from previous Commission decisions.[816]

In the case of the Amsterdam-Lelystad TDR, the distinction between transfer and point-to-point flights is inseparably linked to the legitimate objective of consolidating Schiphol as a hub airport and does not go beyond what is necessary for those purposes. The criteria are also objective in nature. The distinction can thus be considered objectively justified and not *per se* discriminatory as between destinations inside the EU.[817] All destinations that have the same effect on Schiphol as a hub are determined objectively and treated equally, ensuring there is no discrimination on the grounds of nationality or identity of air carriers.[818] Thus, the TDR does not display discrimination among destinations, and also not on the grounds of nationality or identity of the air carrier, even though interested parties asserted that KLM Group and its SkyTeam Alliance and codeshare partners would be the greatest beneficiaries of the TDR.[819] All carriers are treated equally on the basis of the same criteria.[820]

The Commission also acknowledged that slot allocation priorities established under Article 10(6) of the Slot Regulation may be adapted in the context of traffic distribution under Article 19(2) of EU Regulation 1008/2008, "provided that such adaptation is confined to what is strictly necessary to achieve the objective of the traffic distribution rules in question".[821]

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[810] *Id.*, paragraph 97. *See* also Chapter 2, section 2.2.3 for an overview of the primary criteria for slot allocation listed in the WASG, which is resembled largely by the Slot Regulation.
[811] *See* European Commission (the establishment of TDR's for the airports Amsterdam Schiphol and Amsterdam Lelystad), *supra* note 278, paragraphs 52-53.
[812] *Id.*, paragraph 56.
[813] *Id.*, paragraph 102.
[814] *Id.*, paragraphs 43-44.
[815] *Id.*, paragraph 47.
[816] *Id.*, paragraph 49.
[817] *Id.*, paragraph 88.
[818] *Id.*, paragraphs 89 and 92.
[819] *Id.*, paragraphs 53 and 91-92.
[820] *Id.*, paragraphs 91-92.
[821] *Id.*, paragraphs 53 and 98.

However, as mentioned above, the Amsterdam-Lelystad TDR only sets in after the primary allocation priorities of the Slot Regulation have been applied.[822]

In relation to the use of slots, the Commission acknowledges that the objective of the TDR can be achieved "thanks to the conversion of slots with a view to their exclusive use for transfer flights".[823] Such exclusive use "is inherent in the traffic distribution and indeed a feature typical to any such distribution", and is therefore compatible with the Slot Regulation.[824] With these statements, the Commission appears to open the door for the earmarking of slots, which are generally treated as non-aircraft and non-route specific pursuant to paragraph 8.10 of the WASG, as discussed in Chapter 2, section 2.1.2. The earmarking of slots is provided as a recommendation for flexing the slot regime in Chapter 6 of this dissertation.

4.4.4 The imposition of Public Service Obligations

The second exception to the freedom to provide intra-EU air services are PSO's. Member States may impose PSO's in accordance with the conditions and requirements set out in Article 16 of EU Regulation 1008/2008. Article 16(1) reads as follows:

> "A Member State, following consultations with the other Member States concerned and after having informed the Commission, the airports concerned and air carriers operating on the route, may impose a public service obligation in respect of scheduled air services between an airport in the Community and an airport *serving a peripheral or development region in its territory or on a thin route to any airport on its territory any such route being considered vital for the economic and social development of the region* which the airport serves. That obligation shall be imposed *only to the extent necessary to ensure on that route the minimum provision of scheduled air services* satisfying fixed standards of continuity, regularity, pricing or minimum capacity, *which air carriers would not assume if they were solely considering their commercial interest*. The fixed standards imposed on the route subject to that public service obligation shall be set in a transparent and non-discriminatory way." [italics added][825]

The interpretation of the adequacy of an envisaged PSO broadly depends on the judgment of the Member State introducing the PSO. In any case, Member States' discretion should be exercised on the basis of objective factors regarding connectivity needs.[826] The necessity and adequacy of an envisaged PSO is to be determined on the basis of four criteria:

1) proportionality to the economic and social development needs;
2) inadequacy of alternative transport modes;
3) existing air fares and conditions;
4) the combined effect of existing air transport supply.[827]

PSO's cannot be established with the aim of promoting or supporting a particular air carrier or to develop a particular airport, whether directly or indirectly.[828]

EU Regulation 1008/2008 allows the imposition of PSO's on two types of routes: routes to an airport serving a peripheral or development region, and thin routes to any airport. The

[822] *Id.*, paragraph 99.
[823] *Id.*, paragraphs 85 and 93.
[824] *Id.*, paragraph 100.
[825] EU Regulation 1008/2008, *supra* note 39, Article 16(1).
[826] *See* European Commission, *Commission Notice – Interpretative guidelines on Regulation (EC) No 1008/2008 – Public Service Obligations (PSO)* (2017), OJ C 194, paragraph 25; International Transport Forum, *supra* note 162, at 61.
[827] For further information on the contents of these four requirements, *see* European Commission, supra note 826, paragraphs 36-42.
[828] *Id.,* paragraph 27.

remoteness and isolation of a peripheral region – which is generally a remote region – should be assessed with regard to administrative, business, education and medical centers within the territory of the Member State, and within the territories of other Member States with which it shares a border. Development regions are lagging behind economically, as measured by for instance gross domestic product per capita or by unemployment rate. With regard to the 'thinness' of a route, the Commission considers routes with traffic exceeding 100,000 passengers per year cannot normally considered as a thin route within the meaning of EU Regulation 1008/2008.[829]

Since PSO's can only be implemented on routes between Community airports and between airports on the territory of a Member State, they may be suitable for services from, *exempli gratia,* London Heathrow into smaller UK regional airports, but less suitable for services to larger UK cities or not suitable for long-haul routes.[830] Though the Member State is imposing the PSO, the coordinator remains the entity to effectively allocate the slots. The slot coordinator may reserve the slots required for the operations envisaged on the route(s) designated under the PSO pursuant to Article 9(1) of the Slot Regulation, assuming there are any available slots in the pool.[831] If no carrier is interested in operating the route and the Member State does not issue a call for tenders under Article 4(1)(d) of EU Regulation 1008/2008, the slots shall either be reserved for another route subject to PSO's or be returned to the pool.[832]

Hence, the Slot Regulation allows for the reservation of slots for PSO's.[833] The reservation of slots is without prejudice to historic rights granted under the Slot Regulation. Only newly allocated slots may be reserved, which includes slots returned to the pool in accordance with Article 9(1) of the Slot Regulation.[834]

In 2019, 176 PSO routes covering fourteen Member States were established under EU Regulation 1008/2008. PSO routes are often domestic routes.[835] To bring transparency, consistency and clarity to government authorities and industry stakeholders on the imposition of PSO's, the Commission published interpretative guidelines in 2017.[836] These guidelines set out the Commission's interpretation of the criteria embodied in EU Regulation 1008/2008 and clarify the applicable procedures to be followed.[837] Each case should, however, be assessed on its own merits and approached in light of all of its specific circumstances.[838]

According to the Commission's interpretative guidelines, the imposition of a PSO on a route "does not necessarily and automatically create the right for the Member State concerned to restrict the access to the air route to a single operator or to grant compensations for the fulfilment of the PSO. . .".[839] Access to the route should remain free to any carrier respecting the conditions of the PSO, including for carriers willing to operate the route without exclusivity

[829] *Id.*, paragraph 20.
[830] *See* Burghouwt and De Wit, *supra* note 709, at 7.
[831] *See* European Commission, 'Communication from the Commission – Guidelines on State aid to airports and airlines' (2014), OJ C 99, at 73.
[832] EU Regulation 95/93, as amended, *supra* note 47, Article 9(1).
[833] *See* European Commission, supra note 826, paragraph 30.
[834] *Id.*, paragraph 33.
[835] *See* European Commission, List of Public Service Obligations, *available at* https://ec.europa.eu/transport/sites/default/files/pso_inventory_table.pdf (last visited July 26, 2021).
[836] *See* European Commission, supra note 826.
[837] *Id.*, paragraph 11.
[838] *Id.*, paragraph 13.
[839] *Id.*, paragraph 16.

and compensation. PSO's should furthermore be transparent, non-discriminatory and proportionate.[840]

4.4.5 Concluding remarks

Under both EU Regulation 1008/2008 and the Slot Regulation, the special position of regional services is recognized through the possibility to impose PSO's in Articles 16-18 of EU Regulation 1008/2008 in conjunction with Article 9 of the Slot Regulation. Member States may establish PSO's in order to maintain scheduled air services on routes considered to be vital for the socio-economic development of the region they serve, yet are unprofitable for any airline to operate under competitive market conditions.[841]

The Slot Regulation does not in so many words refer to the use and application of TDR's by coordinators. It does, however, provide in Article 10(6) that slots placed in the slot pool are to be distributed without prejudice to the existence of, *inter alia*, TDR's adopted under EU Regulation 1008/2008. Any TDR's need to be compliant with the principles of non-discrimination and national treatment, transparency, and proportionality. They furthermore need to be warranted by mandatory public interest requirements and the measures contained in them must be objective and constant over a certain period.

4.5 Capacity management without *ex ante* slot coordination in the US

4.5.1 The first-come, first-served approach in the US

The WASG guidelines for slot coordination are normally not applied at United States [hereinafter: US] airports for antitrust reasons, except for one high profile exception and for international flights as explained later on in sections 4.5.2 and 4.5.3.[842] In contrast to the EU, the vast majority of airports in the US are not slot-controlled and operate on a 'first-come, first-served' basis without *ex ante* coordination.[843] There are no laws in the US that relate to airport congestion generally. Airlines simply schedule their flights as they wish, taking into account expected delays at the busier airports.[844] Access to airport infrastructure facilities, such as check-in and baggage handling facilities and the use of gates are subject to separate negotiation and arrangements.[845]

Advantages of the 'first-come, first-served' approach include its administrative simplicity.[846] The system requires only a minimum of regulatory intervention, and airlines are not selected on any other basis except for their time of arrival. On the downside, the lack of restrictions does go hand in hand with high levels of congestion and over-subscription at commercially interesting flight times, and scarce airport capacity is mainly reflected in waiting

[840] *Id*., paragraph 18.
[841] *Id*., paragraph 1.
[842] *See* NERA Economic Consulting, *supra* note 5, at 271; Mendes de Leon, *supra* note 48, at 557.
[843] *See* Mendes de Leon, *supra* note 48, at 557; Brecke, *supra* note 491, at 186.
[844] *See* David Starkie, Aviation Markets: Studies in Competition and Regulatory Reform (2008), at 194; NERA Economic Consulting, *supra* note 5, at 271; Starkie, *supra* note 191, at 53.
[845] *See* Mott MacDonald, *supra* note 63, at 5-8.
[846] *See* Jaap de Wit and Guillaume Burghouwt, *Slot Allocation and Use at Hub Airports, Perspectives for Secondary Trading*, 8 European Journal of Transport and Infrastructure Research 2 (2008), at 149.

queues during starts and landings.[847] However, the majority of airports in the US do not face the overdemand problems prevalent in Europe.[848]

Generally, the assumption of the US, primarily US congress, is that access to airports does not need to be regulated.[849] Thus, there is no US legislation especially targeting airport congestion.[850] The presumption holds that the 'first-come, first-served' approach better facilitates competition between legacy carriers and new entrants, as new entrants can allegedly more easily enter the market in the absence of slot controls as opposed to new entrants at slot-controlled counterparts elsewhere in the world. Any interventions addressing airport congestion – if at all – tend to be reactive and driven by the public perception of problems, especially delays arising through the scheduling of an excessive number of flights.[851] Hence, the regulatory regime for slot coordination in the US evolved significantly different from that in the EU.[852]

As opposed to the US, the slot coordination process in another jurisdiction within North America, *id e*st Canada, resembles the guidelines of the WASG. However, the WASG guidelines are criticized by the Canadian Commission Bureau as not adequately addressing 'the competition concerns that would emerge in a dominant carrier scenario'.[853] The allocation process and any transactions are supervised by an independent slot coordinator.[854]

The next section sets out the airports that are or have been subject to the so-called High-Density Rule [hereinafter: HDR] to govern daily operations instead of being reliant on the first-come, first-served approach. Other legislative initiatives, such as the 'Air 21 Act' of 2000 and proposals by the Federal Aviation Administration [hereinafter: FAA] to coordinate slots by means of market-based mechanisms are addressed in sections 4.5.3 and 4.5.4.

4.5.2 Exemptions to the first-come, first-served approach

Access to most US airports is regulated by means of the 'first-come-first-served' approach discussed above, with the exception of a few airports experiencing severe capacity shortfalls. The FAA may impose Level 3 slot coordination or Level 2 facilitation when airport infrastructure is generally unable to meet carrier demand to ensure the efficient use of the airspace consistent with the FAA authority.[855]

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[847] However, the marginal costs of delays at airports dominated by a single carrier or an alliance tend to be overstated. The delay costs imposed by an airline on its own operations by adding additional flights are often internalized into the airline's business equation. In doing so, the airline takes into account the impact of adding additional flights on the operating costs of all the other flights scheduled at the airport. Internalization allows additional flights – so long as they are scheduled by the same airline – to not constitute a negative externality to that airline, but instead allow the airline scheduling flexibility. Hence, the higher the slot portfolio of an airline, the smaller the externality. Other carriers and their passengers, as well as the airport operator, belong to the negatively affected category. The internalization of delays is further addressed in, *inter alia,* Starkie, supra note 65 and De Wit and Burghouwt, supra note 846, at 149.

[848] *See* Sanchez, *supra* note 298, at 19.

[849] *See* Steer Davies Gleave, *supra* note 69, at 125.

[850] *See* Mott MacDonald, *supra* note 63, at 5-10.

[851] *See* Steer Davies Gleave, *supra* note 69, at 125.

[852] *See* Brecke, *supra* note 491, at 186.

[853] *See* House of Commons Canada, Restructuring Canada's Airline Industry: Fostering Competition and Protecting the Public Interest (1999), *available at* https://www.ourcommons.ca/DocumentViewer/en/36-2/TRAN/report-1/page-27 (last visited November 11, 2021).

[854] *See* Gillen and Morrison, *supra* note 114, at 183.

[855] The FAA is the agency charged with ensuring the safety and efficiency of the US National Airspace System and administers coordination or facilitation processes in order to align them with the policy goals established relative to performance goals and runway capacity at airports. *See* Federal Aviation Administration (FAA), Slot Administration – Schedule Facilitation, *available at* https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/perf_analysis/slot_adm

Level 3 slot controls apply at two high profile airports in the US: New York John F. Kennedy International Airport and New York LaGuardia Airport, subject to FAA Orders. At Ronald Reagan Washington National Airport, slot controls equivalent to Level 3 coordination are in place pursuant to the HDR to govern daily operations.[856] More information on the HDR is provided in section 4.5.3 below.

Unlike New York LaGuardia Airport and Ronald Reagan Washington National Airport, New York John F. Kennedy International Airport has a large percentage of international flights and is the only airport in the US that generally follows the coordination process prescribed by the WASG. At New York LaGuardia Airport and Ronald Reagan Washington National Airport, slot allocations are indeed based on grandfather rights, but divert from the WASG through a two-month minimum slot usage requirement and other FAA rules or orders in effect for the specific airport.[857] Other airports, including Chicago O'Hare International Airport, Los Angeles International Airport, Newark Liberty International Airport and San Francisco International Airport are subject to Level 2 facilitation to the extent that WASG guidelines applicable to Level 2 facilitation do not conflict with US laws, rules or procedures.[858]

4.5.3 The High-Density Rule of 1968 and the Air 21 Act of 2000

Under the HDR[859], slots are defined as operating privileges to conduct one landing or take-off each day during a specific hour or 30-minute period.[860] The HDR distinguishes between domestic flights and international flights. Whereas domestic flights fall under the HDR, slots within a separate slot pool for international flights largely adhere to the procedures prescribed by the WASG.[861] The distinction between domestic and international flights yields that access to airports is always available to airlines designated by other contracting States under ASAs. At times, domestic slots have been reduced to make way for international services.[862] Currently, Ronald Reagan Washington National Airport is left as the only airport where operations are still regulated by the HDR, although it is unclear to the author if the separation of slot pools for domestic and international flights alike is still maintained.[863]

The HDR does not provide a method for coordinating the authorized number of runway operations between airlines. Instead, the US government conferred antitrust immunity to

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inistration/slot_administration_schedule_facilitation (last visited January 6, 2021). *See* Chapter 2, section 2.2.1 for definitions of Level 2 facilitation and Level 3 slot coordination.

[856] *See* Federal Aviation Administration (FAA), Slot Administration – U.S. Level 3 Airports, *available at* https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/perf_analysis/slot_administration/slot_administration_schedule_facilitation/level-3-airports (last visited January 6, 2021).

[857] *Id.*

[858] *See* Federal Aviation Administration (FAA), Slot Administration, *available at* https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/perf_analysis/slot_administration (last visited January 6, 2021).

[859] The HDR was vested in 33 Federal Register 17896, Dec. 3, 1968 until it was superseded by the United States Code of Federal Regulations, Title 14 Aeronautics and Space, *supra* note 40. In 1969, the FAA initiated the HDR as a temporary measure to beat the congestion problems at five high-profile airports via regulation of the number of permissible peak-hourly Instrument Flight Rule operations through the allocation of slots without providing prescriptive slot allocation rules, *see* Paul Stephen Dempsey, *Airport Landing Slots: Barriers to Entry and Impediments to Competition*, 26 Air and Space Law 1 (2001), at 22; Steer Davies Gleave, *supra* note 69, at 125.

[860] *See* Sanchez, *supra* note 298, at 4.

[861] *See* NERA Economic Consulting, *supra* note 5, at 234; Brecke, *supra* note 491, at 186.

[862] *See* Mott MacDonald, *supra* note 63, at 5-9.

[863] *See* Federal Aviation Administration (FAA), Slot Administration – U.S. Level 3 Airports, *available at* https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/perf_analysis/slot_administration/slot_administration_schedule_facilitation/level-3-airports (last visited January 6, 2021).

coordination committees[864] comprised of airlines to allocate slots among themselves in order to reduce regulatory oversight.[865] However, as coordination committees are heavily dominated by incumbent airlines which resisted efforts for new entry, the entry of competitors into the market was often stifled prior to deregulation from 1978 on.[866] Because coordination committees in the US require unanimity and deadlock-breaking mechanisms are absent, the discussions often reached an impasse.[867]

In 2000, concerns over the ability of new entrants to acquire slots at congested airports, led US Congress to pass the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century[868] [hereinafter: Air 21 Act], which phased out the HDR at Chicago O'Hare International Airport, New York John F. Kennedy International Airport and New York LaGuardia Airport.[869] The Air 21 Act acknowledged that, although secondary trading under the Buy Sell Rule, as to which see section 4.5.4, had provided all carriers the opportunity to acquire slots, congested airports were still faced with significant unmet demand. The Air 21 Act introduced several changes, including the introduction of slots for 'essential air services' exempted from the HDR and the secondary market ('Air 21 slots'), the US equivalent of PSO's, with the aim of encouraging services to smaller communities as well as services started by new entrants.[870] Slots for general aviation are also earmarked and excluded from the trading system.[871] Low-cost carrier [hereinafter: LCC] JetBlue is perhaps the best illustration of a carrier taking advantage of the Air 21 slots, as it has since managed to carve out a significant slot share at New York John F. Kennedy International Airport.[872]

Only six months after the Air 21 Act became federal law, the relaxation of slot restrictions through the adoption of the Air 21 Act and the phasing out of the HDR triggered much higher demand by airlines wishing to operate services from the former HDR airports, handled to acute congestion and substantial traffic delays. Congestion problems were "spiralling out of control". At the request of the Port Authority of New York and New Jersey, the FAA eventually intervened to address the congestion problems at the airports on the basis that it had the statutory obligation to intervene in order to maintain safety and the movement of traffic as codified in the US Code of Federal Regulations.[873]

In January 2001, the FAA imposed temporary limitations comprising a limit on the number of flights at the most congested airports in the US, *id est* 75 scheduled operations per hour. Air 21 slot exemptions were to be coordinated by a lottery, also referred to as the 'slottery' at the time, and their number was restricted.[874] The measures were successful: within six months of their adoption, delays fell dramatically from 330 per day in October 2000 to 98 per day in April 2001.[875] Although the measures adopted by the FAA were meant to be temporary, they have

[864] At the time referred to as 'scheduling committees'.
[865] *See* Mendes de Leon, *supra* note 48, at 557; Dempsey, *supra* note 859, at 23.
[866] *See* David Starkie, *Slot Trading at United States Airports* (1992), at 7.
[867] *See* Dempsey, *supra* note 859, at 23.
[868] United States Code of Federal Regulations, Title 49 Transportation, § 42121.
[869] *See* Mott MacDonald, *supra* note 63, at 5-18.
[870] *Id.,* at 5-18.
[871] *See* NERA Economic Consulting, *supra* note 5, at 234.
[872] *See* Mott MacDonald, *supra* note 63, at 5-19.
[873] United States Code of Federal Regulations, Title 49 Transportation, § 41715(b).
[874] *See* Federal Aviation Administration (FAA), High Density Airports; Notice of Lottery of Slot Exemptions at LaGuardia Airport (2000); Mott MacDonald, *supra* note 63, at 5-20.
[875] *See* Mott MacDonald, *supra* note 63, at 5-20.

been extended several times. The latest extension was granted on September 18th, 2020 for New York John F. Kennedy International Airport and New York LaGuardia Airport.[876]

4.5.4 The use of market mechanisms for slot coordination

Since the implementation of the Buy Sell Rule in 1986, secondary slot trading has been widespread at US airports.[877] Under this rule, slots could be bought, sold, exchanged, or leased in a secondary market by airlines and third parties. This rule was applicable to the five most congested airports within the country, which had also been subject to the HDR in the past, and essentially substituted for rationing by queue on first-come, first-served basis.[878] Slot trading under the Buy Sell Rule was restricted to domestic slots.[879] International slots and general aviation slots were ringfenced and excluded from the trading system. They were, however, allowed to be exchanged between carriers on a one-for-one basis.[880] The Buy Sell Rule also allowed non-carriers to hold slots, which was something of significance for carriers wishing to use their slots as collateral for loans.[881]

Under the US Code of the Federal Regulations, international airlines were given priority at the slot constrained airports in order to ensure that the promulgation of the 1986 Buy Sell Rule would not impede access to slot constrained airports by foreign airlines, even if it means that a domestic airlines' operations will suffer.[882] The FAA stressed that it still owned the slots traded under the Buy Sell Rule and reserved the right to revoke the slots at any time.[883]

In 1993, modest amendments were made to the Buy Sell Rule. Slots that were traded had to be used according to a 80% threshold in a two month period, from 65% previously. Carriers entitled to slots from the reserved pool was widened to include incumbent airlines with relatively few slots, although restrictions were placed on incumbents to prevent them from acquiring slots intended for new entrants.[884]

Across the board, secondary slot trading in the US has proved to be a useful tool that has led to increased slot mobility.[885] Following the success of the Buy Sell Rule, the FAA has been actively considering alternative market-based and/or hybrid[886] approaches to better coordinate capacity at airports in New York with view to potential applicability to other congested US airports in the future.[887] Policy options comprising of market-based and/or hybrid

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[876] *See* Federal Aviation Administration (FAA), 'Operating Limitations at John F. Kennedy International Airport', 85 Federal Register 58258, Docket No. FAA-2006-25755; Federal Aviation Administration (FAA), 'Operating Limitations at New York Laguardia Airport', 85 Federal Register 58255, Docket No. FAA-2006-25755.

[877] *See* Steer Davies Gleave, *supra* note 69, at 128; Menaz and Matthews, *supra* note 194, at 34.

[878] *See* Mendes de Leon, *supra* note 48, at 557; Achim I. Czerny, Peter Forsyth, Hans-Martin Niemeier et al., *Airport Slots: International Experiences and Options for Reform* (Routledge 2008), at 63.

[879] *See* Forsyth and Niemeier, *supra* note 134, at 64.

[880] *See* NERA Economic Consulting, *supra* note 5, at 73.

[881] Typically, the lender takes possession of the slot and leases it back to the carrier whose debt is secured by the collateral of the slot. *See infra* Chapter 5, section 5.6.3.

[882] US Code of Federal Regulations, Title 14, Part 93, § 93.217(a)(8).

[883] US Code of Federal Regulations, Title 14, Part 93, § 93.223; Mott MacDonald, *supra* note 63.

[884] Since the adoption of the Air 21 Act in 2000, airlines have sought to acquire Air 21 'exemption' slots, since they wouldn't have to pay for these slots. *See* Mott MacDonald, *supra* note 63, at 5-14 and 5-29.

[885] *See* United States Department of Justice, *Comments on congestion and delay reduction at Chicago O'Hare International Airport* (2005); Mott MacDonald, *supra* note 63, at 5-28.

[886] Administrative measures supplemented by market-based measures.

[887] *See* Federal Aviation Administration (FAA), *Notice of Alternative Policy Options for Managing Capacity at LaGuardia Airport and Proposed Extension of the Lottery Allocation* (2001); Federal Aviation Administration (FAA) II, *Congestion Management Rule for LaGuardia Airport* (2006).

approaches were evaluated by the National Center of Excellence for Aviation Operations Research (2004)[888] and Ball et al. (2007)[889].

In 2007, the FAA proposed that slots allocated by it at New York LaGuardia Airport in 2007 would have a lifespan of between 3 to 13 years. In 2010, 10% of these authorizations would have expired, and would be withdrawn by the FAA if more slots would be needed for international flights, *exempli gratia*. This 10% tranche would then be reallocated with a renewed 10-year lifespan. Each year following 2010, 10% of the assigned slots would expire and be reallocated for ten years. According to the FAA, this proposal offers clear incentives for airlines to maximize the value of operating authorizations over the assigned time period. It evens out exposing airport access to market forces, providing access for new entrants, and preserving stability at the airport.[890]

In 2008, the FAA and the US Department of Transportation announced a new congestion management rule, which involved the auctioning of a portion of slots at three New York airports,[891] but those plans faced strong opposition by the airport's operating authorities, airline associations and other interest groups.[892] An FAA initiative to auction slots at the three largest airports serving New York was stayed by the Courts in 2008.[893]

4.5.5 Concluding remarks

In contrast to the EU, access to most US airports is not regulated under the presumption that the 'first-come, first-served' approach better facilitates competition between legacy carriers and new entrants.[894] To further reduce regulatory oversight, the US government has conferred antitrust immunity to coordination committees for airlines to allocate slots among themselves.[895] It is unclear to the author to what extent the US government still grants antitrust immunity to coordination committees to date.

Nonetheless, the entry of competitors into US airports has often been stifled. This seems at odds with the pro-competitive intention behind the US approach mentioned in section 4.5.1 to not regulate airport congestion with the intention to better facilitate competition between legacy carriers and new entrants. Instead, the grant of antitrust immunity may have empowered incumbent carriers in particular by essentially allowing them to self-regulate. To improve slot mobility and enhance market access, the US has proposed a myriad of techniques since the introduction of the HDR in 1968, including lotteries, slot allocation favoring international services and general aviation, services operated by new entrants, as well as the establishment of security interests in slots.[896]

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[888] *See* National Center of Excellence for Aviation Operations Research (NEXTOR), *NEXTOR Congestion Management Project – Interim Report: The Passenger Bill of Rights Game* (2005), at 1.
[889] *See* Michael Ball, Lawrence M. Ausubel, Frank Berardino et al., *Market-Based Alternatives for Managing Congestion at New York's LaGuardia Airport* (2017), at 13.
[890] *See* FAA II, supra note 887.
[891] *Id.*
[892] *See* Madas and Zografos, *supra* note 299, at 275.
[893] Court of Appeals for the district of Columbia Circuit, *Port Authority of N.Y. & N.J. v. Federal Aviation Administration*, No. 08-1329 (8 Dec. 2008)
[894] *See* Steer Davies Gleave, *supra* note 69, at 125.
[895] *See* Mendes de Leon, *supra* note 48, at 557; Dempsey, *supra* note 859, at 23.
[896] *See* Mendes de Leon, *supra* note 48, at 558.

4.6 The coordination of slots in other regions of the world

4.6.1 Preliminary remarks on slot coordination in other world regions

Besides the EU and US as prime examples of mature markets from the perspective of air transport liberalization and the subsequent adoption of rules in the area of slot coordination, rules for the coordination of slots in other jurisdictions around the world have also been drafted.

This section will primarily focus on slot coordination in the selected world regions of Latin America and the Asia-Pacific region, with a prime focus on Mexico City Benito Juárez Airport, China's three largest hub airports of Beijing Capital International Airport, Shanghai Pudong International Airport and Guangzhou Baiyun International Airport, and Sydney Kingsford Smith Airport. These airports have in common severe congestion rates posing barriers to airport access, as well as the efforts of the States whose territories they are located in to address these severe congestion rates via the coordination of slots, which is the reason why I chose these for discussion in the next sections.

4.6.2 Slot coordination at a selection of super-congested airports

4.6.2.1 Slot coordination at Mexico City Benito Juárez Airport

Besides Mexico City Benito Juárez Airport, the Latin American airports of, including but not limited to, Bogotá Eldorado, and São Paulo Guaralhus use slots to distribute access to scarce airport capacity. The slot regulations used in Latin America, however, differ from the international best practices laid down in the WASG, and also differ amongst themselves.[897] Garcia-Arboleda (2013) analyzes the existing regime for slot regulation at the three busiest airports in Latin America: Bogotá Eldorado, Mexico City Benito Juárez Airport and São Paulo Guaralhus.[898] This section limits itself to an analysis of slot coordination at Mexico City Benito Juárez Airport.

In Mexico, the airport determines the assignment of slots based upon the recommendations of a committee that takes into account several factors.[899] The committee usually comprises members of incumbent carriers and may not include members of competing airlines at all airports. Only airlines that are operating at the airport are represented in the committee, which is particularly problematic at super-congested airports where entry by new competitors may not be possible.[900] Since 2005, Mexico's Ministry of Transportation and Communications [hereinafter: SCT] and the operator of Mexico City Benito Juárez Airport have been empowered to implement market-based solutions for slot coordination, including auctions, but have not done so until 2017 as discussed in section 4.6.1.2 below.

Mexico City Benito Juárez Airport experienced a dramatic increase in traffic over the past several years. Demand exceeds airport capacity for each hour of the day, such that there are no slots freely available from the pool.[901] In 2005, the SCT declared Mexico City Benito Juárez Airport to be saturated, meaning that the number of slots during peak hours were at full capacity making it difficult for new entrants to effectively compete in the Mexico City market. It reached the limit of 54 operations per hour.[902]

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[897] *See* García-Arboleda, supra note 381, at 574 and 612.
[898] *Id.*
[899] Mexican Airport Law (*Ley de Aeropuertos*) of 2000, Article 95.
[900] *See* Augustin J. Ros, *A Competition Policy Assessment of the Domestic Airline Sector in Mexico and Recommendations to Improve Competition* (2010)
[901] *See* Victor Valdes and David Gillen, *The consumer welfare effects of slot concentration and reallocation: A study of Mexico City International Airport*, 114 Transportation Research Part A: Policy and Practice (2018).
[902] *See* Ros, *supra* note 900.

When an airport is declared by the SCT as saturated with respect to the availability of slots, a special regime for slot coordination applies and the airport can implement a number of reforms. The special regime consists of the General Operational Rules of Mexico City Benito Juárez Airport [hereinafter: GORMICA], which to the best of the author's knowledge still exists at the date of writing. Within the first four years following the declaration of saturation, the airport management will enforce the use it or lose it rule by withdrawing those slots that have not been used at least 85% of the time during the preceding year, as opposed to the 80% usage threshold mentioned in the WASG.[903]

GORMICA does not foresee in provisions with regard to new entrants. Hence, a competitor seeking to offer air services into Mexico City is dependent on available pool slots. The lack of available slots, however, tends to impede market access for new or expanding airlines wanting to compete with existing airlines.[904]

New slots, as well as slots withdrawn in observance of the 85% threshold and slots voluntarily returned by airlines, should be auctioned. The highest bidder will be allocated the respective slots and must start using them within three months following the allocation. Should the slots not be used during this period, they will be withdrawn by Mexico's airport management.[905] If saturation conditions still exist three years after the auction, the airport is empowered to take back 10% of slots that all airlines are using during the peak hours. These slots will then also be auctioned to the highest bidder.[906]

4.6.2.2 The involvement of Mexico's Federal Economic Competition Commission in the coordination of slots

Following Mexico City's declaration as a saturated airport, Mexico's Federal Economic Competition Commission [hereinafter: COFECE] stated the following in 2010:

> "The assignment of take-off and landing slots is an important barrier to the entry of new competitors given that the airport facilities are limited and those airlines that have ample slots within an airport that is saturated have a competitive advantage that converts itself into a barrier to entry for new competitors."[907]

The Commission also stated:

> "In an airport that is operating under saturation conditions the lack of take-off and landing slots becomes a competition problem given that since there are no slots for new competitors it becomes a barrier to entry."[908]

Accordingly, scarce airport infrastructure functions as a fortress for existing airlines as competitive entry is foregone.[909] Existing airlines include Aeromexico, the airport's sole network carrier, which controls approximately 55% of total slots at Mexico City Benito Juárez Airport.[910] Prior to the traffic increase, there already were concerns about the competitive conditions at Mexico City Benito Juárez Airport, with network carriers Mexicana and Aeromexico accounting for 75% of domestic slots in 2009. Mexicana ceased operations in 2010 and the slots were

[903] *See* García-Arboleda, supra note 381, at 598.
[904] *Id.,* at 598.
[905] *Id.*, at 598.
[906] *See* Ros, *supra* note 900.
[907] *Id.*
[908] *Id.*
[909] *See* García-Arboleda, supra note 381.
[910] *See* Valdes and Gillen, *supra* note 901.

reallocated largely to Aeromexico and to a lesser extent to LCCs. Valdes and Gillen (2018) investigate the impact of slot reallocation on consumer welfare for the case of Mexico City Benito Juárez Airport, stimulated by the bankruptcy of network carrier Mexicana in 2010.[911]

In a 2010 competition policy assessment of the domestic airline sector in Mexico, the Organisation for Economic Co-operation and Development [hereinafter: OECD] recommended, inter alia, to implement market-based solutions for slot coordination, to eliminate grandfather clauses that favor the incumbent carriers' access to essential airport infrastructure, and to modify the regulations so that both current and potential carriers are represented in the committees that administer and allocate slots.[912]

To address the 'competition problem' resulting from slot scarcity, COFECE issued a decision determining that Mexico City Benito Juárez Airport's infrastructure constituted an essential facility, and that the slot management procedures at the time were generating anti-competitive effects. In 2017, COFECE proposed a set of corrective measures for saturated airports.

Similar to GORMICA, slots would be auctioned to the highest bidder, and 10% of existing slots would be forfeited. Slots could be withdrawn on punctuality criteria, and slots cannot be allocated or transferred to air carriers that accumulate more than 35% of the total slots in the same timeslot. Furthermore, the 85% threshold as opposed to a 80% threshold is maintained. All these elements are described in Article 99 of the Regulations under Mexican Airport Law, in force since February 17, 2000.[913]

IATA has strongly criticized the scheme and urged Mexican authorities to embrace the principles of the current WASG instead.[914] COFECE, however, state that the new slot system fully complies with the relevant laws, *id est* the Mexican Airport Law of 2000.[915] So far, it appears that no slot auctioning has yet taken place at Mexico City Benito Juárez Airport.

Later in 2017, the SCT adopted a Decree to Reform the Regulations of the Airports Law and the General Principles to Allocate Take-Off and Landing Slots at Saturated Airports that contradicted COFECE's corrective measures. COFECE filed an appeal against the decree before the Supreme Court in 2017 arguing that COFECE was attributed the powers to regulate an essential facility, and that the Decree was a violation of COFECE's powers.[916] The Supreme Court, however, ruled that the regulation of slot allocation did not fall within COFECE's

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[911] *Id.*

[912] *See* Ros, *supra* note 900.

[913] *See* Comisión Federal de Competencia Económica (COFECE), COFECE responds to IATA's comments on corrective measures imposed on Mexico City's International Airport to promote competition (21 July 2017), *available at* <https://www.cofece.mx/wp-content/uploads/2018/02/COFECE-037-2017.pdf> (last visited November 12, 2021). Furthermore, the Mexican Airport Law, *supra* note 899, Article 99, under I(a), states that "The airport manager should revoke landing and take-off slots from carriers if slots are unused in a proportion equal to or greater than 85% or if carriers operate with delays equal to or over 15%, for reasons attributable to the carriers". Article 99 furthermore provides the basis for the auctioning system and the 10% confiscation under I(b) and II(a).

[914] *See* International Air Transport Association (IATA), IATA Urges Mexico to Embrace Global Standards for Slot Management (20 July 2017), *available at* https://www.iata.org/en/pressroom/pr/2017-07-20-02/ (last visited November 12, 2021).

[915] *See* COFECE, *supra* note 913.

[916] *See* Comisión Federal de Competencia Económica (COFECE), COFECE Filed a Constitutional Dispute against the Decree to Reform the Regulations of the Airports Law and the General Principles to Allocate Take-off and Landing Slots at Saturated Airports' (22 November 2017), *available at* https://www.cofece.mx/wp-content/uploads/2018/02/COFECE-054-2017.pdf (last visited November 12, 2021); Organisation for Economic Cooperation and Development (OECD), *OECD Peer Reviews of Competition Law and Policy: MEXICO* (2020), at 69.

competence. COFECE can only recommend the adoption of measures, but cannot supersede the original regulator power of the SCT.[917]

4.6.3 Slot coordination at the Chinese hub airports of Beijing, Shanghai and Guangzhou

4.6.3.1 Air transport liberalization in China and the impact on slot coordination

Although the Chinese airline market has been largely liberalized in many aspects in the past three decades, including in the areas of airfare setting, fleet planning and airline ownership,[918] airport slots at large Chinese airports, especially the super-congested hub airports of Beijing Capital International Airport, Shanghai Pudong International Airport, and Guangzhou Baiyun International Airport have been tightly controlled by the Civil Aviation Administration of China [hereinafter: CAAC], which is the competent authority in China for civil aviation.[919] The CAAC is responsible for, inter alia, the development, implementation and the supervision of strategy and planning of civil aviation industry development and the drafting of relevant laws, regulations, policies and standards, including for the coordination, allocation and supervision over the use of slots.[920]

The Chinese aviation industry has experienced rapid growth during recent decades, with an annualized passenger growth rate of 14.9% between 1990 and 2010. Although China lags behind other liberalized aviation markets in LCC development, China's largest LCC – Spring Airlines – has achieved rapid growth since its inauguration in 2005. Nonetheless, some legacy regulations remain untouched and the aviation market exhibits some distinctive characteristics, including the low penetration rate of LCCs.[921]

In order to control the excessive demand for air services at Chinese airports, the CAAC has enacted slot regulation since 2010.[922] Regulations on route entry and airport slot coordination in China are less liberalized than those adopted in mature markets such as in the EU and the US, with Chinese airlines often needing to secure approval for both route entry and airport slots when they add new destinations or frequencies on routes linked to hubs in metropolitan areas.[923] The allocation of slots used to be done on an *ad hoc* basis, and slot coordination committees comprised of representatives from the regional bureau, regional air traffic control authorities, airlines, and the airport.[924] A key responsibility of this committee is to suggest adequate slot allocation ratios between hub carriers vis-à-vis airlines based at other airports.[925] This partially changed in 2018, when the Methods for Management of Civil Aviation Slots [hereinafter: the Methods], came into effect on 1 April 2018. The Methods are the latest CAAC regulation covering slots management in China.[926] The Methods are similar to the WASG principles and are subject to discussion in section 4.6.3.2 below.[927]

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[917] Constitutional Dispute 301/2017. First Specialised Court A.R. 142/2018.
[918] *See* Meng Hou, Kun Wang and Hangjun Yang, *Hub airport slot Re-allocation and subsidy policy to speed up air traffic recovery amid COVID-19 pandemic – case on the Chinese airline market*, 93 Journal of Air Transport Management C (2021), at 2.
[919] *Id.,* at 2; Fu and Oum, *supra* note 398.
[920] Jason Jin, The Aviation Law Review: China (18 August 2021), *available at:* https://thelawreviews.co.uk/title/the-aviation-law-review-3/china (last visited: November 12, 2021).
[921] *See* Xiaowen Fu, Zheng Lei, Kun Wang et al., *Low cost carrier competition and route entry in an emerging but regulated aviation market – The case of China*, 79 Transportation Research Part A Policy and Practice 4 (2015), at 3.
[922] See Zhi-jian Ye et al., *Performance Comparing and Analysis for Slot Allocation Model* (2019), at 2.
[923] *See* Fu and Oum, *supra* note 398, at 10.
[924] *See* Fu et al., *supra* note 921, at 7.
[925] *See* Fu and Oum, *supra* note 398, at 10.
[926] *See* Jin, *supra* note 920.
[927] *See* Ye et al., *supra* note 922, at 2.

China's biggest LCC Spring Airlines is of the opinion that the previous system was unfair to LCCs in comparison with State-owned airlines, the latter of which were allocated all the commercially interesting slots at hub airports.[928] China's biggest hub airlines are largely State-owned and based at these hub airports where they grandfather large slot portfolios, preventing low-cost carriers from starting operations in order to avoid fierce competition.[929] For example, the CAAC rejected Spring Airlines access to serve Beijing Capital International Airport, although Spring Airlines have tried to apply for the slots for six years since its inauguration.[930]

In September 2020, the CAAC formally eliminated route entry restrictions for airlines at China's three large hub airports. The weekly maximum frequency of 49 busy routes involving Beijing Capital International Airport, Shanghai Pudong International Airport and Guangzhou Baiyun International Airport has been lifted, and airlines can now freely decide their frequencies according to market demand. Moreover, airlines can apply for slots at Beijing Capital International Airport, Shanghai Pudong International Airport and Guangzhou Baiyun International Airport to serve small airports with annual passenger throughput of less than 1 million, provided the airlines operate at least 15 routes from the hub airports. This policy is a remarkable step in China's airline market liberalization and is targeted at speeding up China's airline market recovery in light of COVID-19. Originally, the CAAC forbade airline services from hub airports to small airports, so that this market could only be served by high-speed rail.[931]

4.6.3.2 The Methods for Management of Civil Aviation Slots

With the Methods, the CAAC intends to

> ". . . further facilitate a fair, efficient, competitive and incorrupt allocation of slot resources, promote normal and orderly operations of flights, press ahead with supply-side structural reform in the civil aviation industry in an in-depth way and boost realization of the strategic goal of building China into a civil aviation power."[932]

The Methods consist of 8 chapters with 59 clauses, specifying the principles and basic rules for the overall management, allocation and oversight of slots. Airports are categorized into three types: coordinated, facilitated and non-coordinated airports, by reference to the three categories identified in the WASG. Slots at coordinated airports are divided into two pools, whereby international slots are reserved for international flights and domestic slots are reserved for domestic flights, which is a departure from the WASG where airlines themselves decide whether to designate a domestic or international flight for any obtained slots.[933] Slots in the same pool can be exchanged, swapped and operated jointly.[934]

The allocation method for international slots encourages airlines to introduce more new routes and favor large-aircraft and long-distance routes for airlines to improve their route networks. Conversely, the allocation method for domestic slots encourages airlines to add

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[928] *See* Reuters, China reforming slot-assignment process at some major airports (7 December 2015), *available at* https://www.reuters.com/article/china-airlines-slots-idUSL3N13W1P720151207 (last visited: November 12, 2021).
[929] *See* Hou et al., *supra* note 918, at 2; Fu et al., *supra* note 903.
[930] *See* Hou et al., *supra* note 918, at 3; Fu et al., *supra* note 903.
[931] *See* Hou et al., *supra* note 918, at 3.
[932] *See* Civil Aviation Administration of China (CAAC), Methods for Management of Civil Aviation Slots to be Implemented on April 1 (1 March 2018), *available at* http://www.caac.gov.cn/en/XWZX/201803/t20180301_55433.html (last visited: November 12, 2021).
[933] *Id.*
[934] *See* Beijing Arbitration Commission, *Commercial Dispute Resolution in China: An Annual Review and Preview* (2019), Chapter 2.1 on General Civil Aviation Provisions.

flights to remote and ethnic minority areas and old revolutionary bases.[935] Airlines may not alter the routes, schedules, aircraft types and operating dates associated with international slots without prior authorization of the CAAC and should make full use of them in order not to lose their international route operating permits to other airlines.[936]

The Methods furthermore provide that the allocation of slots will be prioritized by a formula.[937] In the absence of legal infractions, historic slots enjoy first priority when slots fall to be allocated. Historic 'retimings' have second priority, followed by new airlines. Within each category, airlines with high operating efficiencies will win high scores, which defines the order of prioritized allocation. According to the established order of prioritized allocation, airlines may then choose slots from the pool.[938] The Methods also specify exchange and swap of slots, code sharing, joint operation, transfer, voluntary return and the revocation of slots that can happen in the secondary slot market. A coordination committee is also established to further promote a fair, efficient, competitive and incorrupt allocation of slot resources.[939]

4.6.3.3 2016 slot auctioning trial run

As part of a trial run, slots for additional domestic flights at Guangzhou Baiyun International Airport and Shanghai Pudong International Airport were put up for sale in 2016. Slot allocations were decided by the drawing of lots, akin to a slot auctioning scheme. A total of 196 additional weekly slots were made available at each of the two airports, of which half will be reserved for international routes which will continue to be assigned by the government. The other half will be auctioned. Auction winners may use the slots for three years.[940]

Despite the presence of many other small-sized or privately-owned carriers, the major carriers became the only successful bidders in the trial run. China's four largest airlines, to wit Air China, China Eastern, China Southern and Hainan Airlines, and their affiliates won all slot pairs by paying a total of 550 million Renminbi, the local currency.[941]

4.6.4 Slot coordination at Sydney Kingsford Smith Airport

4.6.4.1 The legal framework for slot coordination at Sydney Kingsford Smith Airport

This section targets slot coordination in Australia, specifically Sydney Kingsford Smith Airport, where slots are coordinated in accordance with the Sydney Kingsford Smith Airport Demand Management Act 1997[942] [hereinafter: the Act of 1997] and its associated Sydney Airport Slot

[935] *See* CAAC, *supra* note 932.
[936] *See* Beijing Arbitration Commission, *supra* note 934, Chapter 2.1 on General Civil Aviation Provisions.
[937] *Id.*
[938] *See* CAAC, *supra* note 932.
[939] *Id.*
[940] *See* Routes News, China gambles on slot auctions (24 September 2016), *available at* https://www.routesonline.com/news/29/breaking-news/268813/china-gambles-on-slot-auctions/ (last visited: November 12, 2021).
[941] *See* Dian Sheng, Zhi Chun Li and Xiaowen Fu, *Modeling the effects of airline slot hoarding behavior under the grandfather rights with use-it-or-lose-it rule*, 122 Transportation Research Part E: Logistics and Transportation Review C (2019).
[942] Sydney Airport Demand Management Act 1997, No. 173, 1997, Compilation No. 12.

Management Scheme 2013, the Sydney Airport Compliance Scheme 2012[943] and the Sydney Airport Demand Management Regulations 1998.[944]

The rules target Sydney Kingsford Smith Airport, for it is the only slot coordinated airport in Australia.[945] Seven other Australian airports have implemented a slot system to manage congestion without the need for legislation, including Adelaide, Brisbane, Cairns, Darwin, Gold Coast, Melbourne and Perth airports. The legislation in place for SYD establishes a scheme for the allocation of slots, institutes the position of a so-called 'Slot Manager' (the Australian equivalent of the slot coordinator), and creates a compliance framework.[946]

The Act of 1997 defines the function of the Slot Manager as being responsible for the development, administration and amendments of the slot management scheme, as well as for the performance of other functions as conferred on the Slot Manager by the Act of 1997 and the supporting legislation.[947] The Slot Manager is appointed by the minister and may, among others, authorize the operator of Sydney Airport to exercise the Slot Manager's powers relating to the allocation of slots or in connection with a slot that has been allocated.[948]

The Act of 1997 was initially introduced by the Australian government to give effect to a movement cap which restricts the number of slots that can be issued at Sydney Kingsford Smith Airport to 80 per hour as a means of achieving a balance between the efficient use of the airport and broader environmental and noise impacts following the opening of Sydney Kingsford Smith Airport's third runway.[949] The Minister may, by legislative instrument, set a lower number of aircraft movements.[950] A curfew is in place between 11 pm and 6 am at Sydney Kingsford Smith Airport.[951]

Slots are used to manage the cap of 80 movements per hour.[952] A 'slot' permits an aircraft to conduct a gate movement in preparation for a take-off or following a landing. A slot is allocated for a specified day and time, and all commercial and private aircraft require a slot for landing or take-off into or out of Sydney Kingsford Smith Airport.[953] Slots are thus defined as gate movements, whereas aircraft movements are regarded as landings or take-offs of aircraft from a runway according to Schedule 1 of the Act. By comparison, under the WASG a slot is an approval for the use of all infrastructure available.[954]

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[943] Sydney Airport Compliance Scheme 2012, made under subsection 54(2) of the Sydney Airport Demand Management Act, *supra* note 942. The Compliance Scheme requires airlines to adhere to the slots they are allocated, with penalties applying for unauthorized (no-slot or off-slot) operations. It is administered by Airport Coordination Australia. Pecuniary penalties in respect of the contravention as the Federal Court determines to be appropriate may be imposed on aircraft operators, *see* Sydney Airport Demand Management Act, supra note 942, section 14(2). In determining the penalty, the Court must have regard to, inter alia, the nature and extent of the contravention, the nature and extent of any loss or damage suffered as a result of the contravention, the circumstances in which the contravention took place, and whether the operator has previously been found to have engaged in similar conduct.
[944] *See* Australian Government, Department of Infrastructure and Transport, Sydney Airport Slot Management Administration Manual (2013), at 3.
[945] *See* Gillen and Morrison, *supra* note 114, at 182.
[946] *See* Australian Government, Sydney Airport Demand Management: Discussion Paper (2020), at 23.
[947] Sydney Airport Demand Management Act, *supra* note 942, section 60.
[948] *See* Australian Government, *supra* note 946, at 29.
[949] Sydney Airport Demand Management Act, *supra* note 942, section 6(1).
[950] *Id.*, section 7(1).
[951] *See* Australian Government, *supra* note 946, at 37.
[952] Sydney Airport Demand Management Act, *supra* note 942, section 33.
[953] *Id.*, section 34(1).
[954] *See* Australian Government, *supra* note 946, at 30.

Slots are not transferable, save for provisions in section 20 and 21 of Sydney Kingsford Smith Airport's Slot Management Scheme of 2013.[955] The Slot Management Scheme may also deal with associated matters such as the variation, suspension, cancellation, surrender or swapping of allocated slots, and the conditions that may be imposed on slots.[956] The Minister may, by legislative instrument, determine additional requirements with which the Slot Management Scheme must be consistent, after consulting the Slot Manager about the proposed determination.[957] The Minister may, for instance, direct the Slot Manager "to vary, suspend or cancel slots that have been allocated under the Slot Management Scheme as specified in the direction".[958]

In order to ensure that the regulatory framework in place "continues to meet the current and future needs of the aviation industry, the travelling public and the local community", the Australian government is currently conducting a comprehensive review into, among others, the slot management scheme at Sydney Kingsford Smith Airport.[959]

4.6.4.2 Differences between Australian legislation on slots and the WASG

The Act of 1997 and its associated instruments have been developed with reference to the WASG guidelines for slot coordination, including the principles of historic precedence according to a 80% threshold and the new entrant rule covering 50% of slots in the pool, although it also provides additional provisions in comparison with the WASG.[960] Additional provisions reflect policy responses to airport capacity challenges in relation to aircraft size and the protection of regional slots for regional services across New South Wales [hereinafter: New South Wales]. Moreover, in 2001, the Slot Management Scheme was amended to include a minimum aircraft seat limit for new slots, which encouraged airlines progressively to introduce larger aircraft.[961] While the industry developed WASG guidelines have been enhanced, the Act of 1997 has not been updated since 2008 and its instruments have not been updated since 2013, so the legislation does not reflect the enhancements and changes made to the current WASG.[962]

Provisions that are also not featured in the WASG include the movement cap and the exclusion of the ability to trade slots. Airlines are permitted to swap slots, but not to trade them for consideration. According to the Australian government, lessons in other fields demonstrate that where "a limited public resource – such as a capped airport movement" is managed by trading, the greater may be the need for careful design to ensure consumer and wider interests than those of the direct negotiating parties continue to be delivered.[963]

4.6.4.3 The ringfencing of regional slots resembling PSO's in the EU

With regard to the protection of regional slots for NSW regional services[964], the Sydney Airport Slot Management Scheme 2013 reserves a number of slots in peak periods[965] for regional services, also known as Sydney Airport's "regional ring fence". It is designed to ensure required

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[955] Sydney Airport Demand Management Act, *supra* note 942, section 34(2).
[956] *Id.*, section 35(1).
[957] *Id.*, sections 36(1) and 36(2).
[958] *Id.*, section 46(1)(a).
[959] *See* Australian Government, *supra* note 946, *supra* note 946, at 3.
[960] *See* Australian Government, supra note 944, at 4.
[961] *See* Australian Government, supra note 944, at 6.
[962] *See* Australian Government, *supra* note 946, at 24.
[963] *See* Australian Government, *supra* note 946, at 25.
[964] A 'regional service' can be defined as a flight that takes off and lands within NSW, noting that a particular service might consist of several legs.
[965] Peak periods at Sydney Airport are between 6-11 am and 3-8 pm, Monday to Friday.

access for airlines operating flights between Sydney Kingsford Smith Airport and communities in regional NSW to guarantee that the NSW communities were able to maintain access to their state's capital city. The regional ring fence slots are reflected in law as the Permanent Regional Service Series [hereinafter: PRSS] and is deemed the Australian equivalent of the imposition of PSO's under EU Regulation 1008/2008.[966] The number of PRSS was set in 2001 by reference to the number of regional slots in the previous season. In 2001, they made up 26% of movements, which has declined to 19% in 2019.[967]

In peak periods, regional flights can only be conducted using a PRSS slot. A PRSS slot cannot be moved between peak and off-peak periods. During peak hours, conversion of non-PRSS slots into PRSS slots is prevented in order to effectively cap the number of regional services able to be operated in peak periods. Non-PRSS slots can be converted to PRSS slots in off-peak periods if the slot series was used for regional flights in the previous to equivalent scheduling seasons, and vice versa.[968]

4.6.4.4 The 'size of aircraft' test

In addition to the use-it-or-lose-it rule, the 'size of aircraft' test for slot series allocated in the previous equivalent scheduling season is applied in Australia by the Slot Manager to support efficient use of Sydney Kingsford Smith Airport's constrained capacity.[969] It is not featured in the WASG, nor in the Slot Regulation. To satisfy this test, an airline has to have used at least 80% of the relevant gate movements in the series using an aircraft in the size category for which the slot was allocated. The size of aircraft test only applies to series where it has been specified by the Slot Manager that the rule applies, whereas the use it or lose it rules applies to all slot series. Section 19 of the Sydney Airport Slot Management Scheme 2013 furthermore accords priority to applications for larger aircraft over smaller aircraft.[970]

4.6.5 Concluding remarks

The variance in measures adopted by different States are illustrative of the non-binding nature of the WASG guidelines, which instead acknowledge that States or regions may have national regulations pertaining to slot coordination preceding over the WASG guidelines.

Analysis of the rules for slot coordination applicable to Mexico City Benito Juárez Airport, Guangzhou Baiyun International Airport, Shanghai Pudong International Airport and Sydney Kingsford Smith Airport and of the evolution of these rules show that States are actively looking for solutions to address levels of super-congestion faced by the airports located within their territories. Initiatives are various and often not limited to a one-off exercise. They range from administrative measures such as the ringfencing of regional slots and the 'size of aircraft' test at Sydney Kingsford Smith Airport to the market-based solution of slot auctioning at Mexico City Benito Juárez Airport and the Chinese airports of Guangzhou Baiyun International Airport and Shanghai Pudong International Airport.

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[966] *See* Australian Government, *supra* note 946, at 15-17. The price cap and price notification regime for PRSS is discussed in Australian Government, Economic Regulation of Airports – Productivity Commission Inquiry Report (2019), at 28.
[967] *See* Australian Government, *supra* note 946, at 17-18.
[968] *Id.*, at 15-17.
[969] Sydney Airport Slot Management Scheme 2013 made under subsection 44(2) of the Sydney Airport Demand Management Act, *supra* note 942, section 8.
[970] *See* Australian Government, *supra* note 946; Sydney Airport Slot Management Scheme 2013 made under subsection 44(2) of the Sydney Airport Demand Management Act, *supra* note 942, section 19(2).

4.7 Concluding remarks

The WASG, global guidelines for the coordination of slots administered by the WASB consisting of airport, airline and coordinator representatives, acknowledge in their Preface the right of each national regulator to derogate or regulate differently from the guidelines incorporated in the WASG.[971] The variance in measures adopted by different States to address slot coordination at (super-)congested airports, as discussed in this chapter, are illustrative of the non-binding nature of the WASG guidelines. In the words of ACI, "[t]he WASG is intended as a minimum common denominator rather than a binding regulation".[972]

In the context of the imbalance between supply and demand of airport capacity as elaborated in Chapter 2, sections 2.3 and 2.4, the Slot Regulation provides the EU's 27 Member State, Iceland, Norway, Liechtenstein and, for the greater part, also Switzerland, with a legally binding slot regime based on the principles of neutrality, transparency and non-discrimination as to nationality and identity of air carriers.[973] The guidelines and procedures laid down in the WASG served as the basis for the Slot Regulation, which entered into force in 1993. In essence, the Slot Regulation gave legal force to existing best practices provided by the WASG.[974]

Although the EU has exclusive external competence in the field of slot allocation in the conclusion of ASAs, the EU cannot enforce this competence without the executive powers of the Member States, thus opening the way for local or national rules. Hence, this chapter has argued that slot coordination is not regulated exclusively at intra-EU level. Member States and coordinators are thus free to adopt national measures on slot allocation, including local guidelines, local procedures and local operational rules insofar as these do not conflict with EU provisions. Under the Slot Regulation, there is no concept of slots being divided into categories, such as 'intra-EU' and 'intercontinental', similar to practices in the US and China.

The general regime for slot coordination elaborated upon in Chapter 3, nor the special regimes for slot coordination discussed in this chapter offer structural solutions to remedy the specific challenges faced by super-congested airports. Analysis of the continuing initiatives of States to revise existing rules and practices for slot coordination applicable in the EU, the US, as well as the super-congested airports of Mexico City Benito Juárez Airport in Mexico, Guangzhou Baiyun International Airport and Shanghai Pudong International Airport in China and Sydney Kingsford Smith Airport in Australia illustrates the global need for structural solutions.

Chapter 5 of this dissertation analyzes a number of concepts related to the coordination of slots at super-congested airports that could potentially assist in drafting structural solutions, including the debate on who holds the legal title to a slot, the functional and financial independence of the coordinator, the application and use of the new entrant rule and secondary slot trading, as well as the imposition of slot commitments to safeguard airport access for new entrants. Chapter 6 holds conclusions and recommendations.

[971] ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, Preface.
[972] *See* Airports Council International (ACI) World, *Demand Management at Sydney Airport* (2020).
[973] *See* European Commission, *supra* note 26, at 2.
[974] *See* European Commission, *supra* note 26, at 2; Odoni, *supra* note 61, at 20; Bauer, *supra* note 602.