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

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5 CHAPTER FIVE

Slots as a conceptual instrument

5.1 Preliminary remarks on slots as a conceptual instrument

Chapter 5 introduces several concepts that may be relevant for the coordination of slots at super-congested airports. Before moving to concluding remarks and recommendations in Chapter 6, Chapter 5 aims to discuss these concepts and explore whether they offer scope for finding solutions for the specific issues experienced with the slot regime at super-congested airports, as to which see Chapter 2, sections 2.3 and 2.4.

Each section starts with an explanation as to how the specific concept discussed is relevant from the perspective of the research questions identified in Chapter 1 of this dissertation. Concepts central to this dissertation include the debate on who holds the legal title to a slots as increasingly scarce capacity resources that slot coordinators have allocated to airlines and, as a related question, what happens to the slots when the airline that holds the slots enters into administration. This question will be examined in section 5.3.

A second concept includes the role of the functionally and financially independent coordinator and its discretionary powers in section 5.4, followed by an analysis as to the capacity of the new entrant rule to ease airport access for competitive entry in section 5.5. Secondary slot trading and leasing as an alternative for primary slot allocation, and market-based instrument to acquire slots at super-congested airports are elucidated in section 5.6. Finally, the relationship between slot allocation and competition law in the European Union [hereinafter: EU] is studied in section 5.7.

5.2 The *lex lacunae* with regard to slot ownership: grandfather rights in the context of property law

5.2.1 *Why it is important to clarify who holds the legal title to a slot*

Slot ownership is a complex legal issue from which industry stakeholders and regulators have shied away over a long period of time.⁹⁷⁵ Besides the merely factual-technical definitions of a slot laid down in the Worldwide Airport Slot Guidelines [hereinafter: WASG] and the Slot Regulation as discussed in Chapter 2, section 2.1.1, case law, sector expertise and academic theory have not yet advanced sufficiently in producing a clarification on who holds the legal title to a slot, or in other words, who is the rightful owner of a slot.⁹⁷⁶

⁹⁷⁵ See Odoni, *supra* note 61, at 93.

⁹⁷⁶ See European Parliament, *supra* note 624, recital 5(a).

The lack of clarity regarding the legal title to a slot is not purely an academic problem. Slots are the object of relevant social and legal interests,⁹⁷⁷ yet their ownership lacks an explicit legislative recognition.⁹⁷⁸ Notably at super-congested airports where airport access has been particularly difficult, the current slot rules have raised discussions among stakeholders and governments about who owns a slot and, accordingly, who may benefit from its proceeds.⁹⁷⁹ After all, at super-congested airports in particular, slots constitute a significant and scarce resource for airlines as the holders of slots, because they can ensure competitive advantage, as to which see also section 5.7.⁹⁸⁰

Identifying the owner of a slot touches upon the roots of the coordination process. It is therefore relevant to identify the law governing their creation and consequent utilization by way of slot leasing, exchanges, transfers, cancellations, bankruptcies and insolvencies, general administration and all issues related to their existence.⁹⁸¹ So as to create a solid basis for a coordination system at super-congested airports, there is an apparent need to clarify the legal status of slots.⁹⁸²

Before Chapter 6 of this dissertation can provide concluding remarks and recommendations as to how the global and specific legal regimes pertaining to airport slot coordination can be used as an instrument to influence coordination decisions at super-congested airports, as well as what measures can be identified to flex the slot regime to better reflect the socio-economic value of a slot in coordination decisions at super-congested airports, it is first important to clarify who is and/or should have final control over the declaration, allocation and use of scarce slots and who is not by addressing the question of slot ownership. After addressing the issue of slot ownership, Chapter 6 of this dissertation is designed to not only recommend measures to flex the slot regime, but to also provide recommendations as to the division of responsibilities with regard to the drafting and implementation of said measures.

To identify who holds the legal title to a slot, this dissertation goes back to the definition of an airport slot and the conditions upon which slots are allocated for them to become the object of grandfather rights. The next sections will provide insights in how slot ownership is perceived by industry stakeholders in section 5.2.2 and governments in different regions of the world in section 5.2.3, and will show that the perceptions with regard to the discussion of ownership are diverse.⁹⁸³ Section 5.2.4 dives into the key principles of property law and assess *de iure* grounds for protection from intervention with historic slots, as well as the role of slots in

⁹⁷⁷ According to Mendes de Leon, *supra* note 48, at 578, slots are multi-faceted instruments within a multifunctional process of coordination that interacts with and has implications for various branches of law and policy, including but not limited to international aviation law, competition and antitrust law, network planning, transport economics, national administrative law, environmental law and international relations.

⁹⁷⁸ As Colangelo, *supra* note 10, at 178, put it: “The allocation of entities that lack an explicit legislative recognition but are the object of relevant social and legal interests is a very complex topic that involves several kinds of rights belonging to the category of immaterial goods and asks the law to regulate their assignment and use.”

⁹⁷⁹ See European Commission, *supra* note 54, paragraph 11.

⁹⁸⁰ See Case M.8633 – Lufthansa/certain Air Berlin assets. Regulation (EC) No 139/2004 Merger Procedure, Article 6(1)(b) in conjunction with Article 6(2), 21 December 2017, paragraphs 167 and 286.

⁹⁸¹ See Colangelo, *supra* note 10, at 185.

⁹⁸² The relevance of addressing who holds the legal title to a slot extends beyond super-congested airports. It may also help answer a host of important questions that are not necessarily related to super-congestion. *Inter alia*, knowing who holds the legal title to a slot may help clarify if a series of historic slots can be withdrawn from an airline for reasons other than not meeting the 80% usage threshold, as discussed in sections x. Moreover, do historic rights expire if an airport’s designated level changes from Level 3 to Level 2 or Level 1? Can slots be seen as investments made by airlines, even though they were allocated free of charge? See European Commission, *supra* note 54, paragraph 11; Odoni, *supra* note 61, at 94.

⁹⁸³ See Behrens et al., *supra* note 67, at 1.

financial proceedings in section 5.3 to arrive at an answer to the central question if grandfather rights are synonymous with ownership.

5.2.2 *Claims as to the legal title to a slot*

On the basis of the current definition of a slot,⁹⁸⁴ airports, governments and airlines have claimed the ownership of slots.⁹⁸⁵ According to the NERA (2004) study, airlines, and also airports have been inclined to consider slots as assets belonging to them, or at least that they are *quasi*-owners of slots.⁹⁸⁶ Airports could claim that slots are inextricably linked to the airport infrastructure which they own and operate as a service to their customers, and they should be regarded as the slot owner accordingly.⁹⁸⁷ Airlines may claim that the principle of historic precedence encouraged them to invest heavily in aircraft and network expansion upon which they built a network of connections, thus they may reasonably expect to be entitled to the same set of slots in the next equivalent seasons, if not in perpetuity.⁹⁸⁸

Indeed, the coordinator may be the designated entity to exert control over both the allocation and use of scarce slots, which fits the current definition of a slot as a “permission given by a coordinator . . . to use the full range of airport infrastructure . . .”.⁹⁸⁹ However, practical experience shows that slots are not necessarily used as merely “permissions to use”, also referred to as *entitlements*. From section 5.3.3, it becomes clear that slots are treated as part of an airline undertaking when an airline takeover is forthcoming, and as such, slots define the market value of an airline, at least in part. In other words, slots are identified as forming part of the possessions of an undertaking that may be (partially) transferred to another undertaking.⁹⁹⁰ Several cases have produced interesting slot ownership-related questions, including if slots should be treated as assets in case of a holder’s insolvency, and potentially also answers, some of which will be elaborated upon in this dissertation, as to which see section 5.3.3 below.

Moreover, slots are leased and traded at the super-congested airports of London Heathrow and London Gatwick, often on terms and conditions decided as between airlines and without involvement of the coordinator, as to which see section 5.6.3 below. The issue of slot ownership also underpins much of the controversy regarding so-called ‘windfall profits’ that airlines may accumulate from secondary trading in slots although initially having been allocated the slots for free, as well as the issue of bonds securitized against their slot portfolios.⁹⁹¹ After all, being able to transfer a slot and benefit from the proceeds implies

⁹⁸⁴ Chapter 2, section 2.1.1 discussed that the definitions of a slot in both paragraph 1.6.1 of the WASG and Article 2(a) of the Slot Regulation imply a permission to use, which essentially comes down to an entitlement to use the airport infrastructure at the appointed date and time.

⁹⁸⁵ See Colangelo, *supra* note 10, at 39.

⁹⁸⁶ See NERA Economic Consulting, *supra* note 5, at 253; Abeyratne, *supra* note 55.

⁹⁸⁷ See NERA Economic Consulting, *supra* note 5, at 254. However, if the airport would be the recipient from the proceeds generated from a slot lease or sale, it may have little incentive to invest in capacity expansion as they would not want to lose out on the scarcity rents generated from existing slots. This would come down to a *de facto* fiscal monopoly, which is prohibited under Article 37 TFEU.

⁹⁸⁸ The concept of grandfather rights allows airlines to operate without having to fear losing slots to competitors as long as they meet the 80% usage threshold, see Chapter 2, section 2.2.3, and therefore airlines may argue that they should be the beneficiary of any monetary benefits related to slot value. See European Commission, *supra* note 54, paragraph 17.

⁹⁸⁹ ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 8.6.1.

⁹⁹⁰ See Case M.8633 – Lufthansa/certain Air Berlin assets, *supra* note 980, paragraph 13.

⁹⁹¹ See Mott MacDonald(II), *supra* note 113, at 45. The question of slot ownership seems to remain subordinate to the resolution of the legality of slot trading between airlines. However, the issue of slot ownership is a separate policy decision that needs to be distinguished from the objective of maximizing the value and use of slots via market mechanisms. See Colangelo, *supra* note 10.

ownership, and, *vice versa*, also depending on the applicable law, ownership indicates that the holder is free to sell the property at its discretion.

As several cases relating to airlines entering administration and the subsequent suboptimal or even non-utilization of slots have shown, some of which are studied in section 5.3.3 below, slots may be ‘frozen’ by the coordinator for multiple scheduling seasons in a row until the financial difficulties have been overcome by the airline concerned upon the request of the respective national administrator, as to which see section 5.3.2 below. This is the case even without the airline having been pinpointed as the legal owner of the slots. Meanwhile, the slots are not reallocated to other airlines and are ‘hanging over the market’, so to say.

The former practices see airlines acting as *quasi*-owners of slots, even though airlines have not been marked as holding the legal title to the slots which have been allocated to them. Allowing airlines to use slots as they deem fit may productively block any future measures to flex the slot regime at super-congested airports in line with applicable public interest considerations. Unless, however, the introduction of a guarantee that the slots allocated to airlines will also be effectively used in line with the terms and conditions imposed upon initial allocation sees the light of day.

The existing *lex lacunae* as to the legal title of slots may lead to coordinators not being able to release potentially scarce airport capacity to other airlines,⁹⁹² thus acting as a barrier to airport access in terms of slots. At super-congested airports where slots are extremely scarce, such practices appear at odds with the prime objective of slot coordination pursuant to the WASG, that is “to ensure the most efficient declaration, allocation and use of available airport capacity in order to optimize benefits to consumers . . .”.⁹⁹³

Hence, as discussed in section 5.2.1 above, although there is a legal definition of what an airport slot is, it is unclear whether anyone – be it airlines, airports or States – holds the legal title to a slot, if at all. This *lex lacunae* raises the question as to whether airport slots are purely entitlements to use the airport infrastructure, or whether airlines, airports or States can also derive other rights from an airport slot comparable to those of ownership. Neither approach has so far been recognized in law. If the issue of slot ownership is not resolved in a definitive way through a clarification of who holds the legal title to a slot, the controversy will persist.⁹⁹⁴

5.2.3 Perspectives on slot ownership in the EU, the UK and the US

In 2012, the European Parliament [hereinafter: the Parliament] noted that it is expedient to draft a guideline for the legal title to slots, the point of departure being the use of slots in the public interest. According to the Parliament, it should be determined that slots may become the object of rights,⁹⁹⁵ however not in any sense the object of property. The view that slots are merely defined as entitlements in the Slot Regulation and do not give the airline concerned any legal claim has also been expressed by the European Commission [hereinafter: the Commission] in its 2001 Explanatory Memorandum to EU Regulation 95/93, as amended [hereinafter: the Slot Regulation], in which the Commission also for the first time mentioned “the need to clarify the legal nature of slots”, which was echoed by Boyfield et al (2003).⁹⁹⁶ According to the Commission, slots are allocated as *public goods* to the most deserving airline,

⁹⁹² For instance, due to slot babysitting practices as discussed in section 5.6.2 below.

⁹⁹³ ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 1.2.1.

⁹⁹⁴ See Odoni, *supra* note 61, at 92.

⁹⁹⁵ See European Parliament, *supra* note 624, recital 5(a).

⁹⁹⁶ See Boyfield, *supra* note 46, at 21 and 39.

based on certain rules.⁹⁹⁷ Former competition Commissioner Karel Van Miert openly stated that runway slots are public property and regarded air services as a public service.⁹⁹⁸

John Prescott, Deputy Prime Minister of the United Kingdom [hereinafter: UK] at the time, held a similar view in an interview with British Broadcasting Company's Radio 4's World at One on 11 August 1998. During negotiations over whether UK-based British Airways should surrender slots at London Heathrow and London Gatwick in order to gain regulatory approval for its proposed alliance with American Airlines from the Commission, he said: "The slots don't belong to British Airways. The slots belong, I believe, to the community".⁹⁹⁹ Sir Malcolm Rifkind, former Secretary of State for Transport in the UK, said that "no airline has a legal right to a landing or take-off slot. Rather, airlines have permission and this must be subject to the public interest".¹⁰⁰⁰

The Commission did not solve the issue of slot ownership in its 2004 revision of the Slot Regulation. Identifying the legal owner of a slot was considered by the Commission as a fundamental reform that required more time to look into and was put aside for later examination.¹⁰⁰¹ However, as discussed in section Chapter 4, section 4.1.4, there have been no substantial amendments of the Slot Regulation since the 2004 revision. Yet, as discussed in sections 5.2.1 and 5.2.2, resolving the issue who holds the legal title to a slot has only increased in relevance.

The Slot Regulation does not stipulate that airlines should be viewed as holding the legal title to a slot. Article 2(a) of the Slot Regulation seems to confirm the view that slots are not property rights of airlines in its definition of an airport slot:

"[S]lot shall mean the permission given by a coordinator in accordance with this Regulation to use the full range of airport infrastructure necessary to operate an air service at a coordinated airport on a specific date and time for the purpose of landing or take-off as allocated by a coordinator in accordance with this Regulation."¹⁰⁰²

The term "permission" used in this Article confirms the Commission's earlier statements that slots are allocated to airlines, according to which airlines are *entitled* to use those slots. Moreover, the wording of Article 2(b) of the Slot Regulation describes airlines as merely "holding" slots at an airport.¹⁰⁰³ Slots must be returned to the slot pool when the airline does not intend to use them as per Article 10(2) of the Slot Regulation. Airlines may attribute value to certain rights they legally derived from becoming a slot holder, including the right to exchange and/or transfer slots subject to Article 8a of the Slot Regulation and paragraph 8.11 of the WASG. However, airlines do not necessarily need to be the legal owner of a slot in order to attribute value to it, which is reflected in slot babysitting practices as addressed in section 5.6.2 and the development of a secondary market in slots in the UK, among others.¹⁰⁰⁴

⁹⁹⁷ See European Commission, *supra* note 54, paragraph 12.

⁹⁹⁸ See Kociubinski, *supra* note 3, at 31; Speech by Commissioner Karel Van Miert at the Royal Aeronautical Society in London of 9 March 1998, titled 'Competition policy in the air transport sector'.

⁹⁹⁹ See Boyfield, *supra* note 46, at 29-30.

¹⁰⁰⁰ Sir Malcolm Rifkind expressed this view in the Parliamentary Select Committee on Transport on 15 May 1992, see Martyn Gregory, *Dirty Tricks: British Airways' Secret War Against Virgin Atlantic* (2000).

¹⁰⁰¹ See European Commission, *supra* note 54, paragraph 12.

¹⁰⁰² EU Regulation 95/93, as amended, *supra* note 47, Article 2(a).

¹⁰⁰³ Article 2b(i) of the Slot Regulation refers to a new entrant as a "... carrier requesting, as part of a series of slots at an airport, a slot at an airport on any day, where, if the carrier's request were accepted, it would in total hold fewer than five slots at that airport on that day. ..." [italics added]. Similar wordings are found in Articles 2(b)(ii) and 2b(iii) of the Slot Regulation.

¹⁰⁰⁴ See Haylan and Butcher, *supra* note 116, at 6.

In the United States [hereinafter: US], slots are regarded as an ‘operating privilege’. The Federal Aviation Administration [hereinafter: FAA] has repeatedly rejected the notion that incumbents hold a property interest in slots, stating that “slots do not represent a property right but represent only an operating privilege subject to absolute FAA control. Slots may be withdrawn at any time to fulfill the US Department of Transportation’s [hereinafter: US DoT] operational needs”.¹⁰⁰⁵ This viewpoint is consistent with the approach of Colangelo (2012) that slots are an intellectual concept that only exists on paper and that are directly linked to a ‘piece’ of capacity as discussed in Chapter 2, section 2.1.2.¹⁰⁰⁶

Paradoxically, and as previously discussed in Chapter 4, section 4.5.4, the FAA initiated the Buy Sell Rule in 1985, under which slots could be bought, sold, exchanged, or leased in a secondary market, which took effect in 1986.¹⁰⁰⁷ Perceiving slots as a tradable commodity raises questions with regard to the legal owner of a slot, regardless of slots being defined as ‘operating privilege’, particularly because the ability to sell or lease slots to private investors like a property right may give the appearance that the airline selling or leasing the slot acts as if it holds the legal title to said slot. However, even though slots may be perceived as tradable commodities under the Buy Sell Rule, slots were always allocated conditionally. After all, a slot is not a *terra nullius* in the US.¹⁰⁰⁸ The FAA may withdraw slots at any time.¹⁰⁰⁹

In the *Northwest Airlines, Inc. v. Goldschmidt*-case, the US Court of Appeals held that the power of the FAA to create slots *ex nihilo* and to consequently allocate them to airlines always encompasses the possibility of policy changes, including a potential reduction of existing slots or an imposition of conditions upon their use.¹⁰¹⁰ Thus, the airline slot holder does not have full control over what happens to a particular slot, as slots may be withdrawn or conditions may be attached to said slot if and when the FAA deems it appropriate. It appears that the airline carries the risk of a potential withdrawal when entering into a trade, or another form of financial construction.¹⁰¹¹

As opposed to the US, the Slot Regulation does not foresee in a general right for Member States to withdraw slots. In certain specific circumstances only, such as slot abuse, slot coordinators may withdraw slots. Slots may also be withdrawn as part of remedy solutions agreed with regulators responsible for the implementation of competition law.¹⁰¹²

¹⁰⁰⁵ US Code of Federal Regulations, Title 49 Transportation, § 41714 and US Code of Federal Regulations, Title 14 Aeronautics and Space, § 93.223. In the US, however, the question of slot ownership cannot be fully isolated from the issue of ownership or control of gates, as gates in the US are owned or controlled by airlines through their terminal rights. See Haanappel, *supra* note 151, at 202.

¹⁰⁰⁶ See Colangelo, *supra* note 10, at 178.

¹⁰⁰⁷ See Mendes de Leon, *supra* note 48, at 557; Mott MacDonald, *supra* note 63, at 5-11 and 5-12.

¹⁰⁰⁸ *Terra nullius* is a Latin expression meaning “nobody’s land”, or “land belonging to nobody”.

¹⁰⁰⁹ See United States General Accounting Office, *Airline Competition: Barriers to Entry Continue in Some Domestic Markets. Statement of John H. Anderson, Jr.* (1998), at 4; US Code of Federal Regulations, Title 49 Transportation, § 41714 and US Code of Federal Regulations, Title 14 Aeronautics and Space, § 93.223.

¹⁰¹⁰ US Court of Appeals, *Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309 (8th Cir. 1981).

¹⁰¹¹ Apart from slots being traded under the Buy Sell Rule, slots have in practice also been treated as assets in, *inter alia*, a credit and guarantee agreement with Citibank, as to which see section 5.3.3 below.

¹⁰¹² See Mott MacDonald, *supra* note 63, at 5-8. The imposition of slot remedies and the relationship between slot allocation and competition law in general is analyzed in section 5.7.4.

5.2.4 Grandfather rights and property law: *de iure* grounds for intervention with historic slots and protection thereto

5.2.4.1 The legal concept of property

In common law and civil law conceptions of property,¹⁰¹³ there is a trend towards recognizing property rights over a variety of things other than material objects.¹⁰¹⁴ Incorporeal things such as slots can, in theory, be the object of ownership.¹⁰¹⁵ A wide range of academic publications have been dedicated to the legal concept of property, including Demsetz (1967), Alchian (1973) and Emerich (2018).¹⁰¹⁶ The criteria used to identify the things that can be objects of property include: economic value, alienability and non-interference or enforceability against third parties.¹⁰¹⁷ This section assesses whether slots, particularly slots with historicity, meet the criteria of economic value and alienability, and if they may be subject to intervention by a third party such as the coordinator.¹⁰¹⁸

Slots at least meet the first two criteria: they represent an economic value as discussed in section 5.3.3 below and may be exchanged with other airlines, or in some cases even transferred pursuant to paragraphs 8.11 and 8.12 of the WASG.¹⁰¹⁹ Slots may also be leased to other airlines as part of a lease agreement. Slot trade and lease agreements are subject to discussion in section 5.6 as alternative means to access congested airports. The third criterion to identify if slots can be the object of property constitutes non-interference or enforceability against third parties. Although there is no directly relevant case law on the matter,¹⁰²⁰ the question whether airlines would enjoy any *de iure* protection if the slot coordinator, possibly following a decision made by the public authority that designated the airport, were to withdraw a slot is a much more practical question than the largely theoretical question of slot ownership according to Haanappel (1994).¹⁰²¹

5.2.4.2 Intervention with historic slots from the perspective of European Convention on Human Rights

For the purposes of answering the question whether airlines enjoy protection against intervention with historic slots, it is helpful to look at Article 1 of the First Protocol to the European Convention on Human Rights¹⁰²² [hereinafter: ECHR], which guarantees the right to property as follows:

¹⁰¹³ By nature, the common law tradition is more open to immateriality as compared to the civil law tradition, which is more influenced by corporality. However, the civil law tradition has increasingly embraced the view that immaterial things may be the object of property rights. This subject is addressed further in Yaëll Emerich, *Conceptualising Property Law: Integrating Common Law and Civil Law Traditions* (2018), at 183.

¹⁰¹⁴ See Ugo Mattei, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (2000), at 76.

¹⁰¹⁵ See Emerich, *supra* note 1013, at 189.

¹⁰¹⁶ According to Alchian (1973), property rights refer to socially recognized rights of action. Demsetz (1967) notes that property rights are a social artifact that creates incentives to efficiently use assets, and to maintain and invest in these assets. See Armen Albert Alchian and Harold Demsetz, *The Property Right Paradigm*, 33 *The Journal of Economic History* 1 (1973); Harold Demsetz, *Toward a Theory of Property Rights*, 57 *The American Economic Review* 2 (1967); Emerich, *supra* note 1013.

¹⁰¹⁷ See Emerich, *supra* note 1013, at 194.

¹⁰¹⁸ The object of property depends on the exclusion of all interference by third parties, see also US Supreme Court ruling *International News Service v. Associated Press*, 248 U.S. 215 (1918) and, for an overview of perceptions of property, see Emerich, *supra* note 1013, at 189-198.

¹⁰¹⁹ One of the traditional criteria of property resides in its transferable character, see a Court of Appeal for Ontario, Canada, judgment in *Caratun v. Caratum* (1992) 42 R.F.L. (3ed) 113 C.A.

¹⁰²⁰ There is case law on the role of slots in financial proceedings that may be relevant indirectly, including but not limited to the *Monarch*-case, *supra* note 45. See *infra* section 5.3.3 (addressing the *Monarch*-case).

¹⁰²¹ See Haanappel, *supra* note 151, at 201.

¹⁰²² European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 Nov. 1950), as amended by Protocols No. 11 and 14, ETS 5.

“Every natural or legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”¹⁰²³

Hence, everyone has the right to peacefully enjoy his or her possessions pursuant to Article 1 ECHR, unless public necessity so demands. In case someone is deprived of his or her property, the State should guarantee fair compensation.¹⁰²⁴ The Universal Declaration of Human Rights¹⁰²⁵ also recognizes the right to property, although more concisely.¹⁰²⁶

To know whether or not a legal person¹⁰²⁷ can invoke Article 1 of the First Protocol to the ECHR, we must first establish if historic slots are a “possession” within the scope of this Article. The European Court of Human Rights has interpreted the term “possession” widely. It does not only include the right of ownership, but also a whole range of intangible property such as rights arising from shares, patents, entitlements to a rent, and even rights arising from the running of a business.¹⁰²⁸ Other assets, including claims in respect of which a legal person can argue that it at least has a legitimate expectation,¹⁰²⁹ which must be of a nature more concrete than a mere hope that they will be realized, qualify as “possessions”.¹⁰³⁰ One could argue that airlines may entertain legitimate expectations to the effect that they have invested significantly in operating routes, encouraged by the principle of grandfather rights that will see

¹⁰²³ *Id.* at Article 1 of the First Protocol to the ECHR. What may qualify as a possession must be assessed by the law of the State where Article 1 of the First Protocol to the ECHR is invoked. “Possession” as a legal term can mean something different in the UK as compared to France.

¹⁰²⁴ Article 1 of the First Protocol to the ECHR does not contain an explicit reference for a right to compensation for intervening with any property. In practice, however, the right to compensation is implicitly required, *see* the ECHR judgment in *The Holy Monasteries v. Greece* 13092/87 and 13984/88 [1994] ECLI:CE:ECHR:1994:1209JUD001309287.

¹⁰²⁵ United Nations General Assembly (Paris, 10 Dec. 1948). *Universal Declaration of Human Rights*.

¹⁰²⁶ Article 17 of the Universal Declaration of Human Rights is as follows: “1. Everyone has the right to own property alone as well as in association with others; 2. No one shall be arbitrarily deprived of his property.”

¹⁰²⁷ Companies, including airline companies, are deemed a “legal person” in the context of Article 1 of the First Protocol to the ECHR. *See* Directorate General of Human Rights and Legal Affairs (Council of Europe), *The right to property under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights and its protocols* (2007), at 6.

¹⁰²⁸ In case of intangible assets such as shares, patents and licenses, the Court has also taken into consideration whether the legal position in question gave rise to financial rights and interests, and therefore the object had economic value. The Court has addressed this in, *inter alia*, *The Traktor v. Sweden* 10873/84 [1989] ECLI:CE:ECHR:1989:0707JUD001087384, paragraph 53, concerning the removal of a license to serve alcoholic drinks. Other cases include *Anheuser-Busch Inc. v. Portugal* 73049/01 [2007] ECLI:CE:ECHR:2007:0111JUD007304901, paragraphs 72, 76 and 78; *Alatulkila and Others v. Finland* 33538/96 [2005] ECLI:CE:ECHR:2005:0728JUD003353896, paragraph 66; *O’Sullivan McCarthy Mussel Development Ltd v. Ireland* 44460/16 [2018] ECLI:CE:ECHR:2018:0607JUD004446016, paragraph 89.

¹⁰²⁹ A legitimate expectation may arise as a result of a practice or policy made, adopted or announced by or on behalf of government or a public authority on the part of, among others, individual citizens, businesses and institutions concerning future administrative conduct. It extends to a benefit that someone or something has received and can legitimately expect to continue. Hence, legitimate expectations are predictive, meaning that they are partially constituted by beliefs or predictions about what will or will not happen in the future. The principle of legitimate expectation recognizes that, in the absence of any overriding reason of law or policy excluding its operation, a situation may arise in which individuals or businesses may have a legitimate expectation of a substantive outcome or benefit. Should such a legitimate expectation be defeated, the individual may perceive that administrative decision as illegal. The theory of legitimate expectations is addressed extensively in Alexander Brown, *A Theory of Legitimate Expectations*, 25(4) *Journal of Political Philosophy* (2017).

¹⁰³⁰ *Pressos Compania Naviera S.A. and Others v. Belgium* 17849/91 [1995] ECLI:CE:ECHR:1995:1120JUD001784991, paragraph 31; *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* 44302/02 [2007] ECLI:CE:ECHR:2007:0830JUD004430202, paragraph 61.

the slots they hold renewed in the next equivalent season if they operate them according to the 80% threshold. Therefore, historic slots could be interpreted by airlines as “possessions” in the sense of Article 1 of the First Protocol to the ECHR.¹⁰³¹ Law firm Clyde & Co, which undertook the legal analysis underpinning the Steer Davies Gleave (2011) study, deems it unlikely that a challenge on such grounds would succeed, provided sufficient notice were given of the intention to limit or end grandfather rights.¹⁰³²

Furthermore, as described at the start of this section, a property claim may only be regarded as a possession when it is sufficiently established to be enforceable. In other words, a legal person who complains of a violation of his or her right to property laid down in Article 1 of the First Protocol to the ECHR must first of all show that such a right existed, as has also been confirmed by the court on various occasions.¹⁰³³

A conditional claim which lapses following the non-fulfillment of the condition *cannot* be considered a possession.¹⁰³⁴ As historic slots were always allocated conditionally to airlines,¹⁰³⁵ it follows that they cannot be considered possessions and, as such, they do not qualify to get protection from Article 1 of the First Protocol to the ECHR. Hence, an airline would also not be entitled to compensation by the State for any damage incurred.

Even if historic slots were seen as possessions instead of as conditional claims, it is questionable whether historic slots are enforceable against third parties and whether the non-intervention criterion can be upheld. Pursuant to Article 1 of the First Protocol to the ECHR, States have a wide power to interfere with the right to property if such an intervention pursues the general or public interest.¹⁰³⁶ Moreover, three conditions must be fulfilled cumulatively before a State may interfere: interference with the right to property shall be allowed only if (1) it is prescribed by law, (2) it is in the public interest, and (3) it is necessary in a democratic society.

The first condition shows that it is imperative that the requirement of legality is satisfied. After all, the principle of legal certainty is one of the fundamental principles of a democratic society.¹⁰³⁷ Since domestic authorities have a better knowledge of their society and its needs, the Court is of the opinion that domestic authorities are usually better placed than the Court to establish what is in the public interest.¹⁰³⁸ The Court will therefore respect their judgment as to whether or not something is in the public interest, unless that judgment is manifestly without reasonable foundation.¹⁰³⁹ Hence, a wide variety of arguments could

¹⁰³¹ See Steer Davies Gleave, *supra* note 69, at 140.

¹⁰³² *Id.*, at 140.

¹⁰³³ See Council of Europe, *supra* note 1027, at 5, 7 and 8. Furthermore, the Court held in various cases that the protection of Article 1 does not apply unless it is possible to lay a claim to certain property, see *Pistorová v. the Czech Republic* 73578/01, ECLI:CE:ECHR:2004:1026JUD007357801, paragraph 38; *Zhigalev v. Russia* 54891/00, ECLI:CE:ECHR:2006:0706JUD005489100, paragraph 131. Moreover, in *Marckx v. Belgium* 6833/74, ECLI:CE:ECHR:1979:0613JUD000683374, paragraph 50 the ECHR clarified that the scope of Article 1 of the First Protocol to the ECHR only applies to existing possessions, and “does not guarantee the right to acquire possessions”.

¹⁰³⁴ *Prince Hans-Adam II of Liechtenstein v. Germany* 42527/98, ECLI:CE:ECHR:2001:0712JUD004252798, paragraphs 82-83.

¹⁰³⁵ The 80% utilization threshold serves as a *conditio sine qua non* for continued operations in the next equivalent season. Moreover, other conditions may be attached to a slot. *Inter alia*, a slot may only have been allocated for use by a new entrant, on the basis of year-round priority or for other reasons depending on locally identified allocation criteria. See Chapter 2, section 2.2.3 for an explanation on allocation priorities pursuant to the WASG.

¹⁰³⁶ See Council of Europe, *supra* note 1027, at 5.

¹⁰³⁷ *Id.* at 12.

¹⁰³⁸ For an analysis of the subsidiarity principle applied to slot coordination, see Chapter 4, section 4.3.5.4 of this dissertation.

¹⁰³⁹ See Council of Europe, *supra* note 1027, at 14.

support an intervention with historic rights, including but not limited to environmental, safety and competition concerns, as long as the intervention eventually benefits the consumer to meet the public interest criterion and having regard to proportionality.¹⁰⁴⁰ Lastly, any intervention that is prescribed by law and in the public interest, must also be necessary in a democratic society.¹⁰⁴¹

Additionally, although airline companies are legal persons that may rely on human rights protection, they may find it more challenging to succeed in their appeal as compared to natural persons.¹⁰⁴² The debate on whether a State may intervene with historic slots would likely focus on whether the benefits of the modification or withdrawal of a historic slot would sufficiently outweigh the benefits of schedule stability and continuity offered by incumbent airlines. When the reasons underpinning the intervention fulfill the three cumulative conditions mentioned above,¹⁰⁴³ the intervention could be regarded proportionate and not in breach of Article 1 of the First Protocol to the ECHR.¹⁰⁴⁴

In the hypothetical situation that airlines would be able to rely on the protection offered by Article 1, it is doubtful whether a damage action against a public authority subsequent to the interference – whether by modification or withdrawal – with a slot would succeed.¹⁰⁴⁵ Haanappel (1994) stresses that, in many jurisdictions

“... courts might actually require an intention to harm rather than mere negligence; or courts could reason that public authority should have a wide margin of policy choice and not be easily actionable for damages in such a sensitive field of public policy, involving the allocation of a scarce resource.”¹⁰⁴⁶

5.2.4.3 Slot ownership and the division of responsibilities under the slot regime

Another argument why historic slots should not be regarded as airline possessions enforceable to third parties is found in the inextricable link between slots and airport infrastructure discussed in Chapter 2, section 2.1.2, and in the distribution of responsibilities identified in the WASG.¹⁰⁴⁷ If, for whatever reason,¹⁰⁴⁸ the capacity of the airport would not be sufficient anymore to accommodate a particular slot, it could be deemed highly contentious to continue renewing the slot simply because the airline has acquired historic rights over the slot. The possession of historical rights could qualify as a possession under Article 1 of the First Protocol to the ECHR. Even though Article 1 provides an exemption for States to intervene with possessions if this is considered to be in the “public interest”, a qualification of historic rights

¹⁰⁴⁰ The principle of proportionality holds that any interference should take place on the basis of a trade-off between the collective interest and the interests of an individual, and in such a manner which is not arbitrary and in accordance with the law. *Id.* at 5.

¹⁰⁴¹ *Id.* at 12.

¹⁰⁴² For companies, the consequences of an intervention are more likely to be regarded as an incident of their business arrangements. See Steer Davies Gleave, *supra* note 69, at 141.

¹⁰⁴³ The criteria used to identify the things that can be objects of property include: economic value, alienability and non-interference or enforceability against third parties. See Emerich, *supra* note 1013, at 194.

¹⁰⁴⁴ See Steer Davies Gleave, *supra* note 69, at 141.

¹⁰⁴⁵ See Haanappel, *supra* note 151, at 201.

¹⁰⁴⁶ *Id.*, at 202.

¹⁰⁴⁷ According to paragraphs 5.3, 5.4 and 5.5 of the WASG, the role of airlines in slot coordination is being the recipients of slots, which are allocated to them by the independent coordinator in a neutral, transparent and non-discriminatory way. Airports are responsible for the declaration of the coordination parameters, as discussed in Chapter 2, section 2.2.2 of this dissertation. According to Article 4(5) of the Slot Regulation, “[t]he coordinator shall be the sole person responsible for the allocation of slots”.

¹⁰⁴⁸ *Exempli gratia*, when the number night flights has to be reduced for noise nuisance purposes. At Amsterdam Airport Schiphol, the amount of night flights will go down from 32,000 to a maximum of 29,000 per year in the coming years. See Airport Coordination Netherlands (ACNL), *Advice reduction night flights Schiphol* (2021).

as possessions would still erode the responsibility of the airport or any other competent authority, to declare the limits of the maximum capacity available at the airport discussed in Chapter 2, section 2.2.2 of this dissertation. The power of a public authority to determine the capacity of an airport is in some States laid down in domestic regulations. Additionally, a reduction of capacity does not necessarily need to be a reflection of public interest considerations, but may also be motivated by operational and/or technical constraints.

Considering historic slots as property of the airlines would also affect the independent function of the coordinator, who has been bestowed with the exclusive responsibility for the management and allocation of slots as discussed in section 5.4. After all, a property claim implies that the slots reside with a specific airline. Anyone else is excluded from gaining access to it without the slot holder's prior permission, which the airline could give in the form of slot leasing or trading.¹⁰⁴⁹ In such a situation, the slot coordinator is deprived from his or her exclusive responsibility for the management and allocation of slots, as it would be up to the airline with a property right over the slot to decide how, and by whom, the slot may be used.

Relying on the exemption grounds for intervention with historic rights provided by Article 1, *id est* based on "public interest" or "conditions provided for by law and by the general principles of international law" would likely make the coordinator's tasks unmanageable due to the continuous risk of legal challenge made by airlines. Also, as with the setting of declared capacities explained in the above paragraph, coordination decisions may be based on operational and/or technical factors which are not of a 'public interest' character nor are they provided for by (international) law.

In essence, airlines would turn into coordinators, which development appears to undermine the intention of the drafters of the WASG. After all, property rights with respect to slots enable private persons, including airlines as private enterprises, to control such resources that might otherwise have been controlled by the independent coordinator.¹⁰⁵⁰

5.2.5 Concluding remarks

Although slots represent relevant operational, economic, legal and social interests,¹⁰⁵¹ they cannot, in my view, be identified as property rights.¹⁰⁵² Pursuant to the EU, US and industry definitions of an airport slot, slots are *entitlements* allocated at no cost to airlines twice yearly to land at and take-off from international airports and use the full range of airport facilities, subject to conditions such as utilization thresholds.¹⁰⁵³ By no means do the available definitions explicitly state that airlines own slots in terms of being able to legally claim slots as property rights, which would give an unequivocal right of ownership to the airline.¹⁰⁵⁴ Slots may have been allocated to airlines according to which airlines are *entitled* to use those slots, but that does not mean that airlines are entitled to consider slots as their property. The FAA even legally established that slots can be withdrawn if and when the FAA deems it appropriate, as discussed in section 5.2.3 above.

¹⁰⁴⁹ See Colangelo, *supra* note 10, at 12. Slot trade and lease agreements are subject to discussion in section 5.6 below as alternative ways to access congested airports.

¹⁰⁵⁰ See William H. Riker, *A Political Theory of the Origin of Property Rights: Airport Slots*, 35 *Political Science* 4 (2008), at 951.

¹⁰⁵¹ See European Commission, *supra* note 54, paragraph 11.

¹⁰⁵² See Abeyratne, *supra* note 55, at 36.

¹⁰⁵³ The WASG and the EU by word of "permission to use", the US by word of "operating privilege". Both terms appear appropriate to label the entitlement that comes with an allocated slot, see section 5.2.3 for further analysis. See also Steer Davies Gleave, *supra* note 69, at 141.

¹⁰⁵⁴ See Abeyratne, *supra* note 55, at 36.

In the view of the author, the fact that slots have been treated as part of the possessions of an airline in take-overs is ill-considered. After all, due to their public functions as discussed in Chapter 2, sections 2.3 and 2.4, slots are valuable resources to society at large for which ‘competition’ among airlines is fierce, in particular at super-congested airports. Although both airports and airlines may have invested heavily in airport infrastructure and aircraft and network expansion respectively, the beneficiary of a slot should not be determined on the basis of financial objectives of an airline or an airport.

Instead of allowing private enterprises property rights over slots, which implies that slots may be used, exchanged and transferred as the owner deems fit as discussed in section 5.2.4.1, it is ultimately the public that should benefit from the socio-economic value of a slot. Hence, slots are essentially public goods. This view is reflected in the fact that the existence of slots depends entirely on the public authority that designated the airport and the coordinator that allocated the slots to airlines. Slots are allocated within the limits of the capacity declaration, and airlines may build history over these slots.¹⁰⁵⁵ Once the limits of the capacity declaration change, the number of available slots changes accordingly. In other words, available capacity is a prerequisite for utilizing a slot as the permission to use the range of available infrastructure. Grandfather rights are merely a creation of legislation within the boundaries of the declared capacity, which means that airlines could not reasonably expect to enjoy them in perpetuity.

Generally, legislators and courts do not regard slots as the property of an airline. It henceforth appears that grandfather rights are not synonymous with ownership rights. However, depending on the applicable law and the context in which the question of the legal title with respect to slots is considered, slots could be identified as possessions of an airline as evidenced by practices of, *inter alia*, the listing of slots on airline balance sheets as discussed in section 5.3.3 below. A definition of possession in legal terms again depends on the applicable law.

In order to solve the existing *lex lacunae* on slot title, at least in the WASG and the Slot Regulation, it is critical to elucidate in the laws and regulations governing slot coordination that the independent coordinator has final control over slots that have already been allocated, and subsequently allocates them to airlines as entitlements to use the available infrastructure. Since slots are essentially public goods as concluded in the above paragraph, the coordinator should ensure that the slots are used in a way that reflects their public interest.

5.3 The role and valuation of slots in financial proceedings

5.3.1 Preliminary remarks

The next sections illustrate the role of slots in several types of financial operations, including bankruptcies and insolvencies of airlines as well as take-overs, as previously referred to in section 5.2.2 above. As a result of COVID-19, several airlines have entered into financial proceedings.¹⁰⁵⁶ Airline bankruptcies and/or airlines ceasing operations are, however, a perennial issue resulting from market dynamics in a broad sense and are not necessarily related to the COVID-19 pandemic. The slot rules would benefit greatly from clarity as to whether airlines entering bankruptcy proceedings should be able to hold and sell slots purely to raise finance to repay creditors.

¹⁰⁵⁵ See Chapter 2, sections 2.2.2 and 2.2.3 for an overview of the capacity declaration and allocation processes respectively.

¹⁰⁵⁶ See Eurocontrol, *What COVID-19 did to European Aviation in 2020, and Outlook 2021*, Aviation Intelligence Unit, Think Paper #8 (2021).

Several pre-COVID-19 related court judgments and developments following the financial distress of, *inter alia*, Air Berlin and Monarch Airlines, will be analyzed below, since these cases have contributed to the ongoing debate amongst industry parties and regulators on the role, and the legal status, of slots in the event of airline bankruptcies and airlines ceasing operations for other reasons. The *Monarch*-case constitutes a particularly important precedent for the management of slots in financial proceedings as well as for legal analysis pertaining to secondary slot trading, to wit that a defunct airline is able to obtain and trade slots.¹⁰⁵⁷

5.3.2 Guidance provided by paragraphs 8.14 and 8.15 of the WASG

Paragraphs 8.14 and 8.15 of the WASG are designed to provide guidance for the coordinator and industry stakeholders as to what happens to slots when an airline ceases to operate at an airport, and/or when it loses its operating license,¹⁰⁵⁸ regardless of the reason. Paragraph 8.14 reads as follows:

“8.14.1 An airline that ceases operations at an airport must immediately return all of the slots allocated to it for the remainder of the season and for the next season (if already allocated) and advise the coordinator whether or not it will use the slots in the future.

8.14.2 If an airline fails to provide the necessary information by a reasonable deadline date set by the coordinator, then the coordinator may withdraw and reallocate the slots.”¹⁰⁵⁹

Hence, airlines must return all of the slots allocated to them when an airline leaves a particular airport or when it has entered administration as per the WASG. Should an airline fail to provide the information required by the coordinator, the coordinator may withdraw and reallocate the slots at his or her discretion. A judgment issued by the Dutch Council of State in a case between KLM Royal Dutch Airlines and Airport Coordination Netherlands [hereinafter: ACNL] in 2019,¹⁰⁶⁰ however, provides a window of opportunity for airlines to exchange slots with partners if they cease operations at an airport instead of returning them to the coordinator in case they entered into a ‘joint operation’ with another airline.¹⁰⁶¹

¹⁰⁵⁷ *Monarch Airlines v. Airport Coordination Limited*, *supra* note 45, paragraphs 54-56.

¹⁰⁵⁸ In order to obtain a valid operating license, airlines should have been granted a valid Air Operator Certificate [hereinafter: AOC], which confirms that the airline operator has the “professional ability and organization to ensure the safety of operations”, as to which see Articles 2(1) and 2(8) of EU Regulation 1008/2008. See also European Commission, *Report pursuant to Article 10a(5) of Regulation (EU) 2020/459 amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports*, COM/2020/558 final, at 10.

¹⁰⁵⁹ ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 8.14.

¹⁰⁶⁰ *KLM v. Airport Coordination Netherlands* [2019], *supra* note 558.

¹⁰⁶¹ When Malaysia Airlines ceased operations at Amsterdam Airport Schiphol following two major air crashes of flights MH17 and MH370, Dutch slot coordinator ACNL required Malaysia Airlines to return their slots back to the slot pool according to paragraphs 8.5.1 and 8.15.1 of the WSG (now WASG). At the time, however, KLM had entered into a codeshare agreement with Malaysia Airlines and therefore asserted that, instead of returning the slots to the pool, the Malaysia Airlines’ slots should be transferred to KLM instead because the two airlines had conducted so-called ‘shared operations’ in keeping with Article 10(8) of the Slot Regulation. Although the court initially ruled in 2016 that ACNL was right to require the Malaysia Airlines’ slots to be returned in line with WSG provisions, three years later the Dutch Council of State overturned this decision.

The situation gets even more complicated when an airline take-over is forthcoming as per paragraph 8.15 of the WASG:

“8.15.1 Slots can only be held by an airline with a valid operating license. If an airline ceases to hold a valid operating license, its slots revert to the slot pool.

8.15.2 In the case of bankruptcy (or similar proceedings), the representatives of the airline should enter into dialogue with the coordinators to discuss their future intentions for the slots and provide the contact details of the administrator.

8.15.3 The slots may be reserved by the coordinator pending reinstatement of the airline’s operating license or a formal takeover of the airline’s activities. The airline, its legal representatives, or the responsible licensing authority should keep the coordinator informed of the airline’s status.

8.15.4 If dialogue has not been initiated within a reasonable deadline set by the coordinator, and if there is no legal protection linked to bankruptcy under national law, then the coordinator should reallocate the slots.”¹⁰⁶²

In essence, paragraph 8.15 of the WASG reads that slots must be returned to the coordinator if an airline loses its operating license following, *inter alia*, financial difficulty. The line of thought of the WASG appears to be that slots can only be held by an airline with a valid operating license, notwithstanding existing jurisprudence which will be discussed shortly.

However, the airlines’ administrators can request the coordinator to ‘freeze’ the slots until the financial difficulties have been overcome or pending formal acquisition of the company’s activities by third parties pursuant to paragraph 8.15.3. This is the case even if the slots are not used in practice, thus wasting valuable capacity, in particular when capacity-constrained airports are concerned.

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, sections 2.2.3 and 2.2.4. Paragraph 8.15 of the WASG provides that the coordinator should reallocate the slots in case of a lost operating license “if (1) dialogue has not been initiated within a *reasonable deadline* and (2) if there is no legal protection linked to *bankruptcy under national law*” [italics added].¹⁰⁶³

As opposed to the WASG, which provide guidance for the freezing of slots, the Slot Regulation does not cover the assumption of ‘freezing’ and national policies with regard to the applicable timeframes in case of airline bankruptcies and/or insolvencies form somewhat of a patchwork.¹⁰⁶⁴ However, even the WASG do not provide much clarity. No timeframe during which slots can be frozen by the coordinator is presented, and perspectives on what constitutes “a reasonable deadline” may vary depending on the various interests of the parties involved.¹⁰⁶⁵

¹⁰⁶² ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 8.15.

¹⁰⁶³ *Id.* at 8.15.4.

¹⁰⁶⁴ Airports Council International (ACI) Europe, *Working Paper – “OFF THE GROUND” – Handling of Airline Slots in case of Bankruptcy/Insolvency* (2020), paragraph 2.4. Article 8a(1)(b) under (iii) of the Slot Regulation merely reads that slots may be transferred “in the case of a total or partial take-over when the slots are directly related to the air carrier taken over.” Moreover, Article 8a(2) provides that slot transfers “shall not take effect prior to the express confirmation by the coordinator” and that the coordinator may refuse such transfers if, for example, the coordinator is not convinced that airport operations would not be prejudiced following the transfer, taking into account all technical, operational and environmental constraints explicated in the airport’s capacity declaration.

¹⁰⁶⁵ *Id.* When an airline enters administration or insolvency, the authorized licensing authority issues a notice to the airline to terminate its AOC. Normally, the airline will then get a defined period within which it has an opportunity to appeal the decision of the licensing authority as per the notice and appeal periods established under national bankruptcy laws. States may have different procedures and timelines in place for the handling of (airline) bankruptcies, so that airlines may be declared bankrupt at different stages of the process in different States. As a

Italy, for instance, has rules in place for slots held by carriers for which freezing is expected pending their financial restructuring. The Italian Aviation Authority establishes that a carrier in financial distress can obtain the ‘freezing’ of slots if it initiates contact with the coordinator within 30 days from the suspension of its Air Operator Certificate [hereinafter: AOC] in order to inform the coordinator about the future use of the slots. The coordinator may then block the slots pending the restoration of the AOC up to a maximum of two consecutive scheduling seasons. Should the carrier fail to contact the coordinator, the coordinator may return the slots to the slot pool.¹⁰⁶⁶

5.3.3 Case law and slot questions pertaining to bankruptcy proceedings

As mentioned at the start of the section, several court judgements have been issued on the management of slots in relation to bankruptcy proceedings. In *R (Monarch Airlines) v. Airport Coordination Limited*,¹⁰⁶⁷ more commonly known as the *Monarch*-case of 2017, the slots held by Monarch Airlines were sold by the airline to raise finance to repay creditors following Monarch’s financial distress. The facts of the case show that Monarch Airlines’ AOC was provisionally suspended, pending the suspension of the airlines’ operating license. Monarch Airlines challenged the decision of UK-based coordinator Airport Coordination Limited [hereinafter: ACL] to deny Monarch Airlines the allocation of slots for the Summer 2018 season,¹⁰⁶⁸ asserting that it was still formally designated as an air carrier with a valid operating license and that it had complied with the use-it-or-lose-it rule by meeting the 80% threshold.

Although the Slot Regulation is silent on the handling of slots in bankruptcy proceedings, it prescribes that an airline should have a valid operating license to be allocated slots in Article 2(f)(i). Eventually, the Court of Appeal of England and Wales considered that a carrier in bankruptcy proceedings can indeed be referred to as an air carrier in a legal sense, even if it has no realistic prospect of resuming air transport services. Therefore, the UK Court of Appeal rules that Monarch Airlines was in fact still an air carrier when slots fell to be allocated and was entitled under Article 8(2) of the Slot Regulation to the slots that it had claimed and to subsequently sell these slots, even though it wasn’t flying them and wouldn’t be flying them in the future.¹⁰⁶⁹ Although the Court’s verdict in the *Monarch*-case is based on the Slot Regulation, it is not binding for courts in EU Member States.

The insolvency of Air Berlin also created slot questions, albeit of a different nature. In the case of Air Berlin, the slots allocated to it at 19 airports were to be transferred to Lufthansa following the purchase of shares from Air Berlin by Lufthansa, which included the whole of *Luftfahrtgesellschaft Walter GmbH* [hereinafter: LGW] as wholly-owned subsidiary of Air Berlin, to which Air Berlin had transferred the slots allocated to it following its insolvency.¹⁰⁷⁰

result, the AOC may also be terminated at different times. Should there be an appeal by the airline, then the appeal process can be subject to a court injunction. If the appeal is granted, the timeline for the handback of the slots becomes unknown and may be subject to a protracted legal process which may vary from one jurisdiction to the other.

¹⁰⁶⁶ See Italian Civil Aviation Authority (ENAC), Assegnazione di bande orarie sugli aeroporti coordinazione nazionali (in Italian), available at https://www.enac.gov.it/sites/default/files/allegati/2018-Lug/EAL-18_firmato%20.pdf (last visited: November 12, 2021).

¹⁰⁶⁷ *Monarch Airlines v. Airport Coordination Limited*, *supra* note 45.

¹⁰⁶⁸ ACL argued that Monarch Airlines was no longer eligible to claim slots because the airline was no longer operational and therefore could not be considered an “air carrier” in the sense of the Slot Regulation. ACL based itself on Article 2(e) of the Slot Regulation, which holds that a Community air carrier refers to an air carrier with a valid operating license.

¹⁰⁶⁹ *Monarch Airlines v. Airport Coordination Limited*, *supra* note 45, paragraphs 54-56.

¹⁰⁷⁰ As a result of the transaction, Lufthansa would acquire sole control over the aircraft, crew and slots of LGW, including the slots previously held by Air Berlin. The legal entity LGW, including the additional aircraft, crew and

Moreover, Air Berlin had also entered into an asset purchase agreement with easyJet to take over “certain assets and rights held by Air Berlin for parts of its airline operations at Berlin Tegel Airport”. As a result, easyJet would require sole control over assets and rights of Air Berlin.¹⁰⁷¹ The transfers took place in the framework of the Slot Regulation, which allows for an exchange or transfer of slots between airlines in certain specified circumstances, including between parent and subsidiary companies, as part of the acquisition of control over the capital of an air carrier and in the case of a total or partial take-over when the slots are directly related to the air carrier taken over.¹⁰⁷²

The slot questions primarily arised in the context of the EU Regulation 139/2004 of 30 January 2004 on the control of concentrations between undertakings¹⁰⁷³ [hereinafter: the Merger Regulation] and focused on whether the transactions were likely to lead to “the creation or strengthening of a dominant position in slot holding having anti-competitive effects” at the airports where Lufthansa would increase its slot holdings,¹⁰⁷⁴ as well as whether the entry of easyJet at Berlin Tegel Airport would lead to competitive disadvantages for easyJet’s competitors.¹⁰⁷⁵ Both transactions secured clearance from the Commission in 2017. Lufthansa received the green light from the Commission in 2017 to buy Air Berlin’s subsidiary LGW in return for giving up slots at Dusseldorf Airport, whereas the asset purchase agreement between Air Berlin and easyJet secured unconditional clearance.¹⁰⁷⁶

LOT Polish Airlines subsequently challenged the clearance given by the European Commission with the Court of Justice of the EU [hereinafter: CJEU]. Nevertheless, the actions of LOT Polish Airlines against the Commission’s decisions authorizing the mergers concerning the acquisition by easyJet and Lufthansa, respectively, of certain assets of the Air Berlin group, were dismissed by the CJEU in late October 2021. According to the CJEU, the Commission has a “margin of discretion” when ruling on complex economic transactions like the disputed Air Berlin deals. Moreover, the slots acquired by Lufthansa and easyJet would not give either airline an unfair market advantage, especially since the airports where the two airlines gained the slots were relatively uncongested.¹⁰⁷⁷ It is yet unknown whether LOT Polish Airlines will use its right of appeal to the CJEU.

The relationship between slots and competition law in the context of Articles 101 and 102 of the Treaty on the Functioning of the EU [hereinafter: TFEU] and the Merger Regulation, of which further analysis of the *Air Berlin*-cases forms part, is addressed in section 5.7. What is relevant for this section is that, in these *Air Berlin*-cases which were assessed by the Commission, slots are identified as forming part of the possessions of an undertaking that may be (partially) transferred to another undertaking pursuant to Article 8a of the Slot Regulation.¹⁰⁷⁸

slots that would be transferred to Lufthansa constitute an undertaking within the meaning of the Merger Regulation, see Case M.8633 – Lufthansa/certain Air Berlin assets, *supra* note 980, paragraphs 7, 13 and 119.

¹⁰⁷¹ See Case M.8672 – easyJet/certain Air Berlin assets, *supra* note 57, paragraph 12.

¹⁰⁷² EU Regulation 95/93, as amended, *supra* note 47, Article 8a(1)(b).

¹⁰⁷³ EU Regulation 139/2004, *supra* note 28.

¹⁰⁷⁴ See Case M.8633 – Lufthansa/certain Air Berlin assets, *supra* note 980, paragraph 162.

¹⁰⁷⁵ See Case M.8672 – easyJet/certain Air Berlin assets, *supra* note 57, paragraph 157.

¹⁰⁷⁶ See Case M.8672 – easyJet/certain Air Berlin assets, *supra* note 57; Case M.8633 – Lufthansa/certain Air Berlin assets, *supra* note 980.

¹⁰⁷⁷ General Court of the European Union, Press Release No 188/21, Luxembourg, 20 Oct. 2021, Judgments in Cases T-240/18 and T-296/18 *Polskie Linie Lotnicze ‘LOT’ v. Commission*.

¹⁰⁷⁸ See Case M.8633 – Lufthansa/certain Air Berlin assets, *supra* note 980, paragraph 13.

Also, slots have been used as collateral to financial institutions in the US and they have also been included in the estate of an airline by bankruptcy courts. After all, when airlines file for bankruptcy, the slots they hold at busy airports are often their most valuable resource.¹⁰⁷⁹ As part of a credit and guarantee agreement with Citibank in 2014, American Airlines and American Airlines Group pledged slots as collateral.¹⁰⁸⁰ Slots at US airports covered by the High Density Rule [hereinafter: HDR] were treated as ‘possessions’ belonging to airlines in practice, despite the FAA’s proposition that slots are operating privileges subject to withdrawal by the US DoT, putting private titles to slots at risk of private investors such as banks.¹⁰⁸¹ These slots were accepted by banks as collateral in bankruptcy proceedings and were listed at balance sheets. For example, airlines have mortgaged their slots to financial institutions and security interests have been vested in them.¹⁰⁸² American Airlines included domestic slots on their balance sheet and depreciates them over 25 years.¹⁰⁸³

The potential of slots as intangible possessions has also materialized in the UK, where airlines identify the economic value of slots on their balance sheets over which they can raise finance. In 2007, for example, BMI valued its London Heathrow slot portfolio on its balance sheet at £770 million pounds, which equates to £9,9 million per daily slot pair.¹⁰⁸⁴ Moreover, British Airways, easyJet and Lufthansa have listed slots on their balance sheets as intangible possessions, even though Lufthansa is registered in Germany and Germany has not permitted a secondary market in slots. Other airlines, including Air France-KLM, have also listed intangible possessions on their balance sheets, though they do not specify if slots are amongst these. These carriers do not list their total slot holdings, but instead only include the value of slots acquired as part of acquisitions of other carriers.¹⁰⁸⁵ Air Canada stated in its Annual Report of 2011 that the value of its international route rights and slots amounted to 97 million Canadian dollars as of 1 January 2019.¹⁰⁸⁶

One could argue that, if airlines are able, and entitled to add historic slots to their balance sheets in a State where a secondary market in slots exists, they may be able to raise finance against the historic slots they hold. After all, the value of the historic slots on the balance sheets may influence the credit ratings achieved by ratings agencies and banks, which will affect airline finances.¹⁰⁸⁷ Such practices could lead to financiers with deep pockets pressurizing airlines to legally challenge the coordinator for, in their opinion, unfavorable coordination decisions affecting slots over which said financiers have taken security. The pressure imposed on the coordinator’s resources and potentially unexpected legal outcomes could destabilize the entire slot coordination system.¹⁰⁸⁸

5.3.4 Concluding remarks

The financial default of airlines raised a number of delicate issues linked to the debate on slot title, including whether it is legally possible to prevent the so-called ‘freezing’ of slots held by these carriers until the financial difficulties have been overcome, meanwhile blocking the efficient use of declared capacity. The current slot rules do not provide much guidance on this

¹⁰⁷⁹ See Boyfield, *supra* note 46, at 39.

¹⁰⁸⁰ See Egeland and Smale, *supra* note 276, at 23.

¹⁰⁸¹ See NERA Economic Consulting, *supra* note 5, at 255.

¹⁰⁸² See Mendes de Leon, *supra* note 48, at 571.

¹⁰⁸³ See United States Securities and Exchange Commission, Form 10-K: American Airlines Group Inc., available at <https://www.sec.gov/Archives/edgar/data/4515/000119312516474605/d78287d10k.htm> (last visited: November 12, 2021).

¹⁰⁸⁴ See Mott MacDonald(II), *supra* note 113, at 120.

¹⁰⁸⁵ See Steer Davies Gleave, *supra* note 69, at 278.

¹⁰⁸⁶ See Air Canada, *2020 Annual Report* (2021).

¹⁰⁸⁷ See Egeland and Smale, *supra* note 276, at 26; Mott MacDonald, *supra* note 63, at 10-15.

¹⁰⁸⁸ See ACL, *supra* note 118, at 21.

matter, and bankruptcy laws and policies vary from State to State, also in the EU. Leaving slot coordination to the whims of national bankruptcy regimes for extensive periods of time, and often outside of the view of the coordinator, seems ill-considered at the least, given that the WASG presume an open, fair and transparent allocation of scarce capacity by an independent slot coordinator for the benefit of all parties involved.¹⁰⁸⁹ Moreover, it may erode the coordinator's independent function in the performance of their exclusively assigned duties as capacity allocator as per Article 4(5) of the Slot Regulation.

It appears that the absence of specific rules addressing the legal position of slots in bankruptcy proceedings, including any next steps including timeframes may be reflective of the period in which the WASG and the Slot Regulation were developed. The drafters of the WASG and the Slot Regulation may not have approached the issue of financial restructuring as one of much concern at the time, as demand for air transport was characterized by growth and available airport capacity was plentiful. The drafters appear to have been more focused on promoting the development of scheduling consistency and networks rather than competitiveness or on the situation of airlines affected by financial default. Both instruments apparently did not presume that slot capacity scarcity was here to stay. Alternatively, the drafters of the WASG and the Slot Regulation may have left the delicate question as to the legal position of slots in bankruptcy proceedings consciously to national laws, which are not harmonized.

5.4 The role of the financially and functionally independent slot coordinator and its discretionary powers

5.4.1 The coordinator's main tasks

In States where the WASG guidelines apply, whether directly as guidelines or because the WASG guidelines are implemented in regional or national laws, the exclusive responsibility for the allocation of slots at Level 3 airports is vested with the slot coordinator, who ensures slot allocation takes place through a system of fair, non-discriminatory and transparent rules so as to ensure optimal utilization of airport capacity.¹⁰⁹⁰

As elaborated upon in Chapter 2, section 2.2.3, the coordinator allocates the slots for the Winter and Summer season as closely as possible to the requested slot time, subject to the limits of the capacity declaration and in line with the basic notions and principles of the coordination process set forth in the relevant laws and guidelines for slot coordination. One of the main tasks of the coordinator is to find the most efficient allocation solutions that comply as closely as possible with slot requests submitted by airlines.¹⁰⁹¹ In doing so, the coordinator is assisted by a coordination committee comprised of, among others, the airport managing body and the airlines operating to and from the airport.¹⁰⁹²

In States where the WASG guidelines do not apply and the coordinator is not given independent functions, the coordinator may be a body of the government or the airport.¹⁰⁹³ The analysis in

¹⁰⁸⁹ ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 1.2.1(c).

¹⁰⁹⁰ *Id.*, at 1.2.1(c).

¹⁰⁹¹ See Odoni, *supra* note 61, at 31.

¹⁰⁹² ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 5.6.1. The principal tasks of coordination committees are set out in paragraph 5.6.2, including but not limited to providing advice on the possibilities of adjusting the capacity of the airport and consult on coordination parameters.

¹⁰⁹³ In China, slot allocation falls within the control of the central government by means of the Civil Aviation Administration of China [hereinafter: CAAC], see Chapter 4, section 4.6.3.1. In the US, the FAA fulfills the role of slot coordinator or facilitator at US airports subject to Level 3 slot controls or Level 2 facilitation. See Federal Aviation Administration (FAA), *Slot Administration – Slot Allocation Process*, available at

this section limits itself to the principles of the WASG and their application in the Slot Regulation in particular.

5.4.2 *De facto financial and functional independence of the coordinator*

With slot scarcity levels and therefore the risk of judicial reviews rising as discussed in Chapter 2, section 2.2.4, especially in the EU, coordinators play an increasingly important role in the correct application of the slot allocation rules. Thus, it is imperative that coordinators fulfill their tasks in an effective, neutral and independent way. To ensure that the independent functioning of the coordinator is beyond any doubt, the WASG require that the slot coordinator manages the process independent from government, airlines and airport operators.¹⁰⁹⁴ It should, however, also be ensured that the entity responsible for slot allocation at a coordinated airport is not only *de iure*, but also *de facto* independent.¹⁰⁹⁵

According to the Commission, *de facto* independence requires the coordinator to have a legal status which enables it to carry out its allocation activities under complete freedom and autonomy, without being pressurized or having to take instructions from the government or the airport managing body.¹⁰⁹⁶ In a case between the Commission and the Portuguese Republic of 2016, the CJEU held that the mere risk of not being able to perform its duties with complete freedom is enough to hinder the independent performance of the coordinator's activities.¹⁰⁹⁷

Besides the functional independence of the coordinator, the Commission also considers that the financing of the coordinator's activities should be set up in such a way that the coordinator is financially autonomous from any interested party.¹⁰⁹⁸ The introduction and subsequent withdrawal of a national law¹⁰⁹⁹ in Italy in 2007 that sought to give the regional government the right to participate in slot allocation decisions at airports in Lombardy to ensure regional development aims were met illustrates the exclusive responsibility of the coordinator in relation to the allocation of slots. The law was challenged and overturned by the Italian Constitutional Court in 2009 on the basis that the region was not competent to introduce such a law.¹¹⁰⁰

Another case that illustrates the neutrality and independence of the slot coordinator is the *Laker*-case.¹¹⁰¹ In 1997, Laker had sued British Airways under federal and state antitrust laws in the Florida courts, alleging that British Airways conspired with ACL, a private English corporation appointed by the UK government to coordinate requests for landing and take-off slots at UK airports, to prevent Laker from being allocated desirable slots at London's Gatwick Airport for a London-Miami service. Laker argued that it was denied access to slots at Gatwick at commercially viable times, leading to the failure of Laker's new services between Gatwick and Florida. The Court upheld the trial court's dismissal of these claims for failure to join ACL, an indispensable party. ACL was considered indispensable because resolution of Laker's claims

https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/perf_analysis/slot_administration/slot_allocation_process (last visited January 7, 2021).

¹⁰⁹⁴ In the EU, the coordinator is *de iure* independent pursuant to recitals 6 and 7 of the Preamble and Article 4b(2) and 4(5) of the Slot Regulation.

¹⁰⁹⁵ See European Commission, *supra* note 54, paragraph 9.

¹⁰⁹⁶ See European Commission, *supra* note 165, at 3.

¹⁰⁹⁷ Case C-205/14 (European Commission v. Portuguese Republic, *supra* note 647, paragraph 18.

¹⁰⁹⁸ *Id.*, paragraph 25.

¹⁰⁹⁹ LOMBARDIA, L.R. n. 29/2007, Norme in materia di trasporto aereo, coordinamento aeroportuale e concessioni di gestione aeroportuali (*in Italian*).

¹¹⁰⁰ Corte Costituzionale, *supra* note 648

¹¹⁰¹ *Laker Airways Inc v. British Airways PLC*, *supra* note 501.

would “inevitably comment upon the neutrality and independence” of the slot allocation process as required under EU law, thereby implicating ACL and prejudicing its interests.¹¹⁰²

5.4.3 *The discretion of the coordinator in allocation decisions*

The coordinator has a certain degree of discretion when it comes to allocation decisions.¹¹⁰³ A degree of coordinator discretion and flexibility is deemed to support the fundamental requirement of coordinator independence, which in turn underpins air transport liberalization. ACL has stated that rules that are overly prescriptive or that essentially come down to plain government instructions could potentially erode the independence of the coordinator and the industry’s trust in fair allocation if no reservations on coordinator discretion are made.¹¹⁰⁴ Chapter 4, section 4.3.3.2 provides examples of local procedures introduced by coordinators.

A recurrent complaint from airlines, airports and governments relating to the coordinator’s discretion is that the rationale for allocation decisions is not always transparent for airline and airport stakeholders,¹¹⁰⁵ which especially poses a problem at airports where there is excessive overdemand and no alternative offers can be made, the so-called ‘super-congested’ airports. It may be unclear for stakeholders what additional criteria were used, what information the coordinator’s decision was based on, and how the relevant criteria were applied and weighted.¹¹⁰⁶ According to the UK Competition & Markets Authority, it is often unclear what reasoning UK-based coordinator ACL uses for their decisions on in the allocation of slots from the slot pool, as publicly available information is limited.¹¹⁰⁷

Arguably, it is a matter of public interest that there is publicly available information about the identity of airlines that are the recipients of slots, and what they are going to use them for. After all, the allocation of slots involves the transfer of valuable elements for use by private enterprises, that is airlines. By publicly providing the rationale and methods for the use and application of additional criteria at the Dutch airports of Amsterdam Airport Schiphol, Rotterdam The Hague Airport and Eindhoven Airport by way of a ‘Policy Rule’, the Dutch coordinator ACNL seems to have alleviated any transparency concerns, although the initiative was stalled by the court in November 2021.¹¹⁰⁸

Another criticism of the coordinator’s discretion posed by airlines and airport stakeholders is that they are not adequately consulted with regard to the implications of allocation decisions, whereas these implications could have been better resolved had coordinators been made aware of additional available information. A complaint typically expressed by airports is that they receive information about slot requests only when slots have already been allocated, thereby foregoing the opportunity for airports to advise the coordinator about additional points or data that should be considered with regard to capacity utilization.¹¹⁰⁹

¹¹⁰² *Id.* at Conclusion.

¹¹⁰³ As we have seen in Chapter 4, sections 4.3.2 and 4.3.3.2 of this dissertation, the adoption of local procedures may assist the coordinator with decisions on competing slot requests belonging to the same priority class.

¹¹⁰⁴ See ACL, *supra* note 118, at 3.

¹¹⁰⁵ See Odoni, *supra* note 61, at 134.

¹¹⁰⁶ *Id.*, at 134.

¹¹⁰⁷ See UK Competition and Markets Authority, *supra* note 448, at 31.

¹¹⁰⁸ See ACNL, *supra* note 726; Airport Coordination Netherlands (ACNL), Additional Allocation Criteria – Destination Lists, available at <https://slotcoordination.nl/slot-allocation/additional-allocation-criteria/?preview=true%20> (last visited: August 14, 2021).

¹¹⁰⁹ See Odoni, *supra* note 61, at 134.

Regarding additional allocation criteria, paragraph 5.4.3 appears to foresee in the needs of airports to provide advice to the coordinator on allocation decisions where competing requests are concerned. Paragraph 5.4.3 reads as follows:

“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 . . .”

ACL, and other coordinators as well, recognize that transparency is important.¹¹¹⁰ However, greater transparency may also place an additional burden on the coordinator through an increased risk of judicial review.¹¹¹¹ Going forward, allocation decisions may increasingly become the subject of judicial review. With scarcity levels rising, airlines are becoming more open to challenge allocation decisions in court, for example if they do not receive the slots they feel entitled to and the allocations were made based on the discretion of the coordinator.¹¹¹²

ACL regards government guidance as a potential useful mechanism to reduce the risk of judicial review, though this would not exhaustively mitigate the risk of challenge.¹¹¹³ ACL’s viewpoint connects with Article 11(2) of the Slot Regulation, stating that

“Member States shall take appropriate measures, in accordance with national law, to protect coordinators with regard to claims for damages relating to their functions under this Regulation, save in cases of gross negligence or willful misconduct.”¹¹¹⁴

5.4.4 Concluding remarks

The exclusive responsibility for the allocation of slots at Level 3 airports is vested with the slot coordinator, who must ensure that slot allocation takes place through a system of fair, non-discriminatory and transparent rules so as to ensure optimal utilization of airport capacity according to both the WASG and the Slot Regulation.¹¹¹⁵ A vital degree of flexibility and discretion is therefore imperative when it comes to the interpretation and application of the slot regime and will enable the coordinator to respond to ever-changing market realities, specifically as local situations differ and may therefore require different solutions as discussed in Chapter 2, sections 2.3. and 2.4.

Given the role of the government with respect to the designation of airports as Level 1, 2 or 3 as discussed in Chapter 2, section 2.2.1 and in defining the functions of an airport, for example through the use and applications of Traffic Distribution Rules as discussed in sections 4.4.2 and 4.4.3, the coordinator should, however, also *take into account*, though should not be forced to apply, relevant public interest objectives as defined by government authorities, as well as local guidelines proposed by the coordination committee as discussed in Chapter 4, section 4.3.2. Except for rules established by law which are without prejudice to the principles of transparency, neutrality and non-discrimination as to nationality or identity, any form of industry or government guidance should not be binding upon the coordinator to preserve its independent function.

¹¹¹⁰ See ACL, *supra* note 118, at 10.

¹¹¹¹ See UK Competition and Markets Authority, *supra* note 448, at 31.

¹¹¹² See ACL, *supra* note 118, at 31.

¹¹¹³ *Id.*, at 31.

¹¹¹⁴ EU Regulation 95/93, as amended, *supra* note 47, Article 11(2).

¹¹¹⁵ ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 1.2.1(c). At Level 2 airports, slots are allocated under the guidance of a facilitator, see paragraph 1.7.1 of the WASG.

Chapter 6 of this dissertation provides suggestions on how a balance between the functions of the coordinator, government authorities and the industry can be achieved, without compromising the independency of the coordinator and while addressing transparency concerns expressed by industry stakeholders and governments in the meantime.

5.5 The New Entrant rule: fit for purpose?

5.5.1 The background of the new entrant rule

To alleviate the increasing concerns of the Commission that the grant of grandfather rights was anti-competitive, since it may deny new entrants opportunities to enter the market, a provision to set aside a portion of slots for new entrants to stimulate competitive entry was introduced in what is currently the WASG.¹¹¹⁶ The new entrant rule may be seen as an ‘asymmetric approach’ pursuant to which new entrants are given preferential treatment in slot allocation over incumbent carriers, akin to handicapping a golf player in order to make competition more even.¹¹¹⁷

As discussed in Chapter 2, section 2.2.3, the new entrant rule provides that 50% of the slot pool is set aside for priority allocation to new entrants. An airline only qualifies for new entrant priority if it holds fewer than five or seven slots at an airport on a given day.¹¹¹⁸ In the EU, airlines do not qualify as a new entrant if it holds more than 4% of the slots at an ‘airport system’ level, even if they do not hold any slots at the airport they are requesting slots for and considering that different airports may serve entirely different markets.¹¹¹⁹ At super-congested airports with limited to no slots available, it is questionable whether and to what extent the new entrant rule is capable of easing market access, a question which is addressed in the next sections.

5.5.2 Shortcomings of the new entrant rule

Although the opening up of numerous routes has been observed in recent years, many of which have been built up by low-cost carriers, this has mostly been for other reasons than a well-functioning new entrant rule. Reasons for this are multifold.

At most European airports, Steer (2011) has found that less than 50% of the slots are allocated under the new entrant rule, partly due to a lack of requests that meet the current criteria, and partly due to a total lack of slots. Available pool slots – if at all – for priority allocation to new entrants at the most congested airports are more likely to be off-peak, limiting the benefits of the existing network of connections at an airport. Hence, despite the *raison d’être* of the current system – namely to promote effective competition and use capacity efficiently – new entrants usually begin their operations on less favorable conditions.¹¹²⁰ At super-congested airports where there is an active secondary market, airlines are likely to seek to monetize slots through the secondary market, which is subject to discussion in section 5.6 below, instead of returning them to the pool. At these airports, the potential impact of the new entrant rule on market access is limited as the number of available slots is low.

¹¹¹⁶ See Chapter 4, section 4.1.2 of this dissertation.

¹¹¹⁷ See Jaap de Wit, *Unlevel playing field? Ah yes, you mean protectionism*, 41 *Journal of Air Transport Management* (2014), at 23; Lumbroso, *supra* note 328, at 26-28.

¹¹¹⁸ The WASG has always defined new entrants as airlines holding fewer than 5 slots at a specific airport on a specific day. However, the first edition of the WASG shows that the definition of ‘new entrant’ has been modified to airlines holding fewer than 7 slots at a specific airport on a specific day, thus allowing for 3 rotations per day in its list of Terms and Abbreviations. The Slot Regulation still follows the ‘old’ definition referring to fewer than 5 slots in Article 2(b) under (i) of the Slot Regulation.

¹¹¹⁹ EU Regulation 95/93, as amended, *supra* note 47, Article 2(b).

¹¹²⁰ See Kociubinski, *supra* note 3, at 36.

Conversely, where slots are readily available through the pool, the application of the new entrant rule is more or less irrelevant, because at these airports, airlines tend not to claim new entrant status even when they would be entitled to do so. It appears airlines do not want to be restricted in how they use the slots allocated to them, *exempli gratia*, the prohibition to transfer new entrant slots for two consecutive years).¹¹²¹

The majority of the airlines currently operating at an increasing number of (super-)congested airports would not satisfy the new entrant criteria, including the ones with limited slot holdings, as the maximum of 5 or 7 slots per day is easily exceeded. This shortcoming has induced excessively fragmented outcomes, with a large number of small airlines holding only very limited slot holdings operating at London Heathrow.¹¹²² For example, airlines holding as much as 3% of the total slot holdings available would qualify as ‘incumbents’, despite the fact that the dominant carrier has a majority slot share, and would have to acquire slots – of which there currently are none – through the initial allocation procedure carried out by the coordinator. Due to the ‘airport system qualifier’, low-cost carriers [hereinafter: LCCs] such as easyJet or Ryanair would not qualify for new entrant slots at London Heathrow because their slot holdings at the London airport system level exceed 4% of total slot holdings, even though they have no operations at London Heathrow.¹¹²³

Another factor affecting the new entrant rule is that it is susceptible to circumvention by airlines with multiple AOC’s and airline groups, which may ‘game’ the system by using the loopholes of the new entrant rule. Since the new entrant rule applies to individual airlines, it is possible for the smaller members of an airline group to obtain new entrant status, despite other members already having significant slot holdings. After two years, the slots may then be transferred to partners. This airline behavior, though not prohibited by the WASG and the Slot Regulation, has already been labeled as a “potential form of gaming” of the slot allocation system by ACL and needs legislative clarification.¹¹²⁴

The specific characteristics of the new entrant rule have reduced the ability of incumbent carriers with limited or modest slot holdings to effectively compete with larger carriers.¹¹²⁵ Any new entrant would need to achieve a large minimum scale in order to operate economically in a given market. The fact that new entrants are limited in the number of slots they may hold to get accorded new entrant priority hinders smaller and medium-sized airlines from expanding their services. Accordingly, they are unlikely to be able to establish a viable network and a competitive critical mass of operations in order to compete with incumbent carriers in terms of destinations and frequencies served.¹¹²⁶ Instead of spiking competitive entry, DotEcon (2006)¹¹²⁷, European Commission (2007)¹¹²⁸, Menaz and Matthews (2008)¹¹²⁹, Steer Davies Gleave (2011)¹¹³⁰, Competition and Markets Authority (2019)¹¹³¹ and Van Houten and Burghouwt (2021)¹¹³² have warned that the new entrant limitation could result in fragmented

¹¹²¹ See Steer Davies Gleave, *supra* note 69, at 104.

¹¹²² See UK Competition and Markets Authority, *supra* note 448, at 29.

¹¹²³ *Id.*, at 28.

¹¹²⁴ See ACL, *supra* note 118, at 29.

¹¹²⁵ See UK Competition and Markets Authority, *supra* note 448, at 29.

¹¹²⁶ See European Commission, *supra* note 26, at 27; Odoni, *supra* note 61, at 67; DotEcon Ltd., *supra* note 64, at 73; European Commission, *supra* note 208, at 4.

¹¹²⁷ See DotEcon Ltd., *supra* note 64.

¹¹²⁸ See European Commission, *supra* note 208.

¹¹²⁹ See Menaz and Matthews, *supra* note 194.

¹¹³⁰ See Steer Davies Gleave, *supra* note 69.

¹¹³¹ See UK Competition and Markets Authority, *supra* note 448.

¹¹³² See Van Houten and Burghouwt, *supra* note 22.

slot allocation outcomes amongst many small operators to the benefit of the relative position of incumbent carriers at hub airports.

5.5.3 *Deliberations as to a broadening of the new entrant qualification*

In order to remedy schedule fragmentation and to help ease airport access, the Commission proposed in 2011 to broaden the definition of a ‘new entrant’ airline.¹¹³³ At the aggregate level, it replaces the existing limit of 5% of the total slots with a limit of 10% together with the entire parent group an airline may be part of.¹¹³⁴ This proposal remained blocked in the European Council at the time of writing, although EU Regulation 2021/250, which incorporates temporary relief measures into the Slot Regulation in response to the COVID-19 crisis, includes a revised new entrant definition resembling the Commission’s 2011 proposal.¹¹³⁵ The Commission has the power to adopt delegated acts based on EU Regulation 2021/250 until 21 February 2022.

Yet, in relation to super-congested airports, it is unlikely that these airports will have a slot pool sufficiently large to accommodate any single new entrant, let alone a new entrant seeking as many as 10% of the total number of slots. Hence, the change in new entrant designation may only be feasible for the lesser congested Level 3 airports.¹¹³⁶

The question is whether broadening the scope of the new entrant rule as is will result in a more efficient allocation. After all, it may well be the case that slots that would otherwise be allocated to new entrants could be better used for routes served by larger incumbent airlines. Competition at the route level could be improved if flights on a particular route could benefit from more connecting traffic or from raising the number of frequencies – both likely only achievable by airlines holding a more substantial slot portfolio.¹¹³⁷ Ultimately, and primarily depending on the local situation, a region may reap more benefits from services carried out by a smaller number of larger operators.¹¹³⁸ From that perspective, it may be more efficient from a socio-economic point of view to encourage the current players in the market at super-congested airports to utilize existing capacity more efficiently.¹¹³⁹

Although some successful services have been launched as a result of the new entrant rule, the new entrant rule paired with the principle of historic precedence makes it very difficult for new entrants to establish a competitive foothold and challenge the dominant position of incumbent airlines at the most congested airports where slot mobility is low. Its future scope is also limited because of the rarity of capacity increases at European airports.¹¹⁴⁰ It follows that most major Level 3 airports are dominated by a small number of incumbents with large shares of slots, while numerous other carriers have each been allocated small portions of slots.¹¹⁴¹

¹¹³³ See European Commission, *supra* note 26, at 27.

¹¹³⁴ See Odoni, *supra* note 61, at 71.

¹¹³⁵ The 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 at an airport where at most two other carriers operate. It also excludes from new entrant status carriers, which together with their parent companies, their own subsidiaries or the subsidiaries of the parent company, hold more than 10% of the total slots allocated on the day in question at a particular airport. See Council Regulation (EU) 2021/250 of 16 February 2021 amending Council Regulation (EEC) No 95/93 as regards temporary relief from the slot utilization rules at Union airports due to the COVID-19 crisis, OJ L 58.

¹¹³⁶ See Odoni, *supra* note 61, at 73.

¹¹³⁷ See UK Competition and Markets Authority, *supra* note 448, at 29.

¹¹³⁸ See UK Competition and Markets Authority, *supra* note 117, at 9.

¹¹³⁹ Bryan Matthews and Betoool Menaz, *Airport Capacity: The Problem of Slot Allocation* (2003), at 4.

¹¹⁴⁰ See Chapter 2, section 2.3 on the factors hampering airport capacity increases, particularly in Europe.

¹¹⁴¹ See Mott MacDonald(II), *supra* note 113, at 24-25.

Chapter 6 provides recommendations on the potential application of the new entrant rule at the route level, instead of at the overall airport level.

5.5.4 *Concluding remarks*

At first glance, the new entrant rule appears to make congested airports more accessible for smaller competitors. Nonetheless, this favorable scenario depends in its entirety on the effective availability of slots to accord new entrant priority to.¹¹⁴² Even where slots are available, it appears that the specific characteristics of the new entrant rule have reduced the ability of airlines with limited or modest slot holdings to effectively compete with larger airlines. Instead of spiking competitive entry, the new entrant rule may instead result in fragmented slot allocation outcomes to the benefit of the position of incumbent carriers.¹¹⁴³

Nonetheless, the specificities of the new entrant rule have not stopped the substantial overall growth of LCCs in the air transport market, which has occurred largely without assistance of the new entrant rule. Many LCCs have entered the market by other means. They have developed operations at secondary airports and have acquired slots through the secondary market, where applicable, which is subject to discussion in the next section.

5.6 Secondary slot trading and slot leasing as a means to increase slot mobility: multiple shades of grey

5.6.1 *The terminology and economic theory behind secondary slot trading*

In States where the WASG guidelines are followed and/or are implemented in national or regional laws, the process for the coordination of scarce capacity in the form of airport slots relies on purely administrative decision-making mechanisms, with little or no economic considerations playing a role in the coordination of slots. The primary allocation mechanism refers to the administrative allocation of slots, as carried out by an independent slot coordinator, to the airlines. It is based on the principle of historic precedence, followed by the remaining priority rules. On the contrary, secondary allocation mechanisms refer to the redistribution of slots between airlines, with the purpose of improving allocative efficiency through the allowance of further changes once the primary allocation of slots has been established, which should mitigate residual inefficiencies resulting from the administrative allocation process.¹¹⁴⁴

The current administrative system based on grandfather rights, especially in the context of increasingly scarce capacity at airports, is widely viewed by academics and US, UK and EU regulators to be economically inefficient, for instance through the strategic behavior of slot babysitting discussed in section 5.6.2 below.¹¹⁴⁵ With incumbent airlines being given priority to use the same slots in the next equivalent season,¹¹⁴⁶ the system does not ensure that slots are allocated to those airlines who attach the highest economic value to them in terms of the profit

¹¹⁴² See García-Arboleda, *supra* note 381, at 593.

¹¹⁴³ See European Commission, *supra* note 26, at 27; Steer Davies Gleave, *supra* note 69, at 111.

¹¹⁴⁴ The administrative mechanism which has grandfathered slots means that some slots have been held by airlines for a long period, meaning that the allocation has not evolved fully to reflect and incorporate changes to the market. It is unlikely that all incumbent slot holders are the most efficient users of those slots. See NERA Economic Consulting, *supra* note 5, at 69; European Commission, *supra* note 26, at 7; UK Competition and Markets Authority, *supra* note 448, at 17.

¹¹⁴⁵ See Chapter 2, section 2.1.4 for an overview of authors who have expressed criticism toward grandfather rights.

¹¹⁴⁶ Equivalent is understood to refer to the same season in the next year, meaning winter-winter and summer-summer.

they are able to reap from that slot and, henceforth, does not adequately reflect the scarce nature of airport slots.¹¹⁴⁷

Accordingly, *secondary slot trading* represents an alternative mechanism through which air carriers can acquire slots, next to the initial allocation process, and is therefore expected to increase slot mobility and enhance market access at congested airports, since airlines are faced with the *opportunity cost* of a slot and will increasingly engage into trade-offs with themselves whether or not they need a certain slot, and to what extent they might be better off selling the slot to airlines that would use the slot more efficiently.¹¹⁴⁸

Secondary slot trading involves historic slot transfers between airlines that include monetary compensation, and possibly also other non-monetary considerations such as agreements relating to codeshares, ground handling or marketing in respect of such transfer.¹¹⁴⁹ It lets airline face the ‘opportunity cost’ – the revenue foregone by not trading the slot – of the slots they hold.¹¹⁵⁰ Secondary slot trading is therefore distinguished from the vertical (re)allocation of slots by coordinators to airline applicants, which is a form of *primary* allocation.¹¹⁵¹ Slot trading is often documented in formal written agreements that are confidential to the parties involved.¹¹⁵²

For the purposes of the present dissertation, a *slot transfer* is taken to mean a permanent, unidirectional transfer of slots from airline A to airline B. All the rights and obligations associated with that slot, including grandfather rights, will transfer as well.

A *slot lease* refers to a temporary slot swap, where airline A and airline B bilaterally agree to reverse the swap in a future season under contracts of varying terms. In the case of leasing, the initial slot holder retains control over the slot. Upon the discontinuation of the lease, the slot will revert back to the airline to whom the slot was initially allocated.¹¹⁵³ Both transfers and leases involve a redistribution of slots after the primary allocation has been completed by the coordinator.¹¹⁵⁴

There is a sizeable body of economic theory on secondary slot trading, including but not limited to DotEcon (2001 and 2006)¹¹⁵⁵, Boyfield et al (2003)¹¹⁵⁶, Sentance (2003)¹¹⁵⁷, NERA (2004)¹¹⁵⁸, Madas and Zografos (2006)¹¹⁵⁹, Mott MacDonald (2006, 2019)¹¹⁶⁰, De Wit and Burghouwt (2008)¹¹⁶¹, Czerny et al (2008)¹¹⁶², Menaz and Matthews (2008)¹¹⁶³, Steer Davies

¹¹⁴⁷ See Menaz and Matthews, *supra* note 194, at 35.

¹¹⁴⁸ See Boyfield, *supra* note 46, at 12; NERA Economic Consulting, *supra* note 5, at 331; Colangelo, *supra* note 10, at 188; Mott MacDonald, *supra* note 63, at 10.2.1; Dempsey, *supra* note 859, at 20.

¹¹⁴⁹ See Odoni, *supra* note 61, at 85; Steer Davies Gleave, *supra* note 69, at 90; Mott MacDonald(II), *supra* note 113, at 45.

¹¹⁵⁰ See Odoni, *supra* note 61, at 86.

¹¹⁵¹ See Mott MacDonald, *supra* note 63, at 4-1.

¹¹⁵² *Id.*, at 5-34.

¹¹⁵³ See NERA Economic Consulting, *supra* note 5, at 127.

¹¹⁵⁴ See Menaz and Matthews, *supra* note 194, at 33.

¹¹⁵⁵ See DotEcon Ltd.(II), *supra* note 110; DotEcon Ltd., *supra* note 64.

¹¹⁵⁶ See Boyfield et al., *supra* note 13.

¹¹⁵⁷ See Sentance, *supra* note 158.

¹¹⁵⁸ See NERA Economic Consulting, *supra* note 5.

¹¹⁵⁹ See Madas and Zografos, *supra* note 216.

¹¹⁶⁰ See Mott MacDonald, *supra* note 63; Mott MacDonald(II), *supra* note 113.

¹¹⁶¹ See De Wit and Burghouwt, *supra* note 846.

¹¹⁶² See Czerny et al., *supra* note 878.

¹¹⁶³ See Menaz and Matthews, *supra* note 194.

Gleave (2011)¹¹⁶⁴, Zografos et al (2012)¹¹⁶⁵, Fukui (2014)¹¹⁶⁶, Kociubinski (2014)¹¹⁶⁷, Behrens and Van Spijker (2018)¹¹⁶⁸, Florence School of Regulation (2019)¹¹⁶⁹, UK Competition and Markets Authority (2019)¹¹⁷⁰, and Odoni (2020)¹¹⁷¹. Secondary trading already exists in many sectors.¹¹⁷² See Mott MacDonald (2006) and NERA (2004) for an analysis of secondary trading in other sectors, such as gas and electricity entry capacity rights, EU ETS, spectrum trading, fishing quotas and water abstraction rights.¹¹⁷³

This dissertation will focus on the legality of slot leases and slot transfers as alternative sources of slots in section 5.6.3 and provides perspectives for discussion if these alternatives should be given a place in a future slot regime in section 5.6.4. First of all, section 5.6.2 introduces the practice of slot babysitting, which may become increasingly prevalent under a mechanism of secondary slot trading. Primary market-based coordination mechanisms such as slot auctions and differential peak pricing are deemed out of scope for this dissertation.¹¹⁷⁴

5.6.2 *The practice of slot babysitting*

The use-it-or-lose-it rule, as discussed in Chapter 2, section 2.2.2, appears to encourage high levels of slot utilization, since airlines will lose slots to the pool if they do not operate the slots they hold according to the 80% threshold. However, as also indicated in Chapter 2, section 2.1.4 of this dissertation, grandfather rights have also been frequently criticized for preventing an optimal use of scarce airport capacity, especially at super-congested airports.

Instead of returning slots to the pool, the use-it-or-lose-it rule may provide an incentive for airlines to hold on to slots for future operations, a practice that is also known as ‘slot babysitting’, even if their use is not financially viable at the time.¹¹⁷⁵ Concerns as to an increased use of babysitting practices rise with the introduction of a secondary market for slots. Although airlines may have other justifiable reasons for airlines to hold onto slots, slot babysitting prevents slots from ending up with competitors, which could potentially make more efficient use of them.¹¹⁷⁶ Incumbent carriers could be inclined to retain surplus slots they hold and simply forego the opportunity cost they could have received by selling the slots. If they would have sold the slots instead, the revenue gained through the sale might have been offset by the additional competition created by the sale at a later stage.¹¹⁷⁷

Babysitting practices come in many forms. One example can be found in the employment of small aircraft on short distance routes, which enables the airline to retain the slot at a relatively low cost for more profitable use later on.¹¹⁷⁸ Airlines may also lease slots to

¹¹⁶⁴ See Steer Davies Gleave, *supra* note 69.

¹¹⁶⁵ See Zografos et al., *supra* note 664.

¹¹⁶⁶ See Fukui, *supra* note 66.

¹¹⁶⁷ See Kociubinski, *supra* note 3.

¹¹⁶⁸ See Behrens et al., *supra* note 67.

¹¹⁶⁹ See Finger et al., *supra* note 18.

¹¹⁷⁰ See UK Competition and Markets Authority, *supra* note 448.

¹¹⁷¹ See Odoni, *supra* note 61.

¹¹⁷² See Colangelo, *supra* note 10, at 31.

¹¹⁷³ See Mott MacDonald, *supra* note 63, Chapter 6.

¹¹⁷⁴ For a discussion of primary coordination mechanisms, see, for instance, Boyfield et al., *supra* note 13; DotEcon Ltd., *supra* note 64; Ribeiro et al., *supra* note 133.

¹¹⁷⁵ See Claudio Noto, *Airport slots, secondary trading, and congestion pricing at an airport with a dominant network airline*, 79 Research in Transportation Economics (2020), at 7; Steer Davies Gleave, *supra* note 69, at 88; Haylan and Butcher, *supra* note 116, at 12.

¹¹⁷⁶ See Finger et al., *supra* note 18, at 7.

¹¹⁷⁷ See NERA Economic Consulting, *supra* note 5, at 130-31; Czerny et al., *supra* note 878, at 267.

¹¹⁷⁸ See Steer Davies Gleave, *supra* note 69, at 88.

partner airlines that cannot immediately be used by the airline they were allocated to,¹¹⁷⁹ a practice introduced in section 5.6.3 below. Furthermore, in order to retain slot portfolios at the super-congested airport of London Heathrow, airlines have resorted to flying smaller planes than necessary in order to spread seat capacity across the slots they hold. London Heathrow is also familiar with the occurrence of so-called ‘ghost flights’, that is to say airlines operating empty or nearly empty flights to ensure that the airport infrastructure is booked at the appointed time.¹¹⁸⁰

Strategic behavior such as slot babysitting raises interesting questions as to whether or not airlines should be allowed to request or purchase slots with the sole intention of leasing them out to another airline or to safeguard them for future operations, thereby affecting the competitive position of its rivals.¹¹⁸¹ Section 5.6.4 provides further considerations for the implementation of secondary slot trading and slot leasing in a future slot regime.

5.6.3 *The legality and practice of secondary slot trading and slot leasing*

Although the flexibility for airlines to swap slots on a one-for-one basis is broadly accepted at Level 3 airports,¹¹⁸² *exempli gratia* for scheduling and logistic reasons, both the WASG and the Slot Regulation fail to unambiguously address the question whether or not the transfer of slots may be accompanied by financial considerations. They do not specifically allow the buying and selling of slots, nor do they explicitly prohibit it.¹¹⁸³ Secondary slot trading for remunerative purposes is, nonetheless, explicitly permitted in the UK and the US, which is subject to analysis later on in this section.¹¹⁸⁴

Henceforth, there appears to be a *lex lacunae* in many States when it comes to the regulation of secondary slot trading. The WASG allow slot transfers where they are not prohibited by the laws of the relevant State, whether or not for compensation or consideration.¹¹⁸⁵ In the EU, slot exchanges and transfers are permitted in specified circumstances listed in Article 8a(2) of the Slot Regulation, subject to the explicit confirmation from the slot coordinator.¹¹⁸⁶ Slots may also be transferred within a slot portfolio of the same airline.¹¹⁸⁷ The Slot Regulation is silent on whether slots, once allocated, may be exchanged accompanied by monetary or other considerations. Notably, the terms ‘sale’ or ‘leasing’ do not appear anywhere in the Regulation.

Though the term ‘leasing’ does not appear anywhere in the WASG nor in the Slot Regulation, slot leases do take place in practice. Slot leases may occur through one-for-one slot exchanges on the basis of paragraph 8.11 of the WASG and Article 8a(1)(c) of the Slot Regulation. They may also occur through a joint operation of a flight, which is explicitly permitted pursuant to paragraph 8.13 of the WASG and Article 10(8) of the Slot Regulation. Generally, the airlines involved sign contracts that commit them to an initial exchange at a particular time and then to reverse the exchange at a future date.¹¹⁸⁸ One of the first known examples of a slot lease dates back to 1997, when Lufthansa was using slots of its alliance

¹¹⁷⁹ See Mott MacDonald(II), *supra* note 113, at 49.

¹¹⁸⁰ See UK Competition and Markets Authority, *supra* note 448, at 7.

¹¹⁸¹ See Gillen and Morrison, *supra* note 114, at 189.

¹¹⁸² See Mott MacDonald(II), *supra* note 113, at 40.

¹¹⁸³ See European Commission, *supra* note 165, at 6.

¹¹⁸⁴ See Mott MacDonald(II), *supra* note 113, at 44. The regime for slot coordination in the US, including the use of market mechanisms, has also been analyzed in Chapter 4, section 4.5.

¹¹⁸⁵ ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 8.12.

¹¹⁸⁶ See SA.57153 – Germany – COVID-19 – Aid to Lufthansa, *supra* note 38, paragraph 224.

¹¹⁸⁷ EU Regulation 95/93, as amended, *supra* note 47, Article 8(1).

¹¹⁸⁸ See Odoni, *supra* note 61, at 97.

partner United Airlines to accommodate 3 daily roundtrips by Lufthansa between London Heathrow and Germany.¹¹⁸⁹

Slot leases between unrelated airlines may occur through the joint operations clause offered by Article 10(8) of the Slot Regulation. Article 10(8) allows a carrier to operate a flight using the slots of another carrier, if both carriers entered into, *inter alia*, a codeshare agreement with one another. For instance, Delta operates slots at Amsterdam Airport Schiphol using KLM slots, and at London Heathrow using both Air France and KLM slots. This is part of their extensive commercial agreement by way of a joint venture for transatlantic services. There is a substantial difference between a codeshare agreement and a full joint venture with sharing of revenue and costs. Hence, it should be clarified what the scope of a joint operation must be to meet this Article.¹¹⁹⁰ Generally, airlines sign contracts that commit them to an initial exchange at a particular date and time and then to reverse the exchange at a future date.¹¹⁹¹ It is not clear what conditions are attached to exchanges or leases, although lease contracts typically include provisions requiring the leasing carrier to use the slot according to the 80% threshold so as to avoid losing it to the pool.¹¹⁹²

In the US, slot leasing is explicitly permitted while it is conditional upon FAA approval. As discussed in Chapter 4, section 4.5.2, slot coordinated airports in the US are subject to Temporary Orders, of which the most recent one dates back to 18 September 2020, extending slot coordination to 29 October 2022. Given its limited validity, the Temporary Order also appears to have as its effect that slots can only be leased up for the duration of the order.¹¹⁹³ Slot leases also take place in the UK, with lease durations varying from one season or year to typically 5-year terms.¹¹⁹⁴ In 2017, slot leases and temporary transfers accounted for around 4% of slots in operation at New York John F. Kennedy International Airport and New York LaGuardia Airport, and 1% of slots at Ronald Reagan Washington National Airport.¹¹⁹⁵

In 2001, a Dutch court adopted in summary proceedings a fairly restrictive view of Article 8(4) of the Slot Regulation, stating that this provision is designed to limit transfers amongst carriers. According to the court, private exchanges of slots would undermine the objectives of the slot coordination process as prescribed in the Slot Regulation as well as the position of new entrant carriers.¹¹⁹⁶

In the UK, secondary slot trading accompanied by financial considerations was explicitly approved by the High Court in a ruling, also referred to as the *Guernsey-ruling*¹¹⁹⁷, over a slot deal between British Airways and KLM in 1999. The case centered around the precise legal meaning of the words “freely exchanged” in Article 8(4) of the Slot Regulation. The judge in place ruled that slots may be traded accompanied by financial considerations as long as it concerns exchanges, or ‘reciprocal transfers’, between air carriers, regardless of the unevenness of the exchange from an economical point of view and of whether an airline intends to use the slots, and may not entail plain slot transfers from one airline to another.¹¹⁹⁸ The respective

¹¹⁸⁹ See US General Accounting Office, *supra* note 509, at 13.

¹¹⁹⁰ See Steer Davies Gleave, *supra* note 69, at 87 and 138.

¹¹⁹¹ See Steer Davies Gleave, *supra* note 69, at 87; Mott MacDonald(II), *supra* note 113, at 48.

¹¹⁹² See Steer Davies Gleave, *supra* note 69, at 87.

¹¹⁹³ See the operating limitations for New York John F. Kennedy International Airport and New York LaGuardia Airport as delivered by the FAA, *supra* note 876; Mott MacDonald(II), *supra* note 113, at 48.

¹¹⁹⁴ See Mott MacDonald(II), *supra* note 113, at 49.

¹¹⁹⁵ *Id.*, at 105.

¹¹⁹⁶ *Dutch Bird v. Transavia Airlines*, *supra* note 652.

¹¹⁹⁷ *Regina v. Airport Co-ordination Ltd ex parte The States of Guernsey Transport Board*, *supra* note 651.

¹¹⁹⁸ See Czerny et al., *supra* note 878, at 209.

judge based his decision “on what I believe to be the clear meaning of the relevant words in the EU Regulation 95/93”.¹¹⁹⁹ Where an airport operates at or near saturation and there are insufficient slots in the pool to facilitate a one-for-one exchange, ACL issues so-called ‘dummy’ or ‘junk’ slots that are not operationally usable solely to facilitate the exchange, after which these slots must be immediately returned to the pool. In essence, this artificial exchange of slots ensures that the requirements of Article 8(4) are met.¹²⁰⁰

The findings of the High Court in the *Guernsey*-ruling are not binding for courts in other Member States, and the CJEU has not yet had an opportunity to issue a clarifying judgment.¹²⁰¹ Nearly two decades later in 2008, the Commission communicated that it did not intend to pursue infringement proceedings against Member States which allowed secondary trading in slots, so long as it takes place in a transparent manner and in accordance with all other administrative requirements for slot coordination. With that statement, the Commission seems to have adopted a tolerant attitude towards secondary slot trading, albeit the mechanism itself is still not regulated and therefore not transparent.¹²⁰² Each Member State may thus adopt its own rules and policies with regard to secondary slot trading. In its 2012 proposal for a revised Slot Regulation, the European Parliament even explicitly allowed carriers to buy, sell and lease slots at EU airports to enhance airline competition.¹²⁰³

Knowledge of trading has also been reported in EU Member States and Brazil.¹²⁰⁴ Although there is no evidence of secondary slot trading accompanied by financial considerations at airports in the EU, it is rumored amongst stakeholders that it also takes place at other airports in Europe, though it is not clear what conditions are attached to slot exchanges and if an exchange can actually be regarded as a trade.¹²⁰⁵ Steer Davies Gleave (2011) also report from meetings with stakeholders that there are indications for secondary slot trading in Europe, for example at the airports of Dusseldorf, Frankfurt and Vienna, although “some of the air carriers involved denied that there had been any payments”.¹²⁰⁶ Moreover, ‘grey trading’ through airline take-overs as discussed in section 5.3.3 above and lease contracts with financial or other considerations attached may already be going on at numerous congested airports around the world.¹²⁰⁷

From the perspective of the *raison d’être* of the current slot regime, secondary slot trading and slot leasing forego the exclusive responsibility of the slot coordinator for the allocation of slots pursuant to Article 4(5) of the Slot Regulation. The WASG do not speak of “exclusive responsibility” but provide that slot coordinators should act independently in paragraphs 1.2.1(c) and 1.7.2(i). The role of the coordinator is reduced as slots are moved directly between carriers rather than being returned to the pool and reallocated, up to the extent that a dominant airline at a congested airport could act as the ‘shadow coordinator’ who determines which airlines can and cannot engage in slot transfers and leases and under what conditions this will happen, as to which see also section 5.6.4 below.

¹¹⁹⁹ *Regina v. Airport Co-ordination Ltd ex parte The States of Guernsey Transport Board*, *supra* note 651; Czerny et al, *supra* note 878, at 209.

¹²⁰⁰ See Airport Coordination Limited (ACL) International, *Guidance on One for One Slot Exchanges* (2020).

¹²⁰¹ See Czerny et al, *supra* note 878.

¹²⁰² See Brecke, *supra* note 491, at 192.

¹²⁰³ See European Parliament, *supra* note 624; Mott MacDonald, *supra* note 63, at 4-5, and Steer Davies Gleave, *supra* note 69, at 84 on the ‘artificial’ changes of slots or ‘junk slots’.

¹²⁰⁴ See Mott MacDonald(II), *supra* note 113, at 44.

¹²⁰⁵ See Behrens et al., *supra* note 67, at 5 and 9.

¹²⁰⁶ See Steer Davies Gleave, *supra* note 69, at 84.

¹²⁰⁷ See Behrens et al., *supra* note 67, as cited in Van Houten and Burghouwt, *supra* note 22.

5.6.4 Considerations for the implementation of secondary slot trading and slot leasing in a future slot regime from an airport access perspective

At London Heathrow, secondary slot trading has developed as a significant source of slots compared with the slot pool since the *Guernsey*-ruling. Until 2008, airlines could still obtain a limited number of afternoon and evening slots at London Heathrow from the pool, and the secondary market was primarily a source of highly scarce morning slots. With the introduction of the capacity limit of 480,000 movements per year in 2008, slots began to be scarce at all times of day. From 2008 on, the secondary market became the primary source of slots for airlines wishing to start or expand services at London Heathrow.¹²⁰⁸ The successful implementation of the US-EU 'Open Skies' agreement in 2008 was only possible through slot trading, allowing Continental, Delta, Northwest and US Airways to enter the severely congested market of London Heathrow, and triggering high slot prices.¹²⁰⁹

Prior to 2008, slot values at London Heathrow were relatively steady at an average of GBP 6,5 million per daily slot pair. The average trade price in 2008 was 20 million GBP and the record price for a morning slot pair was GBP 36 million at the 2008 exchange rate.¹²¹⁰ In 2017, SAS sold two slot pairs to American Airlines for 75 million USD, preceded by a slot sale by Air France-KLM to Oman Air of equally 75 million USD in 2016.¹²¹¹ With the assistance of slot trading, London Gatwick has transformed from a secondary London hub into Europe's largest low-cost carrier airport. It has allowed easyJet to become the largest operator at London Gatwick with a 44% slot share.¹²¹²

There are also certain drawbacks to secondary slot trading which require careful consideration by regulators prior to the implementation of the practice. Concerns may arise in the field of increased concentration and the prospect of airlines strategically participating in secondary slot markets. A prime concern relates to the argument that while secondary slot trading and leasing intends to ease market entry as an alternative source of slots, it may instead reinforce the dominant position of already dominant airlines at already congested airports as net slot buyers, for instance through slot babysitting practices discussed in section 5.6.2 above.¹²¹³ After all, based on knowledge of their competitors, the dominant carrier may be inclined to retain its slots and simply forego the opportunity cost it could have received by selling the slots. The revenue gained through the sale might have been offset by the additional competition involuntarily created at a later stage by the sale.¹²¹⁴

Moreover, carriers may attract prohibitive conditions to the sale of a slot. These conditions may require the purchaser, for example, to not use the slot to compete with the selling party on a specific route ('non-compete clause') or to use the seller's ground handling facilities ('restrictive covenants' or 'tying').¹²¹⁵ Competition policy aspects related to secondary slot trading are discussed in NERA (2004), European Competition Authorities (2005)¹²¹⁶, the

¹²⁰⁸ See Mott MacDonald(II), *supra* note 113, at 106-107.

¹²⁰⁹ *Id.*, at 104.

¹²¹⁰ *Id.*, at 119.

¹²¹¹ See Youcef Berour Minarro, What Is A Landing Slot And How Much Is One Worth? (IBA.aero, 2 December 2019), available at <https://www.iba.aero/insight/what-is-a-landing-slot-and-how-much-is-one-worth-december-2019/> (last visited: November 12, 2021).

¹²¹² See Mott MacDonald(II), *supra* note 113, at 105.

¹²¹³ See Starkie, *supra* note 65; Menaz and Matthews, *supra* note 194, at 34; Boyfield et al., *supra* note 13.

¹²¹⁴ See Czerny et al., *supra* note 878, at 267, as well as section 5.6.2 above on slot babysitting.

¹²¹⁵ See OFT and CAA, *supra* note 72, at 13; European Competition Authorities, *Progress Report of the Air Traffic Working Group on Slot Trading* (2005), at 6-7

¹²¹⁶ See OFT and CAA, *supra* note 72; European Competition Authorities, *supra* note 1215.

UK Office of Fair Trading and the Civil Aviation Authority (2005)¹²¹⁷ and Gillen and Morrison (2008)¹²¹⁸.

There is also a risk that secondary trading may not promote the public interest, even though the practice may offer network benefits.¹²¹⁹ According to NERA (2004), an airline's willingness to pay for a slot may be an imperfect indicator of the socio-economic value of the service provided by that airline. In particular, the value of the service may not reflect in full the external effects caused by that service, including noise and emissions.¹²²⁰ This concern is echoed by Borenstein (2007)¹²²¹ and Van Houten and Burghouwt (2021), arguing that there can be a poor correlation between the amount of profit and the amount of social surplus.¹²²² DotEcon (2006) states that a high willingness to pay for a slot may indeed merely reflect anticipated excess profits by the airline, rather than "being the result of superior efficiency or offering a more attractive proposition to customers".¹²²³ Hence, it depends on the reason of the high willingness to pay if trading fits within the applicable policy context, for instance the promotion of the public interest.¹²²⁴ Other concerns relate to the entry of airlines with 'deep pockets'.¹²²⁵

Moreover, the UK and US experiences are not necessarily representative of the effects secondary slot trading would have at other airports. It is plausible that there are differences in the competitive effects at different airports, given variances in size of local markets and the share of origin and destination, also referred to as Origin and Destination [hereinafter: O&D], versus transfer passengers.¹²²⁶ In any case, the number of airports at which secondary trading is demonstrated is very limited. Therefore, there is currently no strong evidence proving the effectiveness of secondary trading, and certainly not evidence that would be applicable to all airports.¹²²⁷

5.6.5 Concluding remarks

Secondary slot trading offers scope for airlines planning to access airports to expand or start new services where no slots are readily available from the pool. However, in effect, secondary slot trading takes away allocation decisions from the formal coordination system, of which the independent coordinator is the central part. Allocation decisions may become based on an airlines' willingness to pay and the divesting carrier's view of how it can best protect its competitive position at an airport, rather than based on an independent assessment undertaken by the coordinator of the fairest allocation outcome to ensure the most optimal distribution of slots at the airport concerned and the best outcome for consumer choice. Instead of stimulating airport access, secondary slot trading may result in the reverse effect of increasing slot shares on the side of already dominant carriers.

All things considered, the pros and cons of secondary slot trading call for a careful and tailor-made approach. Although secondary slot trading offers an alternative means to access super-congested airports, the practice also offers scope for the reinforcement of the dominant position of already dominant airlines, which could potentially nullify the potential for smaller

¹²¹⁷ See OFT and CAA, *supra* note 72.

¹²¹⁸ See Gillen and Morrison, *supra* note 114.

¹²¹⁹ See Odoni, *supra* note 61, at 88-89; See Behrens et al., *supra* note 67, at 18; Menaz and Matthews, *supra* note 194, at 34.

¹²²⁰ See NERA Economic Consulting, *supra* note 5, at 65.

¹²²¹ See Borenstein and Rose, *supra* note 465.

¹²²² See Boyfield et al., *supra* note 13, at 57.

¹²²³ See DotEcon Ltd., *supra* note 64, at 19.

¹²²⁴ See Behrens et al., *supra* note 67, at 15.

¹²²⁵ See Finger et al., *supra* note 18, at 4.

¹²²⁶ See Behrens et al., *supra* note 67, at 10.

¹²²⁷ See Behrens et al., *supra* note 67, at 5.

or medium-sized carriers to expand or start new services and gain competitive foothold at super-congested airports. Hence, Chapter 6 recommends that the implementation of secondary slot trading, if at all, should be paired with clear rules and conditions to avoid adverse impacts on capacity utilization, the public interest and, especially relevant to this dissertation: airport access.

Another way to access a super-congested airport in the EU is through the use of ‘remedy slots’ made available based on concerns in the field of competition law, as to which see section 5.7.2 below. Section 5.7.1 reflects on the relationship between slots and competition law in a general sense, in which the imposition of slot remedies may play a role.

5.7 The relationship between slot allocation and competition law in the EU

5.7.1 Competition law provisions relevant to slot allocation

This section focuses on the use of slots as a competitive concept subject to *ex ante* regulation through national, regional and international rules and procedures on slots, and subject to *ex post* competition legislation. The fact that airlines effectively ‘compete’ for the same scarce slots at super-congested airports is not *strictu sensu* ‘competition’ within the meaning of the competition rules, as the slot pool at a specific airport does not qualify as a ‘relevant market’ for air transport services on which competition takes place. The level of competition within a relevant market for air transport services is measured in terms of geography and product or service and is the first step in any competitive assessment, as to which see section 5.7.5 below.¹²²⁸

There is, however, no market for slots at airports where secondary slot trading, as discussed in section 5.6 above, is not permitted. Slots are available for allocation from the slot pool or potentially through the alternative means of secondary slot trading or slot commitments and are attached to the capacity of one particular airport, but are not attached to any specific route, as discussed in Chapter 2, section 2.1.2.¹²²⁹ Hence, slots are flexible concepts which can be used by airlines in a wide range of downstream markets according to the airlines’ business plan, *id est* on any route of their choice.¹²³⁰ Because there is no market for slots, competition policy cannot be used to protect competition in downstream markets.¹²³¹ Yet, the slot regime can be linked to the competition rules. After all, “the main barrier to entry in the air transport sector is the lack of available slots at the large airports”, that is to say primarily at the super-congested airports.¹²³²

Where the communication of business plans between airlines, airports and coordinators is involved, the WASG provide that “[n]o party shall act in any way contrary to applicable competition or other laws”.¹²³³ The Slot Regulation refers to competition legislation in its Preamble, specifically Articles 101 and 102 TFEU and the Merger Regulation.¹²³⁴ Section 5.7.2 discusses the extent to which Articles 101 and 102 TFEU may be applied to slot allocation, followed by an overview of slot commitments imposed under the Merger Regulation in section 5.7.3.

¹²²⁸ For more explanations on the product and geographic market, see European Commission, *Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law*, OJ C 372.

¹²²⁹ See Case M.8633 – Lufthansa/certain Air Berlin assets, *supra* note 980, paragraph 48.

¹²³⁰ See SA.57153 – Germany – COVID-19 – Aid to Lufthansa, *supra* note 38, paragraph 170.

¹²³¹ See Gillen and Morrison, *supra* note 114, at 179.

¹²³² Case T-177/04 *easyJet v. Commission* [2006] EU:T:2006:187, paragraph 166.

¹²³³ ACI, IATA and WWACG, *Worldwide Airport Slot Guidelines (WASG) Edition 1* (2020), *supra* note 8, at 10.6.3.

¹²³⁴ EU Regulation 95/93, as amended, *supra* note 47, recital 17.

5.7.2 The applicability of Articles 101 and 102 TFEU to the allocation of slots

The application of Articles 101 and 102 TFEU is intended to correct and, where found necessary, penalize infringements of the competition rules *ex post*. However, the ability of the TFEU to address all the potential competitive issues in relation to airport slots is limited.¹²³⁵

Article 101 TFEU prohibits:

“all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market . . .”¹²³⁶

The application of Article 101 TFEU to the allocation of slots could become relevant where secondary trading in slots is allowed, a concept which has been considered in section 5.6 above. However, it would presumably still be very difficult to apply Article 101 TFEU as slot transactions with only one or a small number of slots is unlikely to have an “appreciable effect” on competition.¹²³⁷

It may be more likely that competition concerns arise due to a growing slot share of an already dominant airline than through any single transaction.¹²³⁸ For instance, if an airline with a dominant position in the supply of slots leased slots to another airline but then refused to renew the lease in order to prevent the airline competing with its own service on a specific route, the refusal could amount to an abuse in breach of Article 102 TFEU,¹²³⁹ which reads:

“Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States . . .”¹²⁴⁰

The Commission considers a dominant position as being in a position “to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”.¹²⁴¹ This corresponds to the definition given by the CJEU in *Hoffmann-La Roche* and subsequent judgments. A dominant position usually arises when a firm or group of firms account for a large share of the supply in any given market, provided that there are other factors such as entry barriers which point in the same direction.¹²⁴²

Because the definition of a slot currently does not constrain the route operated, there is no direct link between secondary slot trading and market concentration at the route level.¹²⁴³ Yet, assuming an airline holds most of the slots at a particular airport, it could be alleged that its refusal to sell or lease slots to competitors amounts to an abuse of a dominant position.¹²⁴⁴ The UK Office of Fair Trading and the Civil Aviation Authority (2005) provide suggestions for the application of competition law under a regime of secondary trading. An assessment of airlines holding large slot portfolios at (super-)congested airports from the perspective of Article 102 TFEU is provided in section 5.7.3.

¹²³⁵ See OFT and CAA, *supra* note 72, at 17-18.

¹²³⁶ TFEU, *supra* note 589, Article 101.

¹²³⁷ See OFT and CAA, *supra* note 72, at 4 and 49.

¹²³⁸ *Id.*, at 47.

¹²³⁹ *Id.*, at 52.

¹²⁴⁰ TFEU, *supra* note 589, Article 102.

¹²⁴¹ Case C-85/76, *Hoffmann-La Roche v. Commission* [1979] ECLI:EU:C:1979:36, paragraph 38; Case C-27/76, *United Brands v. Commission* [1978] ECLI:EU:C:1978:22, paragraph 65.

¹²⁴² See European Commission, *supra* note 1228, paragraph 10.

¹²⁴³ See Behrens et al., *supra* note 67, at 4.

¹²⁴⁴ See OFT and CAA, *supra* note 53.

In relation to airports, the abuse of a dominant position under Article 102 TFEU may arise where the airport operator seeks to prioritize its main airline in the matter of slot coordination. The airport operator could be deemed an operator of an “essential facility”,¹²⁴⁵ and is expected to provide airport access on a fair and non-discriminatory basis. The operator of the essential facility carries the burden of proof that it has provided equal access to all users of the facility.¹²⁴⁶

As evidenced by the imposition of slot commitments discussed in section 5.7.4 below, the Commission intervenes in the process of slot allocation under the competition law regime in the context of merger control under the Merger Regulation, as well as in decisions relating to airline alliances, antitrust proceedings and State aid. For instance, the acquisition of additional slots by an airline that already controls a large slot share at a congested airport and/or on specific routes might be made subject to the approval of the Commission.¹²⁴⁷ It previously also intervened in the process of slot allocation in the context of the provision of so-called ‘block exemptions’ under EU Regulation 1617/93.¹²⁴⁸

It follows from the above clarifications that there is a relationship between the role of the general competition law regime in the EU and the special regime on slot allocation.¹²⁴⁹

5.7.3 *An assessment of large slot portfolios from the perspective of Article 102 TFEU*

An airlines’ slot portfolio at an airport, as well as the airport’s capacity constraints, provide a measure of the airlines’ ability to compete on the air transport markets to or from that airport.¹²⁵⁰ An airline’s slot portfolio or slot share is defined as “the ratio between the number of slots held by an air carrier (or the air carriers that are part of the same group) at an airport and the total available slots at that airport (i.e., the airport capacity)”.¹²⁵¹

Holding a large slot portfolio at an individual airport could potentially qualify as holding a dominant position, although there is no case law on this issue so far.¹²⁵² The mere holding of slots by airlines, nonetheless, even if it concerns a large slot portfolio, does not in itself constitute an *abuse* of a dominant position.¹²⁵³ A dominant position as such is not forbidden under competition law, only its abuse is. One may only speak of abuse when a company’s activities distort competition in the market.¹²⁵⁴

Before the abuse of a dominant position can be ascertained, it is necessary to establish the existence of a dominant position in relation to a particular market, and not dominance in general.¹²⁵⁵ Hence, the mere holding of an extensive slot portfolio does not constitute a *prima facie* scenario which reveals that a dominant position is being exploited by an airline pursuant to Article 102 TFEU. Equally, it may reflect the exploitation of network effects with benefits for consumers.¹²⁵⁶

¹²⁴⁵ The ‘essential facilities’ doctrine is concisely addressed in section 5.7.6 below.

¹²⁴⁶ See NERA Economic Consulting, *supra* note 5, at 250; Case C-7/97 (*Bronner*), *supra* note 83.

¹²⁴⁷ See NERA Economic Consulting, *supra* note 5, at 109.

¹²⁴⁸ See Truxal, *supra* note 10, at 93; NERA Economic Consulting, *supra* note 5, at 240.

¹²⁴⁹ See NERA Economic Consulting, *supra* note 5, at 249.

¹²⁵⁰ SA.57153 – Germany – COVID-19 – Aid to Lufthansa, *supra* note 38, paragraph 178.

¹²⁵¹ See Case M.8633 – Lufthansa/certain Air Berlin assets, *supra* note 980, paragraph 87.

¹²⁵² See Milligan, *supra* note 14, at 97; OFT and CAA, *supra* note 72, at 15.

¹²⁵³ See Colangelo, *supra* note 10, at 49.

¹²⁵⁴ See Czerny et al., *supra* note 878, at 267; Case C-85/76 (*Hoffmann-La Roche v. Commission*, *supra* note 1241, paragraph 91).

¹²⁵⁵ Case T-61/99, *Adriatica di Navigazione SpA v. Commission* [2003] ECLI:EU:C:2003:335, paragraph 27.

¹²⁵⁶ See OFT and CAA, *supra* note 72, at 15-16.

“There is no ‘magic’ share of slots at which point a hub carrier would be considered dominant, . . .”¹²⁵⁷ In a merger case between IAG and Aer Lingus, the Commission considered an increase IAG’s slot portfolio at London Heathrow from 53% to 56-57% to not give rise to competition concerns, given that the airport was already heavily congested and the impact of the increase was limited given the relatively limited incremental share.¹²⁵⁸ Based on Lufthansa’s slot share at Fraport, which amounts to 50-60% in the summer season year, of which 75-85% at peak times, the Commission thus finds that Lufthansa has “significant market power” on the market for the provision of passenger air services to and from Fraport,¹²⁵⁹ yet the Commission did not label the mere holding of a majority slot portfolio by Lufthansa as abuse.

Where the holding of large slot portfolios by airlines gives rise to competition concerns, the Commission may require slot commitments for concentrations be rendered compatible with the internal transport market pursuant to EU Regulation 1008/2008, as to which see section 5.7.4 below.

5.7.4 Slot commitments to alleviate competitive concerns in the EU

In its assessment of, *inter alia*, airline mergers and alliances under the Merger Regulation and EU Regulation 1/2003,¹²⁶⁰ the Commission may make its approval conditional upon the offering of remedial commitments, such as slot concessions, in order to lower barriers to entry and facilitate new entry or expansion of service by existing competitors, in particular at airports where entry is constrained for capacity reasons pursuant to Articles 6(2) and 8(2) of the Merger Regulation.¹²⁶¹

To be able to provide air services, airlines need access to airport infrastructure. At coordinated airports, airlines must thus hold slots to operate routes from or to those airports.¹²⁶² The Commission has previously noted that “slots are a rare resource” and that “access to such resources is of crucial importance for the provision of air transport services and for the maintenance of effective competition”.¹²⁶³ A lack of access to slots constitutes a barrier to an airlines’ ability to compete for passengers and/or cargo on routes between an airport and the destinations served from that airport, especially at the busiest airports.

Hence, holding slots can create competitive advantage. Slot commitments granting access to scarce airport infrastructure for new entrants are the most frequently required commitments in the case of, *inter alia*, airline mergers or alliances in order to render concentrations compatible with the internal transport market safeguarded by EU Regulation 1008/2008 in particular as a result of the creation or strengthening of a dominant position.¹²⁶⁴ At the core of a remedial commitment is the commitment by the entity or entities under review to make available slots.¹²⁶⁵

¹²⁵⁷ *Id.*, at 53.

¹²⁵⁸ See Case M.7541 – IAG/Aer Lingus, *supra* note 33, paragraph 440.

¹²⁵⁹ See SA.57153 – Germany – COVID-19 – Aid to Lufthansa, *supra* note 38, paragraph 190.

¹²⁶⁰ EU Regulation 1/2003, *supra* note 29.

¹²⁶¹ See European Commission, *supra* note 30, paragraph 63. See also Simon Vande Walle, *Remedies in EU Merger Control – An Essential Guide* (2021), at 58.

¹²⁶² See SA.57153 – Germany – COVID-19 – Aid to Lufthansa, *supra* note 38, paragraph 177.

¹²⁶³ See European Parliament, *supra* note 624, recital 4. These statements were repeated in, among others, Case M.8633 – Lufthansa/certain Air Berlin assets, *supra* note 980, paragraph 34.

¹²⁶⁴ See Colangelo, *supra* note 10, at 51; Milligan, *supra* note 14, at 145; European Commission, *supra* note 30, paragraphs 4 and 5.

¹²⁶⁵ See Vande Walle, *supra* note 1261, at 58.

Slot commitments are only acceptable in order to facilitate competitive market entry in circumstances where it is “sufficiently clear that there will be actual entry of new competitors that would eliminate any significant impediment to effective competition”,¹²⁶⁶ which is in line with the requirements for all access remedies.¹²⁶⁷ In other words, the number of slots divested needs to be high enough to enable new entrants to operate a sufficient number of frequencies to exercise a significant competitive constraint on incumbent airlines.¹²⁶⁸ After all, in order to effectively compete with an established airline, a competitor needs to be able to build up a sustainable slot portfolio.¹²⁶⁹

Most of the time, the divestiture of scarce slots as an individual measure may not always be sufficient to ensure competitive entry on those routes where competition problems arise. Instead, a package comprising a combination of divestiture remedies and access commitments is required.¹²⁷⁰ This dissertation limits itself to slot commitments. Besides slot commitments, examples of access commitments are commitments granting access to pay-TV platforms and access to energy via gas release programs, as well as the granting of access to pipelines, telecom and similar networks.¹²⁷¹

Slots may only be taken up by new entrant airlines that have exhausted all reasonable efforts to obtain slots through the normal workings of the slot allocation procedure.¹²⁷² In other words: the prospective slot holder must have tried to acquire slots from the slot pool pursuant to Article 10(6) of the Regulation. Any bids will be evaluated by the Commission.¹²⁷³ Even if the slots are not directly taken up by a new entrant, they may be claimed at any time in the future.¹²⁷⁴ In its assessment of the merger between Lufthansa and Swiss in 2005, the new entrant airline could be granted grandfather rights once it would have operated the slots for at least six seasons.¹²⁷⁵ Eight consecutive seasons were required in Lufthansa’s acquisition of control over Austrian Airlines in 2009.¹²⁷⁶

Examples of cases in which slots have been divested include, *inter alia*, Connect Airways/Flybe in 2019¹²⁷⁷, Lufthansa and certain Air Berlin assets in 2017¹²⁷⁸, IAG/Aer Lingus

¹²⁶⁶ See European Commission, *supra* note 30, paragraph 63; Case M.9287 – Connect Airways/Flybe, *supra* note 34, paragraph 620; Case T-177/04 (*easyJet v. Commission*), *supra* note 1232, paragraphs 197 et seq.

¹²⁶⁷ See European Commission, *supra* note 30, paragraph 63.

¹²⁶⁸ See European Competition Authorities, *Report of the ECA Air Traffic Working Group: Mergers and alliances in civil aviation* (2004), at 32.

¹²⁶⁹ See European Commission, *supra* note 26, at 7; Case M.8633 – Lufthansa/certain Air Berlin assets, *supra* note 980, paragraph 51; SA.57153 – Germany – COVID-19 – Aid to Lufthansa, *supra* note 38, paragraph 223.

¹²⁷⁰ See European Commission, *supra* note 30, paragraph 63.

¹²⁷¹ See, for instance, Case No COMP/M.2876 – Newscorp/Telepiu. Regulation (EEC) No 4064/89 Merger Procedure, Article 8(2), 2 April 2003, paragraph 225 et seq; Case No COMP/JV.37 – B Sky B/Kirch Pay TV. Regulation (EEC) No 4064/89 Merger Procedure, Article 6(1)(b) NON-OPPOSITION, 21 March 2000, as confirmed by a judgment of the Court of First Instance in Case T-158/00, *ARD v. Commission* [2003] ECLI:EU:T:2003:246; Case No COMP/M.2803 – Telia/Sonera. Regulation (EEC) No 4064/89 Merger Procedure, Article 6(2) NON-OPPOSITION, 10 July 2002; Case No COMP/M.2533 – BP/E.ON. Regulation (EEC) No 4064/89 Merger Procedure, Article 8(2), 20 December 2001; Case No COMP/M.2389 – Shell/DEA. Regulation (EEC) No 4064/89 Merger Procedure, Article 8(2), 20 December 2001.

¹²⁷² See Case M.3280 – Air France/KLM, *supra* note 31; European Commission, *supra* note 36, paragraph 28; Case AT.39595 – Continental/United/Lufthansa/Air Canada, *supra* note 37, paragraph 85.

¹²⁷³ See SA.57153 – Germany – COVID-19 – Aid to Lufthansa, *supra* note 38, paragraph 74.

¹²⁷⁴ See Milligan, *supra* note 14, at 147.

¹²⁷⁵ See Case M.3770 – Lufthansa/Swiss, *supra* note 274, paragraphs 193 and 196.

¹²⁷⁶ See Case M.5440 – Lufthansa/Austrian Airlines, *supra* note 35, paragraph 342.

¹²⁷⁷ See Case M.9287 – Connect Airways/Flybe, *supra* note 34.

¹²⁷⁸ See Case M.8633 – Lufthansa/certain Air Berlin assets, *supra* note 980.

in 2015¹²⁷⁹, Alitalia/Etihad in 2014¹²⁸⁰, US Airways/American Airlines in 2013¹²⁸¹, IAG/bmi in 2012¹²⁸², Lufthansa/Austrian Airlines in 2009¹²⁸³, Lufthansa/Eurowings in 2005¹²⁸⁴, Lufthansa/Swiss in 2005¹²⁸⁵ and Air France/KLM in 2004.¹²⁸⁶ The latter case between Air France and KLM in 2004 can be regarded as the starting point of the ‘slot commitments’ movement.¹²⁸⁷ Slot remedies have also been imposed in several antitrust cases,¹²⁸⁸ for instance in a procedure involving Air Canada, United Airlines and Lufthansa in 2013.¹²⁸⁹ Practice has shown that slot commitments have not always yielded the desired pro-competitive results. On that account, the Commission now appears to be willing to more strongly intervene with respect to the implementation of any slot commitments.¹²⁹⁰

In response to the industry’s sharp downturn following the outbreak of the coronavirus and in contrast with most earlier practices regarding, *inter alia*, mergers and alliances, the Commission approved German and French State aid measures for Lufthansa and Air France respectively in 2020 and 2021, paired with slot commitments at airport level instead of at the route level. In return for recapitalization grants, hub carriers Lufthansa and Air France committed to divest 18 respectively 24 daily slot pairs at the congested airports of Frankfurt, Munich and Paris Orly, where these airlines have significant market power, in favor of competitive entry.¹²⁹¹ Section 5.7.4 discusses the measurement of competition in terms of slot concentration at both the airport level and the route level.

The Commission scrutinized the viability of hub-and-spoke networks in multiple decisions in its approval of, *inter alia*, mergers and alliances. The exploitation of hub-and-spoke networks may bring benefits to consumers in the form of a more comprehensive timetable and network of destinations.¹²⁹² The Commission thus finds it imperative to strike a balance between the need to 1) foster potential competition on hub-to-hub routes and 2) ensure that

¹²⁷⁹ See Case M.7541 – IAG/Aer Lingus, *supra* note 33.

¹²⁸⁰ See Case M.7333 – Alitalia/Etihad, *supra* note 32.

¹²⁸¹ See Case No COMP/M.6607 – US Airways/American Airlines. Regulation (EC) No 139/2004 Merger Procedure, Article 6(1)(b) in conjunction with Art 6(2), 5 May 2013.

¹²⁸² See Case M.6447 – IAG/BMI. Regulation (EC) No 139/2004 Merger Procedure, Decision on the implementation of remedies – Art. 6(1)(b) in conjunction with 6(2) – Assessment of viability, 30 October 2017.

¹²⁸³ See Case M.5440 – Lufthansa/Austrian Airlines, *supra* note 35.

¹²⁸⁴ See Case No. COMP/M.3940 – Lufthansa/Eurowings. Regulation (EC) No 139/2004 Merger Procedure, Article 6(2) NON-OPPOSITION, 22 December 2005.

¹²⁸⁵ See Case M.3770 – Lufthansa/Swiss, *supra* note 274.

¹²⁸⁶ See Case M.3280 – Air France/KLM, *supra* note 31.

¹²⁸⁷ See Truxal, *supra* note 10, at 34; OECD, *supra* note 530, paragraph 130.

¹²⁸⁸ See Vande Walle, *supra* note 1261, at 58.

¹²⁸⁹ See Case AT.39595 – Continental/United/Lufthansa/Air Canada, *supra* note 37.

¹²⁹⁰ See OECD, *supra* note 530, paragraph 132.

¹²⁹¹ Germany committed that Lufthansa would divest up to 24 slots per day at the airports of both Frankfurt and Munich, as to which see State Aid SA.57153 – Germany – COVID-19 – Aid to Lufthansa, *supra* note 38, paragraph 71; European Commission, State aid: Commission approves €6 billion German measure to recapitalize Lufthansa (Press release, 25 June 2020), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1179 (last visited November 10, 2021). In turn, France committed that Air France would divest up to 18 daily slots at Paris-Orly airport, as to which see State Aid SA.59913 – France – COVID-19 – Recapitalisation of Air France and the Air France-KLM Holding, *supra* note 38, paragraph 257; European Commission, State aid: Commission approves up to €4 billion French measure to recapitalize Air France (Press release, 6 April 2021), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1581 (last visited November 10, 2021). The 18 slots divested by Air France have been picked up by Vueling, see European Commission, State aid: Commission approves award of slots at Paris-Orly airport to Vueling in context of Air France’s recapitalization (Press release, 20 September 2021), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4805 (last visited November 12, 2021).

¹²⁹² See OFT and CAA, *supra* note 72, at 54.

the efficiencies derived from the hub-and-spoke network are not disrupted, thus harming consumer interests.¹²⁹³

For instance, the Commission has limited the number of slots Lufthansa had to divest in 2020 to a maximum of more than 3 departure slots and 3 arrival slots in any of the three one-hour peak periods at each of Fraport and Munich.¹²⁹⁴ At the time of writing, the specifics as to whom the slots were divested to had not been released yet. Similarly, in its 2004 Air France/KLM merger assessment, the Commission acknowledged the viability of KLM's hub-and-spoke network at Amsterdam Airport Schiphol, which meant that KLM would have to surrender a limited number of slots in specified peak hours.¹²⁹⁵ The commitments made by Air France consisted of making available up to 18 slots per day at Paris Orly airport to a competing carrier. The slots were eventually divested by Air France and made available to Vueling to start operations on new routes as of November 2021.¹²⁹⁶

To address concerns over the creation of a dominant position of Air France-KLM on identified long-haul city pairs following their merger in 2004,¹²⁹⁷ including the Amsterdam-New York route, Air France-KLM committed to make slots available on the Amsterdam-New York route. Besides brief operations by a British Airways subsidiary for 3 months in 2009, there had been no applicants for the remedy slots between Amsterdam and New York until 2017, presumably because there were still slots available at the airport without having to apply for time-limited remedy slots through the Commission procedure. In 2017, when the annual capacity limit of 500,000 aircraft movements was met for the first time at Amsterdam Airport Schiphol, Norwegian applied for the remedy slots on the Amsterdam-New York route. KLM and Delta Airlines subsequently released the slots to Norwegian until the expiry of the commitments in 2025.¹²⁹⁸ The fact that the slots were only taken up in 2017 shows that when capacity constraints start to bite, that is to say when all slots are taken up by historic slots, airlines are exploring alternatives to access the market, particularly when attractive slot times are involved.¹²⁹⁹

5.7.5 Competitive assessments of slot concentration at airport level vs. route level

Slot concentration can present itself in two forms. Firstly, it is possible that route level concentration exists because of, for example, reduced competition levels on a certain route to or from an airport. Secondly, it is possible that slots remain concentrated with one or two airlines at a particular airport.¹³⁰⁰

The competition assessment of, *inter alia*, mergers and alliances in air transport markets is generally more complex than in many other economic sectors, because of the network nature of the industry. Each alliance or merger carry passengers on a multitude of different routes

¹²⁹³ See Case M.3770 – Lufthansa/Swiss, *supra* note 274, paragraph 202.

¹²⁹⁴ See SA.57153 – Germany – COVID-19 – Aid to Lufthansa, *supra* note 38, paragraph 71.

¹²⁹⁵ See Case M.3280 – Air France/KLM, *supra* note 31.

¹²⁹⁶ See European Commission, State aid: Commission approves award of slots at Paris-Orly airport to Vueling in context of Air France's recapitalisation (20 September 2021), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4805 (last visited: November 12, 2021).

¹²⁹⁷ The Commission also had concerns over Air France-KLM's slot share at identified European city pairs. As such, Air France-KLM also committed to making available a number of slots for flights between Amsterdam and Paris, Lyon, Marseille, Toulouse, Bordeaux, Milan, Rome, Venice and Bologna. Other identified long-haul city pairs concerned Paris-Detroit, Amsterdam-Atlanta, Paris-Lagos and Amsterdam-Lagos. See Case M.3280 – Air France/KLM, *supra* note 31.

¹²⁹⁸ See Case M.3280 – Air France/KLM. Regulation (EC) No 139/2004 Merger Procedure, Decision on the implementation of the commitments – Waiver of the commitments, 6 February 2019.

¹²⁹⁹ See Van Houten and Burghouwt, *supra* note 22.

¹³⁰⁰ See Behrens et al., *supra* note 67, at 3.

which are interconnected and constitute a network.¹³⁰¹ Airlines serve many different, direct and indirect, O&D markets between which competition levels vary immensely, thus making the overall competitive position of an airline difficult to determine.¹³⁰²

Traditionally, the Commission has measured the level of competition in terms of market shares and competitive effects exerted in the market for air services based on a city-pair assessment. Under the city-pair assessment, the delineation of the relevant market in air transport starts with the identification of point A as the point of origin (O) and point B as the point of destination (D), also known as ‘the O&D approach’. As such, each city-pair is considered a separate market, which was also upheld by the CJEU in the case of *Ahmed Saeed* of 1989¹³⁰³ and by several Commission notifications relating to slot commitments in airline mergers and alliances.¹³⁰⁴ Slot commitments are then imposed in relation to the routes on which competition is found to be restricted.¹³⁰⁵

Alternatively, the airport-by-airport approach may be used.¹³⁰⁶ In the *Port of Genoa*¹³⁰⁷ and *Corsica Ferries II*¹³⁰⁸ cases, the CJEU held that activities and/or services at single ports may also constitute a relevant market by itself, based on the reasoning that if an operator wishes to offer transport services on a given maritime route, access to ports situated at either end of that route is essential to the provision of that service. Particularly where no substitutes serving the same geographic area are available. By analogy, the relevant market in the air transport industry is the market in air services, for which access to airport infrastructure is required.¹³⁰⁹

¹³⁰¹ See European Competition Authorities, *supra* note 1286, at 16.

¹³⁰² See Sven Maertens, *A metric to assess the competitive position of airlines and airline groups in the intra-European air transport market*, 72 *Research in Transportation Economics* (2017), at 65; NERA Economic Consulting, *supra* note 5, at 102.

¹³⁰³ Case C-66/86 *Ahmed Saeed Flugreisen and Others v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, ECLI:EU:C:1989:140, paragraph 40.

¹³⁰⁴ A confirmation of ‘the O&D approach’ can be found in, among others, Case M.3280 – Air France/KLM, *supra* note 31; Case M.8672 – easyJet/certain Air Berlin assets, *supra* note 57 and Case T-162/10, *Niki Luftfahrt GmbH v. Commission*, 13 May 2015, ECLI:EU:T:2015:283. With respect to air cargo, ‘the O&D approach’ is deemed inappropriate, primarily since air cargo markets are “inherently unidirectional” as the demand at each end of the route may differ substantially, and so the markets must be assessed on a unidirectional basis. See Milligan, *supra* note 14, Case No. COMP/M.5403 – Lufthansa/BMI. Regulation (EC) No 139/2004 Merger Procedure, Article 6(1)(b) NON-OPPOSITION, 14 May 2009, at 19; Varsamos, *supra* note 16; Case M.3280 – Air France/KLM, *supra* note 31.

¹³⁰⁵ See Case M.8869 – Ryanair/Laudamotion. Regulation (EC) No 139/2004 Merger Procedure, Article 6(1)(b) NON-OPPOSITION, 12 July 2018, paragraphs 96-97; Case M.6447 – IAG/BMI, *supra* note 1282, paragraph 31; Case M.3280 – Air France/KLM, *supra* note 31, paragraph 9; Case M.7333 – Alitalia/Etihad, *supra* note 32, paragraph 63; Case M.7541 – IAG/Aer Lingus, *supra* note 33, paragraph 14; Case AT.39595 – Continental/United/Lufthansa/Air Canada, *supra* note 37, paragraphs 17-19; Case M.8633 – Lufthansa/certain Air Berlin assets, *supra* note 980, paragraph 41; European Competition Authorities, *supra* note 1286, at 15-16.

¹³⁰⁶ See, among others, SA.57153 – Germany – COVID-19 – Aid to Lufthansa, *supra* note 38, paragraph 165; Case M.8869 – Ryanair/Laudamotion, *supra* note 1305, paragraph 116. In the Lufthansa/certain Air Berlin assets case, the Commission only carried out an airport-by-airport assessment, since the target assets were not used on any route at the time of the transaction since Air Berlin had permanently ceased its operations on all routes due to its insolvency, see Case M.8633 – Lufthansa/certain Air Berlin assets, *supra* note 980, paragraph 58. Slot commitments at the airport level were also required by the Commission with regard to the proposed joint venture between KLM and Alitalia of 1999, where it was agreed that KLM and Alitalia would together surrender up to 16 slots per day at Amsterdam Airport Schiphol and up to 8 slots per day at Rome Fiumicino and Milan Malpensa, see Case No COMP/JV.19 – KLM/Alitalia. Regulation (EEC) No 4064/89 Merger Procedure, Article 6(1)(b) NON-OPPOSITION, 11 August 1999, paragraphs 69 and 76x.

¹³⁰⁷ Case C-179/90, *Merci convenzionali porto di Genova SpA v. Siderurgica Gabrielli SpA* [1991] ECLI:EU:C:1991:464, paragraph 5923.

¹³⁰⁸ Case C-18/93 *Corsica Ferries Italia Srl v Corpo dei Piloti del Porto di Genova* [1994] ECLI:EU:C:1994:195

¹³⁰⁹ See European Commission, Commission Decision of 26 July 2000 relating to a proceeding pursuant to Article 86(3) of the EC Treaty (AENA), OJ L 208, paragraphs 31-33; European Commission, Commission Decision of 10

In the words of the Commission, under the airport-by-airport approach, “every airport (or substitutable airports) is defined as a distinct market”, enabling the Commission to assess competitive effects at a given airport “on the basis of the slot portfolio held by a carrier at the airport, without distinguishing between the specific routes served to or from that airport”.¹³¹⁰ Although not mentioned by the Commission, the relationship between the supplier of airport infrastructure and access to that infrastructure by its airline users is, besides the commercial considerations of individual airlines, also defined by other arrangements of public law, including the regulation of slots, airport charges, ground handling, safety and environmental requirements, et cetera.¹³¹¹

According to the Commission, majority slot portfolios give airlines a “unique ability to reshuffle their slots in a way that gives them optimal timings”.¹³¹² Other advantages include “operational flexibility and efficiency through swapping slots within their own operations, as well as bargaining power and volume discounts on the services provided by airport managers and ground handling companies”.¹³¹³ The former advantages act as a substantial barrier that any new entrant or smaller competitor would be unable to bridge as they do not have similar flexibility.¹³¹⁴ At major US airports, it is common for the incumbent carrier to account for 75% or more of the slot holdings. At EU airports the proportions are generally smaller, however they often exceed 50%.¹³¹⁵

An assessment under the airport-by-airport approach includes an assessment of the substitutability of airports in view of their overlapping catchment areas from the point of view of air carriers, acting as customers of airport infrastructure services.¹³¹⁶ The Commission appears to define an airport’s catchment area as a radius of 100 km, but any assessment must be evidenced on a case-by-case basis.¹³¹⁷

The Commission may use one or both approaches, depending on the facts before it.¹³¹⁸ The airport-by-airport approach is becoming more prevalent in airline merger, alliance, antitrust and State aid cases, as illustrated by the Commission’s *modus operandi* in regard to *Lufthansa/Air Berlin*¹³¹⁹ and recent State aid cases following the outbreak of COVID-19.¹³²⁰ The origins of the airport-by-airport approach can be traced back to the acquisition by British Airways of British Caledonian in the late 1980’s, when the Commission, *inter alia*, imposed a

February 1999 relating to a proceeding pursuant to Article 90 of the Treaty (Case No IV/35.703 - *Portuguese airports*), OJ L 69, paragraph 14.

¹³¹⁰ See SA.57153 – Germany – COVID-19 – Aid to Lufthansa, *supra* note 38, paragraph 168.

¹³¹¹ *Ex ante* regulation has the aim to, at least in part, correct market failures and to move closer to outcomes in terms of price levels, service quality, investments, reliability and choice, similar to what one would expect in an effectively competitive market. See European Commission, *supra* note 236, at 6.

¹³¹² See, among others, Case AT.39595 – Continental/United/Lufthansa/Air Canada, *supra* note 37, paragraph 48, in which the alliance parties held approximately 57% of the slots at Fraport and 78% of New York Newark slots.

¹³¹³ See Case M.8633 – Lufthansa/certain Air Berlin assets, *supra* note 980, paragraph 286.

¹³¹⁴ See Case AT.39595 – Continental/United/Lufthansa/Air Canada, *supra* note 37, paragraph 49.

¹³¹⁵ See Starkie, *supra* note 65, at 193.

¹³¹⁶ See Case M.8633 – Lufthansa/certain Air Berlin assets, *supra* note 980, paragraph 59-60; SA.57153 – Germany – COVID-19 – Aid to Lufthansa, *supra* note 38, paragraph 175.

¹³¹⁷ See Varsamos, *supra* note 16, at 93. In the case of Brussels Airport and other cases surrounding airports, the relevant market was defined as the market in services linked to access to airport infrastructure, such as the exploitation of runways, taxiways, aprons and approach guidance. If there is no genuine alternative for the services provided, which was the case with Brussels Airport, this was the relevant market. See European Commission, Commission Decision of 28 June 1995 relating to a proceeding pursuant to Article 90(3) of the Treaty, OJ L 216.

¹³¹⁸ See Watson Farley & Williams, EU Merger Control and Airlines: The Evolving Approach to Market Definition (8 January 2020), available at <https://www.wfw.com/articles/eu-merger-control-and-airlines-the-evolving-approach-to-market-definition/> (last visited: August 15th, 2021).

¹³¹⁹ See Case M.8633 – Lufthansa/certain Air Berlin assets, *supra* note 980.

¹³²⁰ See Watson Farley & Williams, *supra* note 1318.

ceiling on British Airways' slot portfolio at London Gatwick of 25% of total scheduled and non-scheduled slots for four years.¹³²¹

In *Lufthansa/Air Berlin*, the Commission opined that the city-pair approach would not fully address the effects of the transaction as it would “fail to capture the structural effects on competition”.¹³²² Since the State aid granted to Lufthansa in 2020 supports the operations of Lufthansa across the board, it may potentially affect competition on all routes originating and arriving at an airport at which Lufthansa holds slots, regardless of the specific competitive position of Lufthansa on any of those routes. Henceforth, the impact of the State aid measures cannot be analyzed on each of those separate routes. Instead, the airports at which Lufthansa offers air services are defined as relevant markets.¹³²³

Using either one approach, majority slot shares can be accepted given their network benefits and provided that there are no barriers to entry and that the remaining actual and potential competition is sufficient to constrain the competitive behavior of the parties involved.¹³²⁴ In a 2012 decision involving KLM and NorthWest, the Commission accepted a combined market share of up to 90% on direct overlap routes.¹³²⁵ Indeed, as Starkie (2008)¹³²⁶ shows, higher slot shares held by large incumbent carriers may well be welfare enhancing. A slot may be more valuable to an airline with a large network, and large networks offer advantages for passenger in terms of increased connectivity, frequencies and quality of service.¹³²⁷

5.7.6 Slots in the context of the ‘essential facilities’ doctrine

By virtue of the Slot Regulation, slots are essential for airlines’ operations. Only airlines holding slots are entitled to get access to the airport infrastructure services and, consequently, to operate routes to or from those airports.¹³²⁸

In 1998, the CJEU used the term “essential facilities” explicitly for the first time in its *Bronner* -decision.¹³²⁹ The term “essential facility” was used in *sealink/B&I*,¹³³⁰ where it was held that a seaport was an essential facility. By analogy, airports could be deemed essential facilities, as briefly touched upon in section 5.7.2 above and more extensively discussed in NERA (2004) and the Organisation for Economic Co-operation and Development (2011).¹³³¹

Nonetheless, slots have never been pinpointed by EU case law as essential facilities, implying that airlines as slot holders have a duty to share them with competitors.¹³³² Further analysis as to whether slots can be deemed essential facilities is deemed out of scope of this dissertation.

¹³²¹ *Id.*

¹³²² See Case M.8633 – Lufthansa/certain Air Berlin assets, *supra* note 980, paragraph 44.

¹³²³ See SA.57153 – Germany – COVID-19 – Aid to Lufthansa, *supra* note 38, paragraph 171.

¹³²⁴ See Milligan, *supra* note 14, at 144.

¹³²⁵ See European Commission, Commission Notice concerning the Alliance between KLM Royal Dutch Airlines and Northwest Airlines, Inc. (Case COMP/D-2/36.111, 30 October 2002), OJ C 264 (2002); European Competition Authorities, *supra* note 1286, at 21.

¹³²⁶ See Starkie, *supra* note 65.

¹³²⁷ See Gillen and Morrison, *supra* note 114, at 189; Starkie, *supra* note 191, at 61-62. Starkie, *supra* note 254. .

¹³²⁸ See UK Competition and Markets Authority, *supra* note 448, at 9; Case M.8633 – Lufthansa/certain Air Berlin assets, *supra* note 980, paragraphs 32 and 54.

¹³²⁹ Case C-7/97 (*Bronner*), *supra* note 83.

¹³³⁰ See, *inter alia*, European Commission, Commission Decision of 11 June 1992 relating to a proceeding under Article 86 of the EEC Treaty (IV/34.174 - *Sealink/B&I - Holyhead*: Interim measures), OJ L 378.

¹³³¹ See OECD, *supra* note 530.

¹³³² See Colangelo, *supra* note 10, at 49.

5.7.7 Concluding remarks

The lack of slots at (super-)congested airports constitutes the main barrier to entry in the air transport industry.¹³³³ The current slot rules strived to have *ex ante* effect in deterring growing slot shares of already dominant carriers for example through the introduction of the new entrant rule, as discussed in section 5.5 above.¹³³⁴ The above clarifications in this section demonstrate that there is also a relationship between the role of the general competition law regime in the EU, specifically Articles 101 and 102 TFEU and the Merger Regulation, and the special regime on slot allocation.¹³³⁵

It is questionable whether Articles 101 and 102 TFEU apply to the conduct of airlines in relation to slots, particularly since there is not yet a market for slots at airports where secondary slot trading is not permitted. The mere holding of a large slot portfolio by airlines does not in itself confer a position of dominance, which is also abused, upon an airline under Article 102 TFEU. After all, a concentrated market is not necessarily the same as a market with low competition levels, and it does not per se lead to the abuse of market power.¹³³⁶

Nonetheless, the Commission may make its approval of, *inter alia*, airline mergers and alliances subject to the divestiture of slots where slots remain concentrated with an incumbent carrier at the route or airport level. Since slots can ensure competitive advantage, the rationale behind slot commitments under the Merger Regulation is to ease market access at congested airports. As Mendes de Leon (2013)¹³³⁷ put it, “slots are multi-faceted instruments which serve as remedies for congested airports and in competition and alliances cases.”¹³³⁸

Although slot commitments may form a relative improvement with regard to enhancing airport access for competitive entry, they may not offer structural solutions. Slot commitments have had mixed success, as the slots that were made available under the commitments have not always attracted long-term competition.¹³³⁹ This somewhat modest contribution to the objective of attracting new competitors in a defined market for the operation of air services has led the Commission’s approach to remedial commitments to evolve considerably over the years.¹³⁴⁰ For instance, the airport-by-airport-approach has become more prevalent, as evidenced by Lufthansa’s acquisition of Air Berlin and the Lufthansa State aid case, which may pave the way for future cases related to instances of slot concentration at the airport level. The growing use of an airport-by-airport market definition approach by the Commission makes the overall position of an airline at an airport an essential consideration in pre-merger/pre-acquisition planning.¹³⁴¹

¹³³³ Case T-177/04 (*easyJet v. Commission*), *supra* note 1232, paragraph 166, in which the General Court stated that: “. . . the main barrier to entry in the air transport sector is the lack of available slots at the large airports”. For similar statements, see Case M.5440 – Lufthansa/Austrian Airlines, *supra* note 35, paragraph 354; Case AT.39595 – Continental/United/Lufthansa/Air Canada, *supra* note 37, paragraph 111; Case M.8633 – Lufthansa/certain Air Berlin assets, *supra* note 980, paragraph 33.

¹³³⁴ See OFT and CAA, *supra* note 72, at 17.

¹³³⁵ See NERA Economic Consulting, *supra* note 5, at 249.

¹³³⁶ See Behrens et al., *supra* note 67, at 17.

¹³³⁷ See Mendes de Leon, *supra* note 48.

¹³³⁸ *Id.*, at 578.

¹³³⁹ See Balfour, *supra* note 92, at 1037.

¹³⁴⁰ See Vande Walle, *supra* note 1261, at 58.

¹³⁴¹ See Watson Farley & Williams, *supra* note 1318.

5.8 Concluding remarks

This chapter explored whether multiple concepts related to slot coordination offer scope for finding solutions for the specific issues experienced at super-congested airports relating to this dissertation's research questions, primarily in the field of reflecting the public value associated with slots in coordination decisions and safeguarding airport access for the purposes of a competitive air transport market safeguarded by EU Regulation 1008/2008. The concepts discussed include the debate on who holds the legal title to a slot, the functionally and financially independent coordinator, the application of the new entrant rule, the implementation of a secondary market for slots and the relationship between the allocation of slots and competition law.

In my view, slots are allocated to airlines as entitlements to use available infrastructure, subject to conditions such as utilization thresholds or allocation criteria. Indeed, they represent relevant operational, economic, legal and social interests and functions.¹³⁴² *Inter alia*, according to the Commission, slots are “critical inputs” for any entrant wishing to operate or expand services.¹³⁴³ Although airlines, airports and governments alike have claimed they should be regarded as the legal owners of slots,¹³⁴⁴ they cannot, in my view, be identified as property rights.

At super-congested airports in particular, slots are valuable concepts to society at large as they safeguard public functions such as connectivity and airport access, as discussed in Chapter 2, sections 2.3 and 2.4. Accordingly, Chapter 6 recommends that the coordinator should ensure that scarce slots are declared, allocated and used in a way that is reflective of these public functions. Solving the debate on slot ownership by clarifying that slots are essentially public goods could contribute to making this recommendation work.

Furthermore, a future slot regime should be cognizant of the shifted role of the coordinator from performing merely technical functions to that of a policymaker, so to say. At super-congested airports, slot allocation ultimately comes down to making decisions which airlines can and cannot operate to and from an airport.¹³⁴⁵ With slot scarcity levels and the risk of judicial reviews of allocation decisions rising, coordinators play an increasingly important role in the correct application of the slot allocation rules. After all, airlines are all in the same ‘game’ for the last available slot pair and the coordinator continuously has to make trade-offs between competing slot requests. Though the coordinator has been delegated public functions, by no means was the slot coordinator intended to perform the task of policy making. Arguably, the coordinator has been handed a role it was never intended to perform.¹³⁴⁶

In a constrained environment where the overall number of slots is largely fixed and there is no outlook for capacity increases, the possibilities for airlines to start or expand services requires incumbent airlines to exit or downscale their services at a particular airport.¹³⁴⁷ Given the high value of slots at super-congested airports, it is unlikely that airlines will simply hand back the slots they hold to the coordinator, even in times of economic downturn. Instead, they may capitalize the slots they hold to pay off creditors in case of a bankruptcy or insolvency, or they may engage in slot transfers or lease agreements, as discussed in sections 5.3 and 5.6 above. Hence, airport access becomes foreclosed in its entirety to airlines wanting to expand or

¹³⁴² See European Commission, *supra* note 54, paragraph 11.

¹³⁴³ See Case M.3770 – Lufthansa/Swiss, *supra* note 274, paragraph 27.

¹³⁴⁴ See Abeyratne, *supra* note 55, at 36; Mott MacDonald, *supra* note 63, at 2-2.

¹³⁴⁵ See ICAO, *supra* note 256.

¹³⁴⁶ See Finger et al., *supra* note 18, at 9.

¹³⁴⁷ See Mott MacDonald(II), *supra* note 113, at 111.

start operations at super-congested airports with no slots freely available, or at peak times at other congested airports.

The lack of airport access, combined with the fact that many of the world's airports have a high proportion of their slot capacity, often exceeding 50%, utilized by a single airline or a group of airlines, has led to concerns from competition authorities and governments that such high levels of slot concentration by a few airlines will adversely impact competition and has inclined policy makers and regulatory bodies towards taking pro-active competition measures, including giving preference to new entrants as discussed in section 5.5, implementing secondary slot trading and leasing addressed in section 5.6, and requirements to divest slots, see section 5.7.

The new entrant rule can be helpful if there are still slots available in the pool. However, the lack of access to a sufficient number of slots at a commercially interesting date and time sees new entrants unable to translate these slots into viable alternatives to incumbent airlines, as was also concluded on the basis of the specificities of the current new entrant rule discussed in section 5.5. Moreover, caution should be exercised to accept unrestricted secondary slot trading and leasing since it may reinforce already existing dominant positions, as to which see section 5.6.4.¹³⁴⁸

Proposed airline mergers and alliances are often accompanied by conditions requiring slot divestiture at the route or airport level, as to which see also section 5.7.4. However, it is questionable whether slot commitments offer structural solutions. Furthermore, a multitude of EU airports is expected to remain congested, or become even more congested, in the future as elucidated in Chapter 2, putting further pressure on the possibilities for airport access by new entrants.

The Commission has labeled the availability of slots “an essential condition for the creation of a stable regular service and thus effective new entry into the routes concerned”,¹³⁴⁹ in line with the provisions of the internal air transport market laid down in EU Regulation 1008/2008. Although the EU Commission and the CJEU have established a link between the Slot Regulation and the general competition rules in the EU, it is not clear-cut whether Articles 101 and 102 TFEU can be made to apply to the conduct of airlines in relation to slots, particularly since there is not yet a market for slots. While practice, as sanctioned in judicial decisions, especially in the UK, confirms that slot trading takes place, and is allowed to take place, the Slot Regulation does not explicitly allow slot trading. This state of affairs affects the qualification of a ‘slot market’.

Chapter 6 of this dissertation provides concluding remarks and recommendations as to how a future slot regime for super-congested airports can account for the socio-economic and airport access challenges faced by super-congested airports. Among others, the specific concepts discussed in Chapter 5 will be paired with recommendations, with the aim of providing answers to the research questions posed in Chapter 1 of this dissertation.

¹³⁴⁸ See Starkie, *supra* note 65, at 193.

¹³⁴⁹ See Case M.3770 – Lufthansa/Swiss, *supra* note 274, paragraph 27.

