

AEROSPACE LAW AND POLICY SERIES

Airport Competition Regulation in Europe

STAMATIS VARSAMOS



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Published by:

Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.wklawbusiness.com

Sold and distributed in North, Central and South America by:

Wolters Kluwer Legal & Regulatory U.S.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@wolterskluwer.com

Sold and distributed in all other countries by:

Turpin Distribution Services Ltd
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-6831-3

e-Book: ISBN 978-90-411-6837-5

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Printed in the United Kingdom.

Airport Competition Regulation in Europe

Aerospace Law and Policy Series

VOLUME 12

Editor

Pablo Mendes de Leon, Professor of Air and Space Law, Leiden University, the Netherlands.

Introduction

Liberalization of air services, the effect of competition law regimes on the operation of air services, the dynamic and versatile relationship between airports and airlines, increased passenger protection, growing awareness of environmental concerns, and the traditional primacy of safety and security and the increasing relevance of corporate structures and the factor 'labour' in the air transport sector are fundamentally influencing policy directions and regulatory regimes governing international civil aviation. These trends call for reflection and analysis across a wide range of legal and policy areas, including but not limited to public international air law and policy, with special reference to safety, security, and environmental concerns, and civil and criminal liability. Books in the series identify influences from competition law regimes, trade and company law, and the complex relationship between European Union law and public international law.

Objective

The objective of the series is to make a meaningful contribution to legal thinking on the multifaceted aspects of this important field of law. The publications are designed to document and anticipate the evolution of aviation law and policy in the twenty-first century.

Readership

Aviation lawyers, academics, representatives of governments and international organizations, airline and airport staff.

The titles published in this series are listed at the end of this volume.

Preface

Connectivity in its most inclusive form can be defined as the ability or effort to establish and maintain a connection between two or more points. Such effort runs the whole history of humanity and has been the laboratory to every social interaction, development, or venture.

Johann Wolfgang von Goethe in his novel *Meister's Apprenticeship* gives perhaps the most comprehensive and most lyrical rendering of human communication: "*The world is so empty if one thinks only of mountains, rivers & cities; but to know someone who thinks & feels with us, & who, though distant, is close to us in spirit, this makes the earth for us an inhabited garden.*"

Communication, if not a synonym, is closely related to connectivity which in turn over the last seventy years refers to aviation. The advances in aircraft technology, in communication systems and the birth and the development of internet have annihilated distances. To make the round of the world you do not need eighty days but rather some hours. Journeys, tourism, international trade and any kind of human activity, economic or not, are now based on connectivity. Indeed our planet has become to a great extent a global "inhabited garden" and aviation is arguably the catalyst to this process.

Airports as part of the aviation business are much more than mere landing fields. In their more simplistic form are infrastructure providers which are sophisticated depending on their size, location or the applicable regulatory regime and complex enterprises providing a variety of services to airlines and passengers; in any case airports, along with airlines, are the facilitators of connectivity between people in any continent, State or region.

This book discusses the nature of airport charges, the factors determining their price structure and the effects of the implementation of the Directive 12/2009 on airport charges to the EU Member-States.

Further it provides an overview of the application of the competition rules, including the provisions on State aid to airports in the EU, based on the decisional practice of the EU Commission and the Court of the European Union.

Rejecting that all airports are natural monopolies in the EU, it proposes a methodology for the delineation of airports' relevant product market and for the

assessment of market power and concludes that airports are often in competition with each other, trying to secure growth and development by attracting airlines and passengers. Competition should be replaced by regulation, only when it is evidenced that the latter outweighs the benefits of the former. A monitoring system is proposed instead of economic regulation, following the assessment of the market power of each airport concerned. Regulation may be needed only for certain type of dominant airports with significant market power (congested airports with limited capacity not substitutable by other airports).

Acknowledgements

The present book in its initial form was submitted as a thesis to the Institute of Air & Space law of Leiden University in partial fulfillment of the requirements for the degree of Masters of Advanced Legal Studies in Air and Space Law.

It was Prof. Dr. Pablo Mendes de Leon who encouraged me to publish the present work. To express my sincere thanks and gratitude to my supervisor and mentor for his true and invaluable support, motivation, guidance, advice and patience is the least I can do. Simply, without Prof. Dr. Pablo Mendes de Leon, this work would have never been published.

At the same time I want to express my gratitude to my family and to my dear wife Agapi for all her support, motivation and understanding during all this period of preparation.

At Wolters Kluwer I wish to sincerely thank and to express my appreciation to Ms. Gwen Vries for her true attention and support.

Moreover, I would like to thank Athens International Airport (AIA) and especially AIA's CEO Dr. Yiannis Paraschis, Ms. Papathanasopoulou E Director Legal Affairs AIA, Ms. Bazigou O, paralegal specialist of AIA's legal department, and my colleagues Ms. Chatzianastasiadou K, Mr. Avramides I and Mr. Nikolakakis A, of the legal department of AIA, for all their kind assistance, motivation and tolerance.

Last but not least, I would like to dedicate this book to my father Nikolaos, who passed away in October of 2013, and to express how deeply indebted I am to him, who taught me that the search of knowledge is a never ending process. Without you I would have never come this far.

List of Abbreviations

AA	American Airlines
ACCC	Australian Competition and Consumer Commission
ACI	Airports Council International
ADP	Aéroports de Paris
AEA	Association of European Airlines
AENA	Aeropuertos Españoles y Navegación Aérea
AIA	Athens International Airport
APC	Australian Productivity Commission
ATC	Air Traffic Control
ATT	Air Travel Tax
BA	British Airways
BAA	British Airport Authority
BBF	Berlin Brandenburg Flughafen Holding GmbH
BOT	Build Operate Transfer
BTS	Bratislava Airport
CAA	Civil Aviation Authority
CAB	Civil Aeronautics Board
CC	Convention on International Civil Aviation of 1944
CDG	Charles De Gaulle Airport
CEANS	Conference on the Economics of Airports and Air Navigation Services
CEU	Court of the European Union
DoT	Department of Transportation
EALA	European Air Law Association
EASA	European Aviation Safety Agency
EC	European Community

List of Abbreviations

ECAA	European Common Aviation Area
ECAC	European Civil Aviation Conference
ECJ	European Court of Justice
EEC	European Economic Community
ELFA	European Low Fares Association
ERAA	European Regions Airline Association
ETS	Emissions Trading Scheme
EU	European Union
FAA	Federal Aviation Administration
FBB	Flughafen Berlin Brandenburg GmbH
BFG	Berliner Flughafen Gesellschaft
IACA	International Air Carriers Association
IASTA	International Air Services Transit Agreement of 1944
IATA	International Air Transport Organization
ICAO	International Civil Aviation Organization
ISA	Independent Supervisory Authority
KLM	Koninklijke Luchtvaart Maatschappij (Royal Dutch Airlines)
LCC	Low Cost Carriers
MEIP	Market Economy Investor Principle
MEO	Market Economy Operator
MOTOE	Motosykletistiki Omospondia Ellados
MPT	Market Power Test
NCC	National Competition Council (Australia)
NPV	Net Present Value
O&D	Origin & Destination
OECD	Organization for Economic Cooperation and Development
OFT	UK Office of Fair Trade
OST	Office of the Secretary of Transportation
PanAm	Pan American World Airways
PCR	Price Cap Regulation
PRM	Persons with Reduced Mobility
PTF	Passenger Terminal Fee
RCR	Revenue Cap Regulation
RoR	Rate of Return
SDR	Special Drawing Rights
SEA	Società Esercizi Aeroportuali
SES	Single European Sky

SGEI	Service of General Economic Interest
SMAC	Syndicat Mixte des Aéroports de Charente
SPV	Special Purpose Vehicle
SSNIP	Small but Significant Non-Transitory Increase in Price
TAT	Transport Aérien Transrégional
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
TWA	Trans World Airlines
UK	United Kingdom
USA	United States of America

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Introduction

The reason for regulating utilities is to control market power.¹ At the time of the conclusion of the Convention on International Civil Aviation – henceforth the Chicago Convention or CC – airports were viewed as and actually were public utilities, providing basic infrastructure. Article 28 of the Chicago Convention, recognizing the importance of airport infrastructure as being the common interest² of all the Contracting States, determines that the Contracting States must, *inter alia*, undertake to the degree possible to provide airports in its territories.

Annex 9³ (Facilitation) to the Chicago Convention, defines an international airport, as the designated – by the Contracting States – port of entry and departure of international air traffic, where the formalities incident to customs, immigration, health and similar procedures are carried out.

Therefore, the main functions of an airport, which vary according to its size and type of traffic, encompasses activities such as operation of the airport facilities (air side and land side), administration and finance, construction and maintenance, air traffic operation, security, ground handling and provision of facilities for immigration, police, fire control and health authorities.⁴ As noted by *Betancor and Rendeiro* (1999), airport services can be classified into three main categories, namely, operational, ground handling and commercial.⁵

-
1. D. Starkie: *Airport Regulation and Competition*. Journal of Air Transport Management, Vol. 8, 2002, p. 63.
 2. Prof. H.A. Vogel: *Shareholder Value in Natural Monopolies – The Case of Airports*. Fourth Annual Conference on Competition and Regulation in Network Industries, November 25, 2011 Brussels Belgium at: <http://www.crninet.com/2011/c12d.pdf>, pp. 1-25.
 3. Annex 9 to the Convention on International Civil Aviation: Facilitation, 2005, p. 2 at: <http://www.ifrc.org/docs/IDRL/Chicago%20Convention%20Annex%209.pdf>.
 4. R. Abeyratne: *Law and Regulation of Aerodromes*. Springer 2014, p. 1.
 5. O. Betancor and R. Rendeiro: *Regulating Privatized Infrastructures and Airport Services*, Policy Research Working Paper, 1999, p. 2, where airport services are in principle divided into aeronautical and non-aeronautical, the former comprised of operational and ground-handling services and the latter of commercial activities.

Table 1 Airport Services as Classified by Betancor and Rendeiro

Operational	Ground-Handling	Commercial
(1) Air traffic control	(1) Aircraft cleaning	(1) Duty-free shops
(2) Meteorological services	(2) Provision of power and fuel	(2) Other retailing shopping
(3) Telecommunications	(3) Luggage and freight (loading and unloading)	(3) Restaurants and bars
(4) Police and security	(4) Processing of passengers, baggage and freight	(4) Leisure services
(5) Fire, ambulance and first aid services		(5) Hotel accommodation
(6) Runway, apron and taxi-way maintenance		(6) Banks
		(7) Car rental and parking
		(8) Conference and communication facilities
Aeronautical or airside services		Non-aeronautical or landside

Over the past thirty years, airports within EU have undergone a major transformation and development.⁶ While after the Chicago Convention and as a result thereof, international air transport was – and still is to a great extent – organized on a bilateral basis between sovereign States, the deregulation process in the USA in 1978, the liberalization process in Europe between 1987-1993⁷ and the creation of the EU common aviation market has led to the gradual development of competition not only between airlines, but also between airports.⁸

However, the economic regulation of airports, stemming from the necessity to control and correct market failures in a noncompetitive environment, where airports were perceived as natural monopolies and passive providers of infrastructure, introduces its own distortions and as pointed out by D. Starkie (2002), there is ultimately a trade-off to be made between “*imperfect competition and imperfect regulation.*”⁹ The emergence of new airline business models, such as of low cost carriers (LCC), the structural changes in the ownership status of many EU airports¹⁰ and the liberalization process, touches upon the critical question of a reexamination of the economic

6. Airports Council International (ACI): *Airport Charges in Europe*, 2013, p. 4.

7. As to the EU Transport policy and the liberalization process see a comprehensive analysis on EU aviation policy by M. Zabokrtsky: *EU Air Transport Policy: Implications on Airlines and Airports*, 2011, pp. 161-180.

8. As pointed out by R. Abeyrante: “*In the past an airport was simply a terminus much the same as a bus terminus of that time assigning it as the focal geographical point at which people gathered to embark on a plane for a journey by air or disembark after an air journey.*” See above fn 4, p. 7.

9. See above fn 1, p. 63.

10. From Table 2 it is derived that 78 % of European airports are publicly owned, 13 % have a mixed public/private ownership structure and 9 % are fully privatized. As to EU Member-States all airports in Finland, Luxemburg, Spain, Sweden, the Czech Republic, Estonia, Latvia, Lithuania and in Slovakia are State owned. In Cyprus, Malta, and Hungary and very recently in Portugal all airports are private. In Austria, Belgium, Denmark, France, Germany, Greece, Ireland, Italy, the Netherlands the UK, Bulgaria, Poland, Romania and Slovenia, the overall ownership status is mixed and varies from airport to airport. Source ACI-Europe: *The Ownership of European Airports*, 2016. The precise ownership status is presented in detail below under Chapter 2 section §3[B], p. 43.