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SLOT ALLOCATION AT EUROPEAN AIRPORTS

by
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of the requirements of the degree of Master of Laws (LL.M.)

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ABSTRACT

International air transport has grown at a staggering rate over the last 50 years and the industry which supports it, now bears little resemblance to that which existed even twenty-five years ago. As the number of operators and the size of their respective fleets have increased, so too have the pressures on the infrastructure which support them. Particularly affected are the major airports where runway, apron and terminal capacity are limited. Unlike other elements of the aviation infrastructure, airport capacity is physically constrained and therefore capacity increases can only be obtained through further development or through more efficient uses of existing resources. As the first option is politically controversial and the latter only provides for incremental increases, the air transport industry, through IATA, has developed an allocation mechanism to distribute available capacity based on historic precedence. In an increasingly commercial environment questions are being raised as to whether a system of allocation originating at a time when flag carriers representing the national interest dominated the skies, is still appropriate. Both air carriers and European competition authorities are concerned as to the competition implications that such a structure has on market access for new carriers, which the latter have sought to emphasise as part of the liberalisation of the European air transport market. Although it is recognised by both industry and governments that any system of allocation will have winners and losers in a market where demand exceeds supply, both recognise that steps require to be taken to ensure that rigidities which currently exist, require to be removed in order to make the allocation system more dynamic and responsive to the needs of the aviation community. This thesis reviews the main issues surrounding the current regime.

RÉSUMÉ

Le transport aérien international ainsi que son industrie se sont considérablement développés au cours des cinquante dernières années, perdant toute ressemblance avec ce qui existait ne serait-ce que vingt-cinq ans auparavant. Avec l'augmentation du nombre d'opérateurs et de leurs flottes respectives, ce sont aussi accrues les pressions sur l'infrastructure qui les supportent. En particulier ce sont les aéroports principaux qui ont été affectés avec leurs capacités limitées en pistes d'atterrissage, terminaux et aires de stationnement. Contrairement à d'autres éléments de l'infrastructure de l'aviation, la capacité des aéroports est physiquement restreinte et donc un accroissement de leur capacité ne peut être obtenu que par davantage de développements ou par une utilisation plus efficace des ressources existantes. Puisque la première option pose des difficultés politiques, l'industrie du transport aérien, à travers IATA, a développé un mécanisme d'attribution pour distribuer la capacité disponible basé sur la précedence historique.

Dans un environnement de plus en plus commercial, la question de la pertinence d'un système d'allocation né à une époque où les transporteurs représentant les intérêts nationaux dominaient le ciel, se pose. Les transporteurs aériens ainsi que les autorités européennes de la concurrence s'en sont inquiétés du fait des conséquences en matières de concurrence qu'une telle structure a sur l'accès au marché des nouveaux transporteurs; ce que ces derniers ont souligné comme faisant partie de la liberalisation du marché européen du transport aérien. Bien que l'industrie ainsi que les gouvernements admettent que, quelque soit le système, il y aura des perdants et des gagnants dans un marché où la demande dépasse l'offre, les deux reconnaissent la nécessité de prendre des mesures qui permettront de supprimer les rigidités

aujourd'hui existantes dans le but de rendre le système d'attribution plus dynamique et mieux adaptés aux besoins de la communauté aérienne. Cette thèse examine les différentes questions concernant le système actuel.

ACKNOWLEDGENTS

As the following paragraphs make up the final pieces in the jigsaw which make up the thesis, one can't help to reflect on the time and energy expended to get to this point. Now, a couple of years older and a few hairs shorter, the thesis formed the backdrop to my daily life for what seems a considerable period and although at times it may not have been that welcome, it allowed me an excuse to thoroughly come to grips with an important issue in commercial aviation. As a consequence I have not only learnt much about my chosen topic and ancillary issues facing the industry, but I have had the opportunity to be introduced to and meet various helpful individuals who allowed me to keep a practical perspective of the issues to hand. In this regard, I am particularly grateful to Prof. Peter Haanappel, who was always willing to provide me with the necessary introductions, which amongst other things allowed me to attend the summer 1996 Scheduling Conference in Berlin, which provided an invaluable insight. I am also grateful to him for his willingness to share information, which might not have generally been in the public domain, but which allowed a greater understanding of the concerns of the industry and the path that future developments might take.

Even if the content were acceptable, this thesis would not have reached submission if it were not for the patience, hard work and good humour of my dear friend, Melissa Knock, who magically (at least to me) managed to physically transform my footnotes into their Cinderella-like final version. To her I am exceptionally grateful for the work which she has done as well as for recognising at an early stage, that I could not be entrusted to come up with a final polished version of the thesis, based on her instructions alone.

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Having said all that, I would not now be sitting here writing this, nor is it likely that I would have my current career in aerospace insurance related work, were it not for the unblinking support provided by my parents, who allowed me to realise the opportunity of undertaking the LL.M. programme at the Institute of Air and Space Law and spending a year living in a truly fantastic city. For their foresight and support I will be forever grateful.

London Heathrow Airport

31 October 1999

TABLE OF CONTENTS

Introduction.....	1
Chapter 1: The Slot Allocation System.....	11
Chapter 2: The IATA Scheduling Procedure.....	15
Chapter 3: Slot Allocation under Regulation 95/93	30
Chapter 4: The Block Exemption - Council Regulation 1617/93.....	47
- Is the Block Exemption necessary?.....	49
- Article 86 considerations	57
- Relevancy of competition rules.....	57
- Will future amendment of the allocation systems have competition implications?	58
- The Airport's response to abuse in the context of Article 86	60
- Conclusion on Competition	64
Chapter 5: Slot Allocation in the United Kindom.....	66
- The Co-ordinator	67
- Slot allocation at London Heathrow Airport	72
- How does the slot system currently operate at Heathrow Airport.	77
Chapter 6: Slot Allocation - the view of the Industry	84
- The flag carrier's views.....	85
- The charter carrier's views	94
- The views of the start-up independent carrier.....	101
- Summary and Conclusion	108
Chapter 7: Future Considerations for allocation and reform	110
Chapter 8: Slots in the context of international air traffic rights	115
- Other regulatory aspects	119
Chapter 9: Future Regulatory Developments	121
- IATA Developments	121
- The European Union.....	126
Chapter 10: Conclusion.....	131

To Klaus and Irmgard Schmid

INTRODUCTION

The international air transport industry has grown rapidly in the last thirty years, and this is not only witnessed by the fact that it has been outpacing world Gross Domestic Product (GDP) and trade by a comfortable margin during that period,¹ but also statistical analysis of such factors as passengers carried, passenger kilometres and tonne kilometres flown as well as aircraft numbers in service,² have shown strong growth. This increase has been particularly marked in the last ten years, where between 1984 and 1994 passenger numbers increased by 45% from 847 million³ to 1,231 million,⁴ passenger kilometres increased by 65% from 1,277,000 million⁵ to 2,098,000 million,⁶ tonne kilometres

¹ See OECD, International Futures Program, *International Air Transport, A Policy-orientated Analysis of its Economic Significance and Prospects - Discussion Paper* (Paris, 17 June 1994) [hereinafter *Discussion Paper*].

² <u>Passengers in millions:</u>	<u>Passenger Kilometres in millions:</u>	<u>Tonne Kilometres in millions:</u>
1979 = 754	1966 = 229,000 (excl. USSR)	1966 = 27,480 (excl. USSR)
1984 = 847	1974 = 656,000	1974 = 80,700
1989 = 1,109	1979 = 1,060,000	1979 = 126,860
1994 = 1,203	1984 = 1,277,000	1984 = 159,090
1995 = 1,288*	1989 = 1,774,000	1989 = 223,030
1994 = 2,086,000	1994 = 271,500	
1995 = 2,230,000*	1995 = 292,340*	

Aircraft in service: (Note: Only aircraft with a MTOW in excess of 9,000kg are included)

1966 = 5,831
 1974 = 7,857
 1979 = 8,460
 1984 = 9,167
 1989 = 11,353
 1994 = 15,010
 1995 = 15,540*

* Note that all 1995 figures are estimates.

See ICAO, *Annual Report of the Council - 1968*, ICAO Doc. 8724 (1966); ICAO, *Annual Report of the Council - 1977*, ICAO Doc. 9233 (1977); ICAO, *Annual Report of the Council - 1987*, ICAO Doc. 9521 (1987) [hereinafter *1987 Annual Report*]; ICAO, *Annual Report of the Council - 1995*, ICAO Doc. 9841 (1995).

³ See *1987 Annual Report*, *ibid.*, app. 14, diagram I-1 at 184.

⁴ See ICAO, *Annual Report of the Council - 1994*, ICAO Doc. 9637 (1994), app. 15, table 1 at 161 [hereinafter *1994 Annual Report*].

⁵ See *1987 Annual Report*, *supra* note 2 at 184.

⁶ See *1994 Annual Report*, *supra* note 4 at 161.

increased by 72% from 159,090 million⁷ to 273,300 million⁸ and aircraft numbers increased by 65% from 9,167⁹ to 15,186.¹⁰ Much of this growth has been spurred on by growing international trade links, a demand for increased personal mobility, and an international tourist industry which is claimed to generate over 10% of world GDP and employs in the region of 200 million people.¹¹ Within the European context, additional growth will also be generated as a consequence of the creation of the single European air transport market, as well as through the economic development of central and eastern European states, leading to an increase in trade and tourism. The ability of the air transport infrastructure to cope with this increasing amount of traffic is therefore put under increasing stress. Between 1985 and 1994 the number of IFR flights handled in EURO/88¹² countries increased by 62% from 2,907,051 to 4,723,188,¹³ and these increases have also made themselves felt in terms of deteriorating levels of flight punctuality. In 1986 only 12% of intra-European flights were delayed by more than 15 minutes, and over 1995 this figure rose to 18.4%.¹⁴ This trend is also reflected in punctuality statistics published in the UK, which indicate that in the first quarter of 1996 only 76% of scheduled flights at UK airports were 'on time', as opposed to 81% in the corresponding quarter the year before, and that the largest reductions in punctuality were to be found at Heathrow and Gatwick.¹⁵ It is noteworthy that charter flights that tend to generally operate on the more congested routes had punctuality statistics as low as 48%,

⁷ See 1987 *Annual Report*, *supra* note 2 at 184.

⁸ See 1994 *Annual Report*, *supra* note 4 at 161.

⁹ See 1987 *Annual Report*, *supra* note 2, table I-16 at 30.

¹⁰ See 1994 *Annual Report*, *supra* note 4, table 11 at 170.

¹¹ See *Discussion Paper*, *supra* note 1 at 3.

¹² EURO/88 was formed by Belgium, Luxembourg, Germany, France, United Kingdom, the Netherlands, Ireland, Switzerland, Austria, Spain and Portugal.

¹³ See EC, Commission, Air Traffic Management, *Freeing Europe's Airspace*, White Paper (Brussels, 6 March 1996), COM(96) 57 final [hereinafter *Freeing Airspace*].

and this represented a drop of 9% vis-à-vis the corresponding quarter last year. Although air traffic management (ATM) constraints form a substantial part of the delays within the European air transport system, other factors such as weather, airline operations and particularly airport capacity play an important part. The limits on the overall infrastructural capacity are therefore brought about by both ground based as well as airborne capacity constraints which are in turn both closely interrelated, and it has been stated that delays brought about by such constraints cost the airlines and travelling public US \$1.5 billion annually.¹⁶

Airport capacity is the most limiting element of the air transport infrastructure, as its capacity is to a great extent dictated by physical constraints, such as the runway system, apron space, parking positions, gates and passenger terminal throughput.¹⁷ The situation as regards ATM constraints is somewhat different, as the present limitations to a great extent are brought about by the fragmented nature of the European ATM systems. Inefficiencies stem from differences in technical and operational specifications between the various ATM systems, which has lead to the coexistence of incompatible equipment with differing levels of performance.¹⁸ In addition, moves towards greater integration of the respective systems are hampered by the lack of an effective decision making mechanism, as decisions by the various bodies operating the ATM system are made on a consensus basis, thereby slowing down moves towards the attainment of common

¹⁴ See *ibid.* at 6.

¹⁵ See UK Department of Transport, Press Notice: 219 (10 July 1996).

¹⁶ See K. Van Miert, "Slot Allocation as an Instrument for Optimising Airport and En Route Capacity Utilization" (Airport & En Route Slot Allocation, Proceedings of an international symposium held in Brussels, 28 October 1991) (1993) 28:1 European Transport L. 13 at 14.

¹⁷ See IATA, *Scheduling Procedures Guide*, 25th ed. (December 1998), para. 1.5.

¹⁸ See *Freeing Airspace*, *supra* note 13 at 32.

procedures and specifications for items such as airborne collision avoidance systems, VHF frequency separation and reduced vertical separation.¹⁹ These shortcomings are presently being addressed by EUROCONTROL under the European Air Traffic Control Harmonisation and Integration Programme (EATCHIP), and ECAC²⁰ countries have invested an estimated ECU 1,200 million per annum on average since 1992 in the modernisation of national systems.²¹ This type of initiative will no doubt allow for an appreciable expansion of current capacity, and it is therefore in the provision of airport capacity where the main constraints will lie. Another factor to be borne in mind, as to the divergent nature of airborne and ground capacity, is that the provision of an air traffic control service is a fairly homogenous 'product', whereas the problems regarding the provision of ground capacity may not be solved by simply building more airports, as numerous commercial and operational factors influence whether a given airport will be a viable destination or not.²²

Ground based capacity increases are therefore more difficult to accomplish, and will to a great extent focus on the expansion of existing facilities through development or increased productivity through procedural improvements. In respect of the latter option significant gains may be achieved if a runway is operated in a mixed mode,²³ or through

¹⁹ See *ibid.* at 11.

²⁰ European Civil Aviation Conference, which is now composed of 33 European states, including all EU member States.

²¹ See *Freeing Airspace*, *supra* note 13 at 5.

²² Note the situation in the south-east of England, where Gatwick and particularly Heathrow suffer from severe capacity constraints, but Stansted and Luton were for a considerable period of time under-utilised.

²³ Mixed mode refers to the situation where a single runway is operated for both takeoffs and landings; an industry insider estimated that in the case of Heathrow, a capacity increase in excess of 15% could be realised through the adoption of such a procedure.

reduction in aircraft separation minima for vortex wake²⁴ purposes through the employment of measuring equipment²⁵ that provides real-time information on the turbulence created by the preceding aircraft. Apart from these types of rather far reaching operational changes, a constant drive to increase operational capacity through general procedural improvements can pay dividends, as in the case of Heathrow which has been considered to be 'full' for a number of years. In the ten year period prior to 1993, the annual limit on Heathrow slots rose from 275,000 to approximately 400,000 slots,²⁶ this increased to 438,174 movements for the 12 months to August 1998,²⁷ and 30% of the present slot pool at Heathrow is made up of newly created slots, resulting directly from an increase in hourly capacity.

²⁴ Vortex wake is the turbulence caused by horizontal, twisting spirals of air emanating from each wingtip, resulting from the pressure differential between the upper and lower surface of the wing. These turbulences can be severe, and have lead to the loss of control and crashing of aircraft. ICAO and national governments therefore introduced separation minima in terms of both time and distance between the lead and trailing aircraft, depending on the respective weight category that the aircraft fall into.

<u>Weight parameters:</u>	ICAO:	UK CAA:	Aircraft example:
Heavy: (H)	136,000kg or greater	136,000kg or greater	B-747, A-340, MD-11
Medium: (M)	129,999kg - 7000kg	129,999kg - 40,000kg	B-757, A-320, MD-80
Small (UK only): (S)	N/A	39,999kg - 17,000kg	Saab 2000, F-50
Light: (L)	6,999kg or less	16,999kg or less	GA aircraft

Wake Turbulence Spacing Minima - Final Approach:

Leading a/c:	Following a/c:	ICAO min.	dist. (nm):	time (min.):	UK dist.:	time:
H	H		4	-	4	2
H	M		5	2	5	3
H	L		-	6	3	
H	S	6		3	8	4
M	H		3	-	-	-
M	M		3	-	3	2
M	L		-	-	4	2
M	S		5	3	6	3

Note: Separation requirements also apply to 'Light' and 'Small' aircraft, as well as to aircraft on departure, but are not shown here in the interest of brevity.

²⁵ See "WVWS Tests Commence at Frankfurt" *Flight International* (10-16 July 1996) 8. Tests are to commence of a vortex wake warning system (WVWS) at Frankfurt airport, in collaboration with the Deutsche Flugsicherung (DFS) to try to reduce separation minima, with a view to increase the present capacity of 72 movements an hour to 80.

²⁶ Sir Colin Marshall, Minutes of evidence before the Transport Committee, "The UK-US Air Services Agreement" (24 November 1993) at 64.

Apart from such operations as constructing additional high-speed turn-offs from runways, which in the case of Copenhagen Kastrup airport is hoped to increase the present runway capacity of 76 movements an hour to 90 by the turn of the century,²⁸ airport development is becoming increasingly more difficult as a result of environmental concerns regarding the construction, as well as the impact of increased traffic resulting from the development.²⁹ It is also increasingly the case that where economic gain is sought to be balanced against potential environmental loss, the situation becomes so politically sensitive that governments become reluctant to press such proposals. Provisions of the IATA Scheduling Procedures Guide now state that in the development of runway capacity, environmental concerns should be taken into account,³⁰ and although it should be a basic objective of governments, airport and ATC authorities, and airlines continually to develop the capacity of their own elements of the system to meet public demand, they are to do so only to the point where "the cost of doing so becomes unreasonable, or where political, sociological or environmental factors form insurmountable barriers".³¹

Other barriers to airport expansion are that in many cases, major airports have found themselves situated in close proximity to large centres of population for historical reasons, and hence there is now no longer any space for further development to take place. These difficulties are added to by the more common issue of securing funding for

²⁷ See Airclaims Ltd., *Blue Print Briefing* (24 September 1998).

²⁸ See Coopers & Lybrand, *The Application and Possible Modification of Council Regulation 95/93 on Common Rules for the Allocation of Slots at Community Airports*, Final Report (17 October 1995), ann. J2. [hereinafter *Slot Report*].

²⁹ Plans for the construction of Terminal 5 at Heathrow as well as the construction of a second runway at Manchester have provoked vocal opposition, and both are undergoing a Public Enquiry. See *ibid.*, L4&6.

³⁰ See IATA, *supra* note 17, para. 1.5.

³¹ *Ibid.*, para.1.4.

such infrastructure projects in a climate where governments are increasingly reluctant to spend public money, in order to assist the needs of private industry.

In addition to obstacles to future expansions, a number of factors add to the existing capacity constraints even though the airport is physically capable of dealing with a greater amount of movements. At a number of airports, night time curfews³² or movement restrictions have been introduced,³³ although this part of the day is commercially less valuable to scheduled traffic, it will have a disproportionate impact on the operators of charter services, cargo flights and over-night express parcel services. In other instances, in an attempt to meet environmental interests, a maximum annual movement cap has been set.³⁴ Capacity constraints in the airspace near major airports may also lead to under utilisation of airport capacity, as air traffic control services are unable to handle beyond a

³² For example, there is a curfew banning all night-time flying at Oslo Fornebu airport.

³³ Night flying restrictions are in effect for Heathrow, Gatwick and Stansted until summer 1998, and some type of night flying restrictions have been in place, affecting Heathrow and Gatwick for thirty and twenty years respectively. Under the current regime, the noisiest type of aircraft may not be scheduled to land or depart between the hours of 23.00 and 07.00. In addition, from 23.30 to 06.00, the night quota period, aircraft movements are restricted by a movements limit and a noise quota, which are set for each season. See UK Department of Transport, Press Notice 252 (16 August 1995).

A Belgian court ruled on 11 July 1996 that aircraft cannot fly over certain Brussels suburbs between 23.00 and 06.00, and will effectively close Brussels airport for that period. The court published a list of aircraft that are excluded during this time, consisting mainly of Stage 2 types, such as the 737-200 operated by Sabena and Sobelair. The ban includes some B-747 freighters as well as hushkitted B-727's operated by DHL. See "Court Rules on Aircraft Noise" *Flight International* (17-23 July 1996) 4.

A noise curfew restricts aircraft movements at Vienna airport between 23.30 and 05.00 local time. See *Slot Report*, *supra* note 28, ann. C4.

³⁴ As a condition of the construction of the second runway at Düsseldorf two conditions were imposed, namely that the commercial movements for the busiest six months of the year be limited to 71,000, and the other would cap hourly movements to 34 during the busiest six hours of the day, and 30 during other hours. The Transport Minister for Nord-Rhein Westfalen has in the meantime increased the movement limit to 90,925. See *Slot Report*, *ibid.*, ann. G4.

The French Minister of Transport introduced a cap on slots on 6 October 1994 for Orly at a level of 250,00 slots for environmental reasons. See *Slot Report*, *ibid.*, ann. F5.

Stansted Airport, although not co-ordinated, was subject to a movement cap as a condition of its development in 1985, which limited the maximum numbers of passengers for the first phase of development to 8 million passengers per annum. On the basis of this a movement cap was calculated, and set at 78,000 movements per annum. The aircraft operating out of Stansted are however smaller than anticipated, and the movement limit was therefore increased to 120,000 on 1 July 1996.

certain limit. This problem is encountered at Palma de Mallorca, where their high share of traffic from Europe means that TMA restrictions can place severe³⁵ limitations on the maximum number of hourly movements, and at times at a level considerably lower than theoretical runway capacity.³⁵ Other constraints are brought about by the nature of the air transport industry. Airlines on a given route require a certain time period or 'window' within which they wish to operate that route in order to maximise its profitability, and other carriers will look to do the same thing, thereby creating a severe capacity constraint at one point of the day, even though there may be an abundance of slots available at another time.³⁶ The development of international carrier alliances has also lead to the concentration of services at certain 'Hub' airports, causing the overall capacity to be less evenly distributed, and frequently focusing services on airports which already suffer from capacity constraints. The concentration of long-haul services will bring with it a number of regional feeder services to feed the alliance. These aircraft tend to be either small jet or turbo-prop aircraft, and the issue does arise whether this can be considered to be an acceptable use of airport resources, especially when capacity is at a premium.

In light of the finite capacity of the infrastructure at any given time, the mechanism through which these limited resources are allocated become of great importance both in terms of the priorities which are sought to be achieved, as well as the mechanism employed to allocate the capacity.

³⁵ See *Slot Report, ibid.*, ann. K8.

³⁶ For example, there is a substantial demand for arrivals at Heathrow between 06.00 and 07.00, which gives rise to an almost full movement limit of 33 per hour, whereas departures during this period are around set at between 18 and 19 movements, even though the limit has been set at 25 movements. In the next rolling hour the picture changes significantly as the departures limit at 41 movements is filled up except on the weekends. See Airport Coordination Ltd., *Arrival and Departure Runway Histogram*, Season W96.

The primarily focus of this ~~paper~~^{thesis} shall be on the allocation of ground capacity through the existing airport slot allocation mechanism. It is important to note from the outset the importance of a slot beyond its terms as a mere scheduling tool.³⁷ The access provided by a slot is of great strategic value as airlines develop their schedules and future route plans around the timing and the number of slots that they obtain. Equally an inability to obtain a certain amount of slots within a convenient time band, will not only mean that the realistic aspirations of that carrier will be more limited than that of his successful counterpart, but also that his ability to actively compete with the more successful incumbent will be limited. As the overall demand for slots increases the advantage enjoyed by the incumbent carriers also increases, as you have an increasing amount of players chasing a relatively smaller pool of slots, and hence the ability of any one of those players to actively compete with the incumbent is reduced. This brief discussion highlights the potential value of a slot at a congested airport, as well as raising the question as to what the purpose of the allocation process should be. Are we simply to seek to allocate any reserves on a first come first served basis, or are we to try and stimulate competition within the air transport market by allocating the reserves to a specific party or class of carriers if we feel that this would benefit the consumer in the form of increased competition. The environment within which the air transport industry operates could therefore to a substantial extent be shaped by the way in which airport capacity is allocated, and by the same token, any changes to an established system may have relatively far reaching implications. These are points which should particularly be

³⁷ A "slot" is defined as "the scheduled time of arrival or departure available or allocated to an aircraft movement on a specific date at an airport". See IATA, *supra* note 17, s. 3.1 at 5.

borne in mind as the pressure on available capacity at airports increase, as traffic forecasts indicate that between 1995 and 1999 scheduled passenger traffic will increase annually between 6.3% and 7.0%, and freight traffic is expected to increase at a rate of between 9.3% and 12.4%.³⁸

³⁸ See IATA, *Annual Report - 1995* (1995) at 9.

CHAPTER 1

THE SLOT ALLOCATION SYSTEM

The present system of slot allocation was developed through the International Air Transport Association (IATA), and centres around the bi-annual scheduling conferences which have been in operation since 1947. The system was developed to facilitate the co-ordination of airline schedules and stems from a period where air transport was primarily operated by nationalised flag carriers, and hence slot allocation was approached as a planning and co-ordination tool, rather than as a means of promoting competition. As a result of political pressure however, the IATA Scheduling Procedures Guide (SPG) was amended in 1991³⁹ to give ‘New Entrants’ preferential access to unused slots,⁴⁰ and the SPG also now contains a broad clause stating that “consideration should always be given to attempting to ensure that due account is taken of competitive requirements in the allocation of available slots”.⁴¹

The main stay of the IATA slot allocation mechanism is system of historical precedent, whereby an airline which has operated an assigned slot is entitled to claim the same slot in the next equivalent season.⁴² It is a system which is on the one hand promoted by incumbent carriers as promoting stability, but on the other hand has been criticised as an unfair application of the ‘First come first served’ rule, as it makes it difficult for other

³⁹ See *Slot Report*, *supra* note 28 at 1.

⁴⁰ See *Freeing Airspace*, *supra* note 13 at 10, s. 3.4.4.4.

⁴¹ *Ibid.*, s. 3.4.5.2.

⁴² See *ibid.* at 9, s. 3.4.4.1.

airlines to establish themselves in the terms briefly discussed above, and takes no account of the highest value of use to which that bit of available capacity could be put.

The IATA Scheduling Procedures Guide was used in Europe as the principal mechanism for the allocation of slots for many years. However with the development of the single European air transport market and the introduction of the 'Third Package'⁴³ which places a particular emphasis on the removal of barriers to market entry and the development of internal competition, the importance of the slot allocation procedure was recognised as extending beyond the bounds of a mere scheduling tool. It was realised that the allocation of slots at congested airports determined airport access, and that the allocation system was therefore in fact central to the question of market entry. The current Council Regulation on common rules for the allocation of slots at Community airports⁴⁴ was passed on 18 January 1993, and recognises as its underlying principles that "there is a growing imbalance between expansion of the air transport system in Europe and the ability of adequate airport infrastructure to meet that demand; whereas there is, as a result, an increasing number of congested airports in the Community"⁴⁵ and "it is also necessary to avoid situations where owing to the lack of available slots, the benefits of liberalisation are unevenly spread and competition is distorted".⁴⁶

⁴³ See EC, *Council Regulation (EEC) No.2407/92 on licensing of air carriers*, OJ Legislation (1992) No. L240/8; See EC, *Council Regulation (EEC) No. 2408/92 on access for Community air carriers to intra-Community air routes*, OJ Legislation (1992) No. L240/8; EC, *Council Regulation (EEC) No.2409/92 on fares and rates for air services*, OJ Legislation (1992) No. L240/8.

⁴⁴ See EC, *Council Regulation No.95/93 of 18 January 1993*, OJ Legislation (1993) No. L14/1.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

In its terms, the Slot Regulation closely reflects the underlying principles of the IATA Scheduling Procedures Guide, but has introduced provisions whereby new entrants at a Community airport or certain intra-Community routes have a right to 50% of the unallocated slot pool,⁴⁷ as well as provisions applying the ‘Use-it-or-lose-it’ principle to slots if they are un-⁴⁸ or under-utilised.⁴⁹ The important distinction that also requires to be drawn is that while the IATA Scheduling Procedures Guide are voluntary guidelines which are not legally binding, however the Slot Regulation is directly effective in all Member States, and therefore has the force of law. The IATA guidelines and the Regulation therefore form a two layered regulatory structure whereby compliance must principally be sought by law with the Regulation, and thereafter the more comprehensive provisions of the IATA guidelines are complied with, as these represent the industry’s established practice. It should however be noted that the priority rules for slot allocation in the IATA guidelines may have an indirect legal effect on the allocation procedure, as in terms of Article 8(1)(c) of the Regulation, the co-ordinator “shall also take into account additional priority rules established by the air carrier industry”. An airline whose schedule is constrained by a curfew at one airport which creates a slot problem at another, and feels that this was not taken into account by the co-ordinator may have a legal basis to challenge the co-ordinator’s decision even though this rule of allocation is not present in the Regulation. An overall assessment of the allocation procedure therefore requires an examination of the IATA rules from which the Slot Regulation is derived, as this shall be considered in the next section. The Regulation itself will remain in effect until such time as a decision is made by the Council to either continue the Regulation in its present form

⁴⁷ See *ibid.*, art. 2(b).

⁴⁸ See *ibid.*, art. 10(2).

or to revise it on the basis of proposals of the Commission that are yet to be submitted.⁵⁰ In order to assist the Commission in any future proposal, a study was commissioned by them and prepared by Coopers & Lybrand, and this was subsequently submitted on 17 October 1995. The study had three main aims, and these were, first, to assess the extent to which the regulation has been implemented across the Community. Secondly, to assess the effectiveness of the regulation and identify problems which have arisen in its application. Thirdly, to propose possible modifications to the regulation to improve its effectiveness. The contents of this study shall be considered during the course of this paper, as well as similar enquiries relating to the effectiveness and possible alteration to the present Regulation, made by other parties.

⁴⁹ See *ibid.*, art. 10(5).

⁵⁰ *Ibid.*, art. 14 of the Regulation requires that the Commission proposal required to be submitted by 1 January 1996, on the basis of which a decision required to be taken by 1st July 1997 as to whether or not Regulation 95/93 should be continued in its present form. As no proposal was submitted, the view of the Commission has been that no decision required to be made as to whether or not the Regulation required to be amended, as the outstanding proposal is a precondition. Their view is that notwithstanding the wording of Article 14, the Regulation will run on indefinitely.

CHAPTER 2

THE IATA SCHEDULING PROCEDURES

The IATA slot allocation system operates around the biannual Scheduling Co-ordination Conferences which take place in June and November of each year, which respectively seek to co-ordinate the schedules for the following winter and summer seasons. These conferences have been in operation since 1947, and were established with a view to co-ordinating the timetables of the respective member carriers, in order to avoid scheduling conflicts. As a result of increasing capacity constraints at airports, the conference's focus has to a great extent now shifted to the obtaining of slots at capacity constrained airports, and allows for a unique forum where all relevant parties, namely the airlines, airports and their respective co-ordinators are represented, allowing for the concurrent consideration of scheduling adjustments of the respective airlines, and thereafter multiparty discussions on ways that scheduling conflicts may be resolved.⁵¹ It would also be difficult to operate this type of scheduling adjustment at a localised level, as airline employees would constantly have to revert to their head offices to seek authorisation for a proposed schedule change. By operating the system of the biannual conference, not only can you send the people with the authority to make schedule changes, but they will also have an

⁵¹ In respect of Heathrow access, British Airways Fl.115 requires a departure slot at 11.15, but has been allocated a slot at 09.25. At the same time Alia Royal Jordanian Fl.112 has been allocated a departure slot at 11.15, but would like one at 09.25. See ACL Ltd., *Accord Slot Swap Listing, LHR*, Season: W96 (16 June 1996).

In this case, a slot swap may be reasonably straight forward, but there are occasions when multiple swaps will need to take place until the preferred slot is obtained. For example, Airline A may have been cleared for a slot at 10.00, but requires a slot at 11.00. Airline B wishes to swap their 08.00 slot for the 10.00 slot, and Airline A may be willing to agree, even though it takes them even further away from their proposed time of departure, as an 08.00 slot may be more marketable, as overall demand for that slot will be greater than for their original 10.00 slot. They may thereafter hope to swap their new 08.00 slot for their desired 11.00 slot, even though there may be additional links in the chain.

overview of the way in which any proposed changes in respect of operations at one airport, may affect the overall flight schedule. In addition the Conferences also seek to optimise interline connections through the co-ordination of schedules where interlining takes place,⁵² but are not to be used as a forum for the discussion of allocation of aircraft capacity, pooling operations, division of markets or other commercial arrangements.⁵³

The steering group for the Schedule Co-ordination Conferences is the Schedule Procedures Committee (SPC), which also assists in the establishment and review of capacity limitations at congested airports. If it is established that schedule adjustments require to be made in light of airport capacity constraints, the SPC will seek to appoint a Co-ordinator for the airport in question, who shall administer the adjustments at both the Schedule Co-ordination Conference, as well as on an on-going basis.⁵⁴ The Co-ordinator will generally be chosen from one of the airlines operating at the airport, but in most cases would be an employee of the national flag-carrier. He is nevertheless required to discharge his duties in an impartial manner having regard to the methods and procedures which are set out in the IATA Scheduling Procedures Guide.⁵⁵ In particular the Co-ordinator should seek to improve airport capacity and scheduling flexibility as well review the criteria for capacity assessment. There is also a requirement to continually monitor the actual use of slots to ensure that scarce resources are not wasted, as well as compile statistics for each season by airline, to show the number of slots applied for, the slots held, and the slots actually operated. If an airline consistently operates less than

⁵² See IATA, *supra* note 17 at 14, 'IATA Schedule Coordination Conferences - Standing Working Arrangements', para. 1.

⁵³ See *ibid.*, para. 2.

⁵⁴ See *ibid.*, para. 3.3.1.a.

⁵⁵ See *ibid.*, para. 3.3.4.

85% of its allocated slots, and does not surrender these, then such non-use shall be highlighted at the next Schedule Co-ordination Conference, and may result in that airline's future application for non-historic slots receiving a lower priority.⁵⁶ The main focus of the Co-ordinator's work is however placed upon the task of allocating the capacity at slot controlled airports.

It should be noted that under the IATA scheduling system there are two types of capacity sensitive airports. The airports which have a substantial capacity constraint are designated 'SCR', as the operators submit a Schedule Clearance Request to the Co-ordinator specifying the details of the proposed service which they are proposing to have cleared. The Co-ordinator may respond by accepting the submission, or if the proposed slot is unavailable, he may make several alternative offers, which may be accepted or rejected by the carrier.⁵⁷ In this system, the Co-ordinator has a high level of control, and has the right to require airlines to alter their schedules to meet the airport's capacity constraints.⁵⁸ The other system in operation is the 'SMA', where the airlines submit to the airport operators or to any other data collection agency details of scheduled operations at the airport, and which information constitute the Scheduled Movement Advice.⁵⁹ In general terms, the airport operators will not provide any response to the submissions which are made, but in the event of conflict can invite airlines to adjust their schedules.⁶⁰ Any such adjustments should also be in the interests of the airlines, as it is desirable to avoid any

⁵⁶ See *ibid.*, para.3.3.4(e) & 3.8.2.

⁵⁷ See *IATA Standard Schedules Information Manual* (February 1996), para.6.2.2 [hereinafter *Information Manual*].

⁵⁸ Note that "SCR" airports may also be referred to as "coordinated" airports, and typical examples are: Heathrow, Gatwick, Frankfurt, Tokyo-Narita, Hong Kong, New York-JFK.

⁵⁹ See *Information Manual*, *supra* note 57, para. 6.3.1.

such conflicts from an operational point of view, and in addition it prevents the status of the airport being promoted to the more restrictive 'SCR' category. As the category into which an airport falls is dependent on the level of the capacity constraint, there are examples where an airport may be operated under 'SCR' conditions during the busier summer season, and which may thereafter revert to 'SMA' status during the quieter winter season. This is particularly true of airports catering for large numbers of tourist, especially northern Europeans seeking to enjoy the Mediterranean sun.⁶¹

Airports that have 'SCR' status require that the Co-ordinator allocate the available capacity in terms of the priorities set out in the Scheduling Procedures Guide (SPG).⁶² The SPG recognises that there are several categories of aviation, namely scheduled public services and programmed charter services, irregular commercial services, general aviation, and military aviation. The first two categories are to be given priority, but consideration should be given to maintaining limited facility for the other segments. Against this background, capacity is to be allocated in line with the following criteria. The first is historical precedence which only applies to scheduled public services and programmed charter services. It states that a slot that has been operated by an airline as cleared by the Co-ordinator should entitle that airline to claim a slot within the same co-ordination parameters in the next equivalent season. Secondly, a schedule change to a historical slot should have priority for new demand for the same slot. These are also sometimes referred to as 'retimed historic'. Thirdly, after all historic slots and schedule

⁶⁰ Airports operating under "SMA" conditions include: Amsterdam-Schiphol, Birmingham, Hamburg, Warsaw, Osaka-Kansai, Bahrain, Kaohsiung, etc. See *ibid.*, app. J.

⁶¹ Airports operating under both "SCR" and "SMA" conditions include: Alicante, Almaria, Ankara-Esenboga, Antalya, Catania, Gerona, Ibiza, Menorca, Naples, Reus, Rome-Ciampino, Valencia and Venice. See *ibid.*

changes have been satisfied, an airline's request for additional slots to extend an existing service to a year-round operation should have priority over completely new requests. Fourthly, a provision was introduced into the SPG in 1991 providing priority treatment for carriers with 'new entrant' status, and is effectively the first time that the SPG has introduced a provision promoting competition amongst the carriers. It provides that 50% of the slots that become available after all requests on the basis of historic precedence have been satisfied and should be made available to requests by carriers with 'new entrant' status. This requires that a carrier whose requests if accepted, shall not hold more than four slots at that airport on a particular day.⁶³ In addition to the above criteria, there are a number of secondary ones which place a greater emphasis on the operational requirements of the industry.⁶⁴ First, there is a requirement for consideration to be given to the mixture of long-haul and short-haul operations at major airports to satisfy public demand. Consideration should also be taken of competitive requirements in the allocation of slots, as well as the requirements of the travelling public with reference to transit times and the losing of connections. It is also stated that higher frequency of operation should not, per se, imply higher priority, as the principle of optimising economic benefit should be the main consideration.⁶⁵ The aim of this last provision is not altogether clear, as the question does arise as to which party's economic benefit is being referred to. Previous provisions refer to notions of competition and public convenience, and therefore the reference to 'economic' benefit seems incongruous. What may be being referred to is that the 'opportunity cost' of operating one service in preference over another should be taken

⁶² See LATA, *supra* note 17, para. 3.4.

⁶³ See *ibid.*, para. 3.4.4.4.

⁶⁴ See *ibid.*, para. 3.4.5.

⁶⁵ See *ibid.*, para. 3.4.5.5.

into consideration. If this is the case, the object of this provision may more clearly be achieved by substituting the word 'economic' with 'consumer'.

In addition to providing priorities for capacity allocation, the SPG provides general guidance for scheduling procedures. It seeks to resolve any problems involving conflicting demands for slots through "discussion in an atmosphere of mutual co-operation and goodwill".⁶⁶ Co-ordinators are also urged to apply a certain degree of flexibility when allocating slots, as aircraft can not always operate to schedule for any number of operational reasons, and regard is to be had to past experience. Emergencies beyond the control of the airline which cause disturbances in the scheduling, should not affect that carriers right to historical precedence, and any longer-term emergency should invoke a rescheduling process. This situation arose in respect of the Gulf War where demand for flights to the Middle East dropped off significantly. Carriers at London Heathrow and Gatwick obtained confirmation from their respective scheduling co-ordinators that the short-term reduction in schedules would not affect the carriers grandfather rights to the equivalent slots in the next corresponding season.⁶⁷ The co-ordinator should also allocate to any party who have requested slots, those slots even if they still require the necessary traffic rights to exercise the use of the slots, and if the airline holding these provisional slots does not receive the required traffic rights, then the slots are to be immediately returned to the Co-ordinator. There is also a general guideline

⁶⁶ *Ibid.*, para. 3.5.1.

⁶⁷ See T. Christopherson, 'Regulatory Framework for Airline Operations', Aircraft Financing, Euromoney Publications (London: Ed. Simon Hall, 1993) at 347.

requiring that if a slot request cannot be met, then the Co-ordinator should offer the closest earlier or later available timing for the specific flight.⁶⁸

The allocation of airport capacity through a system which prioritises certain flights according to historic precedence and other objective criteria are important as a mechanism for initial capacity distribution, but an airport and the capacity demands made in relation thereto are a dynamic system, and accordingly provision must also be made for fine-tuning or amending the slot holdings in order that the scheduling requirements of the airlines are met, and in order to minimise the amount of capacity wastage. The Scheduling Procedures Guide therefore allows for the free exchange of slots on a “one for one” basis between airlines, subject to the final confirmation of the airport Co-ordinator.⁶⁹ This exchange is very limited in its terms, and it appears to ensure that the existing allocation mechanism is not superseded by a highly developed system of slot trading, which might have the effect of frustrating some of the aims of the principal allocation mechanism referred to earlier. If the slot pool is to operate effectively, a mechanism must be in place to ensure that any allocated slots will not remain unused, and in the event that some slots are unused, that this spare capacity is quickly redistributed throughout the system. Provision is therefore made requiring airlines not to request or hold slots which they do not *intend* to operate,⁷⁰ and if an airline holds slots which it is not *able* to operate, it is required to return these at the earliest possible date.⁷¹ If airlines do not comply with these provisions, then the sanctions which may be exercised are however limited. As the

⁶⁸See IATA, *supra* note 17, para. 3.5.6.

⁶⁹ See *ibid.*, para. 3.7.

⁷⁰ See *ibid.*, para. 3.8.

system of slot exchanges is highly dependent on the availability of information, IATA has ensured that capacity figures relevant to the co-ordination process are now available to the airlines over the internet website, as well as providing the site to enable airlines to advise other airlines of their slot needs and their current slot holdings available for exchange. It is seen that dialogue not only between the airlines, but also between them and the co-ordinator as well as the data collection agencies is fundamental to ensuring that the allocation system does not stagnate.

The Guide simply states that historical precedence only applies to slots that are operated,⁷² which is in essence a ‘use-it-or-lose-it’ rule on a seasonal basis. The provision is however somewhat vague in its wording, in that the first sentence appears to allow for the loss of a slot due to non-operation, and the last sentence of the provision appears to explicitly state that the sanction for consistent failure to utilise a slot, is that any future requests for non-historic slots receive a lower priority. This may on first reading give rise to the question whether the latter provision is in fact the sole sanction for non-operation, or whether it operates in addition to the loss of a specific slot, due to non-operation. In addition, further questions arise as to the automatic loss of a slot, as the provision does not indicate what should be considered to be ‘non-operation’. To not grant historic precedence to an operator for missing a single slot in an entire season would appear rather draconian, and as a result the European Regulation⁷³ has incorporated an 80% operations limit for scheduled carriers and a 70% limit for charter carriers. In practice, this provision

⁷¹ *Ibid.*, para. 3.9: The obligation is for the slots to be returned at the earliest possible date, but in any event, the return should not be any later than 31 January for the next Summer season, and no later than 31 August for the next Winter season.

⁷² See *ibid.*, para. 3.8.2.

⁷³ See EC, *Council Regulation 95/93 of 18 January 1993*, OJ Legislation (1993), No.L14/1, art. 10(5).

would appear to allow for the loss of a single slot for non-operation, but most carriers will operate across the season with only a few ‘holes’, and will get back those unused slots which are in fact now non-historic under the secondary criteria for allocation mentioned in the IATA SPG, namely that the carrier whose schedule has been affective for a longer period of operation in the same season should have priority.⁷⁴ The rationale behind this is that the fragmentation of slots is not in the public’s interest, and this approach also appears to be in keeping with the broad secondary provision which requires for the taking into account of competitive requirements in the allocation of available slots.⁷⁵ The second part of the provision dealing with the non-operation of slots therefore appears to provide a general warning to carriers that if they abuse the system, then slots which are non-historic may no longer be ‘rescued’ through the application of secondary allocation criteria.

The SPG has a secondary provision regarding sanctions,⁷⁶ which provides that carriers that “regularly and intentionally” operate services at a time significantly different from the allocated slot will not be given historical precedence for the time that they operate. This provision is more wide-ranging than the above provision, as it allows for the disqualification of a carriers rights to slots which would otherwise have received historic precedence, on the basis of the carrier’s wilful misconduct in disregarding the requirement to operate at a given time. This is in addition to the slots that the carrier would have lost on the basis of the provision in respect of non-operation. The potentially far-reaching effect of this provision is indicative of the entire approach to airport

⁷⁴ *Supra* note 61, para. 3.4.4.5.

⁷⁵ See *ibid.*, para. 3.4.5.2.

⁷⁶ See *ibid.*, para. 3.8.3.

scheduling, which is based on a system of mutual co-operation and goodwill.⁷⁷ Any carrier therefore flouting the system would not only have a detrimental effect on the operations of other carriers, but unless a sufficiently strong sanction was in place, would possibly also provoke other carriers to ignore their allocated slot times, especially at airports which are severely capacity constrained.

The guidelines in the IATA SPG relate to the priorities that the Co-ordinator should ascribe to the allocation process, but this is only one of the channels through which an airline would seek to obtain slots. The other method of obtaining a desired slot is through a swap with an other carrier, and at some airports such as London Heathrow it may form the dominant means, as newly created slots are either unavailable or at times that do not allow for an economically viable services.⁷⁸ It is therefore of the essence that at the time of the Schedule Co-ordination Conference (SCE), all relevant information as to provisional schedules and slot holdings can be made available. The SCC's tend to take place in mid June for the co-ordination of the Northern Winter schedules, and in mid November in respect of the Northern Summer schedules.⁷⁹ Co-ordinators should advise the airlines no later than the end of April as to what they have on record as historic slots as actually operated in the preceding Northern Winter season, and by the end of September as to what they have on record as historic slots in respect of the current

⁷⁷ See *ibid.*, para. 3.6.3.

⁷⁸ At Heathrow, British Airways operate approximately 38% of the available slots. Airlines therefore frequently approach them with a view of swapping slots, and this has taken on such proportions, that at the 98th Schedule Coordination Conference held in Berlin between 13 - 19 June 1996, the facilities which were rented, were comparable to those of Airport Coordination Ltd., who act as the Heathrow Coordinators.

⁷⁹ The Winter Season for 1996/97 extends from 27 October 1996 to 29 March 1997, and the Summer Season for 1997 will last from 30 March 1997 to 26 October 1997.

summer season operated up until that time.⁸⁰ The airlines are under an obligation to acknowledge receipt of this information, and must contact the Co-ordinators if they disagree with the information that has been provided, prior to the 'submission date', which is the third Friday prior to the Conference commencement date.⁸¹ Airlines are also to submit data on proposed services for airport clearance purposes, *i.e.*, with regard to operations at airports which are designated 'SCR' and 'SMA', in line with the procedures and in the format set out in the IATA Standard Schedules Information Manual (SSIM) by the above stated submission date. Data which is received late may be given lower priority in the "solution of congestion problems",⁸² and any timings omitted in this data which would have been entitled to historic precedence, lose their historic precedence.⁸³ In addition to the submission of data to Co-ordinators for airport clearance purposes, the airlines are also required to provide at the commencement of each Conference their full timetables of scheduled services for the forthcoming season⁸⁴ in the format prescribed in the SSIM. Between the submission of the data and the Conference, the Co-ordinators will be able to analyse the data and proceed with preliminary co-ordination of the schedules, thereby allowing responses to the airlines slot requests to be prepared, prior to their arrival at the Conference.⁸⁵ By 10 A.M. on the first day of the Conference, the Co-ordinators are required to advise the airlines of their requested slots, including any changes that are required to meet capacity limitations, as well as the nearest available

⁸⁰ IATA Schedule Coordination Conference - Standing Working Arrangements, para. 8, as amended by SC/98 - BER, Agenda Item: 7, 'Proposed Changes to Scheduling Procedures Guide', para. D.

⁸¹ *Ibid.*

⁸² See *Information Manual*, *supra* note 57, para. 14(a).

⁸³ See *ibid.*, para. 14(b).

⁸⁴ See *ibid.*, para. 15.

⁸⁵ See *ibid.*, para. 20.

timings to those which have previously been requested.⁸⁶ The Co-ordinator should thereafter meet to discuss any scheduling adjustments that are required and to confirm schedules. Once the schedules have been confirmed, any further changes to the schedule, such as those brought about by swaps with other airlines can only be made with the agreement of the Co-ordinator.⁸⁷ As previously mentioned, the primary means to obtain slots at some capacity constrained airports is through swaps with other airlines. There is therefore an obligation in the Standing Working Arrangements for the Conference for the airport Co-ordinators as well as all the airline representatives to be present throughout the period of the Conference.⁸⁸ In the event that an exchange of a slot has been agreed between two airlines, the Co-ordinator is to be advised as soon as possible,⁸⁹ and in order to facilitate this type of co-operation between the airlines and to provide for transparency in the allocation process, the Co-ordinator is to make specified information available to interested parties, and this is to set out *inter alia*, historical slots by airline and chronologically for all airlines, requested slots by airline and chronologically for all airlines, all allocated slots as well as all outstanding requests and the remaining slots available.⁹⁰

Even after the conclusion of the Conference there may still be opportunities to obtain slots that were unavailable at the time of the Conference. A carrier may subsequently not seek to operate a certain slot due to an unforeseen change of circumstances. Any airline that has made a subsequent schedule change is required to promptly advise the Co-

⁸⁶ See *ibid.*, para. 23.

⁸⁷ See *ibid.*, para. 24.

⁸⁸ See *ibid.*, para. 26.

⁸⁹ See *ibid.*, para. 39.

⁹⁰ See *ibid.*, para. 30.

ordinator, in order to allow for the unsatisfied slot demands of other carriers to be accommodated. Airlines that require additional slots after the Conference are also recommended to provide the Co-ordinator at the beginning of each month with a list of slot requests which they wish to have kept under consideration.⁹¹ If the Co-ordinator is unable to confirm such a request, he should provide the nearest alternative offers both before and after the requested time which will be valid for a period of three working days, as well as provide a reason as to why the original request could not be accommodated.⁹²

The Schedule Co-ordination Conference (SCC) is therefore highly geared towards providing carriers with a maximum oversight as to the compatibility of their respective schedules, as well as the capacity constraints at airports. The transparent nature of the allocation process as set out in the SPG, in addition to the high attendance level of carriers at the SCC serves the industry well as regards the allocation of scarce capacity. It is however clear that the IATA system is based on a system of mutual co-operation and goodwill, and although reference is made to the competitive requirements of the industry⁹³ and the preferential treatment of new entrants,⁹⁴ it nevertheless promotes the status quo, making it difficult for start-up carriers to launch a competitive and economically viable service. If the SPG is to embrace competition as an underlying principle in capacity allocation, then it needs to question whether providing new entrant status to carriers with only four slots on a given day could be seen as providing them with the tools to become a competitive force, especially on shorter regional routes. It should

⁹¹ See *ibid.*, para. 42.

⁹² See *ibid.*, para. 45.

⁹³ See IATA, *supra* note 17, para. 3.4.5.2.

⁹⁴ See *ibid.*, para. 3.4.4.4.

also specify whether the 50% of the non-historic specified in New Entrant provision should entitle them to the first pick of the slots in the pool up to the 50% limit, rather than just representing half of the overall slot pool. In more general terms, the right to historic precedence does provide for a great deal of stability and allows for long term planning, but it clearly does favour the long established incumbents who may at one time have been the country's sole carrier, and would therefore have been able to build up a substantial slot holding. It again makes it very difficult for potential competitors to gain market entry at capacity constrained airports and obtain a sufficient amount of slots to operate a truly competitive service. Long established incumbents have a number of advantages in terms of the SPG other than historic precedence, namely they are more likely to benefit from provisions giving preference to carriers introducing year-round services,⁹⁵ those giving priority in competing claims to the carrier with the longer effective period of movement,⁹⁶ those requiring having regard to the needs of the travelling public, as the incumbent will tend to have a higher frequency of services and which will therefore tend to favour them due to the shorter transit times.⁹⁷ In addition to these regulatory advantages, established carriers will also have the commercial advantages by way of having a more extensive route network, an existing brand image, alliances with other carriers giving it advantages in respect of CRS displays, frequent flier programs, a higher level of frequencies due to such factors as fleet availability and slots, as well as operating on routes on which only a single carrier can be designated in terms of the bilateral allowing for a far greater degree of cross subsidisation between services. If these are but some of the disadvantages that a

⁹⁵ See *ibid.*, para. 3.4.4.3.

⁹⁶ See *ibid.*, para. 3.4.4.5.

⁹⁷ See *ibid.*, para. 3.4.5.4.

new entrant faces, then the present provisions that give the appearance of providing for an advantage to the new entrant are wholly inadequate, if competition is to be fostered.

CHAPTER 3

SLOT ALLOCATION UNDER REGULATION 95/93

Unlike the IATA Scheduling Procedures Guide which seeks to “provide governments, airport authorities and airlines with information on recommended methods to deal with congestion problems at airports on a *fair and equitable basis*”,⁹⁸ the European Council Regulation on Common Rules for the Allocation of Slots at Community Airports⁹⁹ approaches the question of slot allocation as a means of promoting air transport within the European market. In the preamble to the Regulation, it recognises in the fourth recital that there is a growing imbalance between the available amount of airport infrastructure and the growing air transport system in Europe. This is in line with the first paragraph of the foreword of the IATA SPG, which recognises that this may cause “serious operational disruptions, an alarming number of delayed arrivals and departures, and economic penalties”.¹⁰⁰ The agenda behind the Regulation becomes clear in the thirteenth recital of the preamble to the Regulation, which reminds that it is Community policy to facilitate competition and encourage entrance into the market, as provided for in terms of the Access Regulation¹⁰¹ in the ‘Third Package’, and thereafter emphasises that strong support is required for carriers who intend to start operations on intra-Community routes. The position of slots in the overall liberalisation strategy is provided for in the seventeenth recital which states: “Whereas it is also necessary to avoid situations where, owing to the lack of available slots, the benefits of liberalisation are unevenly spread and

⁹⁸ [emphasis added]. See *ibid.*, foreword para. (iii).

⁹⁹ See *Council Regulation 95/93 of 18 January 1993*, OJ Legislation (1993) No. L14/1 [hereinafter *Slot Regulation*].

¹⁰⁰ See IATA, *supra* note 17, foreword para. (i).

competition is distorted". It is clear that as a policy level objective, the promotion of competition and the facilitation of market access through the slot allocation mechanism, are treated as higher priorities than the efficient use of airport capacity, which is not explicitly provided for in the Regulation.

The Regulation applies to the allocation of slots at all Community airports,¹⁰¹ as well as to all Member States of the European Economic Area.¹⁰² Article 2 of the Regulation which provides for the definitions is of particular importance, as apart from defining a 'slot' in the same terms as the IATA SPG,¹⁰³ it provides for the definition of a 'new entrant'. It is slightly different from the one that is to be found in the IATA SPG, as although there is a similar reference to four slots, the SPG caps the total amount of frequencies that a carrier can have at four in order to qualify for 'new entrant' status, whereas the Regulation simply states that if a carrier has been allocated fewer than four slots on a given day, then he will qualify as a 'new entrant', but no mention is made of whether that carrier is barred from applying for more slots than the number which would take him up to a total of four for that day.¹⁰⁴ The second part of the 'new entrants' definition has been controversial as it route specific. It allows a carrier to obtain 'new entrant' status if it seeks to serve a non-stop intra-Community route on which there are no more than two other operators, and that fewer than four slots have been allocated for that non-stop service at that airport. One of the main criticisms is that this provision links slots and routes and services, something

¹⁰¹ See *Council Regulation No.2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes*, O.J. Legislation (1992) No. L240 at 8.

¹⁰² See *Slot Regulation*, *supra* note 99, art. 1.

¹⁰³ Adopted by Council Decision (EEC) 92/384, OJ L200 and subsequently amended by Council Decision (EEC) 93/453 OJ L212.

¹⁰⁴ See *Slot Regulation*, *supra* note 98, art. 1

¹⁰⁵ See *ibid.*, art. 2(b)(i).

that the IATA SPG has sought to avoid.¹⁰⁶ It may also be criticised on the basis that it removes slots from the overall slot pool, for what are thin routes, and the question does arise whether these could not be more beneficially employed on other more popular routes. The provision also places an unnecessarily heavy emphasis on European operations, when in fact a large part of the flights that operate out of the congested airports, that have been designated as fully co-ordinated, fly to destinations outwith the Community. The Regulation however bars airlines from taking advantage of the above provisions if they hold more than 3% of the slots available on that day at that particular airport, or 2% of the available slots within an airport system.¹⁰⁷ This barrier may assist new entrants to enter into the market, but it may be questioned if this provision does anything for competition, as in terms of this rule, British Midland are excluded from the new entrant provision¹⁰⁸ at Heathrow, although they due to their size would be the airline most able to launch a competitive service against British Airways and the destination state's airline.¹⁰⁹ At London Gatwick a similar situation exists as regards the exclusion from the 'new entrants' definition of Air UK, Cityflyer Express and Jersey European.¹¹⁰ The other potential problem with this provision is the apparently arbitrary nature of the four slot allocation, as it does not take any element of market share into account. On the one hand, providing a carrier with four slots on the Heathrow to Edinburgh route will not

¹⁰⁶ See P.P.C. Haanappel, "Airport Slots and Market Access: Some Basic Notions and Solutions" (1994) XIX:4/4 Air & Sp. L. 198.

¹⁰⁷ An "airport system" means two or more airports grouped together serving the same city or conurbation, as indicated in Annex II to Council Regulation 2408/92.

¹⁰⁸ See Civil Aviation Authority, 'Slot Allocation: A Proposal for Europe's Airports', CAP644 (London: CAA, 1995) at vi [hereinafter *CAA Slot Study*].

¹⁰⁹ Upon introduction of the "Third package", competition on routes from London Heathrow, which had British Midland as a third carrier saw a substantial fall in business class fares. In particular there was a reduction in the region of 25% on the Amsterdam fare, and a reduction of slightly under 20% on the Paris fare. See Civil Aviation Authority, "Airline Competition in the Single European Market", CAP 623 (London: CAA, 1995).

¹¹⁰ See *CAA Slot Study*, *supra* note 108.

provide him with a competitive position, when his competitors have twenty slots between them. On the other hand, the four slot limit gave certain established long-haul carriers 'new entrant' status, such as South African Airways on the Heathrow to Johannesburg route, at a time when Virgin Atlantic was keen to operate on the route, but was unable to do so owing to the unavailability of slots.¹¹¹

In respect of definitions, it should also be noted that the requirement to obtain a slot only exists in relation to an airport that has been designated as being 'fully co-ordinated'.¹¹² An airport that has been categorised as 'co-ordinated', has had a co-ordinator appointed to facilitate the operations at that airport, but does not require that aircraft have slots.¹¹³ Confusion may arise as in terms of the IATA SPG, a 'co-ordinated airport' is one that requires airlines to operate in accordance with the 'SCR' procedure, and therefore have cleared slots for their operations. The SPG equivalent of the 'co-ordinated airport' as defined in the Regulation, would be one that has been designated as operating under the 'SMA' system.

In terms of Article 3 of the Regulation, a Member State may designate an airport as being co-ordinated as long as this is done on a neutral and transparent basis.¹¹⁴ If however half or more of the airlines operating at the airport and/or the airport authority considers that capacity is insufficient for actual or planned operations,¹¹⁵ or new entrants encounter

¹¹¹ See Review of Regulation 95/93 on the allocation of slots, Consultation by the Department of Transport, Response by British Airways, 23 June 1995, para. 39.

¹¹² See *Slot Regulation*, *supra* note 99, art. 2(g).

¹¹³ See *ibid.*, art. 2(f).

¹¹⁴ See *ibid.*, art. 3(2).

¹¹⁵ See *ibid.*, art. 3(3)(i).

serious problems obtaining slots,¹¹⁶ or a Member State considers it necessary,¹¹⁷ then a thorough capacity analysis shall be carried out, which shall also consider methods of increasing capacity in the short-term. If after consultations with all interested parties operating at the airport, it is established that there are no possibilities to resolve the serious capacity problem in the short-term, then the Member State must designate the airport as being 'fully co-ordinated'.¹¹⁸ This designation shall be maintained until such time as the available capacity is sufficient to meet actual or planned operations.¹¹⁹

The person in charge of the co-ordination is the Co-ordinator, who may be a natural or legal person, and the Member State is to ensure that he carries out his duty in accordance with the provisions of the Regulation in an independent manner.¹²⁰ The co-ordinator is also required to participate in the IATA Scheduling Conference,¹²¹ as well as be responsible for the allocation of slots.¹²² In general terms, the duties of the Co-ordinator closely follow the duties set out in the IATA SPG, especially as regards the monitoring of the use of slots,¹²³ as well as the nature of the information that has to be made available to all interested parties.¹²⁴ In order to assist with the duties of the Co-ordinator, Article 5 of the Regulation calls for the creation of a Co-ordination Committee which shall be open to representatives of the airport authority, air traffic control, as well as the airlines that use

¹¹⁶ See *ibid.*, art. 3(3)(ii).

¹¹⁷ See *ibid.*, art. 3(3)(iii).

¹¹⁸ *Ibid.*, art. 3(4).

¹¹⁹ See *ibid.*, art. 3(5).

¹²⁰ See *ibid.*, art. 4(2).

¹²¹ See *ibid.*, art. 4(4).

¹²² See *ibid.*, art. 4(5).

¹²³ Compare *ibid.*, art. 4(6) with IATA, *supra* note 17, para. 3.3.4.(e).

¹²⁴ Compare *ibid.*, art. 4(7) with IATA Schedule Coordination Conferences, Standing Working Arrangements, para. 30.

the airport regularly.¹²⁵ The aim is for the Committee to serve as a consultative forum to discuss and consider such matters as, *inter alia*, the possibility of increasing the airport capacity, the complaints on the allocation of slots, monitoring the use of slots, guidelines for the allocation of slots, as well as problems encountered by new entrants in obtaining slots. They are also required to determine the capacity available for slot allocation on a twice yearly basis after consultation with a prescribed list of interested parties.¹²⁶ In order to facilitate any such enquiries, there is a duty on all the carriers operating at a co-ordinated or fully co-ordinated airport to provide the co-ordinator with all the relevant information that he may have requested.¹²⁷

The process of slot allocation is dealt with in Article 8 of the Regulation, and as in the case of the IATA SPG, it centres around the principle that priority is given to historical precedent, and the wording of Article 8(1)(a) of the Regulation is virtually identical to the terms of SPG para. 3.4.4.1., except for the omission of the words “same coordination parameter(s)”. There is however some doubt as to whether historic precedence applies to a single slot, as in the case of the IATA SPG. It is stated in Article 10(3) of the Regulation, that only if a carrier can show that he operated a slot for 80% of the time “on a particular moment of the day and for the same day of the week over a recognisable period”, will that carrier be entitled to the same ‘series of slots’ in the next equivalent period. This more narrow interpretation has been given by Co-ordinators in the U.K. and Spain, where a carrier is required to operate at the same time of the day for that week for a period of four weeks in the season. In Spain the slots must be operated on consecutive

¹²⁵ See *ibid.*, art. 5(1).

¹²⁶ See *ibid.*, art. 6.

weeks, but in the UK a fortnightly use of the slot is permitted.¹²⁸ This type of objective standard as to the number of slots that are required to form a series, is far more preferable to the expression “a recognised period”, as is presently used in the Regulation, especially if the grant of historic precedence is dependent on it.

Priority in the allocation process is also given to scheduled air services and programmed non-scheduled services,¹²⁹ which is similar to the related provision in the SPG, which gives priority to “scheduled public services and programmed charter services”. It may however be considered to be somewhat peculiar that the Regulation maintains the scheduled/charter carrier distinction, as this has been abolished for regulatory purposes in the ‘Third Liberalisation Package’.¹³⁰ Apart from the ‘new entrant’ provision which is to be found later on in the Regulation, no other provisions expressly provide for a ranking order, but the Regulation has incorporated into its terms that the Co-ordinator, “*shall take into account* additional priority rules established by the air carrier industry”¹³¹ (emphasis added), and clearly what is referred to here is the IATA Scheduling Procedures Guide. This provision requires that the Co-ordinator must have regard to these in the allocation process, and this therefore transforms them within the Member States from non-binding guidelines developed by the industry to provisions that are binding on the co-ordinator, and have the force of law.

¹²⁷ See *ibid.*, art. 7.

¹²⁸ See Coopers & Lybrand, *The Application and Possible Modifications of Council Regulation 95/93 on Common Rules for the Allocation of Slots at Community Airports*, Final Report, 17 October 1995, para. 7.75.

¹²⁹ See *Slot Regulation*, *supra* note 99, art. 8(1)(b).

¹³⁰ Council Regulation (EEC) No.2407/92 on licencing of air carriers OJ Legislation (1992) No. L240/8, Council Regulation (EEC) No.2408/92 on access for Community air carriers to intra-Community air routes, OJ Legislation (1992) No. L240/8 Council Regulation (EEC) No.2409/92 on fares and rates for air services OJ Legislation (1992) No. L240/8.

The Regulation also recognises that any system of initial allocation will only provide for the efficient allocation of slots up to a certain degree, and that in order to provide the system with flexibility, the exchange of slots between the carriers must be permitted.¹³² This provision is however somewhat more cryptic in its terms than SPG para.3.7., which clearly states that it only allows for a free exchange on a 'one-for-one' basis, whereas the Regulation states that slots may be "*freely exchanged between air carriers or transferred by an air carrier from one route, or type of service, to another by mutual agreement or as a result of a total or partial take-over or unilaterally*". The question has been raised, as to whether this provision allows for the monetised secondary trading of slots, and certain large carriers (including British Airways) have publicly attributed this interpretation to the provision. The provisions of the Regulation to a large extent stem from the IATA Schedule Procedures Guide, which as indicated above does not allow monetised trading, and it may therefore be stated that the any assertion that monetised trading is presently allowed goes against the spirit of the Regulation. In addition, Article 8(4) only refers to the 'exchange' between air carriers, which denotes the giving of one slot in return for another,¹³³ and therefore on a literal interpretation the monetised trading of slots is not provided for. It would however be conceded that the terms of an 'exchange' would still be met if a more valuable slot was traded with a lesser one, which had an additional monetary compensation attached to it and this approach recently been confirmed in the English case of REGINA v. AIRPORT CO-ORDINATION LIMITED.¹³⁴ In any event,

¹³¹ [Emphasis added]. See *Slot Regulation*, *supra* note 99, art. 8(1)(c).

¹³² See *ibid.*, art. 8(4).

¹³³ *The Little Oxford Dictionary*, 7th ed. (Oxford: Clarendon Press, 1994), provides the following definition for 'exchange', namely, "giving one thing and receiving another in its place".

¹³⁴ Unreported - High Court of Justice, Queen's Bench Division, Divisional Court, 25 March 1999. This action was initiated by the State of Guernsey Transport Board (the Board) in respect of the transfer of slots at London Heathrow from Air UK to British Airways, which had previously been used by Air UK for

any exchange or transfer of slots requires to be done on a transparent basis, and requires the confirmation of the Co-ordinator, who requires to confirm that airport operations will not be prejudiced by the transfer, and that the other provisions relating to regional services and the safeguard mechanism under Article 11 which seeks to limit the transfer of slots to routes where a competing Community carrier is having difficulties obtaining landing and departure slots, are not infringed.

This right to freely exchange slots is not however extended to new entrants which are operating a service between two Community airports, unless they have done so for a

services between Guernsey and London Heathrow and which service was considered to be of economic importance to the island, being the only such service.

In challenging the transfer, the Board principally submitted that the transfer were not true exchanges as the slots provided by British Airways were accompanied by an additional payment and therefor the transaction was unlawful under Article 8(4) of the Slot Regulation (see *supra* note 99). The judge was principally concerned with the meaning of the words “freely exchanged”, finding that these clearly and unambiguously encompassed the transaction between Air UK and British Airways. Reference by counsel for the Board to the preparatory materials produced by the [European] Commission during the course of gestation of the Regulation, in the view of the judge merely pointed to a disapproval of the sale of slots, absent the element of exchange. The judge also held that the recitals in the preamble to the Regulation did also not point to a different construction. The submission by counsel for the Board that in any slot transaction where money changes hands, is akin to a sale rather than an exchange, was also not accepted by the Court, as where slots which were perceived to be less valuable were accompanied by a money payment and “exchanged” for slots which were perceived as being more valuable, this did not take them out of the scope of an exchange.

The judgement also interestingly addressed the question as to whether the Coordinator acted *ultra vires* by approving a slot exchange, which was accompanied by a monetary consideration. It was held by the Court that the Slot Regulation does not establish the coordinator as an investigatory or regulatory body and the approval of a transfer is limited to the considerations set out in Article 8(4) of the regulation, namely, that the airport operations would not be prejudiced, that the limitations imposed on Member States according to Article 9 are respected and that the change of use does not fall within the scope of Article 11.

On the issue of slot transfers it may appear that the judge's approach may have been slightly blinkered in light of the generally perceived wisdom that slots can only be transferred on a one for one basis, as why otherwise are air carriers so reluctant to admit that they have paid for slots. It is also well known that slots at economically unviable times are available at Heathrow and that it is therefore easy to dress up a sale as being an exchange. This is particularly true in cases such as the present, where it was clearly never the intention of the “purchasing” carrier to use the slots obtained in exchange. Although the motives of the Court may be questionable, it will undoubtedly put pressure on the Commission to address the issue of secondary slot trading and to clarify what is considered to be a permitted exchange under the terms of the Regulation, the discussion of which was described in the Financial Times (Lex Column, 4 October 1996) as “the constipated debate”.

period of two seasons.¹³⁵ It may be recalled that in terms of Article 2(b), ‘new entrants’ are defined both with reference to the number of daily slots they hold at an airport, as well as with reference to the number of operators and slots used in respect of a given intra-Community route. To exclude the right to transfer a slot in the latter case may be seen as reasonable, as the slot is employed in a route specific manner, with an aim of providing increased competition on that route. It is unclear why a new entrant carrier who qualifies on the basis that he has less than four daily slots at an airport should be barred from transferring these, as this results in a substantial reduction in his scheduling flexibility, as he would almost be bound to accept any slot which he was offered, especially when regard is had to Article 10(8), which states that if a new entrant has been offered slots within two hours of his request, and does not accept these, then he shall no longer retain his new entrant status. This provision should clarify if in fact both types of new entrants are to be caught by it. Another vagueness in the provision is the reference to the ‘two seasons’ in respect of the period which a new entrant has to hold the slots prior to transfer. Is the reference to ‘consecutive seasons’ or ‘equivalent seasons’, although the latter of the two options would seem to be the more appropriate as many airline schedules change between the winter and summer seasons due to differing passenger travel demands. This is perhaps another small point that should be clarified.

The latter part of Article 8 provides for a complaints procedure, whereby the co-ordination committee will consider the complaint and make proposals to the Co-ordinator with a view to solving the problem,¹³⁶ and if this can not be achieved, then the Member

¹³⁵ See *Slot Regulation*, *supra* note 99, art. 8(5).

¹³⁶ See *ibid.*, art. 8(7).

State concerned may provide for mediation by an air carrier representative organisation, such as IATA, or some other third party.¹³⁷ In its present form, this provision does not make it mandatory for the Member State to seek mediation, but discretionary, and in order to promote a more uniform system of dispute resolution, it may be preferable that the reference to mediation is made mandatory.

The Council Regulation on access for Community air carriers to intra-Community air routes¹³⁸ specifies in Article 4 a special regime in respect of access to routes to regional airports, where such routes are considered vital to the economic development of the area, and to that extent services on these routes are seen to fulfil a public service obligation. Article 7 of the slot allocation Regulation is closely related to this, as seeks to reserve certain slots at 'co-ordinated airport[s]' for this purpose. It is peculiar that the Regulation refers to slots at 'co-ordinated' airports, as slots are only allocated at 'fully co-ordinated' airports, and it may be assumed that this was an oversight on the part of the drafters of the provision. In terms of the Regulation, slots can only be set aside in two circumstances, namely, where the route in question serves a peripheral development region, and where that route is considered vital to the economic development of the region. The second circumstance, is where a public service obligation has been imposed under Community legislation. It appears that only France has to date invoked this provision, and 35% of peak slots have been reserved for domestic services from Paris Orly,¹³⁹ and concern has been expressed that this provision may be applied inappropriately, leading to a reduction

¹³⁷ See *ibid.*, art. 8(8).

¹³⁸ See *Council Regulation (EEC) No. 2408/92*, OJ Legislation (1992) No. L.240/8.

¹³⁹ See Coopers & Lybrand, *The Application and Possible Modifications of Council Regulation 95/93 on Common Rules for the Allocation of Slots at Community Airports*, Final Report, 17 October 1995, para. 8.5.

in the available slots for foreign airlines. An example of inappropriate designation may be found in the case of the Toulon to Orly service, even though there are very regular services to Marseilles, which is situated approximately thirty miles away.¹⁴⁰ This situation may also lead one to question whether these services could not be more appropriately operated from a less heavily congested airport, rather than from a capacity constrained airport such as Orly, for which there is a great degree of slot demand from carriers of other Member States.

The maintenance of the slot pool as well as the ‘use-it-or-lose-it’ rule are to be found in Article 10 of the Regulation. It states that at an airport where slot allocation takes place, a pool shall be set up to include all the newly created, unused and surrendered slots.¹⁴¹ Although it is not explicitly stated, this pool can only be created once historic and retimed historic have been confirmed by the Co-ordinator. The provision also provides that if a slot is not utilised, it shall be withdrawn by the Co-ordinator.¹⁴² This situation is somewhat different to the one found in the IATA SPG, which states that “historical precedence applies only to a slot that is operated, and does not apply to a slot that is not operated”.¹⁴³ It states that a carrier will lose its slot at the end of the season as no historical precedence can be attributed to it, whereas the Regulation takes a far more active stance by stating that if a carrier doesn’t operate a slot it will be taken away from him, and there is no need to wait until the end of the season either to reallocate that slot. It is within this provision that the ‘use-it-or-lose-it’ rule lies. It should also be noted that this

¹⁴⁰ See *ibid.*

¹⁴¹ See *Slot Regulation*, *supra* note 99, art. 10(1).

¹⁴² See *ibid.*, art. 10(2).

¹⁴³ See IATA, *supra* note 17, para. 3.8.2.

provision applies only to slots that represent less than 80% of a slot holding, or those which have been allocated on an *ad hoc* basis. In order however not to prejudice carriers who were genuinely unable to operate a slot may be exonerated under this provision if the reason relates to the “*grounding of an aircraft type, or the closure of an airport or airspace or other similar exceptional case*”.¹⁴⁴ It is somewhat surprising that the Regulation does not provide for additional sanctions for those who regularly and intentionally operate at times significantly different from their allocated slots as is the case in the IATA SPG,¹⁴⁵ although the SPG provision may be incorporated through Article 8(1)(c) of the Regulation, when the Co-ordinator is required to have regard to the rules of the industry in the co-ordination process.

The next sub-section¹⁴⁶ is of particular importance, as it states that only slots which form part of a series which extends “over a recognisable period”, shall entitle the carrier to those slots in the next corresponding season, on condition that this series is operated as cleared by the co-ordinator for at least 80% of the period for which they were allocated. As was discussed above, it is rather unsatisfactory that a provision that could lead to the loss of an entire series of slots, should be so vague as to what constitutes a ‘recognisable period’, and an actual number of weeks should therefore be specified, as is the practice in the UK and Spain. The Article in recognition of the far reaching consequences of the loss of a whole series of slots, stipulates a number of grounds, on the basis of which non utilisation of the slot may be justified.¹⁴⁷ The first of these are unforeseen and irresistible

¹⁴⁴ See *Slot Regulation*, *supra* note 99, art. 10(2).

¹⁴⁵ See IATA, *supra* note 17, para. 3.8.3.

¹⁴⁶ See *Slot Regulation*, *supra* note 99, art. 10(3).

¹⁴⁷ See *ibid.*, art. 10(5)

cases outside the air carriers control, leading to the grounding of the aircraft type generally used for the service in question, or the closure of an airport or airspace.¹⁴⁸ These grounds tend to be slightly more forgiving than those found in Article 10(2), relating to the withdrawal of a single slot, as there only 'exceptional cases' lead to exoneration, whereas the rule presently being considered allows for 'unforeseeable and irresistible cases', which may be interpreted a little more broadly. The second justified reason for not meeting the 80% limit, relates to problems with the starting up of a new scheduled passenger service with aircraft of no more than 80 seats, on routes between regional airports, where the capacity does not exceed 30,000 seats per year.¹⁴⁹ The third ground relates to a carrier which is in financially precarious state, and has as a result been granted a temporary licence, pending the carriers financial restructuring.¹⁵⁰ Fourthly, the interruption of a series of non-scheduled services due to the cancellation by a tour operator, provided that the overall slot usage does not fall below 70%.¹⁵¹ Fifthly, an interruption to a series due to action intended to affect these services, which makes it practically or technically impossible for the carrier to carry out the operations as planned.¹⁵²

The other important provision relates to the advantage enjoyed by new entrants,¹⁵³ and it is provided that 50% of slots in the slot pool shall be allocated to new entrants unless the amount requested falls under this figure. The provision only specifies the quantity, but not the quality of the slots to be allocated. The question may therefore be asked whether

¹⁴⁸ See *ibid.*, s. (a).

¹⁴⁹ See *ibid.*, s. (b).

¹⁵⁰ See *ibid.*, s. (c).

¹⁵¹ See *ibid.*, s. (d).

¹⁵² See *ibid.*, s. (e).

the interest of the new entrants and competition would not be more successfully promoted by assuring them the first pick of the slots in the slot pool, even if the amount of slots dedicated to new entrants was reduced from its present 50% level. As previously mentioned, a new entrant that has been offered slots within two hours of its request, but does not choose to accept these, shall not retain the new entrant status. It is not however stated as to what the period of disqualification should be, and there is therefore confusion as to whether the carrier loses new entrant status for the season, indefinitely or for any other other period of time. In addition the two-hour period may be somewhat arbitrary, as in the case where a service requires a slot at 09.00, but receives a slot at 10.00. This slot may be useless to the carrier if it has secured a 10.30 departure slot, and an 07.30 arrival slot may be preferable to a 10.00 slot even though it is further from the requested 09.00 slot.¹⁵⁴ As the 10.00 is within the two hour period, the carrier would be left with no other option than to accept the slot if he is wanting to maintain his new entrant status, and it is clear that the fact that a slot has been offered within two hours of the request, does not automatically mean that it is useable.

In addition to the bar on exchanging slots which effects new entrants in terms of Article 8(5), there is a 'safeguard mechanism' that operates under Article 11 of the Regulation. This prohibits the free exchange of slots between a fully co-ordinated airport and an airport in another Member State, if another Community air carrier, licensed in another Member State, has been unable "*despite serious and consistent efforts, to obtain landing and departure slots which can reasonably be used for providing one or more additional*

¹⁵³ See Slot Regulation, *supra*. note 99, art. 10(7).

frequencies on the route within two hours before or after the times requested of the co-ordinator".¹⁵⁵ This provision is only applicable however if the airline seeking to obtain a slot through an exchange has a greater slot holding than the airline experiencing the difficulties in obtaining slots for additional frequencies. Otherwise the normal rights of exchange under Article 8(4) of the Regulation shall be applicable. This provision has a number of deficiencies, the illogic of the two hour limit has been previously discussed, and no definition is provided as to what constitutes a '*serious and consistent effort*', which acts as the trigger mechanism for this provision. By operating this provision on the basis of carrier nationality, the carriers that have their home base at the congested airport, are the ones that are prejudiced by the other state's carrier's inability to obtain slots, whereas his country men on the same route are unaffected, and could transfer slots and increase their frequency on the route. By way of example, if British Airways, British Midland, Air France and AoM were to operate on the Heathrow to Paris route, and AoM was unable to obtain additional slots at Heathrow, then British Airways and British Midland would be barred from transferring slots to the route, but Air France would be unaffected, and could in fact increase its frequency on the route.¹⁵⁶ Latter parts of this provision address some of these concerns,¹⁵⁷ in that they require the taking into account of the effects of the exercise of this provision on competition between the air carriers. The Member State within which the fully co-ordinated airport is situated "*shall endeavour to facilitate an agreement between the air carriers concerned*". It is unclear what dispute exists between the airlines, that requires agreement, as the unavailability of slots for the

¹⁵⁴ Review of Regulation 95/93 on the allocation of slots, Consultation by the Department of Transport, Response by British Airways, 23 June 1995, para. 52.

¹⁵⁵ See *Slot Regulation*, *supra* note 99, art. 11(1).

¹⁵⁶ Review of Regulation 95/93 on the allocation of slots, Consultation by the Department of Transport, Response by British Airways, 23 June 1995, para. 85.

foreign carrier seeking to obtain these is a matter for the Co-ordinator and not his competitor. If there were an implication that the locally based carrier, who cannot transfer additional slots, should agree to transfer these to the foreign carrier, this would be totally unacceptable in any event.

The remaining four Articles of the Regulation are relatively general provisions. Article 12 merely provides for retaliatory action to be taken in the slot allocation process vis-à-vis foreign carriers, if Community carriers are discriminated against in the foreign states. Article 13 provides for the submission of a report examining the operation of the Regulation after a period of three years, after the Regulation's coming into force. This has already been produced by the firm of accountants, Coopers & Lybrand, who submitted their report dated 17 October 1995 to the Commission. Article 14 of the Regulation deals with its future review and replacement as discussed above, previously thought to be dealt with in January 1997.¹⁵⁸ The last Article simply provides that the Regulation came into force on the thirteenth day after its publication in the Official Journal of the European Communities.¹⁵⁹

¹⁵⁷ See *Slot Regulation*, *supra* note 99, art. 11(2).

¹⁵⁸ Comments by Michael Niejahr of DG VII of the European Commission speaking at the European Air Law Association Conference at Copenhagen, November 1996.

¹⁵⁹ See *Slot Regulation*, *supra* note 99, art. 15. The Regulation was published in the Official Journal on 22 January 1993, and hence it came into force on 21 February 1993.

CHAPTER 4

THE BLOCK EXEMPTION – COUNCIL REGULATION 1617/93

The slot allocation system is governed in Europe by a third element, and this is the Commission Regulation that provides for a block exemption from the provisions of Article 85(1) of the Treaty of Rome.¹⁶⁰ The slot allocation process and the scheduling conferences, may potentially give rise to *“agreements between undertakings, decisions by association of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the ... distortion of competition within the common market”*, and these are prohibited under Community law.¹⁶¹

The main elements of the block exemption provide that the consultation on slot allocation must be open to all air carriers having expressed an interest,¹⁶² that the rules of priority must not relate to carrier identity, nationality or the class of service provided.¹⁶³ In common with Regulation 95/93 exceptions to this rule of non-discrimination are made with respect to rules of priority derived from historic precedence,¹⁶⁴ or with regard to the preferential access enjoyed by new entrants to 50% of the unallocated slot pool.¹⁶⁵ Another major element on which the block exemption rests is the emphasis on the transparency of the allocation process. This requires that airlines are informed of the rules of priority for the allocation process which are established¹⁶⁶ and also provides for

¹⁶⁰ See *Treaty Establishing the European Community*, 25 March 1957, 298 U.N.T.S. 11.

¹⁶¹ See *ibid.*, art. 85(1).

¹⁶² See *ibid.*, art. 85(1)(a).

¹⁶³ See *ibid.*, art. 85(1)(b).

¹⁶⁴ See *ibid.*

¹⁶⁵ See *ibid.*, art. 85(1)(d).

¹⁶⁶ See *ibid.*, art. 85(1)(c).

information on airline slot holdings, requests, criteria for allocation and slot availability be made available to any interested airline.¹⁶⁷ These provisions are a verbatim repetition of the duties of the airport co-ordinator which are set out in Regulation 95/93,¹⁶⁸ and have the effect of stressing the importance attached to not only having a fair system of allocation, but one which can stand up to objective scrutiny. The block exemption also reserves the right for observers of the European Commission and the Member State concerned to be sent to “consultations on slot allocation and airport scheduling”,¹⁶⁹ and this refers to the biannual IATA Scheduling Conferences.

The ultimate aim of the Regulation 95/93 and the block exemption is to try and encourage new entrants onto the routes in order that competition can be increased bringing a theoretically corresponding benefit to the travelling public. The block exemption therefore provides¹⁷⁰ that if new entrants are unable to obtain slots at a congested airport in order to allow them to compete effectively against established carriers on any route, then the benefit of the block exemption will be withdrawn. Although this might appear to be a substantial incentive for airport co-ordinators to ensure that new entrants are given every possible assistance to commence a competitive service, in reality this can be viewed as a rather empty threat. Both the Slot Regulation and the block exemption¹⁷¹ provide that rules of historic precedent are taken into account, and this is ironically one of the biggest barriers to entry encountered by new entrants. The provisions of Article 6(iii) of the block exemption also raises other questions as to when the benefits of the

¹⁶⁷ See *ibid.*, art. 85(1)(e).

¹⁶⁸ See *Slot Regulation*, *supra* note 99, art. 4(7).

¹⁶⁹ *Ibid.*, art. 5(2)(a).

¹⁷⁰ See *ibid.*, art. 6(iii).

¹⁷¹ See *ibid.*, art. 5(1)(b).

exemption might be withdrawn, as it provides that new entrants need to be able to 'compete effectively' with established carriers. It is difficult to envisage that this could ever be the case, as by definition an airport at which rules of historic precedents will be in use are those which have been designated as fully co-ordinated as a result of serious congestion problems. In order for a new entrant to 'compete effectively' it not only requires slots, but it requires a commercially viable number and for these to be at the right times and in a consistent series throughout the scheduling season. It is inconceivable that this could ever be a realistic expectation at such airports as Heathrow, and if the above provision of the block exemption were to be taken literally, then the block exemption would have been removed long ago.

Another oddity of the block exemption is that the benefit of the exemption will only apply if *inter alia* there is no discrimination as to the category of service,¹⁷² whereas the Slot Regulation provides for this type of discrimination as between scheduled services/programmed non-scheduled services and other types of non-scheduled services or irregular services. Similar discrimination is referred to in the IATA SPG.¹⁷³

Is the Block Exemption necessary?

The block exemption is introduced on the premise that the slot arrangements as they exist potentially infringe the terms of Article 85 of the Treaty of Rome and provided that certain pro-competitive requirements are met, the slot allocation process will be exempt

¹⁷² See *ibid.*

¹⁷³ See *ibid.*, para. 3.4.2.

from any enforcement proceedings under Article 85. From the above discussion it may be argued that the conditional nature of the block exemption is an illusion and the question may also be raised if the exemption is required at all.

As previously mentioned, Article 85 of the Treaty of Rome is concerned with agreements between undertakings and decisions by associations of undertakings which may restrict or distort competition within the Community. By its nature each slot can only be allocated once and the fact that it goes to one airline rather than another with a competing bid is therefore inevitable, and that the disappointed carrier will be at a competitive disadvantage is a natural consequence of not obtaining the slot. The issue that must be considered is therefore whether the mechanism used for the allocation of slots is inherently anti-competitive and whether it contravenes the terms of Article 85. The allocation system that has been developed by IATA provides for clear rules that are non-discriminatory on the basis of nationality and the criteria for carrier selection are objective ones.¹⁷⁴ It is further noted that the allocation is not carried out by the airline nor by their trade association, IATA, but by the airport operator itself, although it is conceded that in order to avoid scheduling problems carriers do swap slots. Here we are however dealing with the reallocation of an existing resource rather than its original allocation. The task of allocating the slots is usually transferred to an airport co-ordinator, who is normally an employee of the flag carrier of the country in which the airport is situated acting in an independent capacity and not as a representative of the airline. Structurally it is therefore difficult to imply a relationship between carriers or between the airport

¹⁷⁴ See IATA, *supra* note 17, clause 3.

operator and the carriers which on the face of it could give rise to an implication that parties are in some way acting in concert to distort the supply of slots.

The real problem however arises when historic precedence or 'grandfather rights' are considered, as it is this practice which is almost certainly the biggest barrier to market entry by start up carriers and therefore on the face of it might be considered to be the largest barrier to effective competition. It has been held by the European Court¹⁷⁵ that a recommendation of an industry association can constitute an agreement, decision or concerted practice for the purposes of Article 85(1), even if these are expressed in a non-binding way to the members of that organisation. In that case a recommendation sought to co-ordinate the competitive conduct of the members of the association and this was held to affect competition. In the case of the IATA SPG the recommendations in the Guide are addressed to the airport co-ordinator and not the member airlines themselves and the SPG therefore doesn't co-ordinate the conduct of IATA member carrier against non-member carriers seeking to gain access to slots. The question may however arise whether the relationship between the airport co-ordinator and an airline may be considered to be a concerted practice as even if a given rule is universally applied, it might nevertheless have a discriminatory affect on a certain group. This may particularly be the case at hub airports where the 'flag carrier' may over a substantial period of time have built up such a substantial slot holding which will mean that a new entrant will have little chance of launching a competitive service and in practice this rule can be seen as discriminatory. If an analogy is drawn between the airport co-ordinator/airline

relationship and that of a manufacturer and distributor, it has been held that a sufficient degree of concertation can exist between the latter parties for a breach of Article 85 to arise.¹⁷⁶ In the present situation it may however be difficult to suggest that a sufficient degree of concertation exists as between the co-ordinator and the airline as the right to a slot is automatic provided the conditions for historic precedence are fulfilled and there is therefore little discretion on the part of the co-ordinator or little in the way of an advantage that can be negotiated by the carrier. It is therefore open to question whether a breach of Article 85 could arise in this context which requires the application of the block exemption.

The view has been suggested by certain commentators that the above stated view might be somewhat simplistic and the mere fact that the SPG was written by the trade association of the airlines, IATA, gives rise to an arguable case that there is a concerted practice.¹⁷⁷ In order for this to be the case, case law suggests¹⁷⁸ that a concerted practice will be held to exist provided there is (a) positive contact between the parties and (b) where such contact has the object of firstly, influencing market behaviour, and in particular removing in advance uncertainty as to the future competitive conduct of an undertaking and secondly, has the effect of maintaining or altering the commercial conduct of the undertaking concerned in a manner which is not wholly dictated by

¹⁷⁵ See *IAZ v. Commission* [1983] ECR 3369. See also C. Howes, "Slot Allocation at London Heathrow Airport: The Legal Framework" European Air Law Association Conference Papers, vol. 6 (Paris: Kluwer, 1993) at 51.

¹⁷⁶ See *Musique Diffusion Francaise v. Commission* [1983] ECR 1825.

¹⁷⁷ See Colin Howes, European Air Law Association, Conference Papers, (Paris: Kluwer, 1993), 51 at 60.

¹⁷⁸ See *ICI Ltd. v. Commission* (Cases 48, 49, & 51-7/69).

competitive forces.¹⁷⁹ It may be suggested that for a concerted practice to be established in the slot allocation process, something more must exist other than a common set of rules devised between carriers to allocate a scarce resource, as these are not designed to influence market behaviour, nor to alter the commercial conduct of undertakings. If there is an aspect of the allocation process which is anti-competitive it would lie in the reason for which a slot is allocated to one airline over another,¹⁸⁰ and such a rule would require to be discriminatory on the basis of carrier identity or nationality. The fact that there are winners and losers in the present allocation system is a natural consequence of any situation where demand exceeds supply and suggesting that the maintaining of grandfather rights constitutes a concerted practice by the incumbent carriers to keep out new entrants is perhaps a cynical view. As a means of allocating scarce airport capacity, the rules set out in the IATA SPG may be considered to be “*sufficiently justifiable on objective qualitative criteria*”,¹⁸¹ and in any event, as carriers acquire slots over time the grandfather rights may provide a degree of planning certainty which will reduce the financial risk of investing in new and ultimately competitive services.

Another issue which may be addressed, is that Article 85(1) relates to agreements between ‘*undertakings*’ and the question arises, in the view of some,¹⁸² whether the co-ordinator can be considered as such for the purposes of the legislation. If it held that the co-ordinator is fulfilling a regulatory function, which is either vested in it by a Member State or Community law, then its activities in that context will not be susceptible to

¹⁷⁹ See V. Rose, *Common Market Law of Competition*, 9th ed. (London: Sweet & Maxwell, 1993), para. 2-042.

¹⁸⁰ See J. Balfour - European Air Law Association, Conference Papers (Rome: Kluwer, 1992) at 45.

¹⁸¹ See *ibid.*

Articles 85 or 86. This is perhaps taking a rather simplified approach, as such an assertion must logically be subject to Article 90(1)¹⁸³ of the Treaty, in the context of which, it would be difficult not to view the co-ordinator as a public undertaking. In this context therefore the exact nature of the powers exercised by the co-ordinator must be considered to see if a breach of Article 85 has occurred.

It has been established by the European Court of Justice,¹⁸⁴ that where a Member State takes legislative or administrative measures that require or encourage undertakings to make or operate anti-competitive agreements that attract the operation of Article 85(1), then the State measures are themselves prohibited by Article 5 and Article 85 of the Treaty. It was however held in the subsequent case of *Meng*,¹⁸⁵ that where Member States enact legislative measures that prevent, restrict or distort competition, it does not automatically thereby infringe the Treaty. Thus, taking a hypothetical example, if a Member State introduces legislation which fixes the price of butter, such a measure is not prohibited under EC law by reference to Article 85(1) (as the state is not an ‘undertaking’), whether or not a dairy cartel had prior to the implementation operated such a price fixing agreement, which would have been contrary to Article 85(1). The new legislation replaces the cartel agreement and any infringement of Article 85(1) comes to an end.

¹⁸² This view was expressed by the Department of Transport of a Member State during a meeting in November 1995. Their identity is withheld for reasons of confidentiality.

¹⁸³ See *Treaty Establishing the European Community*, 25 March 1957, 298 U.N.T.S. 11, Article 90(1) provides: “In the case of public undertakings and undertakings to which Member States grant special and exclusive rights, Member States shall neither enact nor maintain in force any measures contrary to the rules contained in this Treaty, in particular to those rules contained in Article 6 and Articles 85 to 94.”

¹⁸⁴ See *BNIC v. Aubert*, [1987] ECR 4789, Case 136/86.

Following the case of *Reiff*,¹⁸⁵ it became important to consider in which capacity the entity through which the legislation was being implemented was acting, as a state measure may lose its character as such, and therefore lose its immunity from the general rule in *BNIC v. Aubert*, if the State delegates to private operators responsible for the taking of the action which interferes with the operation of the free market forces. It is therefore important to consider the capacity in which the co-ordinator is operating. The measures contained within the Slot Regulation, mandate the application of grandfather rights rule as a first priority in the allocation of slots and in so doing, the implementation of potentially distorting measures has not been allocated to private operators. Accordingly it may be submitted that due to the manner in which the Slot Regulation is implemented, it does not fall foul of Article 85(1) of the Treaty and that in this context the Block Exemption is unnecessary.

If it is accepted that the block exemption is not required as no breach of Article 85 is caused by the present regime, it is nevertheless useful to know what is covered by the current exemption as a result of the decreased risk of legal challenge. It may be submitted that the current block exemption only covers the slot allocation and airport scheduling activities conducted in respect of fully co-ordinated airports and that meetings between the co-ordinator and the airlines to facilitate operations at a co-ordinated airport (SMA) are excluded from the protection. The basis for this view can be found in Article 6(iii) of the block exemption, which provides that the benefit of the exemption will be withdrawn if new entrants are unable to obtain such slots as they may require in order to provide for

¹⁸⁵ See *Meng (Wolf)*, [1987] ECRI-5751, Case C-2/91.

¹⁸⁶ See *Bundesanstalt für Güterverkehr v. Gebrüder Reiff GmbH & Co. KG*, [1993] ECR I-5801.

effective competition. In terms of Article 2(b) of the Slot Regulation the definition of new entrant is linked to the number of slots held by them, which by implication only relates to those airports which are fully co-ordinated and which in terms of Article 2(g) of the Slot Regulation require a slot to be allocated to the carrier by the co-ordinator. Co-ordinators at co-ordinated airports (SMA) should be conscious of this and may require to be more vigilant in ensuring that they act in a non-discriminatory and objectively justifiable manner when solving scheduling conflicts between carriers should this analysis find more widespread support.

A benefit of the block exemption's mere existence is that it discourages parties from bringing actions on competition grounds in that even if that party feels aggrieved, the burden of proving that an action on the part of the co-ordinator or the terms of any rule were so discriminatory that it breached the terms of the exemption would be extremely high. Less spurious legal challenges will provide for a greater stability to the present system, which is subject to so many competing and conflicting interests, not all of which can be met. If aggrieved parties were to start challenge the decision of the co-ordinators or unilaterally seek amendment of the SPG, then co-ordinators and IATA representatives would forever be defending actions, thereby wasting time and valuable financial resources. In addition the spirit of corporation and goodwill between carriers, with which scheduling conflicts are often resolved, would be eroded and co-ordinators in their role of mediators would be second guessing the courts as to whether any action on their part might give rise to a breach of the competition legislation both domestic and European.

Article 86 Considerations

Recital number 10 of the block exemption expressly mentions that it is without prejudice to the application of Article 86 of the Treaty of Rome. The Article provides that any abuse of a dominant position shall be prohibited as incompatible with the common market in so far as it affects trade between Member States. A dominant undertaking's behaviour will be considered abusive if it influences the structure of the market where, as a result of its behaviour the degree of competition is weakened. As this prong of the European competition legislation refers to the unilateral acts of an undertaking in its use or the manner that it allocates slots, it is difficult to see in practical terms how the current allocation mechanism could give rise to a breach of Article 86 provided that the co-ordinator follows the rules. This is particularly the case, as the scope for discretion on the part of the co-ordinator under the SPG is limited to such secondary considerations as having regard to competition and considering the needs of the travelling public.¹⁸⁷

Relevancy of competition rules

When considering whether a breach has occurred of the competition rules it is important that the airport co-ordinators do not think that they are immune from breaching the terms of Article 85 or Article 86 on account that they are simply complying with the terms of European legislation, nor because they are acting as appointees of the Government fulfilling a quasi-governmental role.

¹⁸⁷ See IATA, *Scheduling Procedures Guide*, 25th ed. (January 1997), para 3.4.5 [hereinafter *Scheduling Procedures Guide*].

Traditionally it has been the case that the airport co-ordinator were employees of the local flag carrier acting in the capacity as agents for the airport operator. Although they are now appointed by the Member States, many of the co-ordinators are however still employees of the flag carriers who in most cases also still directly fund them.¹⁸⁸ This obviously gives rise to a potential conflict of interest between the co-ordinator acting for the benefit of all the airport users and acting in the interest of the employer. Although this potential conflict has not generally caused problems, there has been the notable example when the co-ordinator appointed but Alitalia in Italy was held to be allocating slots in a manner which favoured Alitalia to the detriment of the independent carrier and prime competitor in the domestic market, Meridiana, and accordingly the Alitalia appointed co-ordinator was replaced.¹⁸⁹ Recently, Laker Airways have made allegations in the Federal Court of Fort Lauderdale that the London Gatwick Co-ordinator was acting in breach of competition legislation and a puppet regime of British Airways.¹⁹⁰

Will future amendment of the allocation system have competition implications?

It is accepted that the continued use of grandfather rights does to a certain extent constitute a barrier to market entry for new entrants, which in turn affects the ability of such carriers to compete effectively against incumbent carriers. It may however be suggested that any system of allocation would tend to favour the large incumbent carriers, as in the case of monetized trading, it is they who could create large cash reserves through

¹⁸⁸ See *Slot Report*, supra note 28, Chapter 5, Table 5.1.

¹⁸⁹ See "Alitalia Fined for Anti-competitive Actions" *Flight International* (4-10 December 1996) 12.

¹⁹⁰ See "Laker takes BA to Court", *Travel Trade Gazette*, 2 July 1997.

slot sales, which in turn would allow them to acquire other slots. In the case of a slot auction, the larger carriers would in many cases have deeper pockets and could outbid the new entrants. It is therefore again submitted that the fundamental problem faced by new entrants trying into a market is not the current method of allocation, but rather the simple fact that airport capacity is a limited resource and currently at major airport demand far outstrips supply.

The rules may however become more important if the allocation rules are amended in future and secondary trading is permitted. Such carriers as British Airways at Heathrow and Lufthansa at Frankfurt respectively hold 39% and in excess of 40% of the slots at the respective airports and this means that as the power of allocation shifts from the co-ordinator to the carriers and they may very quickly find themselves in a dominant position in terms of Article 86 of the Treaty of Rome. If, by way of example, Lufthansa would co-ordinate with its partners in the Star Alliance that operate to Frankfurt, the carriers to whom they would and wouldn't be prepared to sell slots to and then impose discriminatory conditions upon those sales, then this type of activity may also quickly lead to the carriers falling foul of Article 85 of the Treaty of Rome. Similarly if British Airways was to start selling its slots at Heathrow on a discriminatory basis which would distort natural market conditions, then this might be deemed to be an abuse of a dominant position and accordingly breach Article 86 of the Treaty. It will almost certainly be the case that as regulatory restrictions on the allocation process are loosened, then the competition rules set out above will take on increasing importance.

The Airport's response to abuses in the context of Article 86

Apart from the dangers posed by any anticompetitive behaviour in the way that slots are allocated or traded, a bigger immediate danger to the operation of the system may be from carriers that as a result of the commercial pressures upon them start to operate at time different to that of the allocated slot, operate without a slot, planning to operate at a time not allocated or operating with a consistently poor level of punctuality as a result of planning an unrealistic schedule.

The requirement for maintaining historic precedent under both the IATA SPG¹⁹¹ and the Slot Regulation¹⁹² have been discussed. The issue that does need some attention is whether the current sanctions provided against offending carriers who flout the allocation rules are of any use to the carriers affected by such abuse. The only sanction which presently exists is for the relevant slot or series of slots to be withdrawn. One of the main shortfalls of the current system is that there is no definition or guidance on the point as to when off-time use of a slot constitutes non-use for the purpose of maintaining historic precedence. The powers contained in Article 10(2) of the Slot Regulation allow the coordinator to withdraw a single slot for non-use. The view might be taken that this acts as a threat to the carrier who may suddenly find that its schedule in the next corresponding season has a number of holes in it and therefore encourages carriers to use all their slots. This probably doesn't reflect reality as a single slot being placed into the slot pool is generally of little use to competing carriers, and as previously mentioned with reference to the IATA SPG, the offending carrier would probably be entitled to have such a slot

¹⁹¹ See *Scheduling Procedures Guide*, supra note 187, para. 3.4.4.1.

returned on secondary allocation criteria, such as the needs of the travelling public or on the basis that the original carrier has the longer effective period of movement. Article 10(5) of the Slot Regulation allows for an entire slot series to be withdrawn from a carrier if certain usage criteria are not met. The withdrawal of an entire series would benefit other carriers as it might form the basis for commencing a commercially viable service. The problem which a co-ordinator may encounter in this situation is to decide when the 80% usage threshold has been breached, as not only is off-time performance encountered, but the question as to what constitutes a series may not always be clear, especially if an irregular series is being dealt with. It appears that unless you have categorical proof that a carrier's action or inaction amounts to non-use, it is difficult for a co-ordinator to take action, as the exercise of any discretion will always have to be reasonable and this subjective criteria will always lay it open to potential judicial challenge.

It has been suggested that a range of measures may potentially be available to the co-ordinator in controlling off-time performance.¹⁹³ Such measures could include issuing warnings, co-ordinating with the airport information system to only allow the allocated slot time to be used on information screens, delaying the handling of aircraft from the offending carrier, diverting flights and imposing financial penalties. Some of these approaches have already been tried in certain Member States and it cannot be denied that such an approach will encourage carriers not to abuse the system. Airport co-ordinators do however run a certain risk, as this type of approach may be seen as potentially discriminatory against certain carriers, no matter how objectively dispassionate the co-

¹⁹² See *Slot Regulation*, *supra* note 99, art. 8(1)(a).

¹⁹³ See *Slot Report*, *supra* note 28, para. 7.110.

ordinators seek to be, and such action as requiring an aircraft to divert would also be a disproportionate response to the original offence and may have safety implications. Article 86 of the Treaty of Rome might be invoked by the affected carrier who might consider that such action constitutes an abuse of a dominant position by the operator of an essential facility.

A dominant undertaking's behaviour will be considered abusive if it influences the structure of the market where, as a result of its behaviour, the degree of competition is weakened. The essential facility doctrine imposes a special responsibility on undertakings in a dominant position who own or control the access to an essential facility and places them under a duty to allow other entities access to the essential facility on a non-discriminatory basis. This responsibility is particularly important where the owner or operator of the essential facility or an associated entity of itself uses the facility.¹⁹⁴ This is particularly relevant in respect of the slot allocation process where, as previously mentioned, the co-ordinators are often in many cases the employees of the dominant carrier at the airport, which can give rise to a potential conflict of interest.

For this doctrine to be invoked the aggrieved party must show that the airport can be deemed to be an essential facility, which has been defined as "a facility or infrastructure without access to which competitors cannot provide services to their customers".¹⁹⁵ In the Holihead cases, the Commission took the view that the port at Holihead occupied a dominant position and therefore had certain obligations with which it must comply, such

¹⁹⁴ See Royal Aeronautical Society, "Slots and Access to Airport Facilities" (Conference Paper, Air Law Group Conference, March 1997).

as non-discrimination, and further indicated that a port which occupies a dominant position and which is operated by an undertaking which itself operates competing services from the port is subject to even greater regulatory burdens. The range of possible abusive behaviour is very wide, but the most likely abuse that the co-ordinator at a fully co-ordinated airport may be guilty of, is for it to temporarily refuse access to a carrier on the basis of any perceived non-compliance with the slot times allocated or indeed if an airport operator in conjunction with the co-ordinator move to expel a carrier from operating from an airport altogether. Abusive behaviour might also be established if one carrier feels itself singled out for unfair treatment, particularly if the flag carrier at the airport is perceived to be getting an easier ride in respect of off-slot performance.

In determining whether the operator of an airport facility is in a dominant position it is necessary to identify the relevant market. In the context of the air transport the concept as to what constitutes the relevant market may be narrowly defined to only encompass the two airports at either end of the route, rather than the city pairs. In the *Aer Lingus/British Midland* case¹⁹⁵ the European Commission defined the market, as the market for the provision and sale of transport between Dublin and London Heathrow (and not the provision and sale of all transport including surface transport or even the market for air transport between Dublin and London). In assessing whether an airport facility is truly dominant, regard must be had to the substitutability of the airport with neighbouring airports as well as terminals for other modes of transportation. If a facility can be

¹⁹⁵ See *Holihed I*, [1992] 5 CMLR 255.

¹⁹⁶ See *British Midland v. Aer Lingus*, OJ Legislation (1992) L096 at 34-45.

described as essential for competitors to gain access to a given market, the operator of that facility is *prima facie* in a dominant position in respect of the facility.¹⁹⁷

Conclusion on Competition

It is difficult to see how the present slot allocation system developed by IATA and now implemented as law in the Member States by the Slot Regulation can be seen as breaching the provisions of Articles 85 and 86 of the Treaty of Rome as any rule where a limited resource is sought to be distributed into a market where demand exceeds supply will have winners and losers, and a natural consequence on the loser is that it will have a detrimental affect on their ability to compete.

If any activity of the co-ordinator may be seen as being in breach of competition provisions of the Treaty of Rome, then it lies in the way that the rules are applied and how the co-ordinator exercises its discretion between competing claims. To this end, it is important that the co-ordinators remain above suspicion at all times as in many cases it might be perceived that they have a vested interest as employees of the flag carrier to act in a manner favouring them as in the Alitalia incident referred to above. This is particularly the case as a result of airports being readily considered to be in a dominant position in their market and also as a result of the additional responsibilities implied if the airport is viewed as being an essential facility.

¹⁹⁷ For further discussion, see T. Soames, *RAeS Conference Notes*, March 1997.

As to the future, it is likely that some sort of secondary market will be introduced allowing for the monetized trading of slots. Although primary allocation will still take place through the present system, this aspect of the overall allocation system will diminish in importance as the co-ordinator will probably move to a position where they will only be allocating newly created slots and acting as intermediaries for dispute resolution for carriers competing for the same slot. The slot pool will probably reduce in size as carriers sell slots that they don't need rather than simply abandoning them to the slot pool, even if it means selling at undervalue. Flag carriers with large slot holdings in their home hubs will be in a particularly powerful position, and the competition rules will be required to be enforced in order to maintain order and stability within the market place.

CHAPTER 5

SLOT ALLOCATION IN THE UNITED KINGDOM

The Slot Regulation was enacted in the UK by Statutory Instrument,¹⁹⁸ which came into force on 12 May 1993. It provides that the Secretary of State for Transport is responsible for the designation of airports,¹⁹⁹ as required by Article 3 of the Slot Regulation. It is the job of the airport operator to act as the ‘competent authority’ to determine capacity on a twice yearly basis,²⁰⁰ as well as to appoint the co-ordinator at the airport, who shall have ‘detailed knowledge of air carrier scheduling co-ordination’.²⁰¹ The UK Regulation requires that the appointment is approved by the Secretary of State for Transport,²⁰² who also has the power to remove a co-ordinator if he considers that the co-ordinator carried out his duties in an other than independent manner.²⁰³ The fact that the co-ordinator is appointed by the airport operator as opposed to the Secretary of State for Transport indicates that the ultimate authority to allocate slots lies with the airport operator. It is also made plain that air carriers have no independent authority to allocate slots amongst themselves, as the UK regulation provides that if an air carrier exchanges or transfers a slot contrary to the requirements of the Slot Regulation, they will be guilty of an offence punishable by a fine or imprisonment.²⁰⁴ The existence of this offence also has interesting implications as regards the notion of property rights in slots. If air carriers did have

¹⁹⁸ See *Airport Slots Allocation Regulations 1993*, SI No.1067.

¹⁹⁹ See Soames, *supra* note 197, art. 3.

²⁰⁰ *Ibid.*, art. 2(2).

²⁰¹ *Ibid.*, art. 4(1).

²⁰² See *ibid.*, art. 4(2).

²⁰³ See *ibid.*, art. 4(3).

²⁰⁴ See *ibid.*, art. 9.

property rights, then their right to dispose or otherwise transfer them would be absolute and not subject to criminal sanction.

The Co-ordinator

Until 1991 British Airways carried out the co-ordination function at Heathrow, Gatwick, Manchester and Birmingham. After that time, British Airways formed a subsidiary company called Airport Coordination Limited (ACL) to undertake the co-ordination functions at these airports. In May 1992 ACL was established as an independent company and became jointly owned by nine UK airlines.²⁰⁵ The structure of the company is such that there is a Board of Directors comprising of an individual from each of the nine shareholding airlines, although membership of ACL is open to any carrier who expresses an interest in the allocation of slots at UK airports. ACL is a non-profit making body which is funded by the airport operators, through the management fee which they pay to ACL for providing their co-ordination services, as well as the owning airlines. The company currently have in the region of 20 employees, and their head offices are based at Heathrow.

ACL had already been nominated to act as the co-ordinator at the co-ordinated²⁰⁶ and fully co-ordinated²⁰⁷ airports in the UK by the respective airport operators prior to the introduction of the UK Regulation. It was therefore the case that the Secretary of State for Transport simply approved their appointment at the time when the Regulation came into

²⁰⁵ British Airways, British Midland, Virgin Atlantic, Air UK, Britannia, Monarch, Air 2000, Airtours and Cityflyer Express.

force. The companies three main activities are data collection, schedule co-ordination and slot allocation. To this end, they are also responsible for the appointment of the individual co-ordinators, personnel, premises and systems required to carry out their duties. They have also made substantial investment into information systems which allow them to closely monitor slot usage as required by the co-ordinator in terms of the Slot Regulation²⁰⁸ as well as providing information to airlines on historic, requested and allocated slots.²⁰⁹

The airport operator of a fully co-ordinated airport is required by Article 5 of the Slot Regulation as well as Article 7(2) of the Statutory Instrument to establish a co-ordination committee. The main aim of the committees is to advise the co-ordinator in a consultative manner in relation to the tasks that are set out in Article 5 of the Slot Regulation, which *inter alia* include having regard to the possibilities of increasing capacity, improving the prevailing traffic conditions, dealing with complaints and setting out guidelines for the allocation of slots, having regard to the local traffic conditions.

At Heathrow, the co-ordination committee is an unincorporated association with a written constitution that governs its activities. The constitution provides that the co-ordination committee shall have regard to the provisions of the IATA Scheduling Procedures Guide and to any local guidelines advised by the Heathrow Scheduling Committee. The membership of the Heathrow co-ordination committee is consistent with the requirements

²⁰⁶ Stansted, Birmingham and Glasgow airports.

²⁰⁷ Heathrow, Gatwick and Manchester airports.

²⁰⁸ See *Slot Regulation*, *supra* note 99, art. 4(6).

²⁰⁹ See *ibid.*, art. 4(7)(a)-(d).

of Article 5(1) of the Slot Regulation and include Heathrow Airport Ltd. as the airport operator, National Air Traffic Services (NATS) as the air traffic control authority, air carriers using the airport regularly who have expressed an interest in the slot allocation and co-ordination activities at the airport,²¹⁰ the representative organisation of the air carriers using the airport and the airport co-ordinator is invited to attend the meetings of the committee as an observer. The constitution states that the committee shall hold an annual general meeting at least once a year and provision is also made for an extraordinary meeting as and when the need arises. The meeting is held to be quorate if a representative of the airport operator and at least five other members are present.

Article 5 of the Slot Regulation which sets out the main aims of the co-ordination committee, envisages that they shall be directly involved in the dispute resolution process. In the UK however their involvement may be somewhat tempered by the fact that their constitution provides that they shall not meet to consider a slot complaint unless:²¹¹

- the complainant has made a written submission to the co-ordinator setting out the reasons for the complaint;
- the co-ordinator has responded in writing or has had reasonable time to do so;
- the complainant has not accepted the co-ordinator's response; and
- the chairman of the co-ordination committee has notified the complainant of its right to refer the matter to the scheduling committee and the complainant has

²¹⁰ Membership as of 12 January 1995 included British Airways, British Midland, Virgin Atlantic, Air France, SAS, Austrian Airlines and Olympic Airways.

²¹¹ See *Slot Report*, supra note 28, L39.

written to the secretary of the co-ordination committee explaining why he rejects this right.

As can be seen, the complaints procedure places considerable emphasis on trying to reach a negotiated solution between the complainant airline and the co-ordinator. There appears to be a real reluctance to try and impose a decision on a party as the scheduling procedure requires flexibility and if airlines become uncompromising, this will have wide repercussions on the airport scheduling activities which will be to the detriment of all airport users. It will be noted that in the last precondition regarding the hearing of a complaint by the co-ordination committee, reference is made to a referral to the scheduling committee of the airport, and their function and activities will be looked at briefly below. A final point to note however regarding the co-ordination committee's reluctance to enforce a decision is that their constitution states, that they shall not vote where it is required to give advice on a complaint by a new entrant, but rather, they shall ensure that any advice given to them by the co-ordinator fairly reflects the "feeling of the meeting and of the views of any members who dissent from the majority viewpoint".²¹² It might be suggested that this approach has been adopted to try and dissuade new entrants from lodging formal complaints through the administrative process, which would probably have ended up occupying a disproportionate amount of the co-ordination committee's time, as it is clear that those carriers starting out from scratch would fight tooth and nail to obtain any advantage in a system where the rights of the incumbent carriers are guaranteed.

The scheduling committee referred to above has existed in the UK for a number of years and was reconstituted in light of the Slot Regulation, and its main role is to act as a representative organisation for the airlines. The chairman requires to be a representative of an airline registered in the UK and designated as a base operator at Heathrow by Heathrow Airport Limited (HAL).

The constitution of the Heathrow scheduling committee states that the purpose of the committee is to:

- formulate scheduling policies and guidelines for Heathrow;
- advise the co-ordinator in connection with the efficient allocation of slots and co-ordination of schedules at Heathrow;
- represent the views of the airline operators at Heathrow on scheduling matters;
- negotiate reductions in constraints and increases in capacity on behalf of all Heathrow airline users and promote improvements in the utilisation of facilities; and
- solve mediation problems involving conflicting demands for slots.

The scheduling committee has a specially formed mediation group, which will try to resolve the problems in accordance with the Slot Regulation, the IATA Scheduling Procedures Guide and any local scheduling Guidelines issued by the scheduling committee. If a problem cannot be resolved, then the matter is referred to the co-ordination committee for consideration.

²¹² See *ibid.*, L41.

The duties of the co-ordination committee and the scheduling committee overlap in many respects, and especially in the area of dispute resolution the process followed at Heathrow is rather different from that envisaged in the Slot Regulation. The co-ordination committee appears to act more as an advisory body on the part of all the airport users, whereas the scheduling committee seeks to remedy scheduling conflicts on a practical basis within a purely airline constituted forum. To a certain extent it therefore takes over the tasks envisioned by Article 5 of the Slot Regulation to fall within the ambit of the airport co-ordination committee.

Slot Allocation at London Heathrow Airport

The allocation process at London Heathrow operates as follows:²¹³

- Airport Coordination Limited (ACL) will advise the airlines operating into Heathrow of their rights to historic slots, after application of the use-it-or-lose-it rule, in order that carriers can check this with their records regarding slot holdings and as a reference for submitting their requests for the next relevant season. According to the Slot Regulation²¹⁴ only slots constituting a series will give rise to historic rights to the slot and in the UK, it has been established that a series must be constituted of at least four slots which are operated at the same time of the same day of the week during a season. It has however been established that these flights do not have to be operated in consecutive weeks and that fortnightly services will also be entitled to historic precedence in respect of those slots operated.

²¹³ See *ibid.*, L51.

²¹⁴ See *Slot Regulation*, *supra* note 99, art. 10(5).

- In response to be above, the airlines will submit their slot requests, which ACL will in turn classify into four categories, namely as historic, retimed historic, new entrants or new incumbents, the last of which relates to new requests by carriers that do not qualify as new entrants.
- ACL will try to accommodate all historic and retimed historic over other requests. If a retimed historic cannot however be accommodated, then the original time will be reallocated. Carriers wishing to operate different aircraft in respect of a slot will also have to file a request, as due to ramp and terminal constraints, such a change may not be sanctioned and the original usage parameters will continue to be applied.
- At the end of this process, ACL will have a fully co-ordinated schedule, but based solely on historic schedules. In order to establish the availability of slots for the outstanding slot demands, regard will have to be had to the capacity constraints which are in existence. These typically will provide for limitations in the movements for arrivals and departures in whole, half and quarter hour blocks as well as within a rolling hour period, which for the winter 1996/1997 period was set at a maximum of 45 arrivals and 44 departures within the period, which is calculated at 10 minute intervals.
- Once the spare capacity has been established, the surrendered slots are then added to the database, and it is at this stage that the slot pool is created.
- Slots are allocated to incumbent carriers and new entrants as closely as possible in accordance with the original requests, and through the use of a mathematical model, it is ensured that capacity constraints are not breached. It is also noted that in

- accordance with the Slot Regulation,²¹⁵ 50% of available slots are set aside for new entrants.
- In the case of competing requests, ACL uses the guidelines set out in the IATA Scheduling Procedures Guide, which provide for primary and secondary criteria to be taken into account in the allocation process. Priority will therefore be given to schedule changes that involve larger aircraft, block time changes, year round operations and standardised timings. By way of secondary criteria, the mixture of operations at the airport, competitive requirements, world-wide scheduling constraints as well as the needs of carriers and the frequency of their operations will be taken into account.

Once all the above steps have been accomplished, ACL will have their fully co-ordinated timetable for that season. It should however be noted that this timetable is primarily concerned with providing for the capacity framework upon which the operations at the airport will be based. ACL will schedule actual slots up to one day prior to the date in question in order that any short term slot requests that have arisen due to a requirement of a maintenance check flight, or the operation of a service for a special event or to allow for the operation of a one-off General Aviation flight may be accommodated. On the day in question, the responsibility for the operations will lie with air traffic control (ATC), who will use information directly from ACL's database. ATC in turn will supply ACL with information on actual movement times, in order that they may monitor slot usage.

²¹⁵ See *ibid.*, art. 10(7).

ACL will be particular interested in the 80% use-it-or-lose-it rule set out in the Slot Regulation,²¹⁶ and in most cases carriers will be able to provide adequate excuses as to why operationally, this target was not reached. There has only been one reported incident,²¹⁷ where a carrier's entire series of slots were withdrawn, and this related to Nigerian Airlines.

Although the withdrawal of an entire series of slots is a very rare event, the power to withdrawal an unused individual slot is applied very strictly by ACL in order that these may be placed in the slot pool for the next corresponding season. In many cases however, these slots will find their way back to the original carrier if they apply for them, as long as the lost slot formed part of a series that met the 80% operating criteria. The purpose of this is to avoid the fragmentation of a carrier's timetable, which would not be considered to be in the travelling public's interest. To provide some indication of the scale of non-use, ACL identified that during a peak week in August 1994, 76 slots which amounts to approximately 1% of weekly capacity were not operated in accordance with Article 10 of the Slot Regulation. For the reasons outlines above however, many of these slots will not have been lost by the carriers in question.

The non operation of a single slot can be readily identified and in most cases the effects of these unused slots on the overall system could be minimised by carriers handing back slots in advance of the date, if they know that they will not require it. A matter of however great concern to ACL is where carriers are consistently operating at a time

²¹⁶ See *ibid.*

²¹⁷ See *Slot Report*, *supra* note 211, L54

different from the time when they have been allocated in order to gain some commercial advantage. This practice is often referred to as “*operating off slot*”, and it affects the level of delay and congestion experienced by airlines operating at busy times, as well as the quality of service that is available in the terminals due to the unforecast peaks in movements. Whilst this activity is prevalent at an airport, ACL will be reluctant to declare additional capacity at peak times, as there is a fear that the actual levels of delay that will occur on the day will not be able to be handled within the normal delay tolerances.²¹⁸ In order to gain a better understanding of the scale of the problem, ACL is applying statistical techniques to analyse airline performance so that the airlines who persistently and intentionally misuse slots can be identified.

Another means that airlines get around the perceived inflexibilities of the existing allocation system is by trading or in many cases selling slots to one another. It is perceived wisdom that the current slot allocation system as devised by IATA, and as implemented within the Community, only provides for exchanges or unilateral transfers to operating partners and does not impliedly envisage a market based sale of slots as to a great extent, this would usurp the function of the present allocation system. All slot ‘exchanges’²¹⁹ at the UK’s co-ordinated airports are subject to the approval of ACL in order to allow them to update their database for monitoring purposes. The issue of

²¹⁸ Gatwick Airport’s declared movements limit is 47 movements an hour, but during peak morning periods it has experienced peaks as high as 58 movements an hour as a result of airlines arriving or departing off slot. See “Gatwick to penalise for slot abuse” *Travel Trade Gazette* (15 January 1997) 1.

²¹⁹ Since it is understood that selling slots is not to be permitted, these sales are often disguised as an exchange, although in many cases they will appear to be very unfair without any additional compensation being made. In most cases it would be impossible to prove the amount or nature of the consideration paid, which may not be purely in the form of financial compensation, but possibly in the form of offering additional maintenance for free or at a reduced rate, or by entering into some other form of commercial arrangement in exchange for the slot.

providing additional compensation in light of an unequal slot exchange is also of growing relevance in the UK and particularly at airports such as Heathrow which is British Airways's home hub. In the last five years, British Airways has entered into a number of franchise agreements with smaller carriers, whereby that carrier operates under the flight number of British Airways and is branded as a British Airways flight. There has been an increasing concern that BA would use its position of strength over these smaller carriers to obtain their slots in lieu of ongoing commercial co-operation which has proved very profitable to these small carriers. There was much criticism of British Airways when it forced Bryon Airways, a British Airways franchisee, to switch its Heathrow to Plymouth and Newquay services to Gatwick, as this was seen as a move relating to the slot surrender proposed by the UK's Department of Trade and Industry in light of the proposed British Airways/American Airlines alliance. The rationale being that it is less painful to give up a Newquay slot as opposed to a New York slot.²²⁰ These types of perceived abuses of the slot allocation system raises questions as to the shortcomings of the present system and how any of the proposed changes which are presently under review should address these.

How does the slot system currently operate at Heathrow

Historically the slot allocation system is generally seen to have worked well at most airports and there was enough flexibility within the slot allocation system for air carriers to obtain slots at workable times. It is also important to remember that the slot allocation

²²⁰ See "Slot conditions set for alliances" *Travel Trade Gazette* (22 January 1997) 3. The UK Department of Trade and Industry proposal required that BA surrender 168 slots in exchange for receiving the

system was devised by the air transport industry to cope with congestion at airports, and in particular to avoid the risk of an aircraft arriving at an airport that could not physically accommodate it at that time, or more commonly, to avoid excessive delays in aircraft movements which leads to increased operating expenses and may be considered extremely wasteful. At airports such as London Heathrow, the slot allocation system, and particularly the application of grandfather rights, is frequently under attack for appearing to be a cosy little club whereby the incumbent carriers take advantage of their historic rights in order to avoid fresh competition from new entrants. It can not be denied that the landscape of international air transport has been changing as a consequence of the introduction of the Third Package in 1993 and as a result of the movement towards global air carrier alliances, and at a practical level these changes are borne out by the varied and often conflicting demands expressed by the various sectors of the airline industry. What this level of general discussion on the allocation process, and in particular on the issue of Grandfather rights, suggests is that system may require to be updated and the old allocation priorities reconsidered.

In order to put the competing pressures into context, it should be noted that Heathrow's capacity prediction for 2001 was already reached back in 1994,²²¹ when they had approximately 420,000 movements. On top of this pressure on absolute overall capacity, the slot co-ordinator is faced with the problem that demand exceeds supply by approximately 15% and at peak times this figure can rise to 30%.²²² This is also not a

Governments approval for the proposed alliance with American Airlines. The swapping of the Plymouth and Newquay services from Heathrow to Gatwick would free up 56 weekly slots.

²²¹ See "The European Infrastructure", *Airline Business* (May 1996) at 37.

²²² See *Slot Allocation: A Proposal for Europe's Airports*, CAP 644 (London: CAA, 1995), para. 10.

problem which appears easy to resolve, as overall capacity growth can at most be described as incremental.²²³ The difficulty faced at Heathrow by any new entrant is that of the slots available, in the region of 90% of these will be allocated to incumbents either as exact historic or retimed historic.²²⁴ On the face of it, this would suggest that 10% of the overall slots would still be available to be allocated to the new entrants of which 50% would be guaranteed under the Slot Regulation.²²⁵ In the 1994 Summer period, only 18.2% of the available slots went to new entrants, and this is a reflection on the fact that most of the available capacity which is not subject to grandfather rights is at times which do not allow a new entrant to launch a commercially viable service and this will also be coupled with the fact that such a carrier will generally be unable to secure enough slots to provide for the frequencies required to operate a competitive service. This lack of opportunity for the start-up carrier at Heathrow is also borne out by the list of carriers that bid for slots as a result of qualifying for new entrant status in the summer 1994 season. These included many non-European flag carriers seeking additional frequencies, such as Air New Zealand on the Auckland route, Canadian International on the Toronto and Vancouver routes, Japan Airlines on the Tokyo route as well as Korean Airlines on the Seoul route.

In contrast Air Liberté wanted to operate four daily services between Heathrow and Orly, but as a result of being unable to secure a single slot at Heathrow, they were forced to commence their services from Gatwick. Deutsche BA applied for slots to serve Berlin

²²³ See *supra* note 221, 37 at 38. In 1995, London Heathrow's capacity growth was measured at approximately 2%.

²²⁴ See *supra* note 222, para. 12, table 2.3.

²²⁵ See *Slot Regulation*, *supra* note 99, art. 10(7).

twice a day and Stuttgart three times a day. They were given no slots for Berlin and only one arrival and one departure slot for Stuttgart. As these did not provide for a viable basis to commence services, the slots obtained were subsequently handed back to the coordinator. Jersey European applied for slots to serve Belfast City seven times a day, and in the end it received none. In respect of the carriers applying for routes outside of the Community for the Summer 1994 season, Alyemda applied for two flights a week to Aden and they secured slots very close to the timings that they had requested, Shourouk Air requested slots for a weekly flight to Cairo which they obtained and TMA obtained slots for the thrice weekly freighter service to Beirut, although at times later than they had requested. As regards the application of the incumbent airlines referred to earlier, Canadian International managed to obtain slots for their Toronto service, but none for their Vancouver service. Japan Airlines obtained their slots for their Tokyo service albeit at somewhat differing times, Korean Airlines obtained the slots that they requested, however Air New Zealand did not receive any of the slots that they had requested. In the end only five wholly new entrants began passenger services from Heathrow during summer 1994, namely Alyemda (to Aden), Canadian International (to Toronto), Shorouk Air (to Cairo), TAT (to Orly/Paris) and South East European/Virgin (to Athens).

What the above description of the events of summer 1994 appear to bear out is that the carriers that one would have viewed as starting a viable competitive service on intra-community routes were unable to enter into the market due to an inability to obtaining slots, whereas carriers operating to Aden or Cairo were able to use their New Entrant status to their advantage, although it is difficult to envisage that this was the aim of the

current Slot Regulation. Of the 38 applicants for slots who qualified for New Entrant status, 24 carriers were incumbent operators at Heathrow, and of these, 20 managed to secure an additional 40 new departure slots which were used to increase frequencies on existing routes rather than to introduce new ones. Of the 38 New Entrant carriers referred to above, 10 were wholly new entrants and 80% of their bids were for slots during busy periods, namely 07.00 to 13.00 and 16.00 to 19.00, but only 13% of the available slots for allocation were during these times. In the end 68% of the slots allocated to new entrants were at times before 06.00 or after 20.00 and as a result, many of these slots were returned by the airlines involved.

The above bears out very clearly the differing requirements of a Community carrier wishing to commence a competitive service on a route, who require a certain amount of frequencies at the launch of a service, timings that coincide with peak periods of travel as well as regular timings to give the service a degree of consistency. These are all things which the new entrant provision of the Slot Regulation is unable to provide, as all that it caters for is a 50% reservation of the slot pool for new entrants, but their requirements are more complex than this. What would no doubt be helpful to the new entrants is that they had a privileged right not to 'a' 50% share of the slot pool, but first choice to 'the' first 30% of the slot pool in order that they might be more readily able to construct a workable schedule. The new entrant provision of the Slot regulation also sees a special type of new entrant, namely a carrier which seeks to operate on an intra-community route on which there are no more than two other carriers. The provision however incorporates a safeguard in that carriers will only qualify provided that they do not hold more than 3% of the slots

at either of the airports at either end of the route, or no more than 2% of the slots at an applicable airport system.²²⁶ Of the Carriers that put in slot requests for summer 1994, three were on qualifying routes on the basis of the above new entrant route provision, namely South East European's application to Athens, Deutsche BA's application to Stuttgart and Jersey European's application to Belfast. Of these three application, Jersey European and Deutsche BA's applications were disqualified due to the size of their respective slot holding at one of the relevant airports exceeded 3%. It is noteworthy that the only 'new entrant' that has made a substantial impact on a market operating out of Heathrow is Virgin Express operating on the Brussels route. There is some irony in the fact that Virgin Express is not operating on the route as a new entrant under the terms of the Slot Regulation and indeed, that they do not even operate on their own slots, but in co-operation with Sabena who still maintain the slots as their own. Perhaps it is time for the new entrant provision to be reviewed in order to provide some real benefit to those carriers who potentially have the ability to provide for real competition, as opposed to merely an additional service, on intra-Community routes.

It would have to be conceded that to a certain extent it might be inappropriate to try and draw too many conclusions for the operation of the new entrants provision at Heathrow, as the operational conditions there are somewhat special. The criticisms levelled at the new entrants provision or at the operation of the Slot Regulation as a whole is no doubt relevant to other airports as they may soon find themselves faced with many of the problems already encountered at Heathrow. Many capacity constraint problems are brought about not only by an increasing amount of foreign carriers wanting to operate

²²⁶ See *ibid*, art. 2(b)(ii).

into a given airport, but also through the creation of strong locally resident carriers that actively challenge the flag carrier, such as Virgin Atlantic, who in light of the increasing commercialisation of air transport demand a system that will address their needs as well as the flag carriers'. Pressure also arises as the charter industry expands and in particular as year round long haul operations become established that require a long term structured framework in order to boost operating efficiency through high aircraft utilisation.

CHAPTER 6

SLOT ALLOCATION - THE VIEW OF THE INDUSTRY

In order to gauge the requirements of carriers representing these differing market sectors, the UK Department of Transportation²²⁷ as well as the European Commission²²⁸ have circulated discussion papers inviting comments in respect of Slot Regulation from carriers representing all sectors of the industry. In general terms, the industry appears to be generally satisfied with the manner in which slots are currently allocated and the responses received to the operation of the current regime suggests that what is needed is not a fundamental change to the allocation system, but rather clarification of certain provisions which are open to interpretation and therefore abuse and for clearer and more ready use of sanctions against carriers that abuse the system. Certainly some carriers, notably Virgin Atlantic, have been very vocal about the perceived unfairness of the present allocation system based on 'grandfather rights', as it acts as an obstacle to younger carriers wishing to expand services. The fact that there is truth in this statement cannot be denied, but any fundamental change to the allocation system may not suit carriers such as Virgin Atlantic in the long run, as they too mature and build up their own slot pool. The slot allocation system has in recent years become an emotive issue and perhaps the comments of the carriers set out below should not be taken on face value. Each has its own agenda and certainly in the case of carriers wishing to obtain a greater degree of access to Heathrow, there may be the notion in the back of their minds that if you shake a tree hard enough, something will eventually fall down.

²²⁷ See *Slot Allocation at Community Airports* (London: Department of Transport, 1995).

The “flag carrier’s” views

Their review is essentially in two parts, the first dealing with the general views of the airline as to the merits of the current allocation on the grandfather rights and the second element dealing with specific issues emanating from proposed alternative allocation regimes.

It is felt that any system of slot allocation must not only be for the benefit of the consumer, but it must also be fair to the airlines and if other elements required for an airline to be productive can be traded then it is felt that slots should be no different. The current system, which is based on historic precedence is seen as providing certainty over the availability of slots, in the same way that an airline has certainty over the aircraft that it will have at its disposal. Notwithstanding the desire to have the ability to trade slots formalised (British Airways have already publicly stated that they believe that this is not in contravention of the Regulation), they feel that any system of allocation which might be considered for future implementation requires to adhere to four principles, namely:

- (a) The system must not be discriminatory in the manner in which slots are allocated;
- (b) The system must not be rigid and must be able to provide for operational flexibility;
- (c) Carriers should be ensured the continuing availability of a slot;

²²⁸ See *Revision of Council Regulation 95/93 - Discussion Document*, European Commission, Directorate-General for Transport, Brussels, 11 April 1996.

- (d) The allocation process should not impose any regulation on the commercial activities of the airline in any respect.

In light of these comments, British Airways proceeded to review the alternative methods of allocation in light of these four governing principles, which shall be reviewed in turn.

Slot Leasing:

This is the dominant theme of those who are advocating a radical change to the allocation system and would involve the replacement of grandfather rights with a periodic return of the slot, to the slot pool. The largest drawback of this system was felt that it would not provide airlines with the requisite certainty over continuing access to a particular slot. The airlines which would also be most heavily penalised, would be the major European carriers such as British Airways and Lufthansa, who had both made large infrastructural investments in both Heathrow and Frankfurt respectively on the basis of the anticipated access to the slots it uses from those airports. It may also lead airlines to move their operations or at least parts thereof, to airports where certainty over continued access to slots does exist. The question regarding the operational flexibility of such a system would also have to be considered, so that operational changes may be made as required by the market, without the carrier being locked into operating at a certain time during the entire lease period.

Segmentation of slots:

Those supporting such a system, advocate that the slot pool be divided up into a number of segments with the slots from each segment meeting a different type of market demand.

British Airways' concern with such a system is that it introduces a high level of

regulation and administration, which they see as unnecessary, particularly as it will involve regulators in making explicit and implicit judgements about the services which most deserve the slots. There is also a concern on their part that such a quota system will also introduce rigidities into the allocation process unless the slots in one segment could be readily moved over into another with excessive demand, but clearly, deciding into which segments the available slots should be allocated would involve the exercising of judgement on the part of the slot co-ordinator which the airline has already expressed concerned about.

British Airways makes reference to the study conducted by the UK Civil Aviation Authority on slot allocation,²²⁹ which proposes that all available slots should be placed in a pool for carriers wishing to commence services on intra-EC routes on which there are less than three incumbent carriers. In recognition that such a move would remove the opportunity of other carriers wishing to establish a competitive international long-haul service, it was conceded by the CAA that the intra-EC pool should perhaps be restricted to approximately 80% of the available slots. British Airways criticises such a proposal as it inhibits competition on long haul routes, and points (rather surprisingly) to the experience of Virgin Atlantic, who have experienced long delays in introducing new long-haul services to South Africa, America and the Far East. The other point which is made is that aircraft typically operated on high density inter-EC routes carry in the region of 110 passengers, whereas the Virgin equipment would operate with a capacity thrice this amount. The implication is clearly that it is inefficient to grant up to twelve slots a day under the CAA proposal to carriers operating smaller aircraft, but perhaps the benefit

in overall terms should be seen in the potential growth of a route and the downward pressure it would have on prices, which in turn would benefit a great many travellers on such a busy route.

The allocation of slots to a specific cause, as proposed above, no doubt allow the co-ordinator to effectively address a specific allocation need, but clearly there will always be a number of competing groups seeking preferential treatment and the co-ordinator would have great difficulty in reconciling a number of diverse requests. It may also be that such a system may polarise the positions of the various sectors of the industry if there is resentment at the fact that there is a perceived benefit to a certain group of carriers to the detriment of the whole. The current allocation system benefits from a high degree of co-operation between carriers and co-ordinators in resolving conflicting slot requests and it would be to the detriment of the entire industry if the benefits of this conciliatory approach were to be lost.

Secondary trading of slots:

In British Airways' view, the wording contained in Article 8(4) of the Regulation already permits secondary trading of slots and clearly the view of the airline is that it is a good thing and should be made explicit in any future legislation.. This view that secondary trading is a good thing is endorsed the UK CAA,²³⁰ but the current legality of such trading is open to question. The CAA acknowledges that Article 8(4) is somewhat vague, but they nevertheless agree that such monetized trading goes against the spirit of the

²³⁰ See CAA, *Slot Allocation: A Proposal for Europe's Airports*, CAP 644 (London: CAA, 1995).

Regulation which is heavily based on the principles of the IATA Scheduling Procedures Guide, which clearly states that carriers can only exchange slots on a one for one basis.²³¹ In practice however, this approach may be viewed as somewhat academic, as carriers will always be able to obtain a slot at some time, which they will be able to 'exchange' for the desired slot, which will then be returned to the co-ordinator after the transfer has been effected. In essence such a transaction will be a unilateral transfer for some type of consideration simply disguised as a swap. These types of transactions are relatively common, and the concern of the UK CAA is not that these are going on, but rather the secrecy in which they are currently cloaked. The view of the CAA is that the sale process should be made transparent by requiring the parties to register the sale as well and the amount paid, British Airways however believes that such a requirement would serve no useful function. Apart from the fact such a requirement would appear unnecessarily intrusive, it may also be difficult to draw direct comparisons in any event between amounts paid, as selling a series of six slots would be worth more than the sale of six individual slots and although the unilateral transfer of a slot will in most cases be in the form of a sale, there are innumerable other methods in which consideration may be passed, particularly where the transfer is made in connection with a broader commercial co-operation agreement.

If any future slot regulation made it unequivocally clear that secondary slot trading was permitted, this would almost certainly promote the transfer of slots, which British Airways considers would also promote competitive entry. The initial slot allocation

²³⁰ See *ibid.*, para. 123.

²³¹ See *Scheduling Procedures Guide*, *supra* note 187, para. 3.7.

which a new entrant receives will generally not provide it with a competitive basis upon which to commence a service, so the opportunity to purchase some slots outright or to enable it to exchange its slots with the added incentive of a payment where the transfer is considered to be unequal would no doubt be beneficial. The question however arises whether there would be many new entrants in a financial position to take advantage of the new-found freedom to buy slots, as the expenditure involved would greatly contribute to the start-up costs the carrier. It is therefore likely that the carriers most likely to benefit from secondary trading would be the incumbents who would want to expand their existing services and the foreign long haul operator who would only require a few slots to increase frequencies, rather than the start up European carrier who would need to offer a substantial number of frequencies to compete with the incumbents on a route.

British Airways also seeks to justify secondary trading on the basis of consumer benefit, as only a system whereby the slot is allocated to the highest bidder “*could be expected to ensure maximisation of consumer welfare*”. They believe that it is easy for a carrier to place a value on a slot, on the basis of the net value of the added profits which would flow from that slot and if another carrier offered to buy that slot for a greater amount, then they would sell the slot. The principle here is that the carrier attributing the highest value to that slot would provide the greatest consumer benefit. Although such a view appears to be logical, it may however be viewed as flawed due to the very unequal nature of carriers that are operating at an airport such as Heathrow. The amount that a carrier is willing to bid for a slot will to a large extent be based on the amount of money that it has available and clearly this favours the incumbent carrier over the start up, noting in

particular that the whole allocation system would be undermined by many carriers who do not operate to strict commercial criteria and can rely on government funding to assist them.

The incumbent carrier also has less risk in paying over the odds for a slot, as in the event that it does not prove to be financially justifiable on the basis of the route that is currently operating on that slot, it always has the freedom to allocate that slot to a more profitable route. There is also less pressure on the larger carrier to turn a profit on the route operated on the slot, whereas the new entrant will have to turn a profit as quickly as possible to justify that investment.

There is also an associated danger that if access an airport was de facto seen by some foreign carriers to be subject to a payment, then the question arises whether this would be acceptable to bilateral partners. It would probably not take long before European carriers would find themselves paying for the privilege of maintaining access to non-Community airports, even if these are not subject to any capacity constraints.

The other problem with this approach is the idea that consumer benefit can be based on a purely economic analysis. If a carrier such as British Airways was bidding against a start-up carrier for a slot, with British Airways wanting to add an additional service on an exiting route which it, along with another carrier, already serves a number of times a day and with the start up wanting to commence a new service from Inverness into Heathrow, where would the consumer benefit lie. The start-up would almost certainly be out-bid by

British Airways, not out of any malice, but simply because they have the financial resources, although most people would consider an additional service to Inverness to be of greater benefit to the business community of the Scottish Highlands, than an additional service to Edinburgh, which is already served from London by British Airways, British Midland, KLM uk as well as Easyjet. The point made by the UK CAA that a third carrier tends to reduce air fares on a route has already been referred to and such an occurrence clearly benefits the flying public as a whole, but it is not a benefit that will be reflected in the accounts of a carrier, indeed such a market trend will be to their disadvantage.

Although it is agreed that allowing for secondary trading would promote the transfer of slots, which would make their allocation a far more dynamic process, caution should nevertheless be expressed at any suggestion that it would benefit everybody. Reservations have already been expressed about such a system's benefit to new entrant carriers and conceivably, it would allow the positions of some larger operators to become more firmly entrenched. Many of the competition based arguments pointing towards the benefits derived from such a system are based on the premise that airlines operate in a commercially rational way and this is clearly not the case when you have state owned carriers receiving substantial subsidies from their respective governments, or where for competitive reasons, you have a carriers that would prefer to outbid a rival for a slot that it doesn't need, simply in order to keep that competitor off a route.

Allocation on the basis of efficient use:

Proposals have been made by some groups that the allocation mechanism should be adjusted to make the basis of allocation, the efficient use of a slot. Emphasis is therefore placed on the size of aircraft operated on a slot, with the notion being that the more people that benefit from a single movement, the more efficient the use and the greater the consumer benefit. In general terms this is a sound view, but it once again raises the issue as to what amounts to maximisation of consumer benefit - is there a greater benefit in having a Boeing 767 charter aircraft from Palma using a 07.30 Heathrow slot than a Boeing 737 from Hamburg filled with businessmen? This is clearly open to question, particularly in view of the fact that some of those passengers on the Hamburg flight will be transferring onto an onward flight and thereby allowing the benefit of the original slot to be doubled for those passengers. Although basing efficient allocation purely on aircraft size may be misleading, there is a potential for an objective increase in the overall benefit derived, if you were to factor into the calculation, the amount of increased capacity that a proposed flight would generate on a proposed route as well as the number of operators already operating on the route. The problem of such an approach is however that it would create a cumbersome regulatory mechanism for weighing up the relative values of competing claims for slots. Other concerns of such an approach would be that it might well create rigidities within the allocation system which would in many respects make such a system counter-productive and not least increase the administrative burden on the co-ordinator.

The Charter Carrier's views²³²

It is noteworthy that although the current carrier services a market which is quite different from that of a major carrier, such as British Airways, they still express the view that they are generally satisfied with the current regime for allocating slots as developed by IATA and at the heart of which lies the principle of historic precedence. This support for the maintenance of historic precedence is perhaps even more surprising in light of the fact that the charter carrier's schedule will tend to vary from year to year and this demonstrates that the current system, notwithstanding the existence of grandfather rights, possesses enough flexibility to enable such a carrier to base and maintain its operations at a fully co-ordinated airport. This perhaps is reflective of the fact that the system developed by IATA is responsive to balancing all conflicting requirements.

The charter carrier's view is that the current Regulation needs to be retained, as it is in the best interest of the consumer and the industry and it encourages competition. If there is a fault with the current system, it lies in the application of the Regulation and the carrier as part of its overall view therefore recommends the following:

- (a) Co-ordinators must be neutral and operate on a non-discriminatory basis. This is seen to be the position in the UK, but not necessarily everywhere in Europe and an Airport Coordination Limited (the UK co-ordination organisation) like organisation would be recommended, as it is owned by the airlines, but subordinate to none.

²³² The following views represent those which were expressed in response to the UK Department of Transport Consultation Paper on Review of Regulation EC95/93 by a major UK based charter carrier. For

- (b) Co-ordinators must ensure that their operations are fully transparent, and again it is felt that this is the case in the UK, but not everywhere else in Europe.
- (c) The current Regulation be retained.
- (d) Charter operations must have equal access to slots with scheduled flights, as charter operations represents the most competitive and low proceed operations in Europe.
- (e) Co-ordinators must be provided with data on the usage of slots.
- (f) Co-ordinators must have full authority to impose sanctions on offending airlines and must impose them.
- (g) Sanctions must relate to the loss of slots and/or historic precedence in the next corresponding season.
- (h) Overbidding for slots must be penalised by the loss of the slot in the next corresponding season. As some degree of overbidding is generally unavoidable, an allowance of 10% should be given.²³³

reasons of confidentiality, their identity has been withheld.

²³³ This is a very regular occurrence and disguises the true demand at an airport and impacts upon both aircraft utilisation and competition as a result of the loss of valuable runway capacity. The main reason for this is the speculative nature of the bid, as due to slot scarcity it is unlikely that a carrier will get the exact slot that it is after and by bidding for as many slots as possible, the carrier thereby increases its chances of

- (i) New guidelines for co-ordinators should be devised to determine the intent of new and “paper” airlines to mount their operations, with such airlines requiring to demonstrate such intent before bids for their slots can be accepted by the co-ordinator.²³⁴
- (j) Deliberate operation off-slot must be penalised by the loss of the slot in the next corresponding season, however it is recognised that care will be required in determining the meaning of “deliberate” in order to keep these distinct from acceptable off-slot movements, brought about by operational circumstances.²³⁵
- (k) Transfer of slots from one airline to another must be forbidden, with surplus slots being returned quickly to the co-ordinator for reallocation. In particular, the carrier’s view is that the transfer of a slot by an airline to its subsidiaries, franchisees and code sharing partners are particularly anti-competitive as it denies

obtaining a slot which will at least be near to the time that they require. It is noted that in summer 1995, Airport Coordination Limited (ACL) received bids for approximately 199,000 slots. However, at the time, they anticipated that only 135,000 would actually be operated. Similarly the change in demand between the 1995/96 winter season and 1994/95 winter season, indicated a 50% increase in demand, when in fact demand rose by no more than 10% for that period.

²³⁴ This class of carrier often has a disproportionate effect on slot availability, as they by definition tend to be ‘New Entrants’ and therefore have priority to the slots in the slot pool. The problem is that these carriers are often not ready to commence operations at the time beginning of the season and their plans may also be somewhat ambitious. As a result these carriers will often hold onto slots for a large part of the season without using them and in many cases it only becomes apparent fairly late on that slots will not be required due to a scaled down operating programme. Consequently a large number of slots have been sat on unused, which means that scarce runway capacity has been further reduced unnecessarily. It is therefore suggested by the current carrier that airlines should be required to prove their ability to commence operations in accordance with the slots that they have requested.

²³⁵ Some airlines are presently choosing to ignore the slot which has been allocated to them and operate, without clearance, at the original time that they bid for. The reason for this may be that a scheduled carrier requires that a flight requires to fit into the schedule in order to link into the hub operations, or in the charter context it may be because the carrier is contractually bound by the tour operator to operate at a

slots to both competitors and new entrants. This approach would call for a substantive amendment to the current Regulation.

- (l) Historic precedence is essential for investment and planning and must be retained.
- (m) The “use it or lose it” principle must be maintained and enforced and an 80% usage of any series for all airlines is recommended as the threshold. The carrier feels that the lower 70% threshold that exists for charter carriers is unnecessary and wasteful of valuable slots.
- (n) The definition of “use it or lose it” must be specified and it should apply to usage of slots for each series of flights across the season. The penalty would be the loss of historic rights for the whole series in the next corresponding season.

Of primary concern to charter carriers is the feeling that traditionally they are perceived as being second rate and there have even been suggestions that charter carriers should be moved from congested airports. Apart from the nonsense of such an argument, as it is purely a subjective value judgement, the charter carrier also makes the point that on routes that are operated by both scheduled as well as charter carriers, the air fares are in some cases up to 75% cheaper than on routes where there is either no or only minimal charter presence and the point is made that this is clearly beneficial to competition and the consumer. They should therefore not be disadvantaged for the purpose of

certain time and they may be unable or unwilling to change this in light of some contractual penalty which would become payable.

“beaurocratic tidiness”, especially as the distinction has already been removed under the Regulations contained in the ‘Third Package’.

In the view of the current carrier, the slot allocation should be simple and as dynamic as possible and reflects in many ways the views which were earlier expressed by British Airways. Its sole role should be the optimisation of runway capacity and the allocation process should not be removed out of this context. This is particularly so as all that a particular allocation system can do is to optimise available capacity, but not overcome the problem altogether. Any system which therefore seeks to segregate capacity to differing uses will lead to wastage, which in turn will be detrimental overall.

The point is made that locally based carriers require a high levels of equipment utilisation to justify the large capital investment, and if utilisation targets cannot be met, then it is the flying public that will suffer through higher seat prices. Trying to facilitate entry into the market by many carriers will fragment capacity, thereby affecting every carriers utilisation, which in turn will not only be detrimental to established carriers, but to new entrants. The rationale being that if a new entrant is unable to obtain slots at that airport then they will go elsewhere and benefit from a higher level of utilisation without infringing the utilisation of other carriers.

Linked to the point of asset utilisation is also the long term certainty and benefit that is derived from the system of historic precedence, which provides airlines with the confidence to invest in expensive equipment and to take a long term view over strategy

and employment. A further reason for retaining the system of historic precedence from the point of view of a charter carrier is the lead time involved for the planning of a season. It is not untypical for a charter carrier to plan their programme up to two years in advance, with capacity commitments, including firm pricing being given to the tour operators in June of the year preceding the next Summer season. The tour operators in turn will commit their brochures in July of the preceding year and start selling their holidays in September of that year. Without a system of historic precedence, this type of planning would be impossible and pilot recruitment and crew training could not be undertaken to fit in with the carriers requirements. It is therefore suggested that any carrier that argues for the abolition of historic precedence does so only for its own short term and selfish interests and it is noted that British Midland, a former proponent for the abolition of grandfather rights, now support them in principle as it has become in their interest to do so. No doubt the same may also soon be said for Virgin Atlantic.

In summary therefore, there seems to be remarkably little difference in the view of a well operated charter carrier and that of a large carrier such as British Airways, except on the point of slot transfer, noting in particular the resistance to any form of slot trading in favour of a system where a rapid return to the slot pool is favoured. What is clear is that the current system is not seen as in any way deficient, but rather the problem lies in the manner that the Regulation has been implemented (or rather *not* implemented) in some Member States. If the co-ordinator is not only to act impartially, but to potentially penalise carriers, in some cases his own employer, then clearly the system must require

that the co-ordinator not only act independently, but also be independent if he is to act as an effective policeman.

The view of a start-up independent carrier²³⁶

The views expressed here belong to a Heathrow-based carrier whose efforts at expanding their route network have on many occasions been hampered due to their inability to obtain slots at what are seen to be commercially viable times. As a result of being relative newcomers to the industry, they have not yet developed a significant portfolio of slots. The views expressed by them may provide the best indication as to what may be considered wrong with the current system if we are to view the ability of start-up carriers to compete as a paramount consideration. The views expressed are primarily directed at the situation at London Heathrow, but no doubt the comments are also of more universal application.

The problems suffered at Heathrow may be at the extreme end of the capacity constraint spectrum and its attraction may result from the following factors:

- It has extremely good inter- and intra lining opportunities;²³⁷
- A pair of long runways;²³⁸
- Greater proximity to central London than either Gatwick or Stansted airports;
- Great proximity to a large number of businesses which have deliberately located themselves close to the airport;
- Strong image.²³⁹

²³⁶ For reasons of confidentiality the identity of the carrier has been withheld.

²³⁷ In 1991, nearly six times as many travellers used Heathrow rather than Gatwick. See *CAA Survey of London Area Airports* (London: CAA, 1991).

²³⁸ The runways at Heathrow are 3902m and 3658m long against 3316m and 2565m at Gatwick. It has been calculated by VAA that a Boeing 747-200 aircraft operating between London and Los Angeles, can carry 10,178 kg of cargo as opposed to 2,532kg if operating from Heathrow as opposed to Gatwick airport.

²³⁹ VAA has indicated that on flights that it has moves from Gatwick to Heathrow, it is experiencing 20% higher yields.

If as a result of the above factors, the airport is placed in the context of being a valuable national asset, the carrier's view is that the current system at Heathrow does not promote the most efficient use of a scarce and valuable resource.²⁴⁰

By allowing established carriers to retain indefinitely, slots previously operated by them, this purely serves to stifle competition by tying up approximately 92% of the available slots at the airport. The inefficiencies inherent in the current system are not aligned with consumer demand and risk Heathrow being overtaken by airports such as Amsterdam Schiphol, who still have available capacity. The view is also expressed that there must be something wrong with a system where requests for slots are being turned down, yet flights on some routes consistently operate half empty. The fact that the current system gives special privileges to new entrants is seen as symptomatic of the fact that it is flawed, as were a free market to operate, then such an action would be unnecessary. The

²⁴⁰ An analogy that the carrier has presented, is to take the current slot allocation regime and apply the principles to the context of purchasing aircraft. A slot is merely a place in the queue, just like a place in a manufacturer's order book. This may be a sensationalist approach, but it is effective at illustrating how fundamental the availability of a slot is to the operational planning of a carrier and in particular a small carrier seeking to expand.

Following the analogy through, the consequence would be that aircraft that only those airlines that had aircraft in one year would be able to apply for a place in the order book for delivery of new aircraft in the new year to replace those becoming obsolete. Airlines with no aircraft would enjoy a degree of priority in being able to place orders, but airlines with a few aircraft would lose that advantage at a time when they would be hoping to expand.

Under the current regime, new entrant status can only be retained if an airline accepts slots that are within two hours of the time requested. In this analogy, the aspiring new entrant airline requiring a BAe 146-200 (capacity 95 seats), and offered a Boeing 747 (capacity 390 seats) would have to take the unsuitable aircraft or lose its new entrant preferred status.

Those with a wide range of different aircraft already would be able to swap and shuffle the aircraft already operated so as to match the demand for new services with the aircraft available to them. They would be able to maximise existing resources in a manner unavailable to either smaller airlines or new entrants.

In the case of slots, the airline which can use its large slot holding to shuffle a new uncompetitive slot into a popular time is at an advantage, as clearly timing is a vital criterion for passengers (especially business travellers) when choosing a flight.

“benefit” of consistent flight schedules is also not seen as outweighing the substantial consumer disbenefit resulting from the existing priority system.

Apart from the perceived economic shortcomings of the current system, the carrier is of the view that it is also in breach of the competition rules, as it involves competitors agreeing between themselves, how to share certain resources, fundamental to their existence in the market. The reasons why this view may be questionable, has already been addressed earlier.

It is easy to criticise, but the carrier has proposed what it believes to be a workable “solution”, which would require the following changes to the allocation system:

- (a) Modify the existing Grandfather Rights regime to a limited period of approximately 7 years and allocate slots on the basis of maximum passenger throughput;
- (b) Slots from the pool, would in turn be allocated to carriers which would fly the most passengers and in the event of two competing claims of equal merit, the use of the quietest aircraft could be used as a tie breaker;
- (c) The co-ordinator would be empowered to engage in slot “shuffling”, where by using a more flexible definition of “slot time”, the co-ordinator would be allowed to make minor adjustments to the allocated slot times, without affecting the commercial viability of the operations.²⁴¹

²⁴¹ The coordinator could require airlines to accept slots within 10-30 minutes of the slot time previously operated.

The above proposals will be reviewed in somewhat more detail below. It is recognised by the carrier that the introduction of any new system at Heathrow would take time, but that measures, such as the introduction of mixed mode operations,²⁴² reduced lateral separation and the use of the nearby RAF base at Northolt for more civil aircraft, could be implemented within the shorter term to address the immediate capacity constraints.

The proposals as to the revision of the slot allocation system will now be looked at in somewhat more detail, taking the issues of pool slots, grandfathered slots and the allocation criteria in turn, together with their proposed manner of introduction:

Pool slots:

Each new slot that would be granted out of the pool, would be allocated for a period in the region of seven years, as this is seen as a long enough period to allow longer term infrastructural planning by the airlines, which is the most common criticism of any proposed scheme of limited tenure. The basis for the allocation would be on the basis of the most efficient use, which would be based on the passenger throughput per slot as well as the frequency of slot use within the relevant traffic period, *i.e.*, a slot which forms part of a daily service would get priority over a weekly service. If two competing slots appeared to be of equal merit, then it is proposed that the use of the quietest aircraft should be used as a tie breaker. It is however noted that this criterion is to be measured on

²⁴² In a report published by the National Air Traffic Services in August 1994, it was estimated that mixed mode operations could increase capacity by approximately 15%, by increasing hourly movements from around 78 to 92.

Heathrow has two parallel runways (27R/09L and 27L/09R) and each is solely used for either arrival or departures at any one point in time, with the mode of operation changing over at 15.00L if west-bound departures are in operation. For noise reasons, no such swap-over occurs in the case of east-bound departures, with 09R operating as a dedicated departure runway and 09L dedicated to arriving aircraft. Source: My office window.

a per seat basis, which makes what appears to be an environmentally sound argument appear rather self serving.²⁴³ It is also unclear how cargo flights would be accommodated within this system.

Once the operator has obtained the slot, their use of it will be subject to the existing 'use-it-or-lose-it' rules throughout their period of tenure, in addition to which, the carrier will also require to maintain a level of passenger throughput predicted at the time of the application. At any time during the period of tenure, the slot could be transferred, but the transferee would be bound by the passenger throughput indicated at the time of the application. At the end of the seven-year period, the initial application process indicated above would again be repeated.

Grandfathered slots:

In order to avoid reallocating the entire slot pool in a single season, it is proposed that carriers would have to surrender approximately 10-20% of their slot holdings per season, which in turn would be allocated on the above mentioned basis of efficient use. It is envisaged that this process would immediately free up 11 or 12 slots in each peak hour at Heathrow.

²⁴³ Noise calculated on the basis of Perceived Noise Decibels per seat:

Boeing 747-400 = 0.24 EPNDB

Boeing 737-400 = 0.65 EPNDB

This approach clearly favours operators of larger aircraft, which in absolute terms are generally noisier, due to the need for increased thrust levels to allow for their higher take-off weights. The point of a tie breaker is to provide an objective criteria against to which to measure the merits of the applicants, but in this context, the application of a noise criteria on a per seat basis, frustrates its purpose. This approach would almost certainly write off flights by Concorde due to the high noise levels generated, unless the aircraft was given a special dispensation.

Although making passenger throughput per slot the overriding criteria, may on the face of it appear a rational and attractive basis for slot allocation, there are immediately a number of problems which spring to mind. Some of these are set out below:

- (a) Linking the continued availability of a slot for a period of seven years to an estimated passenger throughput for that period is a non-sense as it would be difficult to have any sort of accurate traffic forecast for such a lengthy period. If allowances are made for slight variations, it may become difficult to justifiably differentiate between slot demands of similar merit.
- (b) If any transfer of a slot is subject to the original throughput, then this would impose great rigidities into the system, as it would be virtually impossible for a slot operated for a long-haul service to be exchanged for use by a short-haul European carrier.
- (c) If a route operated with a Boeing 747 was proving to be successful, it would be difficult for the operator to increase frequency on the route by introducing two services operating smaller Boeing 767 aircraft. The carrier making these proposals has made much of consumer benefit, however stifling the development of route frequencies would not be in their interest.
- (d) As has already been indicated, the merit of a slot application on the part of a cargo carrier has not been addressed.
- (e) Looking at passenger throughput per slot as the overriding criteria is to perhaps ignore other important factors. A large number of passengers travelling through Heathrow do so to take advantage of the inter- and intra-lining opportunities. It could therefore be argued that a Boeing 737 operating from Inverness is of greater

merit than a Boeing 767 operating from JFK, New York. For the passengers from Inverness, Heathrow will be their only directly served international hub from which they can fly to most places in the world. For passengers from JFK, the opportunity exists not only to fly to Gatwick, but also to take advantage of flights that operate from Newark, New Jersey. From the point of consumer benefit, it can be argued that the flight operated by the smaller aircraft is of greater value.

- (f) In respect of the last point, the current carrier has expressed the concern that if capacity is not increased at Heathrow, then other European airports, notably Amsterdam Schiphol, will operate as the preferred hub for inter-lining passengers. The uniqueness of Heathrow is also in part the connectivity of services and introducing the capacity criteria would disproportionately affect smaller carriers, such as Luxair, or carriers seeking to commence services from new destinations where the market has not yet had time to mature, such as those to destinations in the former Soviet republics.

The above points do illustrate that there are substantial flaws with the proposed system, not least the added beurocracy that it would introduce in co-ordinators seeking to differentiate between the merits of competing claims. The proposals do however highlight that more attention should be given to this element, perhaps as part of the present rules of priority for secondary allocation criteria. The frequency of service on some city pairs may be economically questionable and may primarily be a matter of prestige to a carrier who can boast a flight from A to B every two hours. Such a frequency of service may be convenient to the travelling public, but not crucial to them. It is in these circumstances

that an intervention by the co-ordinator may be appropriate in order that other services may be introduced.

Summary and Conclusion

The views expressed on the part of the different carriers do vary and this is indicative of the difficulties that any system of slot allocation will encounter, as in any system where demand exceeds supply, there will be winner and losers. It is noteworthy that the views of British Airways and the charter carrier are however not too dissimilar although the market sectors that they represent are fundamentally different. This perhaps speaks for the flexibility within the current regime that it is able to accommodate these differing allocation requirements. It is noted however that both the above carriers are long established within the current system and the main issue raised by the newer independent carrier is access to slots in the context of having access to the necessary infrastructure. It is therefore understandable that their view of the system is more critical.

Their attempts at launching new services are thwarted, by an inability to obtain a relevant number of slots at times which would allow for the commencement of an economically viable service, when their competitors have the ability to get priority treatment for their retimed histories, which for all intensive purposes is akin to the obtaining of a new slot. The promotion of competition is a fundamental concept within the transport sector, both within the European Union and outside it. If a carrier wishes to provide a competitive service, then they will require to be able to operate at times and with frequencies that will

enable them to rival the incumbents. There are several ways that slots can be made commercially uncompetitive and these include:

- (a) Disrupt the schedule by changing the times every day. This lack of scheduling consistency becomes particularly apparent in published time-tables or on computer reservation systems, which acts as a disincentive to many passengers to consider the airline.
- (b) It is also of no use to have two usefully timed slots when the other four per week are unattractive.
- (c) The timing of the slot being degraded by any more than three hours, as you will most likely have lost your target market.
- (d) Making departures too late. Passengers will avoid flights which require them to wait around airports late into the night, after other carriers have already departed and most of the shops have closed.
- (e) Allocate slots grossly inferior to those operated by the competitor. This acts to preserve the dominance of the incumbent airline, which will probably have better and more consistent timings.

It is also not merely a case that an unfavourable slot time puts you at a competitive disadvantage, but it can render a route uneconomic to such an extent that it is not worth developing it. In this context, the penalty of a less competitive departure and arrival time should not only be considered, but also the substantial investment in both time and money²⁴⁴ that a carrier requires to make to launch the route.²⁴⁵

²⁴⁴ It was estimated by one carrier operating on the London Heathrow to Johannesburg route, that the route launch investment was in the region of £25 million.

²⁴⁵ In certain cases the period of preparation for the introduction of a new service may range between two to three years, depending on the amount of issues that required to be addressed. A rough outline of a route launch to a destination outside the European Community may be as follows:

CHAPTER 7

FUTURE CONSIDERATIONS FOR ALLOCATION AND REFORM

Much has already been made about the merits of the current allocation system and possible changes to the mechanism of allocation. It is undeniable that the basic question surrounding slot allocation centres around the simple statement that demand exceeds supply and accordingly choices have to be made. The views generally expressed by carriers views this issue in a current day context, and although this basic demand/supply problem will remain, few address ancillary issues which may have a bearing on the manner in which slots are allocated in the future.

(a) Secure a licence from the national authorities. In the case of the UK, this generally requires a licence application to the CAA at least 6 months prior to the proposed commencement of services, during which period other airlines may object to the application and hearings may be called for. The decision on the part of the CAA may be made, within the 6 months, but may be delayed depending on whether a refusal requires to be appealed, in which case the process may take up to 18 months.

(b) Secure traffic rights from overseas authority. Bilateral talks in pursuit of traffic rights are not normally opened until the licence is secured or at least a provisional grant is made. This process can take a further six to nine months and bring the overall process to a cumulative period of between a year and 27 months.

(c) A carrier then requires to secure slots. During this period it is unlikely that a carrier who cannot show possession of a licence and traffic rights will be given priority to an operator that does not have any regulatory uncertainties. In practice therefore the regulatory approvals have to be in place before slots can be applied for. The cumulative period can now range from between just over one to two and a half years.

(d) Raise the necessary finance. The amount required and the manner in which it is raised depends on your circumstances and is primarily in need of establishing the infrastructure required to service the new route.

(e) Acquire aircraft. Depending on the manner in which the aircraft is going to be operated, the typical time between signature of the contract and aircraft service entry may be nine months and bring the cumulative time to between two and three years.

(f) Recruit and retrain flight crew. The typical time for this is around three months concurrent with the aircraft acquisition.

(g) Marketing. It is essential to make travel agents, tour operators, corporate travel departments and passengers aware of the new route. The period for this is around 6 months concurrent with aircraft acquisition.

(h) Setting-up ground representatives and services. Handling, engineering, catering and reservations services must be established, which may typically take around nine months concurrent with the aircraft acquisition.

There have been fairly fundamental changes to the structure of the air transport industry in recent years, if one has regard to the large airline alliances²⁴⁶ that have developed and which in future will have far reaching effects on the way that airlines operate. Competition will move from the level of individual carriers going head to head on a specific route, transporting third, fourth and fifth freedom passengers, to competition between alliances, seeking to offer seamless transportation throughout their combined route network. It is inevitable that when a number of carriers get together, there will be a certain degree of overlap between their respective schedules and invariably this will lead to some degree of consolidation of the route network. Through this process slots will be freed up at the more congested airports, such as Heathrow, and will enable the alliance to redeploy the slots from one member carrier to another. It may be that an alliance will wish to either increase frequencies on a route, introduce a new route to feed into an overseas network, or to increase frequencies on the regional feeder flights to benefit the long-haul operations out of the airport.

The situation described above is undoubtedly the way that the airline industry is heading and accordingly the system of grandfather rights should perhaps no longer be seen in the context of the carrier, but the alliance, so that if an alliance chose to swap around flights on an ad hoc basis to meet a particular short term demand, then the original carrier would not be in fear of losing the right to that slot in the next equivalent season, on the basis that it did not meet the criteria for maintaining that series of slots.

²⁴⁶ Star Alliance - Air Canada, SAS, Lufthansa, United Airlines, Varig and Thai International, with other Asian carriers to join in near future.

One World - British Airways, Deutsche BA, TAT/Air Libert , American Airlines, Cathay Pacific, Qantas, Sun Air and Iberia. Quality Alliance - Swissair, Sabena, Austrian Airlines.

It may also be the case that if a financially weaker alliance carrier, who operates flights on behalf of the other carrier, goes into liquidation, then in the context of the current allocation practices, it is likely that those slots would be returned to the slot pool for subsequent reallocation. The other alliance carriers are however in the best position to respond to such a situation, as most of the passengers will be ticketed with them, and it would be foremost in their interest to maintain the flight schedule of the defunct carrier, as it forms part of the alliance's over route strategy. In this context too, the rules governing the allocation of slots should make it clear that alliance partners would have an automatic right to take over the slot in question.

It is acknowledged that what amounts to an alliance partner may be open to query, as airline alliances take many forms and the extent of the partnership may vary considerably. A solution may be that carriers would file with the co-ordinator a list of carriers, whose services may be substituted for the applicant carriers, subject to the approval of the co-ordinator, and these would accordingly count towards the 80% threshold for achieving historic precedence in the next equivalent season. Providing an alliance with such flexibility may have implications on competition, as it will stop a particular series of slots from being returned to the pool. It may therefore be appropriate in this context, that the threshold for maintaining historic precedence be raised to 90%.

It is also noted that if such a system of recognising the alliance as a whole, rather than simply the carrier, was introduced, that it might give rise to a situation where these large corporate conglomerates could dominate the market and abuse their position. This greater

degree of freedom in the manner that slots are retained and reallocated must therefore be accompanied by a greater readiness on the part of both the slot co-ordinator, national competition agencies and the Commission to take fast track enforcement action to deal with any abuse under any revised allocation rules and the European competition rules.

Apart from issue relating to a preferred allocation method, other considerations may in future play a large roll in the manner that the system of allocation develops over time. It may well be that the interests of certain minorities may take on increased importance, such as the corporate GA community who may wish to safeguard or develop their access to the premier and often highly congested airports, or regional government who object to the fact that operators who operate from their region often find themselves restricted to a secondary airport at the main cities and therefore lack international inter- and intraline opportunities.

If slot trading does form part of any future slot regulation, parties may have to be more aware of the potential tax implications of this activity, as tax authorities throughout Europe may see this as a new and profitable source of revenue, particularly in light of the substantial sums involved, often running to several million US Dollars, when a series of slots is being exchanged at an airport such as Heathrow.²⁴⁷ Under the terms of the UK legislation relating to Value Added Tax (VAT), the funds received from the sale of slots Heathrow would constitute a taxable supply made within the UK, provided it was made by or to a “taxable” person, *i.e.*, such as a UK resident company, and accordingly the

VAT element of such a transfer would have to be brought into account in the next quarterly VAT return. It may also be open to question, how long parties that claim that the operation of slots amounts to quasi-ownership would maintain that stance, if tax authorities would seek to introduce a Capital Gains Tax, which would become payable upon the resale of part of the carriers slot holding.

²⁴⁷ Company accounts for KLM issued in June 1998, put a price of approximately US\$ 3,000,000 on each landing and take-off slot at London Heathrow. See "KLM Account Hint at the True Worth of BA Slots at Heathrow" *Flight International* (8-14 July 1998) 27.

CHAPTER 8

SLOTS IN THE CONTEXT OF INTERNATIONAL AIR TRAFFIC RIGHTS

A slot of itself has little significance, as it merely marks the beginning or the end of a journey. It is purely incidental to a journey by air, which if made between two states will in most cases be subject to a bilateral air transport agreement which will grant the required rights for the carrier to fly to that state and depending on the nature of the agreement, also specify the city or airport into which flights are to be operated. As should by now be clear, obtaining the *necessary* slot for operating a commercially viable service is not necessarily an easy task and what is the point of a state extending to a foreign carrier the right to operate into their territory, if the ability to land at the required airport is not forthcoming.

Access to airports was already dealt with in the Paris Convention of 1919,²⁴⁸ which provided.²⁴⁹

Every aerodrome in a contracting State, which upon payment of charges is open to public use by its national aircraft, shall likewise be open to the aircraft of all the other contracting States.

In every such aerodrome there shall be a single tariff of charges for landing and length of stay applicable alike to national and foreign aircraft.

This provision appears to allow access *per se* to foreign aircraft, but does not necessarily require that the conditions on the basis of which access is being granted to be uniform.

²⁴⁸ See *Convention Relating to the Regulation of Aerial Navigation*, 13 October 1919, 11 L.N.T.S. 173, 1922 U.K.T.S. 2 [hereinafter *Paris Convention*].

²⁴⁹ See *ibid.*, art. 24.

The only thing that appears to require equality of treatment are the landing fees and the permissible length of stay. The Paris Convention would therefore provided a carrier operating in the current commercial climate with little support in gaining access to an airport another contracting State. The access could have been subject to burdensome preconditions, slots (had they been invented) could have been rationed in order to reduce services regardless of the terms of the bilateral, or these might have been provided at times that would make services unviable. The shortfalls of the Paris Convention of course require to be seen in the context of the fledgling aviation industry. It does serve as a useful illustration of how a changing industry may outgrow a regulatory regime.

The Paris Convention was replaced by the Chicago Convention of 1944²⁵⁰ and this to a great extent maintained the provision incorporated in the Paris Convention, but provided that access was to be provided “*under uniform conditions to the aircraft of all the other contracting States*”,²⁵¹ and the right to access to public airports was also made subject to the provisions of Article 68, which allows the contracting State to designate the route to be followed by any international air transport service as well as the airport that such a service may use. These changes reflect on the one hand the shortfall of the Paris Convention, in that it left an air carrier open to potential discrimination, whereas on the other hand it restricted the operation of air carriers to specific airports, although the latter point is of little significance in this context, as the right to serve destinations will be predetermined in the bilateral air transport agreements which will form the basis of the air transport service. The point regarding non-discrimination is however important in that it

²⁵⁰ See *Convention on International Civil Aviation*, 7 December 1944, 15 U.N.T.S. 295, ICAO Doc. 7300/6 [hereinafter *Chicago Convention*].

requires that any regime that governs access to airports applies equally regardless of nationality of the carrier or the route being operated by a carrier. Although discrimination is now covered by the Chicago Convention, its terms do not require that access is guaranteed and accordingly the question of route rights and rights to slots are still separate, although as a practical proposition, one is worthless without the other.

This has also been the view expressed by the UK and which to a great extent rests on the basis that as the aerodromes fall under independent ownership, air carriers do not have any right to land there against the interests of the owner of the aerodrome or any other party with an interest therein. Under the terms of English land law, aircraft operators which land at an airport must be entering the facility under the terms of either an express or implied license. If a carrier seeks to enter outwith the terms of the licence, then the entry may amount to trespass to land.²⁵² This approach is also consistent with the view expressed by British Airports Authority plc (BAA), who are the owner and operator of the many of the major UK airports, such as Heathrow and Gatwick, who in submissions to the Monopolies and Mergers Commission in 1987, advised that it “as owners of the runways, has the ultimate right to allocate slots, subject to non-discrimination”.²⁵³ If it is established, that under the terms of English law, an air carrier has no automatic right to enter onto the property of the airfield operator, then the question may arise where any licence issued to that operator by the state in pursuance of its obligations under the terms

²⁵¹ See *ibid.*, art. 15

²⁵² For fuller discussion, see C. Howes, *Slot Allocation at London Heathrow Airport: The Legal Framework* (European Air Law Association, 1994) at 51.

²⁵³ MMC, *British Airways plc and British Caledonian Group plc*, Cm247 (London: HMSO, 1986), app. 2.2, para 15.

of a bilateral air transport agreement override the aforementioned restrictions on access under English law.

The above issue was discussed in the case of *Air Canada v. Secretary of State*,²⁵⁴ where Air Canada and other operators took legal action against BAA over increases in airport charges. One of the points advanced by the plaintiffs was that they had rights, as against the airport owner, to land by virtue of having been issued with an Operating permit under Article 77 of the Air Navigation Order (ANO)²⁵⁵ by the Secretary of State. This was however rejected by the Court, as under the terms of the licence issued under Article 68 of the ANO to the airport, it is provided under Condition 8 of the licence that “[s]ubject to condition 1 [providing for equality of access] nothing in this licence shall be taken to confer on any person any right to use the aerodrome without the consent of the licensee”.

The above provision is clearly consistent with the position under English land law, and by making it subject to condition 1 of the license, there is an implied right to foreign carriers to access the aerodrome on equal terms although the provision of itself does not provide an absolute right of access. Article 68 deals with licensed aerodromes and Article 72 of the ANO provides that persons in charge of aerodromes open for public use shall grant access on the same terms and conditions as those applied to aircraft registered in the UK, to aircraft from other states. Again there is an implied right of access to the foreign aircraft operator on the basis of equality, but no absolute right of access is conferred. The notion that an absolute right of access is therefore conferred by the terms of a licence

²⁵⁴ See [1981] 3 All ER, 336 QB.

²⁵⁵ See *Air Navigation Order 1976*, SI 1976, No 1783.

issued to a carrier under Article 77 of the ANO is therefore dispelled by the following provision: “Subject to the provisions of Articles 68 and 72 of this Order, nothing in this Order or the regulation made thereunder shall confer any right to land in any place as against the owner of the land or the persons interested therein”.²⁵⁶

If the right to land at an aerodrome is therefore implied under Articles 68 and 72, there can therefore not be an implication of any such right of access to an aerodrome in Article 77 or any permit issued thereunder. The only express right that is provided to foreign operators, is to be granted access to land on the same terms and conditions as everyone else.

Other regulatory aspects

Looking beyond the scope of the purely UK context, the right for Community air carriers to operate on routes between Member states, stems from the ‘Third Package’.²⁵⁷ Article 8(2) of the ‘Access Regulation’ provides that “[t]he exercise of air traffic rights shall be subject to published Community, national, regional or local operating rules relating to safety, the protection of the environment and the allocation of slots”.²⁵⁸

It is evident from the above provision that the notion of route rights and access to airports and slots are two distinct issues, as otherwise one would not be subject to the regime applicable to the allocation of the other, but rather part and parcel of the same right. This

²⁵⁶ See *ibid.*, art. 91(1).

²⁵⁷ See *Council Regulation (EEC) No. 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community routes*, OJ Legislation (1992) No. L240/8.

proposition is also supported by the contents of Article 8(1) of the 'Access Regulation' which provides that the generality of the right for Community carriers to operate on intra-Community routes does not affect the right of the Member State to regulate without discrimination the distribution of traffic between airports in an airport system. Once again, if the route right provided for an absolute right of access, it would appear odd if the Member State could then dictate the airport to which the carrier could operate. Accordingly, the only view which can be reasonably sustained is that the route right and the airport access right are two distinct issues.

²⁵⁸ See *ibid.*

CHAPTER 9

FUTURE REGULATORY DEVELOPMENTS

IATA Developments

The IATA Scheduling Procedures Guide²⁵⁹ is currently in its twenty fifth edition and the original guide has had to develop to address a growing list of issues from the promotion of competition to recognising the rights of the new entrant as well issues surrounding code sharing or other joint operations. To some extent it has become somewhat of a patchwork and central issues regarding the designation of airports as either 'SCR' or 'SMA' are not dealt with within the Guide, but rather in the Standard Schedules Information Manual.²⁶⁰ In order to lend a greater degree of coherence to the governing document, the Schedule Co-ordinating Services branch of IATA is currently in the process of preparing a rewrite of the Guide, which is due to be circulated for consultation in October 1999. One might speculate that the purposes of the rewrite might also be to enable substantial amendment of the Guide, with a global acceptance of the document bringing all amendments into effect, rather than each amendment having to be voted on and approved individually.

In the forward and opening remarks of the draft rewrite,²⁶¹ emphasis is placed on the fact that the guide is intended as best practice for world-wide application and it recognises that some governments may have legislation covering this area, such as the member states

²⁵⁹ See IATA, *supra* note 19.

²⁶⁰ See *Information Manual*, *supra* note 57.

of the European Union, in which case the legislation will take precedence. Emphasis is placed on the need to constantly examine airport capacity and that the increase in capacity is the only solution to airport congestion. Airport management is urged to ensure the change or remove restricting features, so that the airport can reach its full capacity potential.

The draft rewrite incorporates reference to the three categories of airport, *i.e.*, the non-coordinated airport (Level 1), the schedule facilitated airport (Level 2), and the fully coordinated airport (Level 3). Reference to and the definition of these differing types of airports was previously incorporated in the Standard Scheduling Information Manual,²⁶² which is a logical and welcome amendment. In the following three sections, the draft rewrite then takes each category of airports in turn and provides a full definition for each and discusses the role the airline, airport, the co-ordinator as well as the implications of a change of status from one level to another. As each level of airport is treated in the same way, there is a level of clarity that has to date been absent.

In the latter part of clause 5 as well as clause 6, the redraft deals with the principles as well as priorities of co-ordination. Although these are generally consistent with the Guide in its current form, there are a number of noteworthy clarifications and changes. The categories of airport users has been reduced from four to three, with reference now being made to regular scheduled services, *ad-hoc* services and 'others'. It will be interesting to see whether airports treat corporate GA as falling into the *ad-hoc* or the 'others' category,

²⁶¹ In its draft form dated 26 May 1999 (Version 6)

²⁶² See *Information Manual*, *supra* note 57.

in light of the fact that they have become increasingly vocal in light of perceived pressures to force them out of major European airports. The redraft also emphasises that there should be no confiscation of slots from air carriers unless there is proven abuse and this may be seen as a move to pre-empt the formulation of legislation, which might have as an objective the support of a certain sector of the market, such as new entrants, through confiscation of slots from incumbents. It is unlikely though that this provision would be sustained in the context of any required slot surrender demanded by a competition authority, noting that the redraft only set out to be viewed as 'best practice'. The redraft also formerly puts an old point of argument to rest, by expressly stating that the allocation of slots is independent of any bilateral agreement and that the granting of landing rights does not entitle the airport to slots.

As regards the priorities for co-ordination, there have been no substantive changes, although a number of issues have been clarified. Noteworthy are the reference to the fact that only slots that form part of a series of four slots operated on the same day of the week will receive historic precedence. This is in line with the practice to date by a number of co-ordinators, although it is the first time that express reference is made to this practice. It is not however clear whether the flights require to take place within consecutive weeks or whether a fortnightly service will still benefit from historic precedence, as practice varies on this issue. Recognition is also given to the fact that slots requested on an *ad-hoc* basis may form a series, albeit an imperfect one, and it is at the discretion of the co-ordinator, as to whether these will obtain historical status.

An interesting change has also been noted with reference to the provision concerning new entrants. The current Guide makes reference²⁶³ to 50% of the slots available within each time period co-ordinated to airlines holding new entrant status. The rewrite also makes reference to 50% of slots in the pool being available to new entrants, but then in a separate sentence states that “[t]he remainder should be allocated to incumbent carriers”. Although it is open to interpretation, it may be arguable that this means that new entrants obtain the first bite at the cherry, *i.e.*, that they have a pre-emptive right to the best slots in the pool.

The rewrite also expands on the current Guide, as regards the issue of slot exchanges and transfers. As before, reference is made to slots being freely exchangeable on a one-for-one basis. Unlike the European Slot Regulation²⁶⁴ which penalises new entrants who exchange slots which they have obtained on account of their status, the redraft allows the co-ordinator to sanction such a transfer if he considers that it improves the operating position of the airline. On the issue of transfers, the rewrite adopts the position, that this is only permitted in the event of a total or partial take-over of one airline of another or where the laws of the country permit it. This latter condition is suggestive of a move in certain countries, perhaps the member states of the European Union, to allow the secondary trading of slots. This provision also supports the notion that there is a certain inevitability to the official introduction of secondary trading and that this issue requires to be addressed if the rewrite of the guide is not to be superseded shortly after its formal introduction. The provision regarding transfers also addresses the issue of slots which have

²⁶³ See LATA, *supra* note 19 at 3.4.4.4.

²⁶⁴ See Slot Regulation, *supra* note 99.

been acquired by airlines on account of their status as new entrants and which are subsequently transferred to an incumbent carrier on account of a minor share holding. This issue is particularly associated with transfers which have taken place as a result of franchising agreements entered into by smaller carrier, who have transferred part of their slot holding to the licensee, who not infrequently also acquires a share interest. There has been vocal criticism from regional communities, there as a result of commercial arrangements between their local carrier and the incumbent, their direct service to a major airport has been switched to a secondary airport, in order to free up slots for the incumbent at the major hub. This demonstrates that the redraft is far more reactive to addressing current issues, than the current Guide.

An interesting development has also been regarding abuse of allocated slots. Previously, the IATA position was non-confrontational insofar as airlines that abused their slot holding by operating off-slot, only faced the sanction that the slots originally allocated to them would not receive historic precedence and would therefore be lost. The rewrite however goes further and envisages disciplinary action if it regularly and intentionally fails to adhere to its allocated slot.

Although there are a number of more minor amendments to the rewrite, it may be inappropriate to comment on it in detail in light of further amendments that will undoubtedly be made. It is however clear that the rewrite will add a clarity to the Scheduling Procedures Guide which is currently lacking and it will address current issue in far greater detail than is currently the case. Those who expected the rewrite to formally

sanction the secondary trading of slots may be disappointed, but in light of the fact that it is not possible for IATA to adopt a common position on this issue, the omission should not be surprising. The fact that it recognises that governments may allow the unilateral transfer of slots (read secondary trading) is of itself of great significance.

The European Union

It will be recalled, the European Slot Regulation²⁶⁵ should have been subject to a review process, with the Commission submitting a formal proposal by 1st January 1996, on the basis of which the Council required to make a decision as to whether the Regulation should continue in its current form, or whether it should be subject to revisions. As no formal proposal has to date been made by the Commission, the Regulation has continued to run on in its original form.

One of the main reason for the delay was that the Commission for a long time grappled with the issue as to whether or not monetised secondary trading of slots should be permitted under any revised Regulation, as Member States were split on the issue. The view however appears to have developed within Transport Directorate General under Neil Kinnock's reign, that secondary trading of slots would be desirable as this would increase the flexibility within the allocation process and this was certainly also a view supported by the UK Civil Aviation Authority. Problems however developed in moving forward with this proposal as a result of the proposed wide-ranging alliance between British Airways and American Airlines that required to receive clearance by competition

²⁶⁵ See *ibid.*, art. 14.

authorities on either side of the Atlantic. The Office of Fair Trading, being the agency responsible for competition matters, advised in late 1996 that it would sanction the alliance, provided that both carriers together surrendered 168 slots at London Heathrow. At the time BA and AA had a 61% market share on UK-US routes and a 70% market share on the Heathrow to New York's JFK airport.²⁶⁶ In order to obtain approval, BA intimated that it was prepared to give up the slots and was ready to sell them to rival airlines for a sum rumoured to be in the region of US\$ 300 million.²⁶⁷ These plans were however dashed when the former European Transport Commissioner, Neil Kinnock, declared in a letter to the UK Office of Fair Trading, that such proposed sales were illegal.²⁶⁸ Throughout this period the Competition Directorate General of the European Commission, headed by Karel van Miert, was conducting its own investigations into the competition implications of the alliance, which were not completed until July 1998.²⁶⁹ It was at this point that the Commission announced that BA and AA would have to release up to 267 slots without compensation in exchange for which they would receive approval from the Commission. As the Commission had taken such a hard line for the granting of approval, it would have been very contradictory if a revised Regulation would allow for the sale of slots by carriers. It was also suggested by some commentators at the time that any money that BA received as a result of the slot sales may be deemed as state aid, as they obtained the substantial slot holding on account of their privileged position as the national flag carrier prior to privatisation. The whole issue of slot sales was therefore too sensitive to press on with the circulation and publication of a revised Slot Regulation. As

²⁶⁶ See "OFT requires BA slot surrender", *Sunday Times* (13 March 1997) 3.

²⁶⁷ See *ibid.*

²⁶⁸ See "BA and American Link-up Hopes Rocked by Kinnock Bombshell" *TravelTrade Gazette* (15 January 1997) 3.

²⁶⁹ See Airclaims Ltd., *Blue Print Proofing*, issue 99/13 (7 April 1999) at 1.

the proposed alliance between BA and AA in its original form has also failed to obtain US approval, the originally envisaged partnership has been substantially toned down, removing the necessity for any form of approval or the surrender of slots. It may now be that the time is right for a renewed impetus to updating the current Slot Regulation.

Although there are few details as to the terms of the current draft of any future Regulation, a draft prepared by the Commission in September 1997 and circulated for industry comment, nevertheless provides an interesting insight into the likely direction any future Slot Regulation will take. One of the principal concerns put forward by IATA being that any future Regulation should try and avoid a system of allocation for the European Union (EU), which is in conflict with the IATA system, as international uniformity is highly desirable, and to this extent terminology should also be harmonised. They are therefore also critical of any regime which exacerbates the current Regulation's bias towards carriers operating within the EU.

The aforementioned draft incorporates a number of changes throughout the text, although it is open to question whether these will not be subject to subsequent amendment in light of the IATA rewrite of the Scheduling Procedures Guide (SPG) and a desire to perhaps try and keep the two texts as compatible as possible. An example is that the draft Regulation makes reference to a series of slots consists of at least five slots, whereas the IATA rewrite of the SPG only requires the operation of four slots to qualify as a series, although the wording is stricter regarding the times of operation.

Fundamental changes can however be found in the allocation process, where reference to new slots being allocated on the basis of retimed historic prior to being placed into the pool, has been deleted. This has come in for harsh criticism from IATA, as it greatly handicaps the ability of incumbents or new entrants from previous seasons from gaining improvements to the timing of their schedule. This is exacerbated by the other far reaching proposal incorporated into the draft, whereby new airlines holding new entrant status would have a right to first choice of the best slots contained within the slot pool. This means that new entrants of a current season could leap-frog those qualifying for such status in a previous season and gain a substantial competitive advantage for a single season, which system would then have the effect of substantially discriminating against such carriers with small slot holdings in a subsequent season, should they have lost their new entrant status.

The single most important development is however the draft Regulation envisages a system, whereby an entitlement to a slot could be unilaterally transferred from one carrier to another for “monetary compensation”, *i.e.*, secondary trading of slots would be sanctioned. The draft envisages a transparent system, whereby the transfer has to be notified in advance and advertised, in order that representations may be made by any interested carrier. Similarly if after notification of the transfer an airline wishes to submit a higher bid for that slot, then it requires to be accepted by the carrier. In effect the coordinator is required to organise an auction. Although IATA has no official position on the secondary trading of slots, as it is an issue on which its members are divided, it nevertheless is critical of the auction system insofar as it proceeds on the flawed

assumption that the sole form of consideration given by one carrier to another would be money. They see it as important that should such a system be introduced, then it should not be subject to unnecessary restrictions and the co-ordinator should not be burdened with a role, other than simply confirming the feasibility of a transfer, as any other role would inevitably give rise to delays in effecting the transfer.

It is unclear as to when we are due to see a revised Slot Regulation, as it is likely that the Commission is unlikely to act until after the introduction of the rewrite of the SPG in its finalised form. It will also to some extent depend on where on the agenda the new EU Transport Commissioner, Loyola de Palacio, place the issue, as clearly there are a number of high profile issues ranging from ATC harmonisation to the introduction of a European air safety authority, which are in need of urgent attention.

CHAPTER 10

CONCLUSION

Access to airports has in recent years become a well documented issue, not only in aviation and legal journals, but also in the general media which, particularly in the UK, became a useful tool for those wishing to bring about a change to the current allocation system. The system of slot allocation may not only have been important to start up carriers wishing to obtain access to major airports such as Heathrow, but may also have been a convenient issue with which to highlight the inequalities faced by them. It is probably human nature to favour the underdog, who is trying to compete against the goliath, and no doubt this was something that was not lost on such carriers as Virgin Atlantic.

It was carriers such as Virgin Atlantic that brought about debate regarding the current system of slot allocation, and although their agenda was primarily driven to meet their own commercial needs, they did however lead to questions being raised as to whether the status quo was still acceptable in light of the greater emphasis being placed on competition and consumer benefit. Their main complaint was in respect of the principle of historic precedent which is engrained in the current system as this formed the greatest barrier to their attempts to gain access and compete on routes out of Heathrow. It was proposed by them that carriers should lease the slots for a seven year tenure, after which time they would revert to the slot coordinator for reallocation. The problems of limited tenure in respect of providing a basis to promote long term infrastructural investment by

carriers has already been discussed and to some extent this type of proposal is indicative of the short term requirement of Virgin Atlantic to obtain slots. It is however noted that although the issue of slots is still one close to the hearts of carriers such as Virgin Atlantic and British Midland, they have become increasingly less vocal about their concerns in recent years, no doubt to a great extent due to their own increasing slot holdings which are starting to benefit from the principle of historic precedence.

If the last statement is true, then it to some extent speaks for the current system of grandfather rights, as provided that a carrier can survive the first few years, then its rights to access will be safeguarded in virtual perpetuity providing it with a basis upon which it can plan a long term strategy. If the seven year tenure approach was adopted, then new carriers would need the first few years of that period to establish themselves on the route, then have the opportunity to operate a few further years on the route before suddenly finding the plug being pulled on them and thereafter having to compete to maintain the relevant slot, with the chance that they will have to reschedule their services, or in the worst case it could lead to the loss the slot altogether, without obtaining another economically viable slot. The question must be whether this is in the interest of the travelling public and indeed the carriers themselves.

Many of the other proposed systems of slot allocation, such as slot auctions and lotteries, would bring with them their own problems and increasingly remove 'the slot' from what it originally was, *i.e.*, a planning tool. Other methods of slot allocation may have the effect of redistributing slots to other operators, but they would not have the effect of

increasing capacity. If the slot issue is therefore primarily one of competition, then there is a substantial enough body of competition law to deal with unfairness within the system, but due to the dynamic nature of the air transport industry, access to enforcement procedures would need to be made more readily available, along with a political will for governments to take enforcement action and to do so quickly. It is in this regard that new entrants could be assisted, rather than a regime that operated to their benefit of the first couple of years and then abandoned them, just at a stage when they were managing to establish themselves in a market.

It is therefore on the enforcement side where much benefit could be obtained, not only irrespective of abusive practices by individual carriers or groups of carriers vis-a-vis smaller carriers, but also in respect of abuses of the system, such as where carriers consistently operate off-slot in order to combat wastage within the available capacity. If the current system of slot allocation is amended, it should be taken as an opportunity to incorporate new enforcement procedures and sanctions for abusive behaviour.

One major change which has fairly broad support is the formal introduction of secondary monetized slot trading and this would no doubt assist in enabling slots to be transferred to some extent in line with consumer demand, insofar as a carrier with a sudden seasonal demand could obtain a slot for a limited period from another operator, whereafter they could resell it to another operator. The advantage of this system is that carriers could more readily obtain slots to cover a short term need and at the other end of the transaction, it would allow carriers to sell a slot which they may not absolutely require

and realise its capital value, whereas previously they may have been reluctant to surrender it in case there was a future increase in the demand for the service operated with that slot. It is perhaps with these sorts of measures, by which the existing system is fine tuned, that the greatest degree of universal benefit could be extracted.

Any system which proposes to revolutionise the current mechanism for allocation, would no doubt bring with it new problems which would require to be addressed. There is nothing magical about a slot, it is simply a window of opportunity within which a carrier may operate. The availability of such opportunity is physically constrained by the capacity of the airport and the environment within which it is located. At airports such as Heathrow, it is a simple fact that demand for commercially viable slots will always exceed supply and accordingly some type of election has to be made as to whom a given slot should be allocated to. There will therefore always be winners and losers and this is a fact related to capacity rather than necessarily any deficiency in the manner in which the slot is allocated. Those parties that have been denied access by the current allocation process will always be understandably vocal about the perceived injustice suffered by them. Although their comments should not be ignored, care should however be taken to evaluate their views within the context that they were made. Should the view of the minority be allowed to dominate, we run the risk of the curtain becoming drawn on the opportunities available to the majority.

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