1. Introduction

On 14 July 2010, the Commission adopted two decisions in relation to air transport services. The first decision, in antitrust Case COMP/39.596 BA/AA/IB, made binding the commitments offered by British Airways ("BA"), American Airlines ("AA") and Iberia ("IB") in relation to their cooperation on transatlantic routes. The second decision, in merger Case COMP/M.5747 IB/BA, cleared a concentration between BA and IB in Phase I without remedies.

The present article discusses the main issues raised in these investigations and highlights developments in the Commission’s approach towards competition analysis and remedies in the passenger air transport sector.

2. British Airways/American Airlines/Iberia antitrust case

2.1 Background

BA, AA and IB concluded a set of agreements establishing cooperation on all routes served by these airlines between Europe and North America (“transatlantic routes”). In particular, the parties agreed to coordinate prices, capacity, schedules, marketing and sales, as well as to share revenues. On 8 April 2009, the Commission opened formal proceedings pursuant to Article 101 TFEU.

All three parties are members of the one world alliance, which is one of the three global airline alliances, the other two being the Star alliance and the SkyTeam alliance. The level of cooperation between members of each of these alliances ranges from a relatively low degree of cooperation, involving for example the sharing of frequent flyer programmes ("FFPs") or lounge access, to highly integrated arrangements, such as setting of common prices and revenue sharing. The latter types of cooperation have developed partly in response to existing regulatory barriers which prevent cross-border mergers between airlines at international level. The Commission's investigation concerned only the close transatlantic cooperation between BA, AA and IB, and not the looser forms of cooperation with the other members of the one world alliance.

The Commission decision of 14 July 2010 is a commitment decision on the basis of Article 9 of Regulation No 1/2003. In its decision, the Commission concluded that the commitments offered by BA, AA and IB met the competition concerns that it had expressed in its preliminary assessment of the case, which was contained in the Statement of Objections that was addressed to the parties on 29 September 2009. The sections below describe the Commission's competition concerns as

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1 The authors would like to thank the other members of the case teams, in particular members of the Chief Economist Team Miguel de la Mano, Mario Marinello, Szabolcs Lorincz, Manuel Godinho de Matos and Jose Elias Cabrera. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

2 Mergers involving non-EU airlines are hampered by nationality clauses in bilateral air services agreements due to which a merging airline risks losing valuable air traffic rights. Furthermore, some countries maintain explicit foreign ownership and control restrictions. Thus, the United States limit foreign ownership of its airlines to 49% and foreign control to 25%. Similarly, non-EU citizens may own only up to 49% of EU airlines. Mergers between EU carriers are possible thanks to EU liberalisation measures.
expressed in its preliminary assessment and the commitments that the parties offered to meet those concerns.

2.2 Relevant markets

**Point of origin/point of destination’ (O&D) versus network-wide market**

The Commission examined a recurrent question in recent airline cases, namely whether the relevant markets in these cases should be defined at the level of airline networks rather than at the level of individual city pairs.

From a demand side perspective, passengers usually wish to travel between specific cities. Accordingly, a price increase on a flight to city A will not generally make a passenger fly to city B instead. Hence, passengers are concerned by competitive conditions on a particular route, which is not substitutable by other routes. On the other hand, some full-service airlines consider that they compete on the basis of their networks of flights, since larger networks allow airlines to offer more destinations and to persuade more passengers to travel via their hub airports. However, these supply-side considerations are secondary for the definition of the relevant market. For a passenger wishing to travel on a specific route where a transaction results in monopoly prices, it would be of little relief if the same transaction strengthened the network of the parties vis-à-vis their competitors. Since competition assessment deals first and foremost with the effect of the transaction on consumers, demand-side considerations are key for the purposes of market definition.

The Commission thus provisionally concluded that O&D city pairs were the relevant method to define the market in the present case. This market definition does not negate the importance of networks in the airline industry. The Commission took network considerations into account in its competitive analysis, in particular when assessing the strength of the airlines at the relevant hubs, the likelihood of entry by a competitor in the light of its overall network presence and the competitive constraint imposed by one-stop flights over the airport hubs of competing airlines and airline alliances.

**Premium versus non-premium passengers**

The Commission’s investigation identified the existence of two distinct groups of passengers with different travel needs on transatlantic routes. While one group of passengers selects the flights primarily on the basis of price (“non-premium passengers”), the other group of passengers selects trips on the basis of a combination of factors such as shorter trip duration, ticket flexibility, price and, given the length of the flight, travel comfort (“premium passengers”). Premium passengers are usually less price sensitive than non-premium passengers. The Commission's conclusion was based on qualitative and quantitative evidence collected throughout its investigation. In particular, an analysis of the correlation of fares within the various fare classes on transatlantic flights revealed that fares for restricted Economy tickets are not correlated with fares for flexible Business tickets. Moreover, a passenger survey conducted at London Heathrow airport indicated that premium passengers share common travel preferences, which differ from the travel preferences of non-premium passengers, particularly as regards the time when the ticket was booked (which is generally closer to the time of departure of the flight) and the length of stay at destination (which is generally shorter and includes fewer stays over the weekend). Furthermore, premium passengers appeared to be much more likely to simply switch airlines in the case of a price increase rather than reduce their

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4 While in previous cases the Commission used "time sensitive/non-time sensitive" terminology to define these two groups of passengers, in the present case "premium/non-premium" distinction was applied to underline the importance of non-time-related considerations, in particular travel comfort, for passengers on transatlantic routes.
travel comfort or the flexibility of their travel by switching to a lower fare class. The Commission therefore took the view that services provided by airlines to these two groups of passengers belonged to two separate markets.

The Commission used booking classes as a proxy for determining the size of each of these markets. Booking classes are the main indicator which airlines themselves use to distinguish and price differentiate between premium and non-premium passengers. As it was not necessary to determine the precise boundaries of the two markets in this case, the Commission calculated market shares on the basis of the premium market, including all tickets except restricted Economy.

Non-stop versus one-stop flights

Air transport markets may be further segmented on the basis of the distinction between non-stop services and one-stop services. However, the Commission provisionally concluded that, in the present case, it was not necessary to determine whether non-stop flights and one-stop flights were in the same market. The parties' cooperation would restrict competition irrespective of the precise market definition, since on the routes of concern one-stop services were only remote substitutes to non-stop flights. The competitive constraint imposed by one-stop services varied between the routes of concern and depended on several factors, such as passenger type (premium/non-premium) and total travel time. The Commission conducted a detailed assessment of the extent of competitive constraint imposed by one-stop services on each route of concern.

Airport substitution

London is served by five main airports: Heathrow, Gatwick, London City, Luton and Stansted. The Commission's investigation indicated that demand-side substitution and supply-side substitution between transatlantic flights out of Heathrow and the other four London airports was likely to be insufficient to consider that they all belonged to the same relevant market. However, in this case it was not necessary to define the exact boundaries of the market, since such definition did not alter the Commission's competitive assessment. With respect to New York airports, the Commission provisionally considered John F. Kennedy and Newark airports to be substitutable.

2.3 Competitive assessment

In its preliminary assessment, the Commission considered that the extensive level of cooperation resulting from the agreements eliminated competition between the parties and restricted competition by object. In addition, the Commission found that the parties' cooperation also produced anti-competitive effects on specific routes, which were examined in further detail.

Concerns in relation to restrictions of competition between the parties

The Commission provisionally concluded that the parties' agreements restricted competition between themselves and resulted in anti-competitive effects on six hub-to-hub routes, where non-stop services of two of the three parties overlapped. These were five routes between London and the U.S. cities (Boston, Chicago, Dallas, Miami and New York), plus the route between Madrid and Miami (together "routes of concern").

The provisional finding of anti-competitive effects was based on several grounds. First, the Commission's investigation revealed that on the routes of concern the parties were the closest competitors in terms of frequencies, schedules and service quality. Second, the parties' market position was particularly strong as compared to their actual and potential competitors. For example, the parties' market shares on the routes of concern exceeded 50%. The combination of the parties' operations further strengthened their market position. Third, the parties' position was protected by high barriers to entry, in particular the lack of slots at London and New York airports. Other
barriers to entry included the parties’ high number of frequencies, extensive FFPs and hub advantage at the end of the routes of concern.

The preliminary finding of anti-competitive effects was also confirmed by the Commission's regression analysis of price concentration, which showed that the parties' agreements would be likely to lead to an increase in fares for both premium and non-premium passengers.

It is interesting to note a few peculiarities of the routes examined in the present case, which influenced the Commission's competitive assessment and subsequent evaluation of the commitments offered by the parties. First, the routes of concern were exclusively long-haul routes, which are quite different from short-haul routes. For example, long-haul operations require substantial connecting traffic to fill a plane and make the transatlantic flight viable. Furthermore, unlike many of the routes at issue in certain previous antitrust and merger cases, the long-haul routes which were the subject of the present investigation were quite large in terms of passenger traffic. For example, London-New York is the largest long-haul route in the world in terms of point-to-point (i.e. non-connecting) passengers. Also, there was a substantial amount of high-yield premium traffic on most of the routes of concern. This made these routes particularly attractive for actual or potential competitors of the parties, if barriers to entry and expansion on these routes were to be lowered.

**Concerns of restriction of competition between the parties and third parties**

The Commission also provisionally concluded that the agreements had the potential of creating further restrictive effects through the parties restricting access to connecting traffic by their competitors.

As mentioned, access to sufficient connecting traffic is very important for the viability of transatlantic air transport services. The parties that have hubs at one or both ends of the six routes of concern are important providers of connecting traffic to competitors operating on these routes. They can provide competitors with access to connecting passengers by concluding standard industry interline or special pro-rate agreements. The agreements would combine the parties' increase in market power on the routes of concern with their strong presence on short- and medium-haul routes connecting to their hubs. The Commission's preliminary view was that this would enable the parties to restrict their competitors' access to connecting traffic travelling over these routes, for example by restricting the terms of interline or special pro-rate agreements or by refusing to enter into such agreements altogether. The Commission provisionally concluded that a reduction in connecting traffic from the parties had the potential to significantly undermine the viability of competitors' transatlantic services on the routes of concern, thereby foreclosing the markets for these competitors.

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5 The main goal of that analysis was the statistical measurement of the strength and sign of the historical association between price (fare) and market concentration. In particular, the logarithms of ticket prices were regressed on the number of independent competitors (as a measure of market concentration), and other controlling factors, such as average frequency, aircraft size, slot concentration at origin and destination cities, GDP, population, and time effects. Separate models were set up for the fares of the restricted economy and the fully flexible business booking classes. The estimation used standard panel data estimators (fixed effects, first differences, GMM fixed effects and first differences, and the Arellano-Bond estimator).

6 Under an interline agreement, other airlines can issue tickets including a segment that they operate themselves as a well as a segment operated by the parties. For example, a competitor can issue a ticket for a Manchester-London-New York itinerary, where the Manchester-London segment is operated by BA and the London-New York segment by the issuing competitor itself. The parties subsequently charge the issuing airline for the segment that they operate. The issuing airline and the parties can choose to divide the fare that is collected from the passenger on the basis of standard industry rules set within the framework of the International Airline Travel Association ("IATA"). They can also opt to set the terms and conditions for interlining by a tailor-made, more advantageous agreement ("special pro-rate agreement" or "SPA" in aviation parlance).
The Commission's preliminary view was that the potential for negative effects arising from such practices would depend on route-specific factors. For each of the routes of concern, the Commission considered in detail the parties' market power and the potential negative effect that would result from a restriction of their competitors' access to connecting traffic. In particular, the Commission assessed the importance of connecting traffic for competitors' operations on the routes, the scope of competitors to attract connecting traffic from other interline or alliance partners if faced with a reduction in connecting traffic from the parties, and the potential that a reduction of connecting traffic from the parties had to restrict overall competition on the route of concern.

In the light of these factors, the Commission provisionally concluded that the potential for negative effects was most likely on the London-Chicago and London-Miami routes. The Commission's investigation confirmed that the operations of competitors on those routes were particularly dependent on connecting traffic provided by the parties, so that a reduction of access to connecting traffic had the potential of significantly undermining the viability of competitors' operations and the state of overall competition on those routes.

2.4 The commitments

General description

The parties offered a set of commitments aimed at addressing the competition concerns identified, primarily by removing barriers to entry and expansion for other airlines to operate on the routes of concern. Having analysed the proposed commitments and having market tested them, the Commission concluded that the commitments met the competition concerns as expressed in its preliminary assessment.

The slot commitment

On four of the six routes of concern, the parties proposed to make slots available at either London Heathrow or London Gatwick airports – at the competitor's choice – to allow competitors to operate one additional daily service on each of London-Dallas and London-Miami, two additional daily services on London-Boston, and three additional daily services on London-New York. The number of slots to be made available on a route of concern was to be reduced by any competitive service on this route that was added without making use of the slots released under the commitments. Thus, in line with this clause, the three new services launched or announced by Continental Airlines and Delta Air Lines on London-New York mean that there are currently no slots available on this route.

Under the commitments, the Commission selects the entrant which would offer the most effective competitive constraint imposed on the relevant route. Competitors may choose to offer compensation for the requested slots. However, compensation is not a factor in the Commission's competitive assessment of applicants' requests for slots: it would only be taken into consideration if two or more applicants were deemed to impose a similarly effective competitive constraint.

The slot commitment essentially follows the precedents set in previous antitrust and merger cases in the airline sector. However, it deviates from the precedents in five principal respects.

Compensation

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7 See the final commitments at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39596/39596_3882_2.pdf.

8 Similar clauses were included in commitments in previous merger cases, see for example Case COMP/M.3280 Air France/KLM (OJ C 60, 09.03.2004), para. 1.2.3 of the commitments; Case COMP/M.3770 Lufthansa/Swiss (OJ C 204, 20.8.2005), para. 1.2.2 of the commitments; and Case COMP/M.3940 Lufthansa/Eurowings (OJ C 18, 25.01.2006), para. 2.1.2 of the commitments.
Unlike in previous antitrust and merger cases in passenger air transport, the current commitments do not preclude compensation for the release of slots. This is in line with the Commission’s current position on slot exchanges involving monetary and other consideration\(^9\). The Commission took into account the specific situation at London Heathrow, where an active secondary market for slots has existed for many years. This airport is highly congested and the value of traded slots reaches several millions of euros. In these circumstances, it was considered disproportionate to exclude the possibility of compensation proposed by the parties, given that it had no negative impact whatsoever on the effectiveness of the commitments.

"Anti-gaming" provisions

Contrary to precedent, the commitments restrict a competitor from receiving slots from the parties if it already holds slots at the airport and fails to operate them without a *bona fide* reason. Given the high value of slots at the relevant airports, this provision was included to prevent competitors from "gaming", i.e. receiving slots under the commitments even though the competitor already has unused slots which it can operate to offer a competitive service.

Slots for non-stop services

Unlike in previous remedy packages concerning long-haul routes where released slots could be used for one-stop services\(^10\), the slots in the present case are generally available only for non-stop services on the routes of concern. However, exceptionally, on the London-Dallas and London-Miami routes the slots will become available also for one-stop services as of the IATA summer season 2013, in the event that no competitor has used them up to operate a non-stop flight. This provision was included in particular to encourage competitors to apply for slots for non-stop services on these routes as early as possible.

Time window

In previous air transport cases, the parties undertook to make available slots within +/- 90 minutes of the time requested by the applicant for long-haul routes\(^11\) and between +/- 30\(^12\) and, recently, +/- 20\(^13\) minutes for short-haul routes. The reasoning was that precise timing is less important on long-haul than on short-haul routes, both because peak times are longer and the constraints of aircraft rotation are much lower on long-haul routes. However, two elements in the present case led the parties to improve the commitments and reduce the time-window to +/-60 minutes. First, multiple daily services are offered at London Heathrow on transatlantic routes, which makes it more important to obtain a slot at a precise time. Furthermore, obtaining a slot at a precise time may be important to a carrier with a hub at the other end of the route in order to meet its connection banks at that hub.

Restrictions on slots per hour

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\(^10\) See, for example, commitments in Case COMP/M.3280 Air France/KLM (OJ C 60, 09.03.2004) and Case COMP/M.3770 Lufthansa/Swiss (OJ C 204, 20.8.2005).

\(^11\) Case COMP/M.3280 Air France/KLM (OJ C 60, 09.03.2004), para. 1.3.1 of the commitments; Case COMP/M.3770 Lufthansa/Swiss (OJ C 204, 20.8.2005), para. 1.3.2 of the commitments.

\(^12\) Case COMP/M.3280 Air France/KLM (OJ C 60, 09.03.2004), para. 1.3.1 of the commitments; Case COMP/M.3770 Lufthansa/Swiss (OJ C 204, 20.8.2005), para. 1.3.2 of the commitments; Case COMP/M.3940 Lufthansa/Eurowings, para. 2.2.2 of the commitments; Case COMP/M.5364 Iberia/Clickair/Vueling, para. 1.2.2 of the commitments.

\(^13\) Case COMP/M.5335 Lufthansa/SN Airholding, para. 1.3.4 of the commitments; Case COMP/M.5440 Lufthansa/Austrian Airlines, para. 1.2.2 of the commitments.
The commitments in some previous merger cases included provisions that excluded an obligation either to release slots at certain hours\textsuperscript{14} or to release more than a certain number of slots in a given hour\textsuperscript{15}. This was due to either environmental regulations in force or to ensure the viability of the merged entity’s hub-and-spoke system. The present commitments essentially follow the precedents in their approach and exclude an obligation to release any arrival slots before 6:20 a.m. and more than three slots between 6:20 and 8:20 a.m. The Commission concluded that these restrictions did not undermine the effectiveness of the commitments.

**The fare combinability and SPA commitments**

The parties also offered to conclude fare combinability agreements with competitors on the routes of concern. These agreements provide for the possibility for competitors to offer a return trip comprising a non-stop transatlantic service provided by that competitor, and a non-stop service in the other direction by the parties, thus increasing the number of frequencies the competitor is able to offer.

Finally, the parties committed to enter into special prorate agreements ("SPAs") with competitors on the routes of concern. Such agreements allow interested airlines to attract connecting traffic from the parties on favourable commercial terms. SPAs would be available for any airline that wishes to launch new services on the routes of concern, in particular by using slots to be released by the parties. This should give these airlines a further incentive to enter or expand their operations on these routes. In addition, SPAs would be available for existing services of competitors on London-Miami and London-Chicago, in order to address the Commission's specific concerns in relation to the availability of connecting traffic for existing competitors on these routes.

3. **Iberia/British Airways merger case**

3.1 **Background**

The merger between BA and IB was agreed on in April 2010, notified to the Commission in June 2010, and ultimately unconditionally cleared on 14 July 2010 on the basis of the EU Merger Regulation.

Unlike the BA/AA/IB alliance case, which related to transatlantic long-haul routes, the merger investigation focused to a significant extent on the assessment of two short-haul routes: London-Madrid and London-Barcelona, where both parties provide non-stop services.\textsuperscript{16} In addition, the Commission investigated the impact of the merger on a number of short- and long-haul routes\textsuperscript{17}.

3.2 **Relevant markets**

Many of the considerations on market definition mentioned above in the context of the antitrust case apply in a similar manner on short-haul routes, such as London-Madrid and London-Barcelona. However, since travel comfort is a much less determining factor in passengers’ decisions with regard to the choice of a carrier on short-haul routes, the Commission has traditionally distinguished time

\textsuperscript{14} Case COMP/M.3280 Air France/KLM (OJ C 60, 09.03.2004), para. 1.3.11 of the commitments.

\textsuperscript{15} Case COMP/M.3280 Air France/KLM (OJ C 60, 09.03.2004), para. 1.3.12 of the commitments; Case COMP/M.3770 Lufthansa/Swiss (OJ C 204, 20.8.2005), para. 1.3.11 of the commitments; Case COMP/M.5440 Lufthansa/Austrian Airlines, para. 1.1.3 (iii) of the commitments.

\textsuperscript{16} On London-Madrid, both parties operating non-stop services while on London-Barcelona, IB markets seats as a marketing carrier on BA-operated flights by way of code-sharing.

\textsuperscript{17} On these routes one merging party offers a non-stop connection while the other party offers a one-stop connection, or both parties offer one-stop connections.
sensitive passengers from non-time sensitive passengers (instead of premium/non-premium passengers) to reflect the level of time flexibility of short-haul passengers. More specifically, and similarly to its previous merger cases dealing with short-haul destinations, the Commission found that time sensitive passengers tend to travel for business purposes, require significant flexibility with their tickets (such as cost-free cancellation and changing of the departure time, etc.) and are prepared to pay higher prices for this flexibility. Non-time sensitive customers travel predominantly for leisure purposes or to visit friends and relatives, book well in advance, do not require flexibility with their booking and are generally more price-conscious.  

One further distinctive element of the merger case at the level of product market definition, again due to the short-haul character of the London-Madrid and London-Barcelona routes, was that the Heathrow, Gatwick and City airports were found to be interchangeable with respect to both time sensitive and non-time sensitive passengers. This conclusion, which is consistent with an earlier antitrust decision of the Commission involving the same parties, was reached inter alia in view of the available transport infrastructure between these airports and central London, the strong correlation between fares charged by the parties for flights to the same destinations from different London airports, and the existence of an adequate level of conveniently-timed frequencies and cheaper airfares at London Gatwick.

3.3 Competitive assessment

In assessing the effects of the merger, an important aspect was that easyJet has become a well-established player on both the London-Madrid and London-Barcelona routes, holding nearly a third of all slots at London Gatwick. In addition, easyJet maintains a base at Madrid and was, at the time of the decision, in negotiations to open a base at Barcelona's El Prat airport. Other players who are active on Heathrow/Gatwick-Madrid or Heathrow/Gatwick-Barcelona routes with an established base or hub presence at these airports are the Sky Team alliance-carrier Air Europa and the low cost carrier Ryanair. The Commission’s market investigation showed that all these players placed strong competitive constraints on the merging parties.

Another relevant element of the competitive assessment was that IB and BA were already cooperating intensively pre-merger by way of a revenue- and profit sharing joint venture on the UK-Spain bundle of routes. This cooperation was exempted by the Commission in 2003 in the abovementioned antitrust exemption decision, subject to undertakings such as the release of slots to competitors on both routes. easyJet availed itself of these remedies and thus expanded its market presence on both routes - a position that would not be materially altered after the merger if the merging parties were to request slots back from easyJet. As a consequence, given the low amount of residual competition possibly eliminated by the transaction through the cooperation between the parties pre-merger, as well as the competitive strength of the parties' competitors, the Commission concluded that the merger does not give rise to competition concerns on any of these routes.

Similarly, as regards all other short- and long-haul routes affected by the merger, the Commission's investigation showed that the merged entity will continue to face sufficient competition from other carriers active on these routes, and therefore passengers will have adequate alternatives to fly on

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18 Case COMP/M.5440 Lufthansa/Austrian Airlines; Case COMP/M.5335 Lufthansa/SN Airholding; Case COMP/M.5364 Iberia/Vueling/Clickair (OJ C 72, 26.03.2009); Case COMP/M.3280 Air France/KLM (OJ C 60, 09.03.2004); Case COMP/M.3770 Lufthansa/Swiss (OJ C 204, 20.8.2005).

19 Case COMP/D2/38479 British Airways/Iberia/GB Airways.

20 The situation was different in case COMP/M.5440 Lufthansa/Austrian Airlines, where the merging parties had transferred slots on the route Frankfurt-Vienna to their competitor Niki with a view to complying with Article 101 TFEU. As result of the merger, Niki would have had to hand these slots back and would thus effectively have had to exit the route. In consequence, the merger between Lufthansa and Austrian Airlines was cleared subject to remedies inter alia for this route.
these routes after the merger. More specifically on the UK/Spain-North American routes, the assessment focused on the merger-specific effects of the transaction, taking into consideration the close cooperation that will exist between the merged entity and AA as a result of their transatlantic cooperation mentioned above.

4. Conclusion
In both the BA/AA/IB antitrust case and the IB/BA merger case, the Commission adopted decisions on 14 July 2010 not to oppose the transactions. Whereas in the antitrust case this decision was subject to commitments under Article 9 of Regulation 1/2003, the merger decision was unconditional. As described above, the factual circumstances and the extent of competition concerns in each case were very different, which explains the difference in the final decisions, despite the fact that the same two EU carriers were involved in both transactions. As these two cases demonstrate, the Commission is vigilant in monitoring observance of EU competition rules in the air transport sector, and only intervenes in transactions that raise genuine competition concerns.