Airlines – 2009 world wide competition law review

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Introduction

Since its inception in the mid 1940s, international aviation has depended on a complex web of international agreements, particularly bilateral air services agreements, in order to operate. Those agreements have regulated ownership and control of airlines, capacity and the routes on which airlines may operate internationally.

Although international aviation has grown into a major global industry, the impact of the global financial crisis has had a significant impact on the airline industry. The International Air Transport Association (**IATA**) estimates that the airline industry lost over USD10 billion in the 2008/09 financial year. Despite these figures, global air transport still supports USD3.5 trillion in economic activity, and provides employment for 32 million people. In 2008, 2.2 billion passengers and 41 million tonnes of cargo were flown across the globe.

The number of nations with effective competition laws continues to grow. The growth in the number of nations with competition laws and the cooperative approach that the competition authorities have taken internationally have resulted in the aviation industry being under closer scrutiny by competition authorities world wide than ever before.

The International Competition Network (**ICN**), the world wide organisation of competition regulators, now has some 100 State competition agencies as its members. National competition authorities have become more organised internationally through their membership of the ICN. The cooperation between agencies fostered by the ICN is now becoming apparent with the growth of multi-agency prosecutions of cartel cases, including in the airline industry.

This report covers developments from the period 1 July 2008 to 30 June 2009.

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The Contributions

This report has its origins in presentations to the Aviation Law Committee at annual International Bar Association conferences. The contributions below track how key elements of national competition laws might affect international aviation, thereby adding to the level of knowledge of this important topic. In collating the contributions, a neutral approach has been taken. We advocate neither a winding back of competition laws as they apply to international aviation nor an expansion of them.

Australia

Australian competition law prohibits contracts, arrangements and understandings likely to adversely affect competition, tying arrangements likely to adversely affect competition and misuse of market power. The Australian Competition & Consumer Commission (**ACCC**), an independent agency, actively enforces these laws.

Key developments this year include:

- The conclusion of a Federal Court class action brought by travel agents against a number of airlines including Qantas, Lufthansa, Singapore Airlines, Cathay Pacific, Air New Zealand, Japan Airlines and British Airways relating to a claim for commissions on fuel surcharges for international services. For the purposes of determining questions of liability, the proceedings were continued against Qantas only. The Federal Court ruled that the airline engaged in misleading and deceptive conduct in breach of Australian competition laws by including a levy under the 'taxes, fees and charges code'.
- On 28 August 2008, the ACCC issued its determination granting authorisation for a five year period to 2013 to IATA for its new Passenger Tariff Coordination System including fare construction and baggage composite resolutions.
- On 30 September 2009, the authorisation for the IATA Cargo Tariff Coordination System expired. Following expiry of the authorisation, IATA Cargo tariff coordination for interline purposes ceased for routes to and from Australia.
- The ACCC denied authorisation to give effect to Air New Zealand and Air Canada's Cooperation Agreement. Under the agreement, the airlines would have shared the revenue from flights between Sydney and Vancouver (operated by Air Canada), and Auckland and Vancouver (operated by Air New Zealand).
- Qantas lodged a number of notifications with the ACCC thereby gaining immunity from legal action for conduct that would have breached Australian competition law for conduct related to the offer to supply of accommodation, airfares and certain meeting and conference facilities on certain conditions.

- In December 2008, the Federal Court ordered Qantas Airways Limited to pay $20 million and British Airways PLC to pay $5 million in pecuniary penalties for breaching the price fixing provisions of Australia's competition law after both companies imposed fuel surcharges on air cargo services.
- On 16 February 2009, the Federal Court ordered pecuniary penalties against Société Air France and Koninklijke Luchtvaart Maatschappij NV of $6 million combined ($3 million each), Martinair Holland NV of $5 million and Cargolux International Airlines SA of $5 million for breaching the price fixing provisions of Australia's competition law for fuel surcharges.
- In April 2009, the Federal Court dismissed applications by Singapore Airlines Pte Ltd, Singapore Airlines Cargo Pte Ltd and Emirates that challenged the validity of compulsory notices issued by the ACCC for the production of documents and information in relation to alleged air cargo cartel activity.
- In April 2009, the ACCC instituted proceedings against Cathay Pacific Airways Ltd for alleged price fixing in relation to fuel surcharges. The ACCC alleged that between 2000 and 2006 the airline entered into over 70 arrangements or understandings with other international air cargo carriers which had the purpose or effect of fixing the price of a fuel surcharge, a security surcharge and rates that were applied to air cargo.
- In May 2009, the Federal Court struck out a claim brought by the ACCC in October 2008 against Singapore Cargo Pte Ltd. The Federal Court considered that the ACCC had failed to provide sufficient material facts to demonstrate that alleged understandings for air freight services between destinations outside Australia had the proscribed effect on competition in a market in Australia. The Federal Court also considered that the pleadings failed to show how the parties to the alleged understandings were in competition with each other in a market in Australia when providing international services. The ACCC was granted leave to file an amended statement of claim.

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Belgium

EU competition law or, absent an effect on trade between EU Member States, Belgian competition law, generally applies to all arrangements related to aviation such as code sharing, alliances and joint fares.

There are no Belgian domestic block exemptions relating to the aviation sector. EU Block Exemptions apply in Belgium.

There are no published or reported judicial/tribunal decisions regarding the application of cartel laws to the aviation sector.

On 22 June 2009, the European Commission cleared the proposed acquisition of SN Airholding, the holding company of commercial airline SN Brussels Airlines, by Deutsche Lufthansa AG of Germany after an in-depth investigation. The in-depth investigation was the result of the Commission's identification of competition concerns on a number of passenger air transport routes between Belgium and Germany and Belgium and Switzerland and its assessment that the initial remedies offered were insufficient. On the basis of a new set of remedies, offering an efficient and timely slot allocation mechanism that would allow new entrants to operate flights on each of the routes where the Commission had identified concerns, the Commission finally approved the acquisition.

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Canada

Canada's competition laws include:

- a criminal prohibition of cartels and, effective March 2010, a reviewable practice covering other types of competitor collaborations;
- a reviewable practice of unilateral or joint abuse of dominance which is subject to large 'administrative monetary penalties';
- various other provisions relating to pricing and distribution practices; and
- a merger review regime.

All are generally applicable to the aviation sector. More particularly:

- code sharing, alliances and joint fares could be reviewed under the conspiracy offence if they involve price restrictions, market allocations or output restrictions; otherwise they would be examined under the competitor collaboration or joint abuse of dominance reviewable practices (both of which contain a competitive effects test);
- certain alliances may be subject to review under the broad merger provisions (which have a competitive effects test); and
- unlike other sectors, airline industry mergers also require approval from the Minister of Transport pursuant to a broad 'public interest' test in which the Competition Bureau's assessment is merely one factor.

Prior to 2009, specific airline industry practices such as charging fares below avoidable cost and using loyalty programs in an exclusionary manner were deemed to be 'anti-competitive effects' for purposes of the abuse of dominance provisions (although it was still necessary to determine whether they were likely to result in a substantial lessening of competition). These provisions have been repealed, but any predatory or exclusionary conduct could constitute an anti-competitive act.

There is no comprehensive aviation-related exemption from the competition laws. However:

- travel agents are allowed to bargain collectively in respect of commissions with an airline that has more than a 60 percent domestic market share; and
- notwithstanding substantial deregulation of the airline industry over the past two decades, the Canadian Transportation Agency (**CTA**) maintains oversight responsibilities including with respect to international air services agreements. To the extent that it is exercising regulatory powers, a 'regulated conduct defence' may exempt activities overseen by the CTA from the application of the competition laws. However, the scope of this defence is unclear. The Competition Bureau will generally consider the Competition Act to be applicable in regulated sectors except where there is a clear, express, or implied indication to the contrary in the regulatory regime.

The Competition Bureau is an independent law enforcement agency which actively enforces the Competition Act. Private rights of action are also available in respect of certain provisions of the Act, most importantly the cartel offence. Notable cases in the aviation sector are summarised below:

- An abuse of dominant position proceeding that alleged Air Canada employed predatory pricing and capacity additions on certain routes was abandoned by the Bureau in 2004.
- Undertakings provided to the Government by Air Canada in 1999 to mitigate anti-competitive effects arising from its acquisition of Canadian Airlines (at that time the top two domestic carriers) were rescinded in September 2004 as a result of entry by new competitors and other industry developments. The Bureau simultaneously announced that it would not regard price matching as predatory (provided capacity additions are not made) regardless of the level of a dominant carrier's fares.
- In May 2008, a local association of travel agents (**CStar**) sought leave from the Competition Tribunal to bring an application for refusal to deal against IATA with a view to forcing IATA to continue to supply paper tickets to Canadian agents despite the elimination of IATA paper tickets world wide on 1 June 2008. The application was dismissed.
- There is currently a Competition Bureau investigation and multiple class actions in relation to alleged price fixing of air cargo services, particularly with respect to fuel surcharges.

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Chile

Decree Law 211 (**Chilean Antitrust Law**) states, generically, that anyone who carries out or enters into, individually or collectively, any conduct, act or agreement that 'hampers, restricts or hinders free competition or that tends to produce such effects', shall be sanctioned with the measures indicated therein. Likewise, it broadly enumerates certain events, acts or agreements that are deemed to hamper, restrict or hinder free competition including:

a) Express or implied agreements or practices agreed between market players, that grant them market power and that consist in fixing sales or purchase prices or other commercialisation conditions, limiting production or allocating market zones or shares, excluding competitors or affecting the results in bidding processes.

b) Abuse of a dominant market position by a market player or a group of them, fixing purchase or sales prices, imposing tie-in sales, allocating market zones or shares or any comparable abuse.

c) Predatory practices or unfair competition conducted to attain, maintain or reinforce a dominant position.

Since Chilean Antitrust Law does not include any special exemption for the aviation market, all of the previous considerations are applicable to such market. Therefore, code sharing, alliances and joint fares could eventually be reviewed and sanctioned pursuant to Chilean Antitrust Law if deemed to affect free competition.

Chilean Antitrust Law does not consider any general obligation to make a filing or to request the authorisation to conduct a merger or integration (exceptionally, some particular industries, ie media companies, shall request the Antitrust Court's pre-merger authorisation)[1].

Relevant Cases

Ruling N°44/2006: On June 2005, Sky Airlines filed a lawsuit against the Ministry of Transport and Telecommunications (Ministerio de Transportes y Telecomunicaciones or **MTT**), the Chilean Aeronautical Board (Junta de Aeronáutica Civil or **JAC**) and LAN Airlines before the Antitrust Court. Sky Airlines argued that, given that the binding process for flight frequencies was solely based on the airlines' economic capacity (economic offer), the dominant competitor in the Chilean market (LAN) was awarded with the majority of international flights frequencies.

The Antitrust Court recommended MTT to review and modify the current regulation regarding public bids for international flight frequencies (Supreme Decree N° 102)[2]. The Antitrust Court stated that 'a bidding process based only on monetary offers unequivocally favours the dominant competitor and reduces in a significant way the chances of a new competitor' (Ruling N°44/2006).

Ruling N°81/2009: The National Economic Prosecutor filed a lawsuit before the Antitrust Court against JAC, requesting the amendment of the bidding conditions of the bidding process of seven flight frequencies between the cities of Santiago and Lima. The amendment requested by the National Economic Prosecutor consisted in including as a criterion for awarding the frequencies in dispute: 'the competition that shall be created by the awarding of the frequency', taking into consideration the necessity to restrict the amount of frequencies of each company in the route, the number of airlines operating in such route and the entrance of new companies.

On January 2009, the Antitrust Court ordered JAC to amend the awarding conditions of the bidding process to assign the traffic rights for the Santiago-Lima route. According to the decision, the result of the analysed bidding process should not result in assigning more than 75% of the total traffic rights of the Santiago-Lima route to the same company (including the traffic rights already held by such participant and the new traffic rights to be assigned in the analysed bidding process)[3]. In the event that there are not enough bidders interested in obtaining these rights, there will be a second round where the 75% cap would not apply.

The Court also stated that the traffic rights awarded should be materially used by the bidding Airline.

On June 2009, the Supreme Court overruled the Antitrust Court decision stating that due to the fact that there existed a legal disposition that regulates the bidding conditions to award flight frequencies (to be awarded considering a higher monetary offer), the Antitrust Court could not amend the bidding process that complied with such requirements (Decree law N°2,564 and Supreme Decree N°102 of the MTT).

1 A bill on mandatory pre-merger notification is currently in Congress, but there has not been any discussion or legislative activity since the presentation of the bill in July 2004.
2 Ruling N° 44/2006 dated September 26, 2006 of the Antitrust Court.
3 The same company including its related parties.

US Collusion Case. More recently, and in connection with the fine for collusion imposed on LAN Cargo and ABSA by the Department of Justice of the United States of America, on 15 June 2009, the National Economic Prosecutor decided not to pursue an investigation for this case in Chile because the statute of limitation was expired.

According to article 20 of the Decree Law 211, all legal actions arising from the Antitrust Law have currently a two-year statute of limitation from the execution of the act or agreement claimed to violate antitrust law. However, from 12 October 2009, the statute of limitation for general acts or agreements that violate antitrust law will be three years and five years for collusion cases.

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China

China's Anti-Monopoly Laws (**AML**) came into operation on 1 August 2008.

The AML's provisions are comprehensive and contain broad principles. The main elements of the AML include a:

- prohibition on anti-competitive monopoly agreements, including price-fixing agreements;
- prohibition against the abuse of market dominance; and
- prohibition on mergers and acquisitions (or the formation of 'concentrations') which have or may have the effect of restricting or eliminating competition.

The AML will apply to domestic and foreign companies that have, or are planning to acquire, an investment in the aviation industry in China.

Like most Chinese legislation, the AML is broadly drafted with further detail regarding the operation of the AML to be provided via rules, guidelines and regulations. Many of these rules, guidelines and regulations are yet to be finalised.

Therefore, the operation of the AML (including the introduction of additional defining rules, guidelines and regulations) will need to be closely monitored to ascertain the effect it will have on the aviation industry in China.

Despite the uncertainty in the operation of the AML, the National Development and Reform Commission (**NDRC**) began a price fixing investigation regarding the pricing practices of TravelSky in 2009. TravelSky is a state-owned business providing a computer reservation system to sell domestic air tickets for Chinese airlines and receive service charge for each sales transaction. TravelSky virtually monopolises the domestic air tickets distribution market in China, controlling about 97% of all passengers' domestic bookings on Chinese commercial airlines.

In March 2009, it was alleged that at the request of several major airlines in China, TravelSky adjusted its discounting policies with the effect of increasing the air ticket prices offered by all airlines in TravelSky's network, including big carriers like Air China, China Eastern and China Southern Airlines. The increase has resulted in widespread complaints among consumers.

However, the Civil Aviation Administration of China made a public statement soon afterwards that such price increases were the result of 'independent adjustments' by the airlines and the airlines had not entered into any agreements to fix price.

In any event, if there was a price fixing cartel, it was a short lived one. China Southern Airlines was the first to break the cartel. Two days after TravelSky's fare adjustments, China Southern ignored the 'agreed cap' on discount and offered air tickets with greater discounts to the public on its official website.

It is unclear what progress the NDRC has made in the investigation since May 2009. Under section 46 of the AML, if TravelSky and the relevant airlines are found to have violated the AML, each may be required to pay a fine up to 10% of its respective turnover in the previous year.

In addition to the prohibition on price-fixing, the following are the key issues arising out of the AML which will apply generally to foreign companies planning to enter or expand their aviation operations in China.

The first issue is that the AML has extra-territorial effect. This means that it will apply to foreign companies operating outside China whose operations have the effect of restricting or eliminating market competition within China. Therefore, merger and acquisition activity which may have an effect on the Chinese market will be subject to the merger notification thresholds and procedures in the AML even where the parties to the transaction do not have operations in China.

A recent example of China's attempt in enforcing the AML extra-territorially was in June 2009. Although the relevant transaction does not relate to the aviation industry, it demonstrates the extra-territorial effect of the AML.

In June 2009, China indicated that it may undertake an anti-monopoly review on a proposed iron ore joint venture between mining giant Rio Tinto and BHP Billiton in Western Australia. Rio Tinto and BHP Billiton together supply 75% of China's iron ore imports from their adjacent operations in Australia, and a joint venture between them may have serious impacts on future iron ore procurement by China's steel makers. However, it is not clear if China will actually launch a formal investigation because enforcement is likely to be difficult given that Rio Tinto and BHP are Australian companies with no mining assets in China. This shows the practical difficulties in enforcing the AML extra-territorially, although enforcement against an airline is arguably easier given that, for the implications of AML to arise, its operation is likely to involve its major assets, ie aircrafts, being physically present in China.

A second issue is that the State Council may scrutinise a merger or acquisition (ie a 'concentration') proposed by a foreign investor if it 'affects national security'. Although a similar provision is contained in the current Regulations for the Acquisition of Domestic Enterprises by Foreign Investors (2006), the inclusion of a national security exemption in China's competition law is controversial as it is not a standard international practice in existing anti-monopoly regimes. The provision is viewed with some suspicion that it could be employed to protect the domestic market from competition on vague grounds. Presently it is not certain whether any guidelines clarifying the meaning of this provision or limiting its operation are intended.

Finally, the AML also provides that the State will afford protection for State-owned monopolies and industries which are controlled by the State and which may 'have an impact on the national economy or national security'. However, the AML gives no guidelines on which industries this will apply to or how this exemption will operate. In December 2006, the State Council released a list of strategic sectors in which the State would retain control, the civil aviation sector was included in the list.

However, this does not prevent foreign companies from acquiring a minority investment in these State-owned monopolies or in the aviation industry generally. The AML does attempt to provide some reassurance that the State will 'control' the relevant bodies and industries in a manner that will protect the interests of consumers and promote technological progress. However, there is a concern that this broad exemption in the AML may be utilised to ensure that competitive advantage is afforded to State-owned entities.

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Denmark

Danish competition law applies generally to all arrangements related to aviation such as code sharing, alliances and joint fares. In addition, to the extent that trade between EU member states is affected, the competition rules of the EU apply as well, including the block exemptions applicable within EU competition law.

There are no Danish domestic block exemptions relating to the aviation sector.

In the period from 1 July 2007 through 30 June 2008, no decisions regarding the application of the Danish competition law to the aviation sector in Denmark have been published.

On 9 September 2008, the Danish Competition Authority carried out a dawn raid at the Danish offices of Sterling Airlines A/S (Sterling). The purpose of the dawn raid was to investigate the legality of a code sharing agreement that Sterling had concluded with Norwegian Air Shuttle ASA (Norwegian) regarding a number of routes between the Scandinavian capitals and cities in Europe. However, in October 2008, Sterling entered bankruptcy proceedings and Norwegian acquired a number of Sterling's routes. As a result of this, the Danish Competition Authority closed its investigation into the code sharing agreement. SAS and Maersk Air have previously been subject to raids by the Danish Competition Authority.

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India

With effect from 1 September 2009, a new law called the Competition Act (the **Act**) became applicable in India. The Act governs and regulates activities that have adverse effects on competition which result in an abuse of dominant positions.

The Act replaces Monopolies and Restricting Trade and Practices Act (**MRTP**). However, all matters pending in Tribunals under MRTP will be adjudicated under the old law for two years with effect from 1 September, 2009.

The applicability of the Act can be summarised under the three heads:

(I) Anti-competition agreements

Any arrangement, understanding, agreement or action in concert , in writing or otherwise, which causes or is likely to cause, an appreciable adverse effect on competition in the relevant market segment in India is void. The following agreements or arrangements are deemed to have an adverse effect:

a) agreement to limit production & supply;

b) agreement to allocate markets;

c) agreement to fix prices;

d) bid rigging or collusive biddings;

e) purchase/sale (tie-in arrangements);

f) exclusive supply/distribution arrangements; and

g) resale price maintenance etc.

(II) Abuse of dominant positions

A dominant position is defined to mean a position, where an enterprise operates independently of competitive pressure or where it can appreciably affect the relevant market, competition or consumers. Instances of abuse of dominant position are:

a) if an enterprise imposes an unfair, discriminatory condition or price in purchase or the sale of goods or services;

b) if an enterprise limits or restricts the production of goods or provision of services to the market; and

c) any other practice which results in denial of market access.

(III) Combination Regulations

The Act seeks to prevent combinations of business which may have an appreciable adverse effect on competition. To control such amalgamations/mergers, certain mandatory filings become necessary when prescribed threshold limits are reached.

Where a merged entity will have assets over USD500 million in aggregate or a turnover of USD1500 million of which USD100 million is in India or a turnover of USD300 million from India, a notice must be issued to the Competition Commission (**Commission**) within 30 days of the trigger point (ie the date when the agreement/MoU is signed or the Board of Directors of either company approves the merger).

On intimation being received by the Commission, it will either approve the merger or order an inquiry. If the latter, it must give its ruling within a period of 210 days.

Exemptions

The Government may exempt application of this Act or any of its provisions in the following cases:

a) if such an exemption is necessary in the interest of security of the State or in the public interest;

b) if the agreement arises out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country;

c) any enterprise which performs a sovereign function on behalf of the Government.

Penalties

The Act prescribes a fine of INR 250 million for violations of its provisions. Imprisonment up to three years is provided where an order of the Commission is flouted.

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Japan

In principle, Japanese competition laws apply to the aviation sector, and there are no exemptions in these competition laws that are specific to the aviation sector. Exemptions specifically designed for the aviation sector may instead be found in sections 110 to 113 of the Aviation Law, which allow exemptions for airlines on fares, alliances, code sharing and other aspects of aviation practice if there is appropriate public benefit. In this regard it is said that several leniency applications for a fuel surcharge were made to the Japan Fair Trade Commission (**JFTC**) in 2007, however that the JFTC, in accordance with the exemption contained in sections 110 to 113 of the Aviation Law, may decide not to conduct an investigation into cartel activity.

However, recently a working group on the State Regulations and the Competition Policy established by the JFTC announced its report in which it was noted that the working group would be required to review and possibly change the current exemptions applicable to the aviation sector. The preliminary conclusion is that the JFTC plan to delete the exemptions from the application of the Antimonopoly Act under the Aviation Law. These changes will affect multilateral talks in the IATA and bilateral agreements between airlines. It is still unclear whether the deletion of exemptions will be made in the face of strong objections of the ministry in charge of transportation.

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Korea

The Monopoly Regulation and Fair Trade Act of Korea (**MRFTA**) which is the principal antitrust law in Korea prohibits two or more enterprises from engaging in a concerted act to unreasonably restrict competition in any form of agreement. In principle, the MRFTA apply to all business sectors including the aviation sector.

However, in the case of the aviation sector, the Aviation Act of Korea provides the Ministry of Land Transport and Maritime Affairs (**MLTMA**) with the authority to approve 'transportation-related agreements' and 'alliance agreements'.

Specifically, airlines entering into 'transportation-related agreements' (whose meaning is narrowly defined in the Aviation Act as agreements concerning flight routes and schedules such as code sharing agreements) with other airlines are required to obtain the approval of the MLTMA, and the application of antitrust laws as set forth in the MRFTA may be exempted requiring no evaluation by the Korea Fair Trade Commission (**KFTC**), which is the principal competition law enforcement authority in Korea, since such agreements may be considered to not have the effect or the risk of substantially reducing competition in the Korean aviation sector due to the narrow applicability of such agreements. On the other hand, in case of 'alliance agreements' (whose meaning may be broadly defined in the Aviation Act of Korea as agreements for comprehensive cooperation over flight schedules, fares, marketing, collaborative sales, and other concerted acts, which may be referred to as strategic alliances, eg, Sky Team, Star Alliance, etc), such agreements are required to obtain the approval of the MLTMA. However, the KFTC's input thereon during a mandatory prior consultation between the MLTMA and KFTC is required since there may be effects or risks of substantially reducing competition in the Korean aviation sector due to the broad applicability of such agreements.

In essence, the Aviation Act of Korea can reasonably be interpreted as giving the MLTMA the authority to approve 'transportation-related agreements' and 'alliance agreements,' while the KFTC has the role of providing its input on 'alliance agreements' during a mandatory prior consultation between the MLTMA and the KFTC as mentioned in the above. It can also reasonably be interpreted to mean that the MLTMA and the KFTC are required to share the exemption authority and that the MLTMA and the KFTC therefore have a joint authority to exempt 'alliance agreements' from the application of MRFTA.

Pursuant to the Aviation Act of Korea, Korean Air has sought the approval of the MLTMA to enter into an 'alliance agreement' with Delta Airlines. In this regard, the MLTMA had first consulted with the KFTC and then granted approval to such 'alliance agreement' in June 2007.

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Mexico

Article 43 of the Aviation Law governs the authority of the Mexican Federal Antitrust Commission in the regulation of aviation fares. The Mexican Competition Act applies to all arrangements related to any unjustified restraint of trade, including aviation when they are intended to control prices offered or demanded in a market, including code sharing, alliances and joint fares. There is no exemption to aviation, and the Mexican Competition Authorities are currently applying the cartel laws to aviation.

Each year the Mexican House of Representatives organises a National Forum Regarding the Labor Situation, Infrastructure and Aeronautical Market, in which the Chairman of the Mexican Federal Antitrust Commission participates, discussing all competition issues of importance regarding the aeronautical industry.

On 2008, the Chairman of the Mexican Federal Antitrust Commission discussed the following three competition issues:

- the Chairman stated that the concession monopoly of jet fuel that currently holds Aeropuertos y Servicios Auxiliares, must be eliminated in order to favour competition in the jet fuel market;
- furthermore the Chairman stated that airport fares must be reviewed, which are one of the main factors that affect the cost of airplane tickets; and
- regarding mergers between airlines and in light of the GFC, the Chairman stated that before making any determinations, an analysis of each air route must be made.

None of the abovementioned issues have had any development until this date. Nevertheless it is expected that in the 2009 National Forum Regarding the Labor Situation Infrastructure and Aeronautical Market, these issues will be discussed and practical solutions proposed.

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Netherlands

In relation to international aviation, European Union Law takes precedence. EU Block Exemptions apply in the Netherlands. The Dutch antitrust laws are generally in line with the EU laws on cartels, abuse of dominant position and mergers. The laws are enforced by the Nederlandse Mededingingsautoriteit (**NMa**) and infringements are regularly sanctioned with significant fines. The aviation sector has not yet been the subject of such fines. In 2004, the Office of Transport Regulation (Transport Office) was established as part of the NMa. It is in charge of the sector-specific supervision of (competition in) the railway sector, other public transport (eg trams, buses, metro) and Schiphol Airport.

KLM was the subject of an investigation after a complaint that it abused its dominant position by charging excessive prices on routes from Amsterdam to Paramaribo (Surinam) (in 2003) and the Dutch Antilles (in 2000). The complaint was dismissed because KLM had demonstrated that cost differences could explain differences in prices with comparable routes and that economic profits should be measured over a number of years because an excessive profit during one year is not sufficient for establishing abuse.

The code share agreement between Surinam carrier, SLM and KLM was also investigated. Due to administrative control over such agreement by the Dutch aviation authorities, the NMa had no authority at the time. That would no longer be the case now.

KLM and its group companies were also investigated after a complaint by a charter airline that the companies were abusing the KLM Group's dominant position by using scarce night slots only to keep them from being awarded to other carriers next year. The NMa dismissed the complaint for lack of substance as to the facts in 2002.

The NMa investigated Amsterdam Airport (**Schiphol**) landing charges in 2001. Applying a dual till like split between aviation and non-aviation costs and income and applying a benchmark for profitability based on the Capital Asset Pricing Model and Weighted Average Cost of Capital, the NMa found that the landing charges were probably not excessive but that Schiphol should separate its accounts more clearly.

On 27 June 2006, the Dutch Parliament adopted an amendment to the Aviation Act regarding the operation of Schiphol. This amendment enables partial privatisation of the Schiphol Group, subject to a number of conditions. The majority of the shares must remain in the hands of the government. In the end, however, the Dutch Cabinet decided against privatisation.

The NMa is in charge of supervising the tariffs and conditions for aviation activities (eg landing, take off, parking planes, baggage transport and security) provided to airline companies by Schiphol. The tariffs and conditions should be cost-based, reasonable and non-discriminatory. In addition, Schiphol will have to base its tariffs on an attributive system of costs and benefits that requires the NMa's approval, thus providing airline companies with a better insight into the tariffs charged by Schiphol. The Transport Office will deal with complaints on tariffs and conditions, as well as the supervision of the cost attribution system. In April 2007, the Transport Office approved the cost attribution system Schiphol intends to use for landing charges and luggage claim costs. However, on the basis of a complaint by airline KLM, the Transport Office ruled in November 2007 that Schiphol wrongfully refrained from including a number of debit items relating to the period 2005 to 2006, which the company is required to take into account (both windfalls and setbacks), in the calculation of the airport's tariffs for aviation activities. As a result, Schiphol is allowed to charge € 36.8 million less to airline companies using Amsterdam Airport Schiphol. On a similar note, the Transport Office ruled in April 2009 that Schiphol needs to lower its airport tariffs that have been in effect since 1 April 2009 by EUR3.5 million. This is the outcome of a complaint filed with the Office by Dutch airline KLM and BARIN, the trade organization for airlines active in the Netherlands. Schiphol is required to lower the tariffs, because it had wrongfully included in the airport tariffs part of the construction costs of a noise barrier near the Polderbaan runway. Under the Dutch Aviation Act, constructing a noise barrier (which is used to counter the noise of taxiing aircraft) is not considered an aviation activity, and its costs can therefore not be passed on to the airlines. In addition, Schiphol had also wrongfully included in the tariffs the recruitment and training costs of baggage-handling employees. As these are not considered aviation activities, their costs cannot be included in the tariffs. Finally, Schiphol cannot include in the new tariffs the costs of an accountant's report that related to an earlier tariff round. In July 2009, the Transport Office ruled on similar grounds that Schiphol should deduct EUR1.7 million from the airport tariffs to be effective as of 1 April 2010.

In 2008, the District Court of Haarlem ruled that IATA abused its dominant position by preventing travel agents from booking tickets at IATA airlines when in default of payment, even though they had good reasons to suspend their payment obligations.

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New Zealand

New Zealand's (**NZ**) Commerce Act 1986 (**Commerce Act**) prohibits restrictive trade practices including arrangements that substantially lessen competition, price fixing, collective boycotts and misuse of market power.

While the Commerce Act does not contain a specific aviation-related exemption, the NZ Commerce Commission (**NZCC**) can, in certain circumstances, authorise restrictive trade practices.

More specifically, the Minister of Transport can authorise arrangements in respect of tariffs and/or capacity relating to international air services, provided certain conditions are met. If such an authorisation is obtained, it excludes the application of the relevant sections of the Commerce Act.

Recent developments include:

- In August 2009, the High Court heard Air New Zealand's (**Air NZ**) appeal against the NZCC's imposition of section 100 orders preventing Air NZ employees, interviewed by the NZCC during its investigation of alleged price fixing in international air cargo services, from disclosing the contents of their interviews. The decision is reserved.
- In August 2009, the NZ and Australian Prime Ministers agreed to a joint plan to streamline trans-Tasman travel by implementing a passenger clearance model similar to that currently in use between the US and Canada.
- In August 2009, the European Commission indicated that NZ may achieve an open EU aviation agreement before Australia.
- In July 2009, Air NZ vowed to oppose a proposed Virgin Blue – Delta Airlines trans-Pacific revenue sharing arrangement. In January 2009, the ACCC declined a similar proposal between Air NZ and Air Canada.
- In June 2009, Jetstar Airways Ltd (a Qantas subsidiary) entered the NZ domestic market, replacing Qantas.
- In May 2009, the Centre for Asia Pacific Aviation predicted Air NZ will be in merger talks by the end of the year.
- In January 2009, the NZCC warned KLM that it risked breaching NZ's consumer protection legislation after KLM mistakenly advertised airfares to Europe for as little as NZ$50.
- In January 2009, Aerolineas Argentinas was fined NZ$11,000 after pleading guilty to the criminal offence of failing to provide information to the NZCC during its investigation into the alleged international air cargo services cartel. Cathay Pacific Airways and Singapore Airlines Cargo Pte Ltd also faced charges for alleged similar offending.
- In December 2008, the NZCC initiated proceedings against 13 airlines (Air NZ Ltd, British Airways plc, Cargolux International Airlines S.A., Cathay Pacific Airways Ltd, Emirates, PT Garuda Indonesia, Japan Airlines International Co Ltd, Korean Airlines Co Ltd, Malaysian Airline System Berhad Ltd, Qantas Airways Ltd, Singapore Airlines Cargo Pte Ltd & Singapore Airlines Ltd, Thai Airways International Public Company Ltd & United Airlines Incorporated) for alleged price fixing in international air cargo services.
- In October 2008, the NZCC cleared Shell New Zealand Ltd to acquire Mobile Oil New Zealand Ltd's light aircraft refuelling assets.
- In August 2008, due to NZCC concerns, Auckland International Airport Ltd agreed to abandon its plans to reduce the Airport's general duty-free retailers from two to one.

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Norway

The Norwegian Competition Act, which is harmonised with EU competition law, applies to the airline industry without any particular exceptions or other adaptations. The Norwegian Competition Authority (**NCA**) has initiated a number of actions against Scandinavian Airlines (**SAS**) after SAS was allowed to acquire the largest domestic competitor Braathens under the falling firm doctrine in 2001. In 2002, the Nordic Competition Authorities issued a combined report titled '*Competitive Airlines – towards a more vigorous competition policy in relation to the air travel market*'. The report discusses a number of different possible restrictions to competition in the aviation industry, including how these issues should be dealt with by the authorities. The actions taken by NCA, both before and after the report was published, are more or less in line with the report's conclusions.

These actions include a ban on allowing passengers to earn frequent flyer points on domestic flights and restrictions on the use of certain conditions in agreements with corporate customers. NCA has also investigated SAS' agreements with travel agents but has not taken any action in relation to these agreements. In 2007, the prohibition against SAS allowing passengers to earn frequent flyer points on domestic routes was extended to cover all airlines operating on domestic routes in Norway.

In June 2005, NCA imposed a fine of NOK20m (EUR2.5m) on SAS. The fine was imposed because the company had allegedly abused its dominant position through predatory behaviour on a domestic air route (Oslo-Haugesund) in May-June 2004. SAS instituted legal proceedings against this decision. The decision was overturned by the Oslo City Court in 2006. The case was settled out of court in 2008. The settlement implied that SAS did not have to pay the fine. In July 2005, the NCA also warned SAS that it intended to issue a decision with a fine of NOK 30 million for predatory behaviour on another domestic route (Oslo-Aalesund). This case was however dropped in December 2006.

During the NCA's investigations in the predation, cases it was discovered that the former SAS subsidiary Braathens had access to passenger data of its domestic competitor Norwegian Air Shuttle through the booking system Amadeus. Subsequently, in a Supreme Court decision of December 2007, SAS was given a fine of NOK 4 million for illegal use of business secrets. Norwegian sued for compensation for damages and was awarded NOK 132 million by the City Court in May 2008. The case will be heard by the Appeals Court in late 2009.

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Peru

The Peruvian Antitrust Law (Legislative Decree No. 1034) applies to the aviation sector with no specific exemptions. It prohibits restrictive trade agreements, both horizontal and vertical ones, as well as the abuse of dominant market position.

It considers that abuse of dominance exists when a dominant competitor in the relevant market uses its position to improperly restrict competition, obtaining benefits and damaging real, potential, direct or indirect competitors, which would have not been possible without such a dominant position. Only exclusionary effect conduct is forbidden.

Horizontal collusion is prohibited per se when the act refers to price fixing: market, customers and suppliers share: output limitations and collusion in public tenders and auctions. Other collusive acts – horizontal and vertical – are banned just when they are proved that they have – or may have – negative effects in competition and on consumers' welfare.

The Peruvian competition authority, INDECOPI has published a report named '*Situation and Perspective of the Peruvian Aviation Market*'. In this report, INDECOPI analysed the development of the Peruvian aviation market, the behaviour of the airlines and the participation of the State in that market.

In 1998, an aviation company was accused before the Peruvian Antitrust Commission for discriminatory pricing in the carriage of newspapers. Notwithstanding the aviation company being a dominant supplier, the Commission declared the accusation groundless since the price differentiation had objective justifications. It was confirmed by the Antitrust Court of INDECOPI one year after.

In 2006, the Peruvian Antitrust Commission upheld an accusation against two airlines for coordinating the date in which the fees paid to travel agencies were reduced. However, in 2007, the Antitrust Court of INDECOPI revoked the Commission's resolution, considering that the there were no concerted practices among the airlines. There is no other decision related to the aviation market.

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Singapore

Singapore's Competition Act (Cap. 50B) (**the Act**) establishes the Competition Commission of Singapore (**CCS**) and contains provisions on anti-competitive agreements, decisions by associations or concerted practices, abuse of dominance, enforcement, appeal processes and other miscellaneous provisions. The Act came into force on 1 January 2006. The remaining provisions relating to anti-competitive mergers came into force on 1 July 2007. To provide certainty to business, where anti-competitive agreements are concerned, the Act provides up-front exemption and guidance through block exemptions and individual exemptions or guidance after notification to the CCS where an agreement contributes to improving production or distribution, or promotes technical or economic progress. The section dealing with anti-competitive agreements does not apply to agreements satisfying these criteria and so can be argued as a defence. While there is no explicit exemption for the aviation industry, the Minister may exempt anti-competitive agreements where there is a compelling public policy reason for doing so or where there is a conflict with international obligations.

When the CCS has grounds to suspect a breach of the prohibitions of the Competition Act, the CCS may conduct an investigation. If that investigation reveals a breach of the Act, the CCS may, in certain circumstances, impose financial penalties or give directions to bring the infringement to an end. If the CCS makes any infringement decision, the decision must be published.

Under the Act, the CCS may publish guidelines indicating the manner in which the CCS will interpret and give effect to the provisions of the Act. The CCS has issued thirteen guidelines which provide useful information on how the CCS applies and enforces the prohibitions against anti-competitive agreements and abuse of dominance. The guidelines also provide guidance on matters such as market definition, notification, powers of investigation, leniency, enforcement and penalties.

On 2 October 2007, Singapore and the United Kingdom (UK) concluded a landmark Open Skies Agreement, which removes all restrictions on air services operated by carriers of both countries. The Open Skies Agreement between Singapore and the UK provides for unlimited 'hubbing' and 'cabotage' rights, and is the first agreement that gives a non-European Union and non-United States airline unimpeded access to the London-United States route. The Agreement took effect in March 2008. Under the Agreement, Singapore carriers will be allowed to fly to any UK airport, transport domestic passengers and use airports in the UK to fly to other countries. The Agreement also provides for similar rights to apply to UK carriers in Singapore.

In 2008 and 2009, Singapore concluded several more Open Skies Agreements with various other countries, which further expanded its international aviation market. It concluded separate Open Skies Agreements with Oman, the Czech Republic, Romania, Kuwait, and Zambia,
all of which allow passenger and cargo airlines to operate unlimited flights between each country and beyond.

Singapore also concluded separate Open Skies Agreements with Iceland and Peru on 23 January 2009 and 26 August 2009 respectively. Under the Agreements, the signatory countries have the freedom to operate unlimited passenger and cargo flights between the signatory countries and beyond. The Open-Skies Agreements with Iceland and Peru are more liberal than conventional Open Skies Agreements as they also give the signatories mutual unlimited 'hubbing' rights for passenger and cargo services without restrictions on capacity, frequency and aircraft type.

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South Africa

There are no special exemptions relating to the aviation industry under South African competition law. South Africa used to have an exemption for 'acts subject to or authorised by public regulation', which was repealed with effect from 1 February 2001.

South African competition law applies to all arrangements associated to aviation such as code sharing, alliances and joint fares.

In June 2004, South Africa's major national and international carrier, South African Airways (**SAA**) announced that it intended to become part of the Star Alliance. In December 2004, SAA reportedly signed a Memorandum of Understanding (**MoU**) with the alliance, which requires the implementation of code share agreements with the various Star Alliance members. Some of these agreements may require an exemption from the Competition Commission (**Commission**) if the alliance members are actual or potential competitors with SAA.

In March 2005, the Commission referred a case of alleged collusion against a number of local airlines to the Competition Tribunal (**Tribunal**) for adjudication. The respondents in this matter include: SAA, SA Airlink, SA Express Airways and Nationwide Airlines (Nationwide), who are all members of the Airlines Association of Southern Africa (**AASA**). The referral follows an investigation initiated by the Commission against AASA and its members, including British Airways/Comair (Comair), following announcements published during May 2004 indicating that several domestic airlines would concurrently introduce a fuel surcharge of an equal amount on the price of tickets for carriage on all legs of domestic flights. These actions allegedly resulted in uniform price increases. Interestingly, during the investigation, Comair successfully applied for corporate leniency as a whistleblower under the Commission's Corporate Leniency Policy.

In July 2005, the Tribunal ruled that SAA abused its dominant position by operating an exclusionary incentive scheme for travel agencies in contravention of the Competition Act (No.89 of 1998). According to the Commission, the period of abuse commenced in April 1999 and was believed to still be continuing at the end of the hearing in December 2004. However, in the interest of fairness, the Tribunal limited the period under review to a finite period from October 1999 until May 2001. The scheme created categories of commissions for travel agencies (basic, override and incremental commissions) based on sales targets. Moreover, individual travel agent consultants were rewarded with free international tickets based on sales targets. SAA has been ordered to pay a R 45 million administrative penalty (see decision, Case No: 18/CR/Mar01). SAA initially lodged an appeal to the Competition Appeal Court, after which the Commission lodged a cross-appeal alleging that the imposed penalty was not sufficiently high. Shortly before the appeal and cross-appeal were to be heard, SAA withdrew its appeal and the Commission withdrew its cross appeal. In terms of a settlement reached with the Commission, SAA paid the R 45 million penalty to the Commission on 31 May 2007. The terms of the settlement reach between SAA and the Commission further provided for the payment of the following agreed penalties:

- R 20 million in respect of a complaint initiated by the Commission relating to alleged price fixing between SAA and Lufthansa which occurred as a consequence of various bilateral agreements concluded between the two airlines. The airlines had fixed the selling price of air tickets on their flights between Cape Town/Johannesburg and Frankfurt through meetings and communications where price changes and the harmonisation of fares were discussed. Lufthansa also signed a consent agreement with the Commission on substantially similar terms than the consent agreement reached with SAA. In terms of the consent agreement, Lufthansa agreed to pay an administrative penalty of R8.5 million and to ensure that its business complies with the provisions of the Competition Act.
- R 20 million relating to the matter referred to above concerning alleged collusion between a number of local airlines that are all members of AASA.
- R 15 million relating to an abuse of dominance complaint lodged by Comair relating to commissions paid to travel agents. The conduct complained of in this complaint is similar to the conduct considered in Case No 18/CR/Mar01 referred to above, but relates to different time periods.

SAA paid the total amount of R 55 million relating to the above settlement on 1 June 2007.

During March 2006, the Commission initiated a complaint against several airlines competing in the international market for air freight services concerning the alleged fixing of fuel surcharges. The Commission's investigations are continuing.

Flowing from the Tribunal's decision in Case No: 18/CR/Mar01, Nationwide instituted a claim for damages. The matter was set down for hearing in February 2008 and was to be the first time a Court was called upon in South Africa to determine the quantum of damages resulting from a contravention of the Competition Act. The matter was settled privately shortly after the case commenced thus South Africa still has no case precedent on the imposition of civil damages. Due to economic hardship, Nationwide was subsequently placed in liquidation. A damages claim by Comair against SAA is still likely to be brought.

Comair's complaint and a second complaint by Nationwide against SAA (for the continued abuse of its dominant position) were consolidated and the matter was heard before the Tribunal during March 2009. Comair and the liquidators for Nationwide are currently awaiting the Tribunal's decision. If successful before the Tribunal, the parties are likely to institute damages claims against SAA.

During March 2008, a domestic airline offering low fare passenger services within South Africa, 1Time Airlines, instituted a complaint against one of its competitors, Kulula.com, involving a challenge to the exclusive access enjoyed by Kulula to a regional airport. The matter is currently under investigation by the Commission and a decision is expected by 30 October 2009.

During May 2009, the Commission initiated a complaint against several airlines competing in the international market concerning the alleged fixing of international passenger airline fares. The Commission's investigations are continuing.

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Spain

Spanish cartel law applies generally to all arrangements related to aviation such as code sharing, alliances and joint fares. In relation to international aviation, EU law will take precedence. EU block exemptions also apply in Spain to purely national arrangements.

The Spanish Court for the Defence of Competition (decision of 26 July 2006, case 591/05 'Travel Agencies') analysed several restrictive conducts by airline companies and the Spanish Travel Agencies Association (**CAAVE**). These were fined for their participation in three anticompetitive conducts: (i) the joint negotiation of charges for issuing airline tickets, (ii) a price fixing arrangement for tickets, and (iii) a market sharing agreement in relation to sales of tickets to companies.

The Spanish Supreme Court by judgment of 27 January 2007 partially overturned the decision of the 'Audiencia Nacional' concerning an interlining and a price fixing agreement (judgement of 19 February 2003, which in turn had partially overturned the decision of 29 November 1999, 432/98, 'Airlines' of the Spanish Court for the Defence of Competition). The Supreme Court considered that the evidence available was insufficient to prove the restrictive effects on competition of the interlining agreement and annulled the fine imposed by the Court for the Defence of Competition. However, the Supreme Court upheld the ruling of the Competition authority in what concerns price fixing.

On 22 June 2009, the National Competition Commission (CNC, the new antitrust agency) rejected a complaint submitted by a consumers association against Ryanair for abuse of dominant position due to Ryanair's cancellation of certain tickets sold by online travel agencies. The authority held that it was a legitimate policy of Ryanair to ask its potential clients to acquire their tickets exclusively through its own webpage and therefore to refuse tickets acquired through other web pages. This policy allows the company to keep certain sales conditions and prices.

A complaint against Iberia for excessive prices in the route Madrid-Asturias, in which Iberia held a monopoly at the time of the complaint, was also rejected on 10 July 2009. After the initial investigation, the CNC held that the prices could not be considered excessive as they were similar to those charged by Iberia when that same route was also served by a competing company and to the prices charged by Iberia to other destinations within the same distance in Spain.

In merger control, the reasoning applied by the Spanish antitrust authorities is similar to the one followed at EU level. In case *C105/07 Air Berlin/LTU (August 2007)*, the Court for the Defence of Competition investigated the competitive risks that could arise from the acquisition by the German airline Air Berlin of sole control over LTU, in particular concerning several regular flights between Spain and Germany. The Court concluded that there were effective alternative airlines which would exercise sufficient competitive restraints on the new entity, and authorised the concentration in second phase without conditions. More recently, in case *C/0024/07 Easyjet Airline Company/GB Airways (January 2008)*, the authorities made a distinction between traditional network airlines and low cost carriers, expressly recognising the dynamising role of the latter in the aviation market and considered this difference as a factor to exclude any coordinated effects. The competition authorities cleared the transaction in its first phase despite relatively high market shares (in some cases up to 70%) due to the dynamic character of the market and the competitive pressure from actual or potential competitors (high probability of new entrants).

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Switzerland

Swiss cartel law applies generally to all arrangements related to aviation such as code sharing, alliances and joint fares. It operates on the presumption that horizontal agreements among competitors which directly or indirectly fix prices allocate territory/customers or reduce capacities and vertical agreements fixing resale prices or allocating separate territories are illegal. Code sharing and joint fares would constitute horizontal agreements, as would alliances which do not take the form of joint ventures.

According to the Agreement between the European Community and the Swiss Confederation of Air Transport (**Agreement**) the institutions of the EU are exclusively competent to decide on arrangements related to aviation if these arrangements may affect trade between the Swiss Confederation and the EU. EU legislation as referenced to in the Agreement, including in particular aviation related exemptions, will apply. Regarding mergers, EU merger control law applies if the merger relates to aviation and if the companies involved reach the EU merger control thresholds. The Swiss cartel law designates the Swiss Competition Commission as the competent body to cooperate with the EU institutions, in particular, regarding investigations in Switzerland.

The Agreement was applied with respect to the merger between the two airlines Lufthansa and Swiss which was exclusively dealt with by the EU Commission. The EU Commission cleared the merger subject to conditions (see IP/05/837).

Swiss cartel law applies to all other arrangements related to aviation that do not affect trade between the Swiss Confederation and the EU. There are no exemptions for aviation related activities under Swiss law. As a matter of fact, however, the Swiss Competition Commission is likely to take the EU exemptions into consideration in deciding a case.

In 2004, the Swiss Competition Commission examined the new tariffs of Swiss (the national airline of Switzerland) abolishing commissions for travel agencies exclusively based on Swiss competition law as the behaviour did not affect trade between Switzerland and the EU. The Competition Commission held that the new tariffs did not constitute an abusive behaviour leaving open the question whether Swiss was holding a dominant position with regard to travel agencies.

The merger between Swiss and the Swiss charterer Edelweiss was cleared in 2008 by the Swiss Competition Commission. The merger did not raise concerns as the merging companies were facing strong competition on all relevant markets.

AirBerlin's merger with Swiss carrier Belair was cleared by both the Swiss Competition Commission and the German Cartel Office in August 2007. The merger did not raise competition concerns, a key reason being that the Swiss carrier provided a strong counterweight to routes operated by market leader Lufthansa.

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United States

In May 2009, the new head of DOJ's Antitrust Division, Christine A. Varney, announced in a speech before the U.S. Chamber of Commerce that the Antitrust Division was reversing the Bush Administration policy on single-firm conduct under Section 2 of the Sherman Act and signalled the Obama Administration's more aggressive antitrust enforcement in banking, health care, energy, transportation and telecommunication industries.

Ms Varney condemned the 'passive' antitrust enforcement policy of the prior Administration and expressly rejected the economic theory, which promotes limited regulation of markets and relies more heavily on 'self-policing' and 'self-correction' by market players. She stated, '*we cannot sit on the sidelines any longer – both in terms of enforcing the antitrust laws and contributing to sound competition policy as part of our nation's economic strategy*'. She also emphasised that vigorous enforcement of the antitrust laws is important in times of economic distress in order to protect consumer welfare.

Specifically, she announced that the Obama Administration was withdrawing an Antitrust Division policy paper published in September 2008 on Section 2 of the Sherman Act. The policy paper, known as the Section 2 Report, applied legal standards that made it difficult to bring new cases involving single-firm monopoly and predatory practices. Ms Varney described the Report as '*an overly lenient approach to enforcement*'.

She argued that the focus of an inquiry under Section 2 ought to be whether '*consumers are harmed by higher prices, reduced product variety and slower innovation*', and not whether the alleged monopolist achieved efficiencies. Ms Varney stated: 'Reinvigorated Section 2 enforcement will thus require the Division to go 'back to the basics' and evaluate single-firm conduct against these tried and true standards that set forth clear limitations on how monopoly firms are permitted to behave. There can be no better charter for our return to fundamental principles of antitrust enforcement'.

Ms Varney made clear the intentions of the Obama Administration: '*Going forward, the Department is committed to aggressively pursuing enforcement of Section 2 of The Sherman Act…*'. She said that there would be no 'free pass' for dominant firms who engage in illegal monopoly behaviour. Ms Varney stated that her office will to continue the previous administration's vigorous prosecution of criminal violations of Section 1 of the Sherman Act that prohibits, among other things, cartels and conspiracies to fix prices, rig bids or allocate markets.

Ms Varney signalled that civil merger and non-merger areas would also see an increase in antitrust enforcement. She suggested that her leadership team would explore new theories to analyse such arrangements.

Ms Varney promised to continue the Bush Administration's collaboration with antitrust enforcement authorities outside the U.S. with respect to investigation and prosecution of international cartels, convergence in substantive laws, cooperation with international organisations, including the International Competition Network and the Organisation for Economic Corporation Development (OECD), and support for emerging antitrust regimes around the world.

Key developments for the period 1 May 2008 – 30 July 2009 have been:

- On 22 May 2008, DOJ approved antitrust immunity for alliance agreements for a four-way joint venture between Delta, Northwest, Air France, and KLM. The alliance would operate under the U.S.-EU Air Transport Agreement.
- On 28 July 2008, the former highest-ranking cargo executive in the U.S. for SAS Cargo Group A/S (SAS) agreed to plead guilty and serve six months in jail for participating in a conspiracy to fix prices for air cargo rates. According to the court papers, this executive, while in his capacity as SAS's Area Director of Sales and Marketing for North America, conspired with competitors to fix the rates charged to U.S. and international customers on air cargo shipments.
- On 14 August 2008, American, British Airways and Iberia applied for antitrust approval, with Oneworld partners Finnair and Royal Jordanian. The applications said the relationship will enable more effective competition with immunised SkyTeam and Star airlines. Virgin Atlantic filed in opposition. A decision is expected later this year.
- On 30 September 2008, a British citizen and former executive of British Airways World Cargo agreed to plead guilty, serve eight months in jail and pay a USD20,000 criminal fine for participating in a conspiracy to fix rates for international air cargo shipments. According to the charges filed in Federal Court, the former Commercial General Manager for British Airways World Cargo, and his co-conspirators engaged in a conspiracy to fix the air cargo rates charged to customers for international air shipments, including to and from the United States.

- On 29 October 2008, DOJ closed its six-month investigation and approved the merger arrangement of Delta and Norwest. The new Delta, headquartered in Atlanta, became the largest carrier in the world. Northwest is now a Delta subsidiary, NWA, Inc. These companies will be integrated over the next 12-24 months.
- In January 2009, LAN Cargo, Aerolinhas Brasileiras (ABSA), and EL AL Israel Airlines agreed to plead guilty and pay criminal fines totalling USD124.7 million for conspiring to fix air cargo prices. LAN Cargo, a Chilean company, and ABSA, a Brazilian company that is substantially owned by LAN Cargo, agreed to pay a single criminal fine of USD109 million, and EL AL agreed to pay USD15.7 million.
- On 9 April 2009, DOJ said Asiana, Cargolux and Nippon Cargo agreed to plead guilty to conspiring to fix air cargo prices. Asiana will pay a criminal fine of USD50 million, Cargolux USD119 million and Nippon USD45 million. These four carriers agree to pay a total of USD214 million in criminal fines. Asiana also was charged with fixing passenger fares on USA-Korea flights.
- On 29 April 2009, a Dutch citizen and executive of Martinair Holland N.V. (Martinair) has agreed to plead guilty, serve eight month in jail and pay a USD20,000 criminal fine for participating in a conspiracy to fix cargo rates for international air shipments. According to court papers, former Vice President of Cargo Sales in Europe for Martinair, and his co-conspirators engaged in a conspiracy to fix the cargo rates charged to customers for international air shipments, including to and from the United States.
- On 23 July 2009, DOT approved alliance agreements that add Continental to the existing alliance involving Air Canada, Austrian, bmi, LOT, Lufthansa, SAS, Swiss, TAP and United and, within that broader alliance, approved an integrated, 'metal neutral' joint venture agreement called Atlantic Plus-Plus involving Air Canada, Continental, Lufthansa, and United. DOT also granted immunity from the antitrust laws for both of these expanded agreements as they apply to foreign air transportation

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