

Legal and Regulatory Issues of Aviation

Compliance

Dr. Till Vogel

Agenda for this Modul

Saturday, 2022/09/17

- Institutions and Authorities
- Traffic Rights
- Access to Airports
- Compliance

Sunday, 2022/09/25

- Safety & Security
- Liability & Consumer Protection
- Air Traffic Control - ATC
- Travel Agencies

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~~■ Institutions and Authorities~~ **Done!**

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Useful books

- *Diederiksen-Verschoor/Mendes de Leon*,
An introduction to Air Law, 10th edition, 2017
- *Havel/Sanchez*,
The Principles and Practice of International Aviation
Law, 2014
- Paul Stephen Dempsey, Ram Jakhu
Routledge Handbook of Public Aviation Law, 2017
- Milde, Michael,
International Air Law and ICAO - Third edition - 2016
- *Schaefer, Christoph*,
Recht des Luftverkehrs, 2017

Part IV

Compliance

Compliance

What is compliance?

- *“The act of obeying an order, rule, or request”*
(from the Oxford Dictionary)
- In business compliance usually means to be
 - conforming to all rules, laws, regulations and standards that are applicable to the company and/or any act of its representatives and employees

Is this something special?

Compliance

What are typical fields for compliance in aviation?

- Data protection
- Labor & Employment
- Regulatory
 - Safety & Security
 - Maintenance
 - Licensing of personnel
- Bribery
- Cartels/Competition

Compliance Management = Risk Management

What risks are to be managed?

- The risk of
 - systematic breaches
 - of applicable laws
 - in the course of the business operations of the company
- The relevant laws, regulations, etc. have to be identified
- Experience shows that two areas will always be part of a good compliance program:
 - Anti-Bribery and
 - Competition Laws
- + in Aviation: Regulatory matters

What if risks materialise?

Criminal sanctions, fines	<ul style="list-style-type: none"> ➤ Against the acting managers and employees ➤ Against the company
Damage Claims	New trend in competition laws (private enforcement)
Legal fees	<ul style="list-style-type: none"> ➤ In particular US authorities require companies to investigate at their own cost which is usually substantial ➤ Internal investigations
Labor law	<ul style="list-style-type: none"> ➤ Termination of the employment contract of the acting persons ➤ Damage claims of the company against the acting persons
Harm to reputation	Siemens as an example
Loss of competitiveness	Resources are used improperly, loss of competitiveness

Non-Compliance ruins careers
and potentially
your whole life!!!

How do Compliance Programms work?

Tone form the top	Communication from top management (CEO) that violations will not be tolerated
Risk Analysis	Finds the risks that the company actually faces and has to handle
Adequate procedures and guidelines	<ul style="list-style-type: none"> ➤ Guidance and clear instruction for staff how to act ➤ Establishing a working compliance office
Training, advice, communication	<ul style="list-style-type: none"> ➤ Face-to-face and web-based ➤ Compliance office available for advice etc. ➤ Compliance team must know the business
Reporting, investigating, sanctioning	<ul style="list-style-type: none"> ➤ Reporting channels (whistle blower) ➤ Internal auditing ➤ Adequate sanctions

Typical areas of concern

- Using agents or consultants in foreign countries
- Corporate hospitality
 - Travel
 - Meals
 - “Entertainment”
- Meeting with competitors
- Ways to establish “slush funds”
 - Payments to fake companies or consultants

What is bribery

- Bribery means:
 - Granting an undue advantage in exchange for a favorable decision
- Not only towards public officers but also towards decision makers of customers or suppliers

Why is bribery dangerous for the company?

Case:

- You pay 100,000 USD to the minister of transportation of a foreign country to support his decision that the state owned airport buys 50 new trucks from your company.
- Your company makes a profit of 10 million Euro from the deal!

Why is bribery dangerous for the company?

What are the risks?

- Criminal prosecution in both countries
 - Under German criminal law (Sec. 333, 334, 335 and 335a of the German criminal code)
 - US Law (Foreign Corrupt Practices Act - FCPA) sanctioning bribery of foreign public officials by US persons or if there is link to US Law
 - UK Law against corruption (UKABA) is sanctioning any bribing of foreign officials
- Personal liability
- Harm the reputation of the company
- Bribery triggered lots of compliance cases in the past (Siemens, MAN, etc)

European Competition Law

European Competition Law

Article 101 TFEU

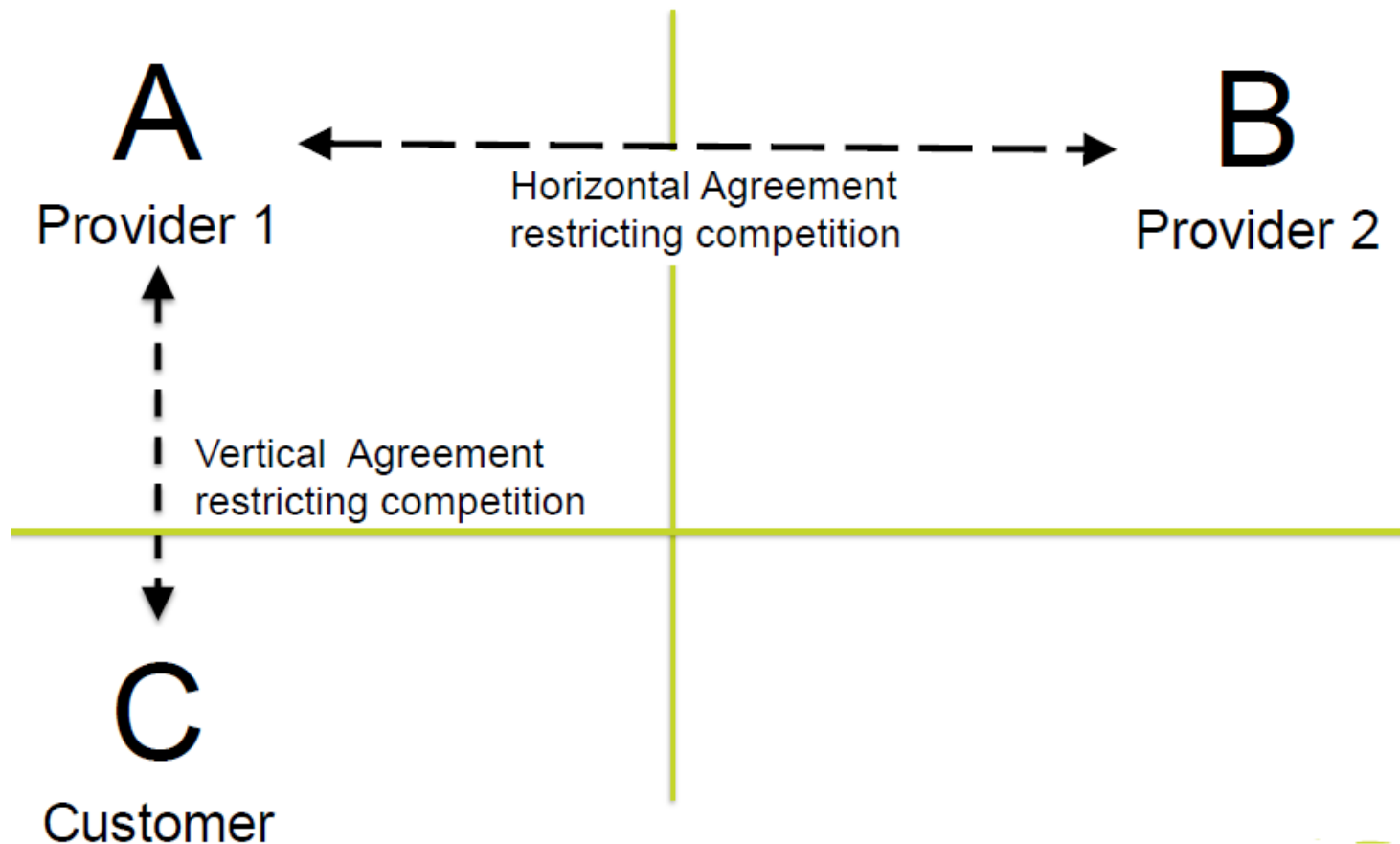
The following shall be prohibited as incompatible with the internal market:

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

European Competition Law

Aim	Competition is an institution which is not at the disposition of individual economic parties!
Source	<ul style="list-style-type: none"> ➤ European Law: Art. 101ff TFEU, ➤ Member State Law: Only applicable if trade between Member States is not affected
Applicability	EU Law applicable if there is an effect of the agreement or measure on EU market which is the case in most constellation
Aviation Industry	Not exempted but fully subject to competition Law.

Restricting Agreements or Concerted Practices



Abuse of a Dominant Marketposition

Art. 102 TFEU

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

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. ...

Abuse of a Dominant Marketposition

Question: What is the relevant market?

Answer:

From the perspective of the customer: Can the flight be substituted by another type of transport (flight/train/ship/car/bus/truck)?

- Basic rule: Origin & Destination (“O&D”) = individual route is the market (FRA to MUC)
- Flight between FRA and JFK
 - Is a flight to LGA the same market?

Abuse of a Dominant Marketposition

- Basic rule: Origin & Destination (“O&D”)
= individual route is the market (FRA to MUC)

For passenger flights:

- Differentiating between:
 - Time sensitive (business) passengers and
 - Non time sensitive (private) passengers
- Also consider:
 - Catchment areas?
 - Indirect flights?
 - Further individual circumstances?

Abuse of a Dominant Marketposition

- Basic rule: Origin & Destination (“O&D”)
= individual route is the market (FRA to MUC)

For cargo-flights:

- A substantially broader approach
 - Common Market EU or USA
 - In other territories: The country as a whole?

Competition Law

Who is subject to prohibition?

- Definition peculiar to Competition Law:
 - Economic Operator as such
 - Irrespective of legal organization
 - Organizations exercising sovereign powers are excluded however „sovereign powers“ construed narrowly.
 - Privilege for Groups of Companies

Competition Law: Restriction of Competition

What is competition?

- Two or more independent companies/operators sell products that the customers consider equivalent
- Each economic operator determines his policy independently
- Uncertainty about behavior of other operators is essential element of competition

What is prohibited?

- Any adverse effect: Market parameter usually determined by independent behaviors are frozen and concerted by the operators.

Competition Law: What Practises are Prohibitet?

Agreements

- Formal = contractual
- Informal = gentleman's agreement

Concerted Practices

- Any other mode of eliminating uncertainty by communication
- In particular: "Signaling"
- In particular: Exchange of sensitive business information without agreement

Unilateral Acts are not covered by restriction!

- Parallel behavior based on observation and unilateral decision is okay

Competition Law: Acceptable Practises

- Industry Block Exemption Regulations
 - at present: none for airline industry
- Individual Exemptions based on self-assessment (EU Law, Art. 101 para 3 TFEU)

Competition Law: Acceptable Practises

Agreements or concerted practices are allowed if they fulfil the following conditions (Art. 101 para 3 TFEU):

- The restriction contributes to improving the production / distribution of goods or to promoting technical or economic progress or
- The restriction allows consumers a fair share of the resulting benefit and
- The restriction does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives or
- The restriction does not afford undertakings involved the possibility of eliminating competition in respect of a substantial part of the products in question

Case Study: The LH-OS Cooperation 1999

In 1999, both companies were not affiliated. By way of a Cooperation Agreement they wanted to form a close alliance by worldwide integration of networks. Important Elements:

- Common Network, Coordination of schedules.
- Common Pricing: Revenue Share and cost share on flights between Germany and Austria, governed by an “Alliance Steering Committee.” Worldwide common pricing to be achieved by Special Prorate Agreement and Code Share Agreements.
- Shared Ground Services, shared sales etc.
- Customers gain access to other Airline’s frequent traveler programs

Case Study: Relevant points

Relevant Market	VIE-FRA was exemplary route. O&D approach = 100% combined market share.
Art. 101 (1)	Cooperation Agreement restricts competition. Foreclosure of market for other competitors (frequent traveler programs reciprocally opened, all available slots with LH and AUA combined).
Art. 101 (3)	(1) Economic progress: more efficient network. (2) Customer benefit: Wider choice, more connections, shorter waiting times (3) Indispensable (4) Elimination of competition? In current scenario yes
Commitment	➤ Transfer slots to competitors, freeze frequencies ➤ Lower price on 1 route with competition entails lower price on three other routes without competition (to avoid cross-subsidising)