European Union Competition Law
Developments in the Aviation Sector: July to December 2018

Martin Strom*

The second half of 2018 highlights that the aviation sector continues to see new developments in competition law. This article summarizes the main developments over the past six months and provides the reader with greater detail of each of these developments.

One major development is the July 2018 judgment by the European Court of Justice in the dispute between flyLAL, on the one hand, and Riga Airport and Air Baltic, on the other. The court ruled that flyLAL was entitled to bring an action for damages against Riga Airport and Air Baltic (both Latvian companies) in Lithuania. In doing so, the Court clarified the interpretation of both Articles 5(3) and 5(5) of Regulation 44/2001. In particular, it ruled that loss of earnings caused by predatory pricing can constitute initial damage for the purposes of Article 5(3) and clarified the circumstances in which a tortious claim can be brought in the location of a branch of the defendant under Article 5(5).

ASL has launched a claim for damages before the General Court arguing that the Commission’s (the ‘Commission’) decision to block the proposed acquisition of TNT Express by UPS, on the grounds that the intra-EEA (European Economic Area) express small packages delivery services market would be reduced in a large number of Member States, has caused ASL to incur losses of EUR 263m. The Commission’s decision to block the merger has since been overturned by the General Court, and an appeal brought by the Commission is currently pending before the European Court of Justice.

This period has also continued to see a succession of State aid cases heard in the General Court, with no less than five judgments involving Ryanair. Ryanair appealed decisions by the Commission concerning State aid at airports in Nîmes, Angoulême, Altenburg-Nohtitz and Pau-Pyrénées (where Transavia also lodged an appeal), but was unsuccessful in each. However, the General Court did annul a Commission decision, insofar as it related to Ryanair and its subsidiary, finding that they had received illegal State aid at Zweibrücken airport in Germany.

* Associate at DLA Piper UK LLP. Martin is grateful to Geoffrey Deasy, legal counsel (regulatory and compliance) at Cargo Logic Management, for his comments on this article. A special thanks also to Tom Williams, Trainee Solicitor at DLA Piper UK LLP, for his contribution.

Email: Martin.Strom@dlapiper.com.
### Table 1  Policy Developments

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<thead>
<tr>
<th>Forum</th>
<th>Parties</th>
<th>Summary</th>
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<tbody>
<tr>
<td>EU</td>
<td>Aviation Industry</td>
<td>The EU has launched a consultation into possible reform of its code of conduct for computerized reservation systems. The consultation ran until October 2018, with a decision expected in March 2019.</td>
</tr>
<tr>
<td></td>
<td>EU Parliament and Council</td>
<td>The EU Parliament and Council has reached a provisional agreement on new rules to safeguard competition in the EU aviation sector which will give the Commission greater ability to address actions by non-EU carriers.</td>
</tr>
<tr>
<td>Small Airports</td>
<td></td>
<td>The Commission has extended the regime for operating aid for small airports to April 2024.</td>
</tr>
<tr>
<td>UK</td>
<td>Aviation Industry</td>
<td>The UK government has published a report into the future of the UK aviation industry. Alongside, the Competition and Markets Authority (the ‘CMA’) issued a report focussing on competition issues.</td>
</tr>
<tr>
<td></td>
<td>Aviation Industry</td>
<td>A draft Air Services (Competition) Regulations has been published, detailing measures designed to protect against subsidization and unfair pricing practices following the UK’s exit from the EU.</td>
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### Table 2  Investigations: Opened/On-Going

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<tr>
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<tbody>
<tr>
<td>EU</td>
<td>ETTSA/Commission</td>
<td>European Technology and Travel Services Association (‘ETTSA’) has filed a complaint against the Commission for failing to properly enforce EU law, after it declined</td>
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<tr>
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<tr>
<td>EU</td>
<td>ETSSA/Lufthansa</td>
<td>to act against Lufthansa following an investigation into its use of surcharges. ETSSA has filed a complaint against Lufthansa, alleging that the airline is abusing its dominant position by refusing to supply certain fares through global distribution systems.</td>
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<td></td>
<td>Ryanair</td>
<td>Ryanair has filed a complaint with the Commission against rival airlines alleging that they have interfered with Ryanair’s trade union negotiations.</td>
</tr>
<tr>
<td></td>
<td>Amadeus/Sabre</td>
<td>The Commission has opened an in-depth investigation into agreements between airlines, travel agents and system operators regarding airline ticket distribution services.</td>
</tr>
<tr>
<td>UK</td>
<td>American Airlines/International Airlines Group/Finnair</td>
<td>The CMA has opened an investigation into the Atlantic Joint Business Agreement (the ‘AJBA’) between American Airlines, the International Airlines Group (British Airways and Iberia), and Finnair.</td>
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<tr>
<td>EU</td>
<td>IATA/CFM International</td>
<td>Following a settlement with the International Air Transport Association (the IATA), CFM International has published conduct policies relating to warranties, servicing and repairs.</td>
</tr>
<tr>
<td></td>
<td>Brussels Airlines/TAP Portugal</td>
<td>The Commission has closed its investigation into an agreement between Brussels Airlines and TAP Portugal (Transportes Aéreos Portugueses, S.A.) regarding the sale of seats on the Brussels-Lisbon route.</td>
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The CMA has settled its investigation into airport transport facilities. The CMA imposed a GBP 1.6m fine on Heathrow Airport.

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<tr>
<td>UK</td>
<td>Airport transport facilities</td>
<td>The CMA has settled its investigation into airport transport facilities. The CMA imposed a GBP 1.6m fine on Heathrow Airport.</td>
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### Table 4 Mergers: Notified/Under Review

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<tr>
<th>Forum</th>
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<tbody>
<tr>
<td>EU</td>
<td>UTC/Rockwell Collins</td>
<td>United Technologies Corp (‘UTC’) has obtained conditional clearance from the Commission in relation to its acquisition of Rockwell Collins. The clearance is conditional on UTC divesting businesses in actuators, pilot controls, ice-protection and oxygen systems.</td>
</tr>
<tr>
<td>UK</td>
<td>Menzies Aviation (UK)/Airline Services</td>
<td>The CMA has provisionally cleared the completed acquisition by Menzies Aviation of Airline Services, following an in-depth phase 2 review.</td>
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### Table 5 Mergers: Concluded

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<thead>
<tr>
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<tbody>
<tr>
<td>EU</td>
<td>Ryanair/LaudaMotion</td>
<td>The Commission has granted unconditional clearance to the proposed acquisition of LaudaMotion by Ryanair.</td>
</tr>
<tr>
<td></td>
<td>Cerberus/WFS</td>
<td>The Commission has unconditionally approved the acquisition of WFS Global Handling by Promontoria Holding.</td>
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<tr>
<td></td>
<td>Boeing/Safran – Joint Venture</td>
<td>The Commission has approved a proposed joint venture between The Boeing Company (‘Boeing’) and Safran S.A. (‘Safran’), which will be established for the</td>
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### Forum Parties Summary

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Boeing/KLX</td>
<td></td>
<td>The Commission has unconditionally approved the acquisition by Boeing of aircraft-parts distributor KLX Inc. (‘KLX’) for USD 4.25 billion.</td>
</tr>
<tr>
<td>Adient/Boeing – Joint Venture</td>
<td></td>
<td>The Commission has approved a joint venture between Adient and Boeing, relating to the production of aircraft seats.</td>
</tr>
<tr>
<td>ORIX Aviation/Bohai Capital/Avolon</td>
<td></td>
<td>Using its simplified procedure, the Commission has approved the proposed acquisition of joint control over Avolon by ORIX and Bohai.</td>
</tr>
<tr>
<td>Carlyle Group/Apollo Aviation</td>
<td></td>
<td>The Commission has approved the acquisition of sole control of Apollo Aviation by Carlyle Group.</td>
</tr>
<tr>
<td>UK</td>
<td>Gardner Aerospace Holdings/Northern Aerospace</td>
<td>The CMA has approved the acquisition of Northern Aerospace by Gardner Aerospace Holdings, following an investigation opened in response to a public interest intervention by the Secretary of State.</td>
</tr>
<tr>
<td>CityJet/Aer Lingus</td>
<td></td>
<td>The CMA has cleared a wet lease agreement between CityJet and Aer Lingus after a phase 1 investigation.</td>
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### Table 6 Judgments Awaited

<table>
<thead>
<tr>
<th>Forum</th>
<th>Parties</th>
<th>Summary</th>
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</thead>
<tbody>
<tr>
<td>EU General Court American Airlines/Delta Air Lines</td>
<td>American Airlines has appealed a decision by the Commission which allowed Delta Air Lines to permanently operate a flight route from London Heathrow to Philadelphia following merger commitments from 2013.</td>
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</tr>
<tr>
<td>Forum</td>
<td>Parties</td>
<td>Summary</td>
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</tr>
<tr>
<td></td>
<td>TUI fly/Ryanair/Klagenfurt</td>
<td>TUI fly and Ryanair have mounted separate challenges against the Commission’s 2016 decision finding that the airlines received illegal State aid at Klagenfurt airport.</td>
</tr>
<tr>
<td></td>
<td>Airport – Commission</td>
<td>The Commission’s conditional approval of the merger between Lufthansa and Air Berlin is being appealed to the General Court by LOT.</td>
</tr>
<tr>
<td></td>
<td>Lufthansa/Air Berlin/LOT – appeal</td>
<td>Irish airline ASL has lodged a EUR 263m claim for damages against the Commission in relation to the Commission’s decision to prohibit the acquisition of TNT Airways by UPS. The losses are alleged to stem from a failed ASL deal which was contingent on the TNT/UPS merger obtaining clearance.</td>
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<tr>
<td></td>
<td>ASL/Commission</td>
<td></td>
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**Table 7  Judgments Handed Down**

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<thead>
<tr>
<th>Forum</th>
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</thead>
<tbody>
<tr>
<td>European Court of</td>
<td>flyLAL/Riga Airport/Air Baltic</td>
<td>The Court of Justice has ruled on the appropriate jurisdiction to govern a dispute between flyLAL, a Lithuanian airline, and Riga Airport and Air Baltic. The Court found that while Air Baltic’s is based in Latvia, the claim can proceed in Lithuania, as the jurisdiction where the losses were incurred.</td>
</tr>
<tr>
<td>General Court</td>
<td>Lufthansa – Commission</td>
<td>The Commission has published its decision rejecting a request from Lufthansa to lift conditions placed on its buyout of Swiss International Air Lines in 2005.</td>
</tr>
<tr>
<td>Milan Airports/</td>
<td></td>
<td>The General Court has rejected an appeal brought by the Municipality of Milan against a Commission State aid decision which ordered the recovery of EUR 360m in illegal aid.</td>
</tr>
<tr>
<td>Commission</td>
<td></td>
<td></td>
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</tbody>
</table>
Ryanair has lost an appeal in the General Court against a Commission decision which found that the airline, along with its subsidiary Airport Marketing Services (‘AMS’), received State aid through various arrangements with Angoulême airport.

Ryanair has lost an appeal in the General Court against a Commission decision which found that the airline, along with AMS, received State aid through various arrangements with Altenburg Nobitz airport.

Ryanair has lost an appeal in the General Court against a Commission decision which found that the airline, along with AMS, received State aid through various arrangements with Nîmes airport.

Ryanair and Transavia have lost an appeal in the General Court against a Commission decision which found that the airlines (along with AMS), received State aid through various arrangements with Pau-Pyrénées airport.

The General Court has annulled a Commission decision which found that Ryanair, along with AMS, received State aid through various arrangements with Zweibrücken airport.

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</thead>
<tbody>
<tr>
<td>Ryanair/AMS/</td>
<td>Angoulême</td>
<td>Ryanair has lost an appeal in the General Court against a Commission decision which found that the airline, along with its subsidiary Airport Marketing Services (‘AMS’), received State aid through various arrangements with Angoulême airport.</td>
</tr>
<tr>
<td>Ryanair/AMS/</td>
<td>Altenburg Nobitz</td>
<td>Ryanair has lost an appeal in the General Court against a Commission decision which found that the airline, along with AMS, received State aid through various arrangements with Altenburg Nobitz airport.</td>
</tr>
<tr>
<td>Ryanair/AMS/</td>
<td>Nîmes</td>
<td>Ryanair has lost an appeal in the General Court against a Commission decision which found that the airline, along with AMS, received State aid through various arrangements with Nîmes airport.</td>
</tr>
<tr>
<td>Ryanair/AMS/</td>
<td>Transavia/Pau-Pyrénées</td>
<td>Ryanair and Transavia have lost an appeal in the General Court against a Commission decision which found that the airlines (along with AMS), received State aid through various arrangements with Pau-Pyrénées airport.</td>
</tr>
<tr>
<td>Ryanair/AMS/</td>
<td>Zweibrücken</td>
<td>The General Court has annulled a Commission decision which found that Ryanair, along with AMS, received State aid through various arrangements with Zweibrücken airport.</td>
</tr>
</tbody>
</table>
Flows in relation to Montpellier airport constitute illegal State aid.

The Commission has opened an in-depth investigation into potential State aid, in the form of various agreements and guarantee, granted to Ryanair and the operator of Frankfurt-Hahn airport.

### Table 9 State Aid: Cases Concluded

<table>
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<tr>
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<tbody>
<tr>
<td></td>
<td>Ryanair/Lübeck airport – Commission</td>
<td>The Commission has published its decision finding that the arrangements between Ryanair and Lübeck airport did not amount to State aid.</td>
</tr>
<tr>
<td></td>
<td>EU</td>
<td>The Commission has announced its decision to approve the granting of a twenty year extension to Athens Airport’s State aid concession, finding that the operator will pay an adequate market fee for operating the airport.</td>
</tr>
<tr>
<td></td>
<td>Greece/Athens International Airport</td>
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1 POLICY DEVELOPMENTS

1.1 EU’s reservation systems conduct code¹

On 17 September 2018, the Commission launched a public consultation into possible reform of the EU’s Code Of Conduct Regulation² for computerized reservation systems. The purpose of the public consultation is to ensure that wider stakeholder groups are given an opportunity to express their views on the implementation and operation of the Code of Conduct. A targeted consultation was previously sent out to key stakeholders including airlines and travel agencies.

¹ See Commission consultation page, Public consultation on the evaluation of the regulation on a code of conduct for computerized reservation systems.

The consultation follows the Commission’s 2015 Aviation Strategy, which is aimed at improving the sustainability and competitiveness of the EU air transport sector.

The consultation closed for further comments on 10 December 2018, and the Commission will now summarize the replies received during the consultation.

1.2 European Parliament and Council Agree on Aviation Competition Safeguarding

On 12 December 2018, the European Parliament and Council approved a provisional agreement on new rules designed to safeguard competition in the aviation sector within the EU. A spokesperson for the Commission welcomed the agreement, which followed a provisional agreement reached in November 2018, stating that it would help contribute to an open and connected Europe, with an aviation industry geared towards growth, mobility and the generation of jobs.

Under the new rules, the Commission will be better able to take actions to ensure fair competition between EU and non-EU carriers. In particular, the Commission will have powers to launch an investigation and take action to redress practices which distort or threaten competition in the industry where such conduct has caused harm to an EU carrier (or poses a clear threat of such injury).

The agreement is yet to be formally adopted, which must be done first by the Parliament and then by the Council.

1.3 Commission prolongs specific regime for operating aid for small airports

On 18 December 2018, the Commission announced an extension of the rules on certain categories of operating aid to airports with up to 700,000 passengers. The special regime is provided for in the Guidelines on State Aid to Airports and Airlines (the ‘Guidelines’). The Commission’s default position is that airlines and airports should bear their own operating costs. However, recognizing the need to allow the aviation industry to adapt to changing market situations, certain categories of operating aid might still be justified. The Guidelines establish a transitional period of ten years (from 4 April 2014) during which airports with up to 3 million annual passengers can receive operating aid. However, after the transitional period, all such airports are expected to fully cover their own operating costs.

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4 OJ C 456/06 2018.
The Guidelines further recognize that airports with annual traffic of up to 700,000 passengers per year may experience particular difficulty in achieving cost recovery within the ten year transitional period. The Guidelines therefore establish a special regime applicable to such smaller airports, where the aid amount is established ex ante as a fixed sum covering the expected operating funding gap (up to a maximum of 80%). The special regime originally applied up until 3 April 2019.

Under the Guidelines, the Commission is expected to undertake a general review of the Guidelines in April 2020. In its December 2018 communication, the Commission noted that it would be beneficial to undertake a review of the specific regime covering smaller airports (i.e. with up to 700,000 passengers per year) at the same time as the overall review of the Guidelines to ensure a comprehensive review of operating aid for airports. In order to align the transitional period for the application of the rules to smaller airports with that applying to airports with more than 700,000 passengers per year, and to provide legal certainty and continuity of treatment, the special regime has now been extended until 3 April 2024.

The Commission will undertake a general review of the Guidelines, including the now-extended special regime for small airports, by 4 April 2020.

1.4 UK government report into the future of UK aviation

On 17 December 2018, the Department for Transport (the ‘DfT’) began a consultation of its proposals for a new aviation strategy. The strategy focuses on a variety of issues in the industry, including meeting rising passenger demand by ensuring sustainable growth, improving passenger experience, reducing environmental and community impact, reducing delays at the border and further improving consumer choice by continuing to build connections across the world. A final white paper is expected in mid-2019.

Alongside the DfT’s work, the CMA has published associated reports focusing on, inter alia, the impacts of the current regime for slot allocation on competition in the sector and whether alternative methods for allocating slots could improve competition.

The CMA considers that there are strong arguments for adopting a market-based approach to slot allocation, whether through secondary trading or by the auctioning of slots. The CMA expects that this would lead to efficiency benefits, more transparent slot-pricing, and ultimately, greater competition. The report also considers certain perceived risks with moving to a market-based approach, including the risk that airlines wielding market power can be encouraged to bid higher

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prices for slots than new entrants as well as leading to higher prices for slots at congested airports.

1.5 Publication of Air Services (Competition) Regulations

On 10 December, the Air Services (Competition) (Amendment) (EU Exit) Regulations 2019 were published, alongside a draft explanatory memorandum.

The new regulations will amend Regulation 868/2004, concerning the protection against subsidization of, and unfair pricing by, non-EU airline carriers which cause injury to EU-carriers. Regulation 868/2004 will be retained under the (EU Withdrawal) Act 2018.

The amendments provide for the Civil Aviation Authority (‘CAA’) to initiate proceedings where there is sufficient evidence of anti-competitive conduct by countries other than the UK, and where such practices adversely impact on the aviation industry in the UK. Aside from changing references from ‘Community’ to ‘United Kingdom’ and other similar changes, the regulation will empower the Secretary of State to impose redressive measures.

Of particular note, the new regulation will allow the UK to take enforcement measures where it suspects that EU Member States are engaging in unfair practices and where such practices have an impact on routes to and from the UK.

2 Investigations: Opened/On-going

2.1 ETSSA files complaint against Commission

On 19 July 2018, the ETSSA filed a complaint with the European Ombudsman against the Commission in connection with the latter’s investigation of Lufthansa’s use of surcharges. In particular, in May 2018, after a three-year investigation into Lufthansa’s surcharges on tickets purchased through independent distributors, the Commission declined to pursue the matter further.

In its complaint to the Ombudsman, the ETSSA is arguing that the Commission:

- Failed to act within a reasonable time period; and
- Claimed that it could cease to investigate the complaint based on the Code of Conduct for computerized reservation systems simply because of the possibility that the Code could be changed in the future. However,

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7 See 41(2) AILA, at 74.
ETTSA is arguing that this constitutes an erroneous abdication of responsibility.

2.2 ETTSA FILES COMPLAINT AGAINST LUFTHANSA

On 19 December 2018, ETTSA and VIR (Verband Internet Reisevertrieb, a German association which represents the digital travel industry), filed a joint complaint against Lufthansa with the Commission, alleging that the airline has engaged in an abuse of dominance.

In particular, the parties claim that Lufthansa has refused to supply its cheapest tickets through global distribution systems, thereby denying access to such fares to the majority of travel agencies which, as a result of Lufthansa’s actions, are unable to offer them for booking to consumers. The complaint also alleges that Lufthansa is imposing unjustified surcharges which penalize consumers who use independent distribution channels (see paragraph 2.1, above).

As a result of these practices, the Parties claim that Lufthansa is restricting competition in both the air ticket distribution and airline services markets, to the ultimate detriment of consumers and smaller competitors.

2.3 RYANAIR FILES COMPLAINT AGAINST RIVAL AIRLINES

On 26 September 2018, Ryanair submitted a complaint to the Commission arguing that certain rival airlines, including Norwegian, KLM and TAP, are unlawfully interfering in its trade union negotiations. Ryanair argues that this interference could lead to a distortion of competition and a restriction of customer choice. In particular, Ryanair is claiming that the actions of its competitors have negatively impacted on its negotiations with pilots and cabin crew, thus damaging Ryanair’s business.

2.4 COMMISSION OPENS INVESTIGATION INTO BOOKING SYSTEM OPERATORS AMADEUS AND SABRE

On 23 November 2018, the Commission opened an in-depth investigation into agreements between booking systems providers Amadeus and Sabre, on the one hand, and airlines and travel agents, on the other, to determine whether they comply with EU competition rules. Amadeus and Sabre both supply IT products

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*EC AT.40617.*
to the travel industry, and the Commission suspects that certain provisions in their agreements are restricting competition by preventing airlines and travel agents from using alternative ticket distribution services, thus creating a barrier to entry and raising prices for airlines and consumers.

2.5 American Airlines/International Airlines Group/Finnair

On 11 October 2018, the CMA announced that it has launched an investigation into American Airlines, International Consolidated Airlines Group (including BA and Iberia) and Finnair, relating to the AJBA.

This investigation follows commitments by the parties (excluding Finnair) to the Commission given in 2010, in relation to a revenue-sharing joint venture covering various transatlantic routes. These commitments, which are binding until 2020, included an agreement to make landing and take-off slots at London Heathrow or London Gatwick available to competitors.

As the majority of the relevant routes depart from the UK (London-Dallas, London-Boston, London-Miami, London-Chicago and London-New York), the CMA has decided to review the AJBA in advance of the expiry of the commitments in 2020. The CMA has noted that the Commission is not required to reassess the commitments given and, in any event, the Commission might no longer have responsibility for competition in the UK after March 2019.

3 INVESTIGATIONS: CONCLUDED

3.1 CFM International Publishes Conduct Policies

After reaching a settlement with IATA, jet engine maker CFM International has published conduct policies which set out guidelines relating to warranties, servicing, repairs, communication, contracting, technical support, and licensing. As a result of the settlement, IATA has withdrawn the complaint it originally launched against the company with the Commission in 2016.

IATA, whose membership includes 290 airlines, expressed concerns about a perceived lack of competition in the engine maintenance market. The recent settlement is designed to address this. In particular, CFM (a partnership between Safran and GE) was accused by IATA of imposing restrictive contract terms between original parts makers and third party rivals. Following the settlement, airlines and third party overhaul facilities will be granted the right to use the CFM

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Engine Shop Manual free of charge, and will be allowed to perform all parts repairs even where no CFM parts are used.

3.2 Commission drops investigation into Brussels Airlines and TAP

On 30 October 2018, the Commission closed its investigation into a codeshare agreement between Brussels Airlines and TAP Portugal concerning the sale of seats on the Brussels-Lisbon route. The Commission issued a Statement of Objections against the airlines in October 2016, following concerns that the airlines had discussed and implemented capacity reductions, pricing policy alignments as well as allowing each other unlimited rights to sell flights on the route.12

Following a thorough review of the evidence, including an oral hearing, the Commission has now closed its investigation due to insufficient evidence to support its initial concerns regarding the practice. The Commission’s press release emphasized that its initial concerns related to specific concerns with this particular codeshare, rather than with codeshare agreements in general.

3.3 CMA settles airport transport facilities investigation

On 18 September 2018, following an investigation commenced in December 2017, the CMA announced that it had found competition law infringements in relation to facilities at certain airports and that it had reached a settlement with the infringing parties. In particular, the CMA investigated a lease agreement between Heathrow Airport and the Arora group in relation to an Arora hotel at the airport. The relevant agreement contained restrictions on the pricing for parking of non-hotel guests.

As part of its investigation, which marked the first time the CMA exercised its enforcement powers in relation to land agreements (previously excluded from scrutiny under competition law), the CMA also sent a series of warning letters to other airports and operators where it had reasonable grounds to suspect that the parties engaged in similar pricing restrictions.

The Arora group was granted leniency by the CMA and was not fined, whereas Heathrow Airport agreed to pay a GBP 1.6m fine as part of its settlement.

This is not the first time that parking practices of airport operators have come under scrutiny in the UK. In 2016, the CAA investigated East Midlands International Airport Limited and Prestige Parking Limited for suspected breaches of competition law in relation to access to airport facilities for airport car parking.

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11 EC AT.39860.
12 See 42(2) AILA, at 226.
13 CMA Case 50523.
operators. The CAA has also carried out a broader review of the market conditions for surface access at UK airports and issued an advisory letter to all airport operators to review their commercial agreements in order to ensure that they comply with competition law.\(^{14}\)

## 4 MERGERS: NOTIFIED/UNDER REVIEW

### 4.1 UTC/ROCKWELL COLLINS — DIVESTMENTS\(^{15}\)

In May 2018, UTC received conditional clearance from the Commission for its proposed acquisition of Rockwell Collins. As a condition for receiving clearance for the merger, UTC is required to divest businesses in actuators, pilot controls, ice-protection and oxygen systems.

During its phase 1 investigation,\(^ {16}\) the Commission expressed concerns that the merger would lead to a reduction of competition in certain markets (as mentioned above) and noted that the parties were both global players which would have faced limited competition from other suppliers following the transaction. The Commission also noted, in relation to oxygen systems, that the market was very concentrated and that UTC had planned to enter the market and challenge Rockwell Collins’ leading position in the absence of a merger. However, the Commission concluded that the merged entity would not have the ability and incentive to use its portfolio of components to foreclose competitors. It also examined certain other overlaps but concluded that they did not give rise to any competition concerns.

On 20 July 2018, following the commitments offered by the parties to secure clearance from the Commission, UTC entered into an agreement to sell its global assets in actuators and pilot control systems to Safran. This agreement has been approved by the Commission.

The deal has also received conditional approval in the US (again subject to commitments to divest certain businesses), but is still awaiting approval in China.

### 4.2 MENZIES AVIATION (UK)/AIRLINE SERVICES\(^ {17}\)

On 14 December 2018, following a phase 2 review, the CMA announced that it had provisionally cleared Menzies Aviation (UK) Limited’s (‘Menzies’) acquisition of Airline Services Limited. Its provisional findings report was published on 19 December 2018.

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\(^{14}\) See 42(2) AILA, at 225.

\(^{15}\) M.8658 — UTC / Rockwell Collins.

\(^{16}\) See 43(6) AILA, at 632.

\(^{17}\) CMA case ME/6746/18.
The CMA launched its phase 1 merger inquiry on 12 June 2018 and, at the conclusion of that review, referred the matter for an in-depth phase 2 review on the basis that the transaction might result in a substantial lessening of competition in the following markets:

- Supply of de-icing services in Edinburgh airport;
- Supply of de-icing services at Glasgow airport;
- Supply of de-icing services at London Heathrow airport;
- Supply of ground-handling services at London Gatwick airport; and
- Supply of ground handling services at Manchester airport.

Following the parties’ decision not to offer undertakings to address the above concerns, the CMA opened the phase 2 review on 14 August 2018. On 19 December 2018, and as mentioned above, the CMA published its provisional findings that:

- The ground handling market at the relevant airports has changed in recent years, with a recent history of new entrants competing for contracts as well as exits and expansions. In particular, the CMA found barriers to entry to be relatively low, and that the threat of future entries/expansions would provide a strong competitive constraint on the parties. In relation to Manchester airport in particular, the CMA noted that the parties’ combined share of supply was not particularly high and that the merged entity would continue to face significant competition from the five remaining operators; and
- In relation to de-icing services, the CMA found that the competitive interaction between the parties was limited (with both parties bidding head-to-head in very few tenders and no instances where contracts were switched between the parties in recent years). As such, the proposed transaction would not give rise to a substantial lessening of competition on the market for the provision of de-icing services.

The CMA invited comments on its provisional findings, with a deadline of 9 January 2019, and will consider any responses received before reaching its final decision before the deadline of 28 January 2019.

5 MERGERS: CONCLUDED

5.1 Ryanair/Laudamotion\(^\text{18}\)

On 12 July 2018, the Commission announced its decision to unconditionally approve the proposed acquisition of sole control of Laudamotion by Ryanair.

\(^\text{18}\) M.8869 – Ryanair / Laudamotion.
Niki Lauda founded leisure air carrier NIKI in 2003, but later sold the company to Air Berlin. Following the insolvency of Air Berlin, Niki Lauda used the Austrian company LaudaMotion to re-acquire NIKI from Air Berlin. As mentioned in paragraph 6.3 below, NIKI was originally set to be acquired from Air Berlin by Lufthansa but was subsequently removed from the scope of that transaction following concerns expressed by the Commission.

The Commission investigated the impact of the Ryanair acquisition on air transport of passengers on certain routes involving Germany, Austria and Switzerland where the parties' activities overlap. It also assessed whether Ryanair would gain the ability to prevent competitors from entering or expanding at certain airports, as a result of its increased slot portfolio.

Following its phase 1 investigation,\(^19\) the Commission found that Ryanair’s increased slot portfolio is unlikely to have a negative effect on customers. Moreover, in the overlap airports and routes, Ryanair will continue to face strong competition from other carriers. In a relatively rare move, the Commission granted Ryanair a derogation from the normal standstill obligation and allowed it to sell seats on LaudaMotion flights during the merger investigation.

While Ryanair welcomed the Commission’s decision to clear the transaction, it subsequently released a statement claiming that Lufthansa had taken various steps to destabilize LaudaMotion. These allegations include, for example, that Lufthansa has failed to deliver two aircraft to LaudaMotion as required by the Commission’s clearance decision in the Air Berlin acquisition. Ryanair is also alleging that Lufthansa has failed to compensate LaudaMotion for flights operated on behalf of Lufthansa.

Lufthansa is denying the allegations made by Ryanair.

5.2 **Cerberus/WFS\(^{20}\)**

On 9 August 2018, the Commission announced that it had cleared the acquisition of WFS (Worldwide Flight Services) Global Handling by Promontoria Holding under the simplified procedure. WFS is active in the provision of air cargo handling services and ground technical assistance whereas Promontoria Holding is part of the Cerberus Group (an investment fund).

The Commission’s investigation revealed that the two companies are not active in any of the same markets nor in any related or complementary markets.

\(^{19}\) See 43(6) AILA, at 630.

\(^{20}\) M.9018 – Cerberus Group / WFS Global Holding.
### 5.3 Boeing/Safran – Joint Venture

On 28 September 2018, the Commission approved a joint venture between Boeing and Safran. The proposed joint venture will be active in the design, manufacture and supply of auxiliary power units for use on commercial aircraft, providing electrical power to aircraft while their main engines are shut down, and pneumatic pressure for air conditioning and to restart the main engines. The parties originally notified the transaction to the Commission on 5 June 2018, but later withdrew it before re-notifying on 23 August 2018.

The Commission noted that the activities of the joint venture and Safran only overlapped to a limited extent, with the joint venture predominantly manufacturing auxiliary power units for large commercial aircraft whereas Safran’s manufacturing mainly focuses on military helicopters and aircraft. In relation to Boeing, the Commission noted Boeing’s strong position in the market for the manufacturing of large commercial aircraft but found that it was unlikely that competing auxiliary power units producers would be excluded from the market. It also noted that the transaction would lead to the creation of a new entrant on the market, to the benefit of consumers.

### 5.4 Boeing/KLX

On 31 October 2018, the Commission published its decision to approve Boeing’s acquisition of aircraft-parts distributor KLX Inc. for USD 4.25 billion. Both parties are active across the EEA and globally, KLX as a distributor of parts and chemicals for the aerospace industry (e.g. aerospace fasteners) whereas Boeing is active in the space, aircraft and defence industries and supplies aftermarket services and security systems to the aerospace market.

The parties notified the transaction on a full Form CO, meaning that the Commission carried out a full investigation into the possible effects on competition caused by the merger. In clearing the merger, the Commission noted that the parties’ activities are primarily complementary and that they would continue to be constrained by a number of competing actors.

### 5.5 Adient/Boeing – Joint Venture

On 8 October 2018, the Commission announced its approval of the proposed joint venture between Adient US LLC, Adient Aerospace LLC (together, ‘Adient’) and Boeing. The joint venture will be implemented by way of a share purchase in a new company called Adient Aerospace. The new company will design, develop...

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21 M.8858 – Boeing / Safran / JV (Auxiliary Power Units).
22 M.8985 – Boeing / KLX.
23 M.8960 – Adient / Boeing / JV (AIRCRAFT SEATS).
and manufacture seats for new commercial aircraft and as retrofit configurations for aircraft produced by Boeing and other manufacturers.

The transaction, which was notified on a full Form CO, was approved by the Commission following an in-depth assessment. In particular, the Commission noted that:

– Boeing is not active in the manufacturing of aircraft seats and only resells seats on a small number of its aircraft and Adient is not active in the production of aircraft seating. The overlap between the parties is therefore limited; and

– The transaction is unlikely to result in competing aircraft seat suppliers being excluded from the market, despite Boeing’s strong position in the manufacturing of large commercial aircraft. In particular, the transaction would lead to the creation of a new entrant on the market (which is currently characterized by the presence of three large actors).

5.6 Orix Aviation Systems / Bohai Capital Holdings / Avolon

On 19 October 2018, the Commission announced its approval of ORIX and Bohai’s proposed acquisition of joint control over Avolon. ORIX and Bohai signed a share purchase agreement on 8 August 2018, pursuant to which ORIX will acquire 30% of the shares in Avolon and Bohai retain the remaining 70%.

ORIX is an aircraft and asset manager, based in Ireland, and is owned by Japanese financial services group The ORIX Corporation. Bohai is a subsidiary of the HNA Group, a Chinese conglomerate with divisions in aviation, holdings, capital, tourism and logistics. Avolon is an indirect subsidiary of Bohai, and is active in provision of aircraft leasing services.

The deal was notified to the Commission on 24 September 2018, which assessed it under the simplified merger control review procedure before clearing it. The Commission held that the transaction did not raise competition concerns, in light of the parties’ limited share of the market in which Avolon operates.

5.7 The Carlyle Group / Apollo Aviation Holdings Limited

On 11 December 2018, the Commission announced its decision to approve the acquisition by the Carlyle Group of Apollo Aviation.

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24 M.9103 – Orix Aviation Systems / Bohai / Avolon.
25 M.9120 – Carlyle Group / Apollo Aviation Holdings Limited.
Apollo Aviation is a US-based aviation investment manager, focussed primarily on managing funds active in the provision of commercial aircraft operating lease services. Carlyle is a US-based global asset manager. The Commission investigated the transaction under the simplified merger review procedure, and concluded that the acquisition did not raise any competition concerns in light of the limited horizontal overlaps between the companies.

5.8 Gardner Aerospace Holdings/Northern Aerospace

The CMA has cleared the proposed acquisition of Northern Aerospace Ltd by Gardner Aerospace Holdings Ltd. On 17 June 2018 the Secretary of State for Business, Energy and Industrial Strategy issued a public interest intervention notice in relation to the proposed transaction, on the ground that it could have national security implications. Following the public interest notice, the CMA carried out an investigation and prepared a report to the Secretary of State containing: (1) its assessment of whether the transaction would give rise to a relevant merger situation; (2) its assessment of whether there are any competition issues relevant to the decision (these findings are binding on the Secretary of State); and (3) a summary of the representations received by the CMA in relation to the public interest consideration (national security).

The CMA delivered its report to the Secretary of State on 13 July 2018 and found that:

- **Jurisdiction**: the parties would cease to be distinct following the merger. Further, the CMA noted that Northern Aerospace develops/produces goods specified in relevant export control legislation and holds information which can be used in the development or production of restricted goods. As such, and given that Northern Aerospace’s UK turnover exceeded GBP 1m, the transaction satisfied the new national security jurisdictional thresholds (as further discussed below).

- **Competition assessment**: the CMA noted that the parties overlap in the supply of wing spars and fuselage frames. Given the high degree of specialization involved, the CMA considered each type of aircraft part as a separate market. It concluded that the competitive constraint between the parties, which would be lost as a result of the merger, was not material and that the merged entity would continue to face sufficient competitive constraints from competitors.

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26 See CMA case page: *Gardner Aerospace Holdings / Northern Aerospace*.
27 See 43(6) AILA, at 630.
National security representations: the CMA only received representations from the Ministry of Defence (’MoD’) on potential national security issues. In particular, the MoD expressed concerns with whether Shaanxi Ligeance Mineral Resources Co. Limited (’Shaanxi’), which acquired Gardner Aerospace in 2017, would obtain access to restricted information of Northern Aerospace as a result of the merger. However, the MoD received assurances from Gardner Aerospace and Shaanxi that undertakings which had been given as part of Shaanxi’s acquisition of Gardner Aerospace to address concerns about information flows would extend to Northern Aerospace if acquired by Gardner Aerospace.

Following the report, the Secretary of State gave notice to the CMA to deal with the merger as normal under the Enterprise Act 2002, finding that no public interest considerations were relevant to the merger situation. The CMA announced on 20 July 2018 that it had cleared the transaction, on the same grounds as those set out in the CMA’s report to the Secretary of State.

This marks the first case to be assessed under the new jurisdictional thresholds for mergers with potential national security implications. The new thresholds will apply to mergers where the target: (1) is active in the development or production of military or dual-use items, (2) owns, supplies or creates IP rights relating to certain multi-function computing hardware or (3) researches, develops, designs or manufactures goods/services in relation to quantum technologies. Under the new thresholds, the CMA and/or Secretary of State can intervene if the target’s UK turnover exceeds GBP 1m (rather than the GBP 70m threshold which applies to mergers outside of the specified sectors) or where the target has a 25% share of supply of goods or services on a market in the UK (without any requirement that the transaction also leads to an incremental increase in that share of supply).

5.9 CityJet/Aer Lingus – wet lease agreement

On 21 December 2018, the CMA cleared a wet lease arrangement between Aer Lingus and CityJet, following a phase 1 investigation.

Wet leases, which involve the supply of aircraft, crew and maintenance by one airline to another, are typically used for a short-term aircraft requirement (e.g. a summer season). Under the investigated arrangement, CityJet had agreed to provide Aer Lingus with two fully-staffed Avro RJ85 aircrafts to operate on the Dublin and London City route. However, and atypically for wet leases, the agreement did not specify an end point. In addition, Aer Lingus acquired landing

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28 See CMA Case page: CityJet / Aer Lingus.
slots from CityJet at both London City and Dublin airports under the agreement. CityJet also redirected potential new customers to the Aer Lingus homepage following the agreement, and customers which had already booked flights with CityJet on the route were transferred to Aer Lingus. This raised the prospect that a relevant merger situation would be created by the arrangement, prompting the CMA’s review.

In an Initial Enforcement Order made on 4 October 2018, the CMA stated that it had reasonable grounds to believe that the deal could result in certain assets ceasing to be distinct, but did not prohibit the parties from adhering to the agreement (which started to operate from 28 October 2018) while the CMA reviewed it.

Following its phase 1 review, the CMA concluded that although CityJet had not marketed its business to other airlines, no other airline would have been interested in taking the business. Further, CityJet itself had already taken the decision to stop providing services on the route prior to the agreement. The CMA concluded that, in the absence of the agreement, CityJet would have instead transferred the assets and used them in the operation of other routes. The arrangement with Aer Lingus therefore did not give rise to a substantial lessening of competition on the London City to Dublin route.

In January 2017, the Bundeskartellamt investigated a similar six-year wet lease arrangement (involving thirty-eight aircraft) between Lufthansa and Air Berlin but ultimately left open whether it constituted a merger under German competition law.29

6 JUDGMENTS AWAITED

6.1 AMERICAN AIRLINES CHALLENGES DELTA’S RIGHTS TO AIRPORT SLOTS30

American Airlines has lodged an appeal against a Commission decision dated 30 April 201831 which allowed Delta Air Lines to acquire so-called ‘grandfathering rights’ over certain slots made available by American Airlines on the London-Philadelphia route. The appeal stems from an earlier Commission decision from 2013, where the Commission conditionally cleared the merger between US Airways and AMR Corporation (the holding company of American Airlines). During its investigation, the Commission identified concerns on the London-Philadelphia route and, in particular, that the merged entity would have a monopoly in the provision of non-stop services on the route. In order to obtain

29 See 42(6) AILA, at 616.
clearance, the parties therefore offered a number of remedies, including an obligation to release slot pairs at Heathrow and Philadelphia airports. The parties also committed to allow new entrants the possibility of obtaining grandfathering rights over the released slots, where the entrant has made appropriate use of the slots.

American Airlines is now appealing the Commission’s decision finding that Delta was entitled to acquire grandfathering rights over the slots under the commitments. In its appeal, details of which were published on 10 September 2018, American Airlines argues that:

- The Commission made an error of law by applying the wrong legal standard for the acquisition of rights under the agreement. In particular, American Airlines claims that the Commission incorrectly focused on whether there was an ‘absence of misuse’, rather than whether the use made by Delta was in line with the bid it submitted in order to receive the slots; and
- The Commission was required to determine whether the departure by Delta from the use specified in its bid was acceptable, taking into account relevant economic evidence. The failure to undertake this assessment meant that the Commission’s view that Delta complied with the ‘appropriate use’ requirement was vitiated by a manifest error of assessment.

6.2 Ryanair and TUI Fly Lodge Appeal Against State Aid Recovery Order in Relation to Klagenfurt Airport

In 2016, the Commission found that various services and marketing agreements between TUI fly, Ryanair, Hapag-Lloyd Express (which has since merged with TUI fly) and Klagenfurt airport in Austria amounted to illegal State aid and that grants from the Austrian government gave the airlines an unfair advantage over competitors. In particular, the Commission found that no profit-driven operator would have entered into similar agreements.

On 18 July 2018, TUI fly and Ryanair lodged separate appeals before the General Court. The airlines are arguing, inter alia, that the Commission:

- failed to allow the applicants access to the investigation file, in contravention of their rights of defence and the principles of good administration;
- erroneously imputed the conclusion of the agreements to actions of the state;

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32 TuiFly: T-447/18; Ryanair: T-448/18.
33 See EC SA.24221 and 32(2) AILA, at 238.
failed to adequately assess the facts justifying the aid, in particular by not
taking into account the agreements’ considerable positive effects on the
regional economy;
erroneously applied a stricter standard than that set out in the 2014
aviation guidelines, even though the relevant facts predate the guidelines;
and
committed a manifest error of assessment and law in determining the
quantum of the aid by, for example, implying to the Member State that
the adjustment of the quantum of recoverable aid is optional.

On 3 December, details of a related appeal by TUI fly were published, in which
the airline is appealing the Commission’s decision to deny it access to the case file
in the Klagenfurt State aid case. TUI fly is arguing that, without access to the
investigation documents, it cannot properly defend itself.

6.3 LUFTHANSA/AIR BERLIN – LOT APPEAL

On 2 July 2018, details were published of an appeal lodged by Polskie Linie
Lotnicze (‘LOT’) against a decision by the Commission to conditionally approve
Lufthansa’s acquisition of certain assets belonging to the now insolvent Air Berlin.
The Commission approved the acquisition on 21 December 2017, following
Lufthansa’s decision to remove leisure air carrier NIKI from the scope of the
transaction.

In its appeal against the Commission’s clearance decision, LOT is arguing that
the Commission:

– Failed to fully assess the negative effects of the concentration on compe-
tition, including an assessment of the effects using an origin and destina-
tion model. In particular, LOT is claiming that an assessment using an
origin and destination model would have revealed a series of competition
distortions caused by the transaction;
– Committed a gross and manifest error in its assessment of the effect of the
concentration on the provision of passenger air transport services at the
airports concerned. Such an analysis, LOT argues, would have revealed
that the transaction will lead to Lufthansa acquiring a dominant position
at certain airports;

34 Case T-619/18 - Tuifly v. Commission.
Commission clearance decision: M.8633.
– Infringed the principles of neutrality, transparency and non-discrimination in relation to the allocation of slots at airports;
– Infringed the guidelines on the assessment of horizontal mergers by failing to assess whether the alleged efficiency gains would counteract the negative effects on competitors caused by the transaction; and
– Failed to give an adequate statement of reasons for its decision.

6.4 ASL launches claim for damages against the Commission

On 30 January 2013, the Commission blocked the proposed acquisition of TNT Express by UPS on the grounds that competition on the intra-EEA express small packages delivery services market would be reduced in a large number of Member States. However, following an appeal brought by UPS, the General Court annulled the Commission’s prohibition decision pointing to, inter alia, deficiencies in the Commission’s econometric analysis (in particular, by failing to communicate changes in its analysis to UPS prior to adopting its decision). This, in turn, undermined UPS’ right of defence.

On 5 November 2018, Irish airline ASL launched a claim for damages with the General Court arguing that the Commission’s 2013 decision to block the merger has caused it to incur losses of EUR 263m plus interest. In particular, in 2012 ASL agreed to acquire stakes in TNT Airways and Pan Air Lineas Aereas from TNT Express in a deal which was contingent on the UPS/TNT merger. ASL has raised several pleas in law to support its claim that the Commission’s prohibition decision breached ASL’s entitlement to sound administration.

The Commission has appealed the General Court’s annulment decision, which is currently pending before the European Court of Justice. In July 2018, the Advocate-General gave an opinion that the appeal should be dismissed.

7 JUDGMENTS HANDED DOWN

7.1 FlyLAL and Air Baltic/Riga Airport jurisdictional dispute

On 5 July 2018, the European Court of Justice issued its judgment on the appropriate forum for the long-running dispute between flyLAL (the former national airline of Lithuania), on the one hand, and Riga Airport and Air Baltic, on the other.

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36 T-540/18 – ASL Aviation Holdings And ASL Airlines (Ireland) v. Commission.
37 C-27/17 – Flylal-Lithuanian Airlines.
The default rule under the Brussels I Regulation (Regulation 44/2001) is that a defendant should be sued in the courts of the Member State where the defendant is domiciled. However, as an exception to this rule a defendant in tortious matters may be sued in the place where ‘the harmful event occurred’ (Article 5(3)). Further, where a dispute relates to a branch, agency or establishment of a defendant, the applicant can elect to bring the action in the Member State where the relevant branch, agency or establishment is located (Article 5(5)).

The dispute stems from a 2006 finding by the Latvian Competition Council that Riga Airport had abused a dominant position by offering substantial rebates to Air Baltic. flyLAL subsequently brought an action against both Riga Airport and Air Baltic before a regional court in Vilnius, arguing that predatory pricing practice of Air Baltic had forced it out of business. It further claimed that the predatory pricing formed part of an anti-competitive arrangement between Air Baltic and Riga Airport pursuant to which Air Baltic was granted significant rebates by Riga Airport and used the savings generated to finance the predatory prices which eventually caused flyLAL to withdraw from the market.

The Latvian court of First Instance initially awarded flyLAL EUR 16.1m in damages. This judgment was subsequently appealed to the Latvian Court of Appeal which referred several jurisdictional questions to the European Court of Justice under Article 267 of the Treaty on the Functioning of the European Union (“TFEU”).

In its judgment, the European Court of Justice has now clarified that:

- Loss of earnings (such as those claimed by flyLAL) is capable of justifying the application of Article 5(3) and the ‘place where the harmful event’ occurred can include the location where the loss of profits was suffered. In so doing, the Court drew a distinction between initial damage directly resulting from an event and subsequent adverse consequences of an event giving rise to losses. The Court held that only the location of damage which can be classified as ‘initial’, rather than the subsequent adverse consequences, can be used to engage Article 5(3). As mentioned above, the Court found that loss of income can be seen as a form of initial damage for the purposes of Article 5(3).

- The determination of where the harmful event has occurred will differ depending on whether the contested conduct relates to anti-competitive arrangements under Article 101 TFEU or an abuse of dominance under Article 102 TFEU. In particular:

  - **Article 101**: where an anti-competitive arrangement under Article 101 TFEU constitutes the causal event giving rise to the damages, Article 5(3)
can be used to bring an action in the courts of the Member States where the agreement was definitively concluded.

– **Article 102**: in abuse of dominance cases, the event giving rise to damages will be the implementation of the abuse (i.e. the acts by the dominant company by which it puts the abuse into practice). The location of such implementation is therefore the relevant place for the purpose of Article 5(3).

– In tortious claims, whether an action can be brought in the location of a branch of a defendant under Article 5(5) will depend on whether the branch has actually participated in the actions giving rise to the tort. National courts must examine the role of the branch in the commission of the anti-competitive conduct and whether any participation is sufficiently significant to justify the application of Article 5(5).

The Court of Justice’s judgment is consistent with the Opinion of Advocate General Bobek from February 2018.\(^\text{38}\)

### 7.2 Lufthansa’s Request to Lift Conditions from 2005 Rejected\(^\text{19}\)

On 25 July 2018, the Commission published its earlier decision to reject a request from Lufthansa to lift certain conditions placed on the airline following its 2005 acquisition of Swiss International Air Lines. The request from Lufthansa, and the Commission’s refusal to grant the waiver, related to commitments on the Zurich–Stockholm and Zurich–Warsaw routes. In particular, the Commission found that there were insufficient grounds to grant a waiver as there had been no new entry, no exceptional circumstances nor any other radical changes since the original decision.

In 2016, Lufthansa lodged an appeal against the Commission’s refusal to grant a partial waiver with the General Court.\(^\text{40}\) On 16 May 2018, the General Court partially annulled the Commission’s decision to reject the request (i.e. the newly published decision). In particular, while the General Court upheld the Commission’s decision in relation to the Zurich–Warsaw route, it annulled it in relation to the Zurich–Stockholm route:

– while the Court found that the Commission failed to properly assess certain changes in relation to the Zurich–Warsaw route, the changes were not sufficient to affect the validity of the contested decision; and

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\(^{38}\) See 43(6), AILA at 638.


\(^{40}\) See 42(2) AILA, at 234.
in relation to the Zurich-Stockholm route, the Commission had committed a manifest error of assessment by failing to adequately assess the impact of, for example, the termination of a joint venture agreement between Lufthansa and SAS and of Lufthansa’s offer to terminate a Bilateral Alliance Agreement it entered into with SAS in 1995.41

7.3 MILAN AIRPORTS STATE AID APPEAL REJECTED42

On 14 December 2018, the General Court rejected an appeal by the Municipality of Milan against a 2012 Commission decision, which ordered the recovery of EUR 360m (plus interest) of State aid within four months. In its decision, the Commission held that aid granted by SEA, the state-owned operator of Malpensa and Linea airports in Milan, to its subsidiary, SEA Handling, amounted to illegal State aid. Similar appeals were also brought by Italy (which withdrew its appeal before the hearing) and SEA Handling (since defunct).

In its appeal to the General Court, the Municipality of Milan argued that the Commission’s decision incorrectly attributed the contested measures to Milan (and therefore to the Italian State). Without evidence to support this attribution, the appellant argued that the measures cannot be categorized as State aid.

In rejecting this argument, the General Court noted that the shares held in SEA were held almost exclusively directly by public authorities, which had exercised control over SEA. While it noted that mere control over a public undertaking did not in itself automatically render the measures imputable to the State, the Court accepted that imputation could be proved through a set of indicators (e.g. the intensity of public supervision, the structure of the public administration and the content/conditions of the measures). In particular, the Commission did not have to demonstrate that the measures were in fact adopted on the specific instruction of public authorities. It therefore held that the support given by SEA constituted State resources. The Court also held that the measures under review should be regarded as a single intervention, and found that the Commission had correctly assessed the measures holistically and found them to form part of an overall strategy.

Milan further argued that the Commission erred in finding that the private investor test had not been satisfied. However, the Court noted that it was impermissible to rely on economic evaluations after the advantage had been conferred, and retrospective findings that the investment was actually profitable as

41 See 43(6) AILA, at 636.
42 Italy (T-125/13); SEA Handling (T-152/13); and the Municipality of Milan (SEA’s major shareholder) (T-167/13).
proof that the private investor test was satisfied. Rather, the Commission must confine its assessment to the information which was available or reasonably foreseeable at the time the measures were adopted and which would be liable to have a significant influence on the decision-making process of a reasonably prudent and diligent private actor. In upholding the Commission’s initial assessment on this point, the Court noted, inter alia, that the Italian authorities failed to submit estimates of SEA Handling’s capital requirements or any potential profits which a private investor could reasonably expect.

7.4 Ryanair’s application to annul 2014 State aid decision – Angoulême

On 13 December 2018, the General Court rejected an appeal by Ryanair and its subsidiary, AMS, against a 2014 Commission decision. In July 2014, the Commission found that certain marketing agreements and rebates from 2008 provided an undue economic advantage to Ryanair and AMS, and that no private operator could have been expected to enter into similar agreements. Ryanair appealed the decision in March 2015 and argued, inter alia, that the Commission:

– infringed the principle of good administration by refusing Ryanair/AMS access to the administrative file and by not informing them of the facts and considerations which the Commission intended to base its decision on;

– erroneously imputed the measures in question to the French Republic; and

– failed to establish that an advantage was present, by misapplying the market economy operator test (under which, broadly, a transaction carried out by a public authority will not constitute illegal State aid if it is carried out in line with normal market conditions).

The General Court rejected Ryanair’s first argument on the basis that Ryanair and AMS themselves, unlike the Member State granting the aid, do not have rights of defence under the State aid review procedure nor any right to consult the Commission’s file. The General Court held that Ryanair and AMS’ role in the proceedings were more akin to information sources for the Commission.

The second argument was rejected by the General Court, which held that the Commission’s reasoning was sufficient to support a finding that the decision taken by the operator of the airport was imputable to the State. In particular, the General Court noted the composition of the operator (including local authorities and
Chamber of Commerce and Industry) and held that the members had exercised actual control over the operator when adopting the contested measures.

Ryanair and AMS’ final argument was also rejected by the General Court, which held, inter alia, that there was no case law support for the appellants’ claim that the Commission was required to carry out a comparative analysis of measures and further found that the Commission had relied on sufficient and reliable data.

7.5 Ryanair’s Application to Annul 2014 State Aid Decision – Altenburg Nobitz

On 13 December 2018, the General Court rejected an appeal by Ryanair and AMS against a 2014 Commission decision. In October 2014, the Commission concluded that Ryanair and its subsidiary AMS received illegal State aid amounting to approximately EUR 300,000 in the form of various marketing and airport services agreements. The Commission held that these agreements granted Ryanair and AMS an undue economic advantage and would not have been entered into on the same conditions by a private operator.

Ryanair and AMS’ first ground of appeal related to the principle of good administration, and was dismissed on similar grounds as in the Angouleme case above (see paragraph 7.4). In addition, Ryanair argued that the Commission:

- failed to establish that any advantage was present; and
- failed to establish selectivity by, amongst other things, conflating the assessment of whether an advantage was present with the separate assessment of whether said advantage was selective.

In relation to the first plea, the General Court noted that the Commission is not required to have regard to a comparative analysis in order to establish that an advantage was present as a result of the aid (as it also held in the Angoulême-case, above). The General Court found that the Commission used appropriate assumptions in both the calculation of profitability and the effect of the agreements.

The second plea was similarly dismissed, on the basis that, inter alia, other airlines which operated on the same route at the relevant time did not benefit from similar marketing agreements. In relation to AMS, the Court held that the fact that other airlines could not offer similar marketing services only served to confirm the individual nature of the agreements.

44 T-165/16.
45 See 41(6) AILA, at 537.
46 EC SA 26500.
47 EC SA 26500. See 40(2) AILA, at 192.
7.6 Ryanair’s application to annul 2014 State aid decision – Nîmes

On 13 December 2018, the General Court dismissed an appeal by Ryanair against a State aid decision of July 2014, whereby the Commission ordered Ryanair/AMS to repay EUR 6.4m of aid they had received from Nîmes Airport in France.

Ryanair subsequently appealed the decision, raising various arguments. The General Court rejected arguments based on the principles of good administration, incorrect imputation of the measure to the State and the use of an incorrect market economy test on similar grounds as those noted in section 7.4 above. The General Court also rejected an argument that the Commission failed to establish the existence of a selective advantage on similar grounds as in the Nobitz-case (see section 7.5). In relation to imputability, the General Court noted that the relevant body was managed by a board consisting solely of local authority representatives.

Ryanair also argued that the Commission made a manifest error of assessment in finding that the resources of the managers of Nîmes airport, Veolia Transport Aéroport de Nîmeso (VTAN), were State resources. Amongst other things, the General Court noted that VTAN had received flat-rate contributions from a public body, which it then used to fund the agreements with Ryanair. In particular, the Court held that the flat-rate contributions enabled VTAN to enter into the agreements without having to bear the costs of the advantages which the agreements conferred on Ryanair/AMS.

7.7 Ryanair’s and Transavia’s application to annul 2014 State aid decision – Pau-Pyrénées

On 13 December 2018, the General Court dismissed an appeal brought by Ryanair and Transavia against a 2014 decision by the Commission to order the recovery of State aid granted to the airlines at Pau-Pyrénées Airport in France, amounting to around EUR 2.4m for Ryanair and EUR 400,000 for Transavia.

The parties raised a number of pleas in support of their appeal, most of which were rejected by the General Court on similar grounds as those discussed in sections 7.4 to 7.6, above. The General Court also made a number of additional findings, including:

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48 T-53/16.
49 T-165/15 and T-591/15.
50 See 40(2) AILA, at 198.
Where aid strengthens the position of an undertaking vis-à-vis other undertakings competing in the EU, the latter must be regarded as being influenced by the aid; and

The Commission is not required to specify the exact amount of aid which must be reclaimed by the Member State. However, the decision must enable the recipient to determine the amount without undue difficulty. Where the Commission does decide to order a specific amount recovered, it is incumbent on the Commission to determine the value of the aid received by the recipient.

7.8 Ryanair’s application to annul 2014 state aid decision – Zweibrücken

On 13 December 2018, the General Court granted an appeal brought by Ryanair requesting the annulment of a Commission’s decision which held that Ryanair and AMS received State aid at Zweibrücken airport. As part of its initial assessment, the Commission found that Ryanair had paid less for its use of the airport than the expected additional costs associated with its presence at the airport.

Ryanair’s appeal was based on two grounds:

– that the Commission failed to establish selectivity in the measure; and

– the Commission made use of incomplete and inappropriate data.

In relation to the first plea, the General Court found that the Commission had only established selectivity in relation to one element (the granting of discounts on airport charges) of the economic advantage identified by the Commission. Further, it was not clear to the General Court that the discounts received by Ryanair differed from those generally applicable to all users of the airport and the Commission had therefore failed to demonstrate why the conditions for Ryanair were more favourable than those applying to other users.

In relation to the second plea, the General Court noted that the only relevant evidence is the information available (or reasonably foreseeable) at the time the decision in question was taken. In particular, it held that the Commission failed to note the significant discrepancies as regards passenger number estimates in the data provided by the German authorities and by Ryanair. The Commission was also found to have failed to properly establish the amount of the certain additional costs.

51 T-77/16.
52 See 40(2) AILA, at 201.
The General Court therefore annulled the Commission’s decision.

8 STATE AID: CASES OPENED/ON-GOING

8.1 INVESTIGATION OPENED INTO RYANAIR FUNDING AT MONTPELLIER AIRPORT

On 4 July 2018, following receipt of a complaint, the Commission opened an in-depth investigation into the marketing agreements concluded between Ryanair and the Association for the Promotion of Touristic and Economic Flows (‘APFTE’). In particular, the Commission will investigate several agreements between APFTE and Ryanair, pursuant to which Ryanair has received significant payments in exchange for promoting Montpellier (a regional French airport serving 1.9m passengers in 2017) and the surrounding area as a tourist destination. The Commission has preliminarily held that the financing of the agreements is attributable to the State, noting that APFTE is funded almost exclusively by regional and local public entities.

The Commission’s investigation will investigate concerns that Ryanair is receiving an unfair advantage over its competitors as a result of these payments, and examine whether the conditions offered to the airline are so favourable that no private operator would have entered into them.

Opening of the formal investigation will also provide an opportunity for third parties to submit comments to the Commission.

8.2 INVESTIGATION OPENED INTO RYANAIR FUNDING AT FRANKFURT-HAHN AIRPORT

On 26 October 2018, the Commission confirmed that it has opened an in-depth State aid investigation into certain measures in favour of Ryanair at Frankfurt-Hahn airport. The investigation follows an appeal lodged by Lufthansa in March 2018 against the Commission’s decision to clear certain aid at Frankfurt-Hahn. The airport, which handles substantial freight traffic and around 2.5m passengers per year, is operated by Flughafengesellschaft Frankfurt-Hahn GmbH (‘FFHG’) which, between the years 2009 and 2017, was controlled by the State of Rhineland-Palatinate (but is now owned by the HNA Group).

The Commission will now investigate certain measures in favour of both Ryanair and FFHG. In relation to Ryanair, the Commission suspects that the airline received an undue economic advantage as compared to its competitors by

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53 EC SA.47867.
54 EC SA.44346.
55 See 43(6) AILA, at 635.
virtue of: (1) certain marketing agreements between Ryanair and Rhineland-Palatinate concluded before the State became a controlling shareholder of FFHG; and (2) a variety of other agreements between the airline and FFHG at a time when the latter was controlled by Rhineland-Palatinate (e.g. funding for pilot and crew schools and a maintenance hall).

In relation to the operator, FFHG, the Commission is investigating whether certain measures adopted by Rhineland-Palatinate in favour of FFHG relating to sales of land (including a guarantee) are compliant with EU State aid rules.

9 STATE AID: CASES CONCLUDED

9.1 Ryanair/Lübeck airport\textsuperscript{56}

On 21 September 2018, the Commission published the full text of its 2018 decision\textsuperscript{57} in which it cleared two agreements between Ryanair and the operator of Lübeck regional airport as being in line with EU State aid rules. The Commission found that both agreements could be expected to provide an incremental positive return for the operator, such that entering into the agreements could be justified under the market economy operator principle.

9.2 Greece/Athens International Airport\textsuperscript{58}

On 12 December 2018, the Commission announced its decision to clear a twenty year extension of a State aid concession granted to Athens International Airport S.A. (‘AIA’), subject to the operator paying an increased fee. The concession was originally granted as part of the Greek Government’s privatization programme.

The initial value of the extension to the concession (which the Commission found to be EUR 484m) was held by the Commission to be based on parameters which were out of line with market conditions and which would not have been acceptable to a private investor. However, following cooperation by Greece, the revised extension increased the fee payable by AIA to EUR 1,115m, which the Commission accepted was an adequate market fee to continue operating the airport and therefore did not involve State aid. The new concession will remain in place until 2046.

\textsuperscript{56} EC SA.21877.

\textsuperscript{57} See 43\textsuperscript{(6)} AILA, at 642.

\textsuperscript{58} EC SA. 48509.