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# CONCURRENCES LAW & ECONOMICS WEBINARS

## Competition in the Air transport sector after Covid-19

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Webinar organised in partnership with Compass Lexecon and EU Travel Tech, as part of Concurrences Law & Economics Webinar series.

### Geert Goeteyn

Geert Goeteyn introduced the webinar by questioning the impact of Covid-19 on the air transport sector. Enforcers, lawyers, economists, and business operatives have faced an unprecedented crisis over the past few months. It may be the moment to take a step back and wonder what we have seen over the last months. In particular, it is necessary to reflect on what can be expected for the coming months and years with regards to the air transport sector. Indeed, the Covid crisis has renewed sector-specific issues that already existed before the crisis.

Firstly, at the upstream level, we witnessed a rising concentration among air carriers. At the downstream level, the distribution of airline tickets is changing through the rise of innovative channels. This issue is all the more important since tickets sales are the pathway to recovery for many market players. The Covid crisis has disrupted the sector at all levels and questions its future. Therefore, it is first necessary to have a clear understanding of the current economic situation for air carriers. Second, an overview of the ongoing challenges for retailers is relevant to assess the impact of

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**GEERT GOETEYN**



of the crisis on the downstream market. Third, the perspective of enforcers is crucial as the European Commission and National Competition Authorities (“NCA”) need to update their rulebook to a new and fast-moving crisis.

## Urs Haegler

Urs Haegler first gave an overview of the sector since the crisis started. The magnitude of the Covid crisis is unprecedented and very different from past crises, even for airline standards. Even major negative events such as 9/11, SARS pandemic or the 2008 financial crisis are not comparable to the Covid situation. It is widely accepted that the aviation sector is the most hardly hit as it lost 3 billion passengers compared to 2019. International passenger traffic is down by 65% while domestic flights have dropped by 40%. Naturally, airports have been similarly affected, just like aircraft manufacturers.

It seems that the road to recovery will be very long. De-

demand will be slow and hard to recover until at least 2024. Several factors may explain this. First, the economic turmoil will harm consumers spending. Secondly, the Covid crisis has made individuals and businesses reflect on their travel habits. There may well be a permanent shift in the attitude towards business and leisure trips. Videoconferences are now very common for business meetings, while, increasingly, leisure travellers may have become more aware and mindful of the environmental consequences of their travels. Also, the reduction of business trips may negatively affect the scope of cross-subsidisation between business and leisure passengers.

The policy response to the crisis, particularly in the form of State aid, has been very swift both in the EU and worldwide. This was necessary for the view of the interdependence between the aviation sector and the global economy. However, such a massive injection of public funds may raise questions regarding the persistence of a level playing field. The Commission has already authorised more than 33 billion euros of State aids to airlines under the Temporary Framework. However, there have been discrepancies between Member States in both absolute and relative terms of State aid granted, i.e., even when measured against the size of the recipients. Lufthansa and Air France-KLM, for instance, have enjoyed significant support, while many other air carriers have received less. This may distort competition in the internal market.

Moreover, there have been differences in the conditions attached to the aid. Some measures were granted subject to competition conditions while others are conditional on environmental commitments. It is not clear that these are sufficient to prevent distortion of competition, and they may even introduce further distortions.

Finally, the Covid crisis constitutes a challenge to traditional enforcement in merger and antitrust proceedings. Determining the correct counterfactual is now extremely difficult. The CMA investigation of the Atlantic Joint Business Agreement illustrates this issue. The CMA highlighted the difficulty to assess the effects of proposed commitments given the current circumstances. It decided to suspend the investigation and to adopt interim measures until 2024 instead of making a final decision now.

There has been a fair amount of consolidation in the sector before the crisis. This trend will likely go on as a result of the Covid bankruptcies. Against that background, competition authorities will have to decide how to take into account the impact of State aid on the parties or their rivals. Likewise, the crisis may require a modified stance towards the failing firm defence, as the air transport market of the future may not be able to “support” the same number of carriers as in the past.

## Guillaume Teissonnière

Guillaume Teissonnière explained that Travel Tech is a European association that regroups travel technology companies that operate in Europe (comparison websites, corporate airline agencies, online retailing platforms etc.).

Before the Covid-19 crisis, Europe had a very competitive market with low fares, driven by traffic growth. Optimistic figures forecasted sector expansion, and some were even afraid of missing pilots. There was also a consolidation trend. Finally, all the industry was focusing and investing in digital as it has usually been a very innovative sector.

**“IT SEEMS THAT THE ROAD TO RECOVERY WILL BE VERY LONG. DEMAND WILL BE SLOW AND HARD TO RECOVER UNTIL AT LEAST 2024.”**

**URS HAEGLER**



Following the recent sectorial evolutions, the distribution ecosystem learned from its weaknesses. The multilateral approach is being questioned and it is now necessary to rethink this approach. Basic regulations like passengers' rights have not been implemented properly and actors asked for emergency reform. At the same time, some private mechanisms arose that amount to quasi-regulation. Nowadays, when consumers know they have a right to refund, they simply ask their banks instead of taking legal actions. This very much shows that the private sector can create its regulations. Therefore, public regulators have to monitor these developments carefully.

The rise of sustainability criteria is another important feature to look at. Airlines are being careful about their impact on the environment and Member States have considered it when granting State aids. Asked about a possible regulatory minimum retail price for airline tickets, Mr Teissonnière explained that this could relate to a sustainability concern. However, such a rule should be based on objective economic justification.

**“ALL TRAVEL AGENTS DO MORE THAN MERE AGENCY SERVICES. A NEW MULTILATERAL FRAMEWORK IS REQUIRED BECAUSE TRAVEL AGENTS DISAPPEAR TO THE BENEFIT OF TRAVEL ADVISORS.”**

**GUILLAUME TEISSONNIÈRE**



In terms of recovery, intermediaries need to make sure that connectivity remains available to consumers. The network of secondary airports and regional airlines is being jeopardised, which threatens connectivity on some routes. The uneven allocation of State aids to airlines may reinforce that threat. This could be mitigated with an open international market. At the EU level, Member States shall understand their domestic market as the EU market. This is essential for airlines and airports to success in the recovery process. Indeed, domestic markets will probably recover more swiftly. In comparison, Chinese and American airlines with large domestic markets will be in better shape.

The Covid crisis is also an opportunity for the distribution ecosystem. The agency model built in the 1960s-1970s has changed. Travel agents are not paid by airlines anymore. Although founding IATA principles provide that travel agents should be viewed as acting in the name and on the behalf of the carrier, this is no longer relevant. All travel agents do more than mere agency services. A new multilateral framework is required because travel agents disappear to the benefit of travel advisors.

In that context, fair competition is essential. However, some airlines prevent intermediaries to appear on comparison websites which threatens intra-brand competition. In that respect, the VBER reform is a good opportunity to provide clarification and guidance to market players all along the distribution chain. This would ensure a level playing field in the distribution sector.

Finally, the growing influence of Google may be the ultimate disruption for retailers of airline tickets. There is a significant risk of self-preferencing to the benefit of Google flight comparison services. Against that background, it remains to be seen if the proposed ex-ante regulation of digital platforms will be sufficient.



## Henrik Morch

Henrik Morch acknowledged the consolidation wave in the transportation sector. Although the European market is not comparable to the US industry from that perspective, we saw the emergence of very important carriers and significant low-cost airlines. Given that consolidation trend, competition law enforcers need to assess the kind of remedies to put in place. Releasing slot capacities has already been used and will continue to be a remedy in the future.

In the context of the Covid economic crisis, some have asked for a more relaxed assessment of failing firm defence. Nevertheless, the crisis itself does not lead the Commission to be

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more flexible because we need effective competition. Indeed, the crisis is temporary while mergers have structural effects on the market. This is the reason why the Commission will not be more lenient. It is not enough to say that there

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will be less supply and less demand after the crisis. What is relevant is the structural change in the supply or the demand which shifts the dynamics of the market and the competitive landscape. This will remain a case-by-case analysis.

State aid rules on Covid have been developed very quickly. Essentially, the Commission relies on two pillars. First, the Temporary Framework was developed as an emergency response to guide Member States in their aid to the aviation sector while maintaining a level playing field. The Commission has first looked at short term liquidity measures before focusing on recapitalisation of airlines and airports. Second, the Commission has also implemented Article 107 (2) (b) which ensures compensation for damages that companies have suffered as a result of government decisions on travel restrictions. It is a different tool which requires an assessment of what companies have lost as a result of restrictive measures. It is a backwards-looking exercise while the Temporary Framework is forward-looking.

Despite these two instruments, it is possible to admit that there are imbalances in the aid granted. First, Member States have helped primarily airlines in comparison to other actors of the industry such as airports. Second, flagship carriers have received more support than low-cost carriers. The Temporary Framework has reduced these imbalances but has failed to prevent them completely. However, State aid rules are selective and generate imbalances by their nature. Therefore, the Commission and Member States will need to draw the lessons from the crisis and adopt future broader instruments. Under State aid rules, the Commission cannot impose on Member State to support a given company or industry. National government remain completely autonomous when they decide how to spend taxpayers' money.

Another problematic aspect regarding imbalances may be subsidies granted by third countries to foreign companies. This factor is not taken into account under EU State aid rules because they are not appropriate for that purpose. However, the Commission has launched an initiative to focus on foreign subsidies.

In any case, the Commission may still ensure that State aids do not distort competition. In the *Lufthansa* decision (Case SA.57153), the Commission approved a EUR 6 billion recapitalisation subject to several conditions.

First, the company is prevented from any future acquisition. It will be important for the Commission to monitor very carefully that the acquisition ban is being respected and not circumvented by other corporate mechanisms.

Second, the Commission required slots divestments in Frankfurt and Munich airports. These slots should be made available to new entrants. The Commission will focus on who comes in and picks up these released slots. Indeed, they shall be competitors that can exercise competitive pressure on Lufthansa

Finally, airline ticket distribution faces several challenges. In particular, bans on keyword bidding for online advertising is an issue which is not specific to the air transportation industry. The Commission has already taken enforcement action in the *Guess* case (Case AT.40428) on that matter. In particular, the GDS ticket distribution investigation focuses on parity clauses in Amadeus' and Sabre's agreements with airlines which may restrict the ability to use alternative suppliers of distribution services. ■