

Unclassified

DAF/COMP/WD(2014)35

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

04-Jun-2014

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

AIRLINE COMPETITION

-- Note by Austria --

18-19 June 2014

This document reproduces a written contribution from Austria submitted for Item IX of the 121st meeting of OECD Competition Committee on 18-19 June 2014.

*More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/airlinecompetition.htm>.*

JT03358658

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1. The Austrian airline sector has undergone dramatic changes in the past decades. Airlines are thereby closely interlinked with a wide variety of players, eg airports, ticket sellers, jet fuel suppliers and the like who all influence the success of airlines and vice versa. In order to describe the airline sector and its challenges in a comprehensive way it is therefore necessary to take a broad picture of all players. This contribution therefore first gives a short overview of the Austrian aviation industry, then summarizes some characteristics of the aviation market as well as findings on the market definitions and finally reports on the most important cases the Austrian Competition Authority (Bundeswettbewerbsbehörde, BWB) has dealt with in the entire aviation sector.

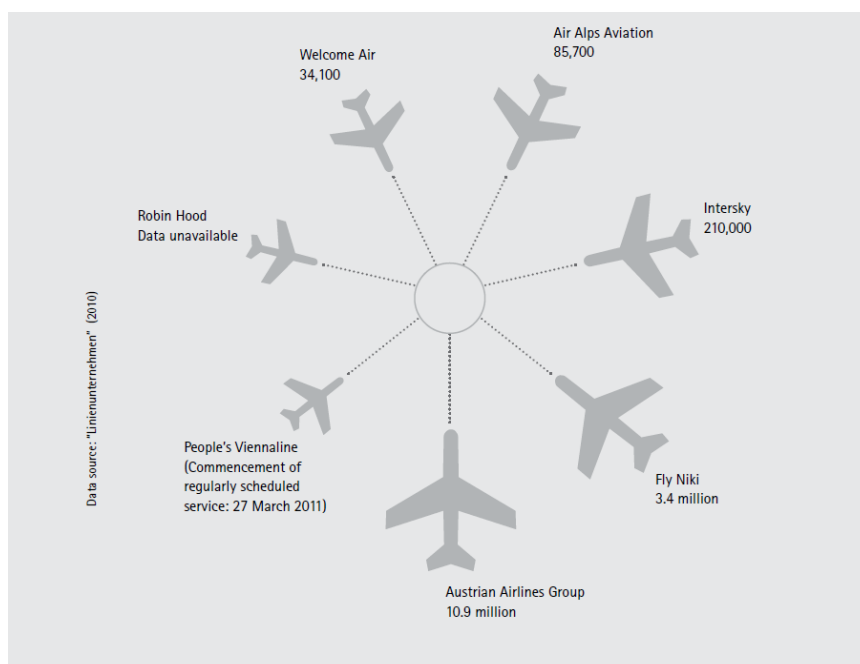
1. Overview of the Austrian aviation industry

2. With the signature of the Austrian State Treaty in 1955 it was possible to develop airports for civil aviation. Austrian Airlines, the national carrier, was founded and took off in April 1958 for its first time. In the beginning, 20 airlines offered scheduled airline services to Austria, now the number is more than four times as high. While in 1955 about 150.000 passengers were counted on the six Austrian airports, in 2013 the number rose to 26.3 million passengers. In the following, a short overview of the current situation of the Austrian aviation industry will be given.

1.1 Austria's most important air carriers

3. In 2010, a total of 81 air carriers were registered in Austria; of these, 63 were categorized as fixed-wing carriers and 18 as helicopter carriers. The largest Austrian air carriers in terms of passengers were **Austrian Airlines Group** (Austrian Airlines / Tyrolean / Lauda Air) and **Fly Niki** (Niki Luftfahrt GmbH). Since September 2009, Austrian Airlines Group has been part of the Lufthansa group after the respective merger was cleared by the European Commission subject to remedies¹. In 2010 the German airline Air Berlin took over Fly Niki. Other than the two abovementioned airlines, there are a number of other air carriers providing regularly scheduled service and/or charter services; such companies are particularly important for regional airports.

¹ Decision of the European Commission of 28 August 2009, COMP/M.5440 Lufthansa/Austrian Airlines, http://ec.europa.eu/competition/mergers/cases/decisions/m5440_20090828_20600_en.pdf

Fig 1: Passenger volume of Austrian carriers in 2010

Source: Aviation Roadmap 2020, p 11.

Remark: Robin Hood went bankrupt in 2011. Air Alps Aviation's future is unsecure: it was taken over, still stopped flights several times; the state of discussions about its sale remained unclear in 2014.

1.2 Airports in Austria

4. In 2013, 26.3 million passengers and 210,468 tonnes of freight were transported through Austria's **six international airports**²: Vienna, Salzburg, Innsbruck, Graz, Linz and Klagenfurt. Demand has thereby increased greatly over the past few years: between 2000 and 2010, the number of passengers grew by nearly 60 % while the amount of freight increased by even more than 80 %.³

5. **Vienna International Airport** is one of Europe's ten largest airports in terms of flight movements.⁴ In 2013 22 million passengers used Vienna airport, 6.8 million of them being transfer passengers. It is the only⁵ airport in Austria which is fully slot regulated according the EU-regulation 95/93.

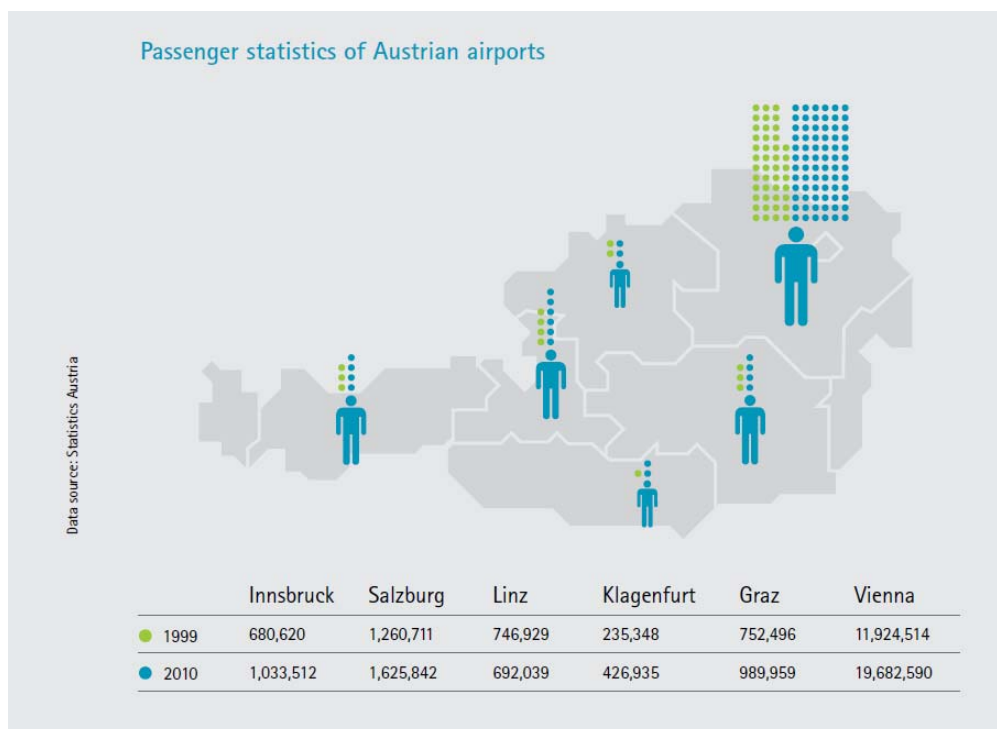
² See http://www.statistik.at/web_de/statistiken/verkehr/luftfahrt/index.html

³ See Statistik Austria, Verkehrsstatistik 2012, p 51 and 58; see also Aviation Roadmap 2020, p 6

⁴ See Aviation Roadmap 2020, p 6

⁵ Innsbruck is slot coordinated on Saturday and Sunday in the winter season. See <http://www.slots-austria.com/sca/index.php/about/mission>

Fig 2: Development of number of passengers at Austrian airports



Source: Aviation Roadmap 2020, p 13

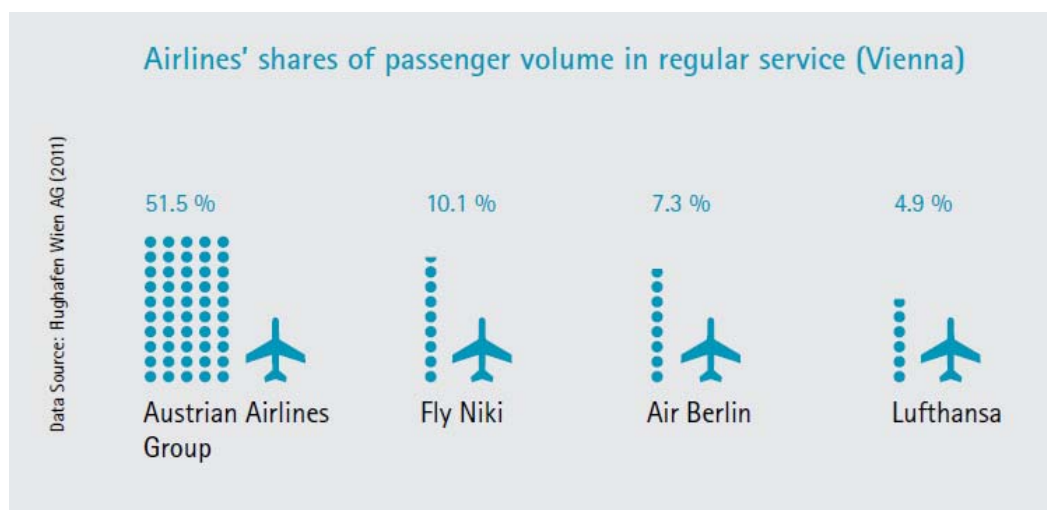
1.3 Market shares at Vienna International Airport

6. In 2010, Austrian Airlines Group claimed 51.5 % of regular-service passenger volume and Lufthansa 4.9 %. The second most important airline at this Austrian air transport hub was Fly Niki (10.1 %) and Air Berlin (7.3 %). All other airlines came in below the 3 % mark. Over a 5-year period, this represents an increase in market share for Fly Niki/Air Berlin and a loss in market share for Austrian Airlines Group/Lufthansa. The entire **Lufthansa group** (including Austrian Airlines Group, Brussels Airline, British Midland, Germanwings, SunExpress and Swiss) thus claimed a market share of **62.6 %** in 2010, with the combined market share of **Air Belin and Fly Niki** amounting to **17.4 %**.⁶

7. The figures remained more or less constant since then: in 2013 the market share of the entire Lufthansa group reached about 59 % (AUA 49.1, Lufthansa 5.5, Germanwings 2.7, Swiss 1.7, SunExpress unknown), the one of Air Berlin/Fly Niki 17.1 % (Niki 11.0, Airberlin 6.1).⁷

⁶ See Aviation Roadmap 2020, p 12

⁷ See annual report of Vienna Airport 2013, p 32, http://ir.viennaairport.com/jart/prj3/va/uploads/data-uploads/IR/2014/GB_2013/VIE_GB2013_de.pdf

Fig 3: Airlines' share of passenger volume at Vienna Airport in 2010

Source: Aviation Roadmap 2020, p 13

1.4 Fee levels of Austrian airports

8. The fees charged by individual airports are prescribed by their respective fee schedules. Due to the variety of fees charged and the differences in services, a comparison of the individual airports is of only limited value. An attempt at comparison was made by the International Civil Aviation Organization (ICAO) in its publication "Tariffs for Airports and Air Navigation Services" (2009), which puts Vienna International Airport, for example, in the **upper-middle range** in terms of landing, take-off and passenger fees compared to the most important airports in directly neighboring countries. According to this comparison, Zurich Airport had the highest fees while the fees at Munich Airport were lower than those at Vienna International Airport.

9. In terms of **air traffic control user charges**, Austria ranks consistently between 8th and 12th. In 2011 Austria ranked 8th among Eurocontrol's 38 current member states, with first place representing the most expensive provider.⁸

2. Structure and challenges of the aviation market

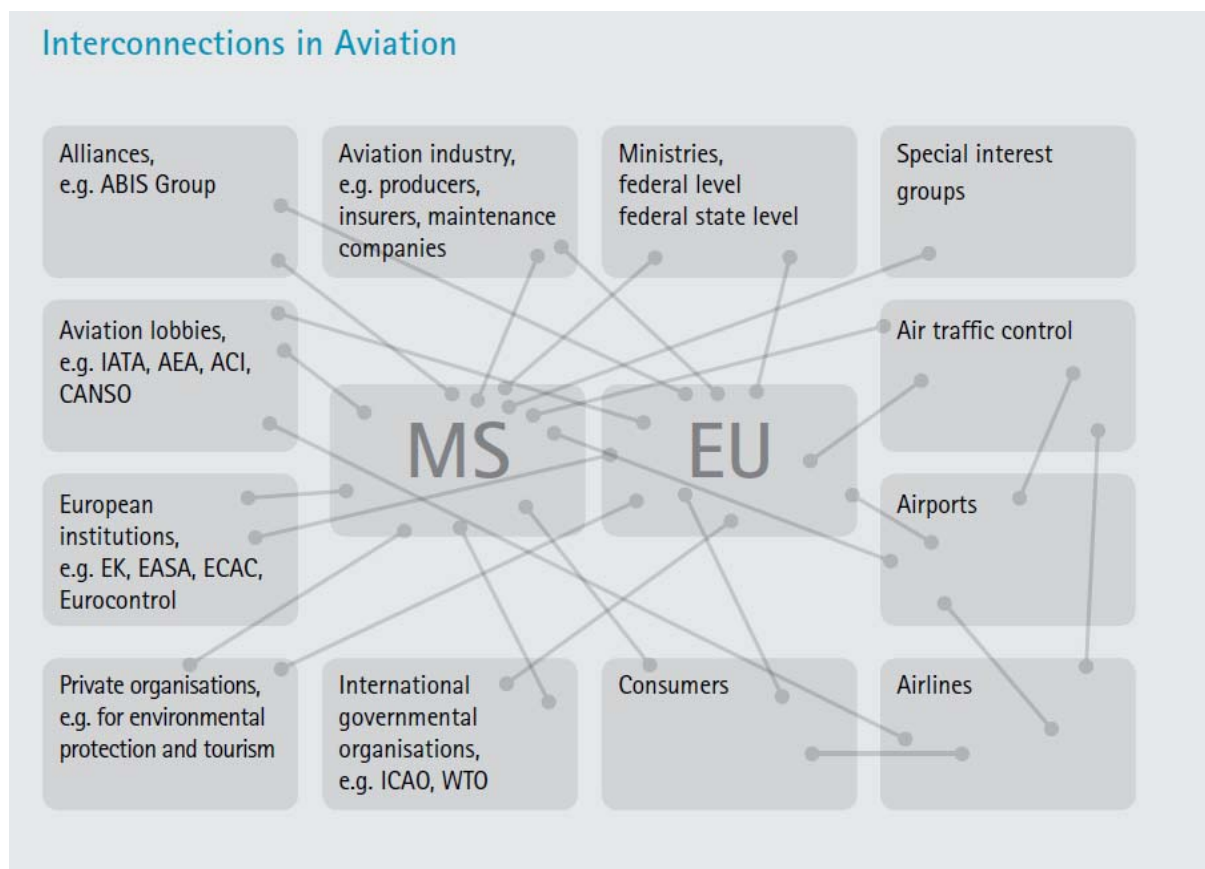
2.1 Aviation: a complex market with many players

10. Aviation must be regarded as an integrated system in a global context. Aviation has always been regulated on the basis of bilaterally and multilaterally implemented regulations, and consequently the degree of regulation is high – in particular in terms of bilateral, reciprocity-based agreements concerning the traffic rights of individual national carriers. Nevertheless, the economic activity of aviation occupies a special position which is to a great extent not covered by international trade law (WTO). Its protagonists are networked both within their respective countries and internationally due to this mode of transport's international component. Therefore, it is necessary and desirable to pay attention to all relevant stakeholders when dealing with issues of aviation.⁹

⁸ See Aviation Roadmap 2020, p 14

⁹ This analysis in the Aviation Roadmap 2020 is completely shared by the BWB. See Aviation Roadmap 2020, p 34

Figure 4: Interconnections in aviation



Source: Aviation Roadmap 2020, p 34

2.2 *Developments and challenges*¹⁰

11. Demand for aviation services depends heavily on the economic growth of a country. In economically expanding countries such as Brazil, China, and India, the aviation sector is likewise growing at an above-average rate. Overall, the aviation market is considered to be growing but also volatile, in light of the severe setbacks in 2001 (9/11) and 2009 (economic crisis). This **volatility** represents a considerable challenge to all those involved in aviation (airports, air navigation services, airlines, etc.) since they must give consideration to this unpredictability when planning their long-term (infrastructure) projects.

12. Generally speaking, liberalisation of the aviation market has led to increased **competition** between airlines and to a reduction in ticket prices leading to a boost in demand with commensurate profits in individual segments, but on the other hand it has also led to lost jobs and lost profits. Takeovers, the formation of alliances and the bankruptcy of airlines have permanently changed the image of the sector, including the formerly traditional national airlines. Many airlines have turned to developing so-called “hub and spoke” systems and/or integrated their existing systems into “multi-hub” systems with a view to network synergies, improved services and cost reductions (such as through the integration of the AUA

¹⁰ This analysis in the roadmap for the Austrian aviation policy, i.e. the federal governments's strategic plan for an optimum development of Austrian aviation between 2010 and 2020 developed with stakeholders, is shared completely by the BWB. See Aviation Roadmap 2020, p 18.

network in the “multi-hub system” of Lufthansa). This sometimes, however, leads to tough competition between the hubs for transfer markets that overlap (e.g. FRA, MUC, VIE, ZRH).

13. Another structural change results from the new business models of **low-cost carriers**, which are able to maintain very low ticket prices by unbundling the traditional product (simple networking strategies, continuous cost-cutting efforts and innovative sales systems, such as via the Internet). Direct and indirect competition with low-cost carriers has forced many traditional “network carriers” to adapt or simplify their products on short and medium-haul routes in order to save costs.

14. Liberalisation has – as described above – led to the formation of **global alliances** (eg Star Alliance, SkyTeam and One World) and thus to the development of “multi-hub systems”. Currently, less popular routes are served mostly with two transfers. The use of new, smaller long-haul aircraft could represent an incentive to serve such routes with a single transfer, without transferring at the hub of an airline’s alliance partner (hub-bypassing).

15. In terms of ensuring competitiveness by maintaining a level playing field, many factors – such as geographical location and the quality of services – are important, but **factors** especially relevant to whether or not airlines **choose to serve a given hub** include airport fees, air navigation charges, government fees and other charges relating to “total stay costs” (such as airport fees, security fees, handling fees and air traffic control).¹¹

16. Airlines complain about different regulations in different regions of the world, preventing a **level playing field**. In first instance, potential subsidies provided to airlines in booming regions, eg United Arab Emirates, are considered unfair by airlines and have led to requests to the Austrian Competition Authority. While - as far as the BWB is informed - a text for a competition clause is currently drafted on European level, the inclusion of this clause in bilateral air service agreements seems to be difficult in practice due to the refusal of the negotiating countries.

17. The aviation sector is a **growth market**, even if it has had to overcome repeated market slumps (e.g. 9/11, volcano ash clouds, economic crises). Yet current projections point upwards (e.g. Eurocontrol’s “Challenges of Growth 2008”): a doubling of demand can be predicted based upon moderate annual growth in Europe of approximately 2%. This means that more airports will have reached maximum capacity by 2030.¹²

3. Market definition in the airline sector

18. Mergers between airlines usually meet the turnover thresholds of the European Merger Regulation and therefore have to be notified with the European Commission.¹³ The only major exemption of importance to Austria so far was the acquisition of shares by Air Berlin Plc & Co Luftverkehrs KG in Niki Luftfahrt GmbH in 2010 which was notified with the Austrian Competition Authority.

19. The BWB therefore did not undertake investigations concerning the market definition in the airline sector as such. It relies on the **common market definitions used by European competition**

¹¹ See Aviation Roadmap 2020, p 18

¹² See Aviation Roadmap 2020, p 6

¹³ For Austria the most important decision of the European Commission was the clearance of the merger between Lufthansa and Austrian Airlines in 2009 subject to remedies. See Decision of the European Commission of 28 August 2009, COMP/M.5440 Lufthansa/Austrian Airlines

agencies and the European Commission.¹⁴ Consequently, the BWB assumes that passenger traffic and cargo traffic have to be distinguished. With regard to passenger traffic a separate market is defined for each route (point of origin and point of destination; O&D approach), although also network effects (hub-and-spoke systems) are taken into consideration to some extent. For each route distinctions are made between time- and non-time-sensitive customers. Also a distinction between point-to-point passengers and connecting passengers must be considered. Flights carried out by different airlines from adjacent airports with overlapping catchment areas might have to be taken into account, too, as well as in certain cases indirect flights and alternative modes of transport.

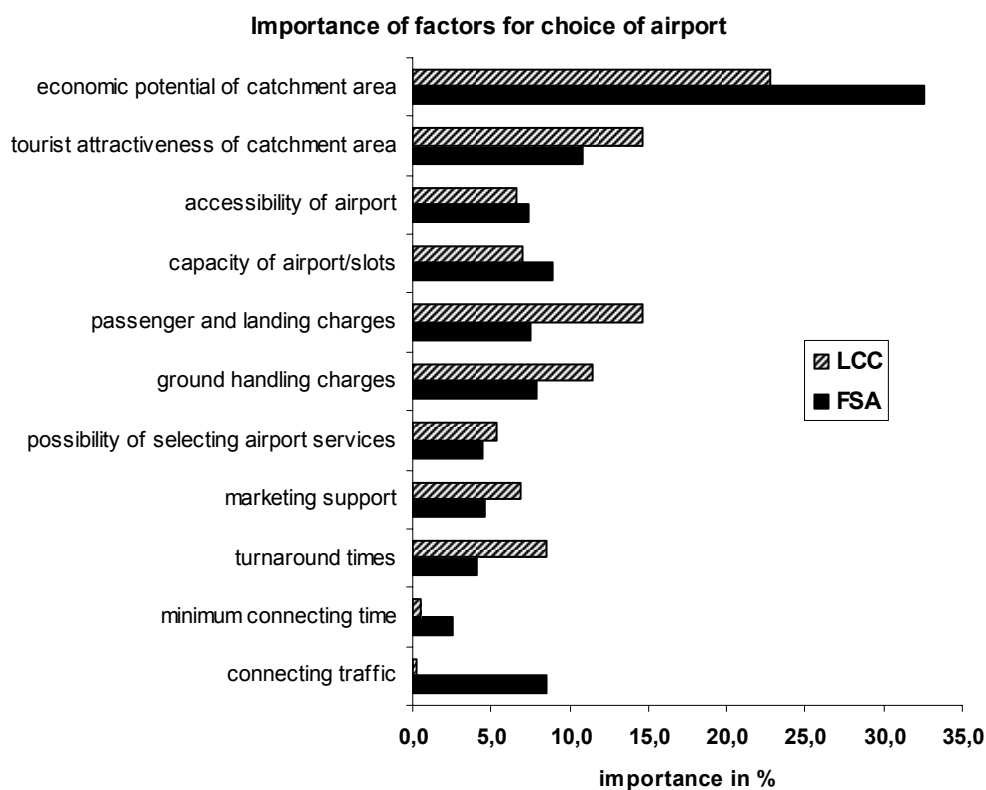
20. Another consideration concerns the question **whether low cost carriers, full service airlines and charter airlines form separate markets.** Most often factors like departure times (frequency, convenience), choice of airports (main or secondary airports), flexibility of fares and the like are considered to decide whether or not they exert competitive pressure on services.

21. With regard to the choice of airports the results of BWB's investigations on the respective demand behaviour of airlines might be interesting. The result of the market inquiry in the framework of a merger between two airports was that full service airlines (FSA), low cost carriers (LCC) and charter airlines differ clearly in their demand behaviour.

22. This became evident in a number of ways: When asked directly, 82 % of the airlines considered the demand for airports of FSA, LCC and charter airlines to be different. Furthermore, also when asking the airlines to state the importance of different factors for the choice of an airport for a new scheduled short or medium haul flight by allocating a total of 100 % to these different factors, differences in demand became evident: The following graph shows the answers of FSA and LCC.

¹⁴ The corresponding practice has been summaries in a document by the ECA Air traffic working group in which Austria participated actively. See European Competition Authorities, Report of the ECA Air Traffic Working Group, Mergers and alliances in civil aviation - an overview of the current enforcement practices of the ECA concerning market definition, competition assessment and remedies, 2004; http://www.bwb.gv.at/SiteCollectionDocuments/ECA_AirTrafficWorkingGroup.pdf

Fig 5: Airlines' view on importance of factors for choice of airport



Source: Investigation of BWB in 2006

23. For LCC factors linked to charges are much more important (31.5 %) than for FSA (20.0 %). Similarly, short turnaround times are twice as important (8.5 %) as they are for FSA (4.1 %). In contrast connecting traffic and minimum connecting time are irrelevant for LCC. The fact that also the economic potential of the catchment area is less important for LCC could relate to the fact that LCC are ready to use secondary airports.¹⁵ The differences in demand also emerged when asking airlines about their past behaviour when deciding on the substitutability of the two airports Vienna and Bratislava.

24. As a result, the BWB concluded that LCC are in a different market to FSA. Therefore, the BWB analysed the market situation as well as the consequences of the merger between two airports for FSA, LCC and charter airlines separately.

4. Mergers

4.1 Merger between airlines: Air Berlin - Niki Luftfahrt

25. As already mentioned above, the only airline merger of major importance for Austria which did not meet the turnover thresholds of the European Commission and was therefore not notified to the

¹⁵ Due to the small number of answers the test of significance showed significant differences only with the factors "passenger and landing charges", "minimum connecting time" and "connecting traffic". However, also when looking at the interquartile range important differences become clear.

European Commission but to the Austrian Competition Authority concerned the merger between Air Berlin and Fly Niki. In March 2010 Air Berlin Plc & Co Luftverkehrs KG (Air Berlin) notified the acquisition of up to 100 % of Niki Luftfahrt GmbH (Niki). Niki and Air Berlin were the second and third biggest airline in Austria, both being a hybrid between a classic low cost carrier and a classic full service airline.

26. Air Berlin already had a share of 24 % in Niki and cooperated in technical matters. At the moment of the notification routes did not overlap. Due to unclear data it was first however unclear whether there had been an overlap before cooperation started and what therefore was the correct counterfactual. In the end it was shown that an overlap of routes never existed. The competition authority could not find any evidence that the merger would create or strengthen a dominant position. Consequently, the merger was cleared.

4.2 Merger between airports: Airport Vienna - Airport Bratislava

27. In February 2006 the indirect acquisition of 66 % of Bratislava Airport (BTS) by a consortia composed of Vienna International Airport (VIE) and a group of investors was notified to the BWB. The remaining 34 % shares would have been kept by the Slovak Republic. However, the merger did not take place: The Slovak government pulled out of the privatisation contract in mid August 2006 since the obligation, stipulated in the privatisation contract, of a clearance by the Slovak Antimonopoly Office by 15 August 2006 was not fulfilled. As the intensive investigation conducted by the BWB still give interesting insights, the results will be reported briefly.

28. The airports in Vienna and Bratislava are situated at a distance of about 50 km. They are the primary national airports in Austria and Slovakia respectively. Due to the quick development of BTS in terms of passenger volume and the rising importance of low cost carriers, i.e. point to point traffic, for VIE the BWB assumed that VIE and BTS are competing for direct short and medium haul flights.

29. The crucial point in the analysis of the BWB was therefore the question which competition effects the merger would have on direct short and medium haul flights.¹⁶ Especially the question whether the **demand for airports** for these flights differs between low cost carriers (LCC), full service airlines (FSA) and charter airlines was examined as well as whether the catchment area of the airport Vienna and Bratislava overlap. The BWB therefore sent out questionnaires to 68 airlines and met with tour operators.

30. The result of the market inquiry was that LCC, FSA and charter airlines differ clearly in their demand behaviour (for details see point 3 market definitions above). E.g. in the last five years only LCC took BTS into account as viable alternative to VIE and vice versa. VIE and BTS were therefore interchangeable for LCC. On the contrary, for FSA BTS was per se no alternative for VIE. However, BTS was influencing competition in VIE, e.g. concerning airport charges or flight prices. Charter airlines and

¹⁶ The BWB basically delineated three markets: (i) the provision of non-aviation services (i.e. restaurants, parking etc.), (ii) the provision of ground handling services and (iii) the provision of airport infrastructure services. The market for the provision of airport infrastructure services may further be divided into the segments passenger services (short and medium haul flights as well as intercontinental flights) and cargo services.

The BWB considered that the merger poses no competition problems as to the provision of non-aviation and ground handling services as the geographic scope of both markets is merely local. The BWB further considered the provision of airport infrastructure services for intercontinental flights and cargo transport to be wider than Austria in scope exposing both parties to sufficient competition.

The analysis of the BWB focused therefore on the potential impact of the merger with respect to the provision of airport infrastructure services for direct short and medium haul flights.

tour operators did not expect important effects of the merger as BTS does not seem to be an alternative for charter passengers yet. The main concerns of the airlines were related to airport charges and cross-subsidisation.

31. Consequently, the BWB as well as the Federal Cartel Prosecutor (FCP), i.e. the second official party in Austria, filed an application for further examination with the Cartel Court. After intensive negotiations the BWB, FCP and the notifying parties agreed on **remedies** in April 2006. The remedies aimed at compensating the loss of competitive pressure due to the merger. They included most importantly the establishment of a price cap on airport infrastructure services offered by VIE: for that 14 European airports that were thought to represent the current competitive constraints to VIE, were selected for benchmarking the prices of VIE. Furthermore provisions concerning capacity and slots as well as the unbundling (in accountancy terms) of airport infrastructure services vertically (with respect to other airport businesses) as well as horizontally (VIE versus BTS) were agreed on. The remedies would have been controlled by the BWB by means of a trustee.

32. As already stated the merger was however **not implemented** due to the decision of the Slovak government.

4.3 Merger between airline and airline caterer: AUA - Airest

33. In March 2005 the AUA notified the acquisition of the remaining 65 % in Airest Restaurant und HotelbetriebsgesmbH (Airest). As already mentioned AUA is the national flag carrier; Airest is mainly active in airline-catering and the operation of airport restaurants.

34. The BWB focused on the question whether the market dominant position of Airest in airline catering (Airest holds between 40 and 99 % market share on regional airports and 70 % on the important airport of Vienna) is reinforced by the acquisition of AUA which is the main customer of airline catering services in Austria (about 75 % of all airline catering services are bought by AUA).

35. After filing an application for examination with the Cartel Court, further investigations of the BWB have shown however that a further reinforcement of the market dominant position of Airest by the merger is unlikely: AUA already had a stake in Airest - the danger of a privilege of Airest services therefore already existed. Furthermore, the managing director has always been nominated by AUA while the two other stake holders were only represented in the supervisory board. It was therefore not probable that the involvement of AUA in strategic decisions would be changed substantially. Finally, as AUA was under pressure in the airline market and was not any longer obliged by other stakeholders to meet its catering needs with Airest, it would pass on the pressure to suppliers such as airline caterers.

36. Nevertheless, a framework had to be established to ensure an effective and fair competition in airline catering. The BWB and the notifying parties have therefore elaborated commitments which were put forth by a modification of the notification. They concern the obligation of AUA and its affiliates not to grant exclusivity to Airest. Furthermore, it was committed that the contract between Airest's competitor Do & Co and AUA's affiliate Lauda Air which ended in 2009, will be put up for tender and awarded to the best offer regarding quality and price.

37. Following the modification of the notification the BWB withdrew its application for examination with the Cartel Court and the merger was cleared.

5. Cartels and (vertical) agreements

38. Not only the airline industry as such but as a consequence also the relationship between airlines and travel agencies changed over the years and became tougher. Low cost airlines put competitive pressure

on ticket prices and used internet as the main distribution channel thereby further saving distribution costs. Full service airlines had to cope with reduced ticket prices, forcing them to reduce costs. In addition, internet and online sales became more prominent in general reducing the importance of travel agencies as distribution channel. Consequently, airlines pushed their online sales by introducing cheap(er) online prices on airlines' websites and reduced or eliminated commissions formerly paid to travel agencies.

39. The BWB received several complaints of travel agencies in 2003/2004 which described the new practices of the airlines. Like other national competition authorities did in similar cases¹⁷, the BWB however never found an abuse of a market dominant position. As an interesting example the discussions between Lufthansa and travel agencies are summarised below.

5.1 Lufthansa - Travel agencies

40. In autumn 2004 Lufthansa **abolished its commissions** formerly paid to travel agents while travel agents were free to ask for service charges from their (end) customers. Following a complaint by the Association of Travel Agencies, the BWB started investigations on the question whether this would constitute an abuse of a market dominant position. Like other national competition authorities¹⁸, the BWB came to a **negative result** not only because it was unclear if Lufthansa had a dominant position vis-a-vis travel agencies. Further considerations included for example: travel agencies were free to introduce a service fee to be paid by the final customer; travel agencies mainly provided services for the customer and not the airline and were thereby not forced to provide a service for the airline for free; transparency increased for the customer leading to more competition between travel agencies.

41. As a consequence, the Association of Travel Agencies complained directly to the Cartel Court in November 2004. However, their complaint did not concentrate on the abuse of a market dominant position, but they argued that the envisaged distribution system constituted an **infringement of Art. 81** (now Art 101 TFEU; retail sale price maintenance): as travel agencies are no longer considered "genuine" sales agents by Lufthansa they must not be obliged to sell at a certain price. As they can fix the service fee autonomously, the total final price (net price plus service fee) is not fixed by Lufthansa. However, the obligation of the travel agency to print the net price on the ticket (and to sell the ticket only under the conditions granted by Lufthansa) constitutes (at least) a minimum price.

42. In January 2005, the Cartel Court decided the case in favour of Lufthansa. The complaint by the Association of Travel Agencies was rejected. Its main conclusions were the following:

- European law has to be applied as the distribution system is applied in several member countries.
- However, the system does not constitute a retail price maintenance infringing Art. 81 (now Art 101 TFEU) as the travel contract is concluded directly between the airline and the final customer. The travel agency is only executing a declaration of interest to buy a ticket on behalf of the final customer. The price for the travel contract between airline and customer is fixed by Lufthansa.

¹⁷ See European Competition Authorities, ECA Air Traffic Working Group, Loyalty Programmes in Civil Aviation: an overview of the competition issues concerning frequent flyer programmes, corporate discount schemes and travel agent commission, 2005, point 37ff

http://www.bwb.gv.at/SiteCollectionDocuments/ECA_LoyaltyPaperCivilAviation.pdf

¹⁸ See European Competition Authorities, ECA Air Traffic Working Group, Loyalty Programmes in Civil Aviation: an overview of the competition issues concerning frequent flyer programmes, corporate discount schemes and travel agent commission, 2005, point 37ff

http://www.bwb.gv.at/SiteCollectionDocuments/ECA_LoyaltyPaperCivilAviation.pdf

The price for the additional service contract between travel agency and customer is fixed by the travel agency.

- Furthermore, the travel agency is neither a genuine nor a non-genuine agent as it is not acting on behalf of the airline.

43. The Supreme Cartel Court upheld the decision of the Cartel Court.

6. Abuse of a dominant position

6.1 *Airport charges: potential discrimination between airlines*

44. Airport charges were subject to several decisions by the European Commission in the 1990ies as tariff structures often seemed to favour a particular carrier, eg the national flag carrier. In recent years airport charges favouring low cost carriers became an issue.¹⁹ The cases were partly dealt with under the provisions of state aid. As a consequence, legal instruments brought clarification²⁰.

45. In Austria airport charges were also subject of a **proceeding with the Cartel Court**: An airline filed a complaint against a regional airport directly with the Cartel Court in 2005. It complained that the airport would discriminate between airlines as a low cost airline would pay substantially less charges. It was assumed that the low cost carrier would be reimbursed nearly all airport charges in the framework of an incentive scheme if it meets certain criteria (number of passengers etc). Finally, the airline and the airport could bilaterally agree on a non-discriminatory and transparent airport charges and incentive scheme which was published. Consequently, the proceeding was closed.

46. European and Austrian discussions led to a **2-day workshop** with airports and airlines organised by the Austrian Ministry of Transport together with the BWB in 2007. The BWB gave an overview of competition issues that could arise with airport charges and corresponding case law. The BWB was also consulted on the implementation of the EU directive on airport charges in Austria.

6.2 *AUA - OMV: Excessive Pricing in the jet fuel market at Vienna International Airport*

47. Following a complaint by Austrian Airlines (AUA) against the oil and gas corporation OMV in August 2006 the BWB investigated the market for jet fuel at Vienna International Airport (VIE). Initially the investigations covered a broad range of topics including price abuse as well as exclusionary practices and tacit collusion.

48. In its market delineation the BWB came to the conclusion that the relevant market comprises the supply of fuel of the specification Jet A1 at VIE. OMV was considered to hold a dominant market position on the relevant market as it controls - on the site of its refinery (in 7 km distance from the airport) - the only viable supply alternative: rail transport. Furthermore, the sole storage facilities linked to the rail discharging installations as well as the pipeline to the airport are part of the refinery installations of OMV.

¹⁹ See e.g. 2004/393/EC: Commission Decision of 12 February 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi (notified in Number C(2004) 516). The decision was however not upheld by the General Court in 2008.

²⁰ See eg Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges; Commission Communication of 9 December 2005 "Community guidelines on financing of airports and start-up aid to airlines departing from regional airports", 2005/C312/01

49. Moreover, OMV - together with four other oil companies - jointly controlled Flughafen Schwechat Hydrantengesellschaft (FSH), i.e. the owner of the hydrant installations under the airfield, which provide for the only means to deliver the jet fuel into the airplane. The control of these facilities enabled OMV to closely monitor all the supply of the competitors.

50. BWB's first inquiries of the conduct showed that 1) there are no grounds for assuming any exclusionary practice of OMV and 2) the evidence for tacit collusion was too weak to qualify for further in-depth investigations.

51. Therefore, the BWB concentrated on the **alleged price abuse** with the aim of using it as a tool to open the market. All price comparisons as well as econometric tests revealed an elevated level of prices at VIE, albeit with a wide range of deviations from the respective relevant benchmarks. Consequently, the BWB drew the conclusion that a price abuse cannot be excluded with the necessary degree of certainty. Therefore, it decided to submit the case to the Cartel Court in June 2007.

52. To speed up the procedure, the BWB discussed intensively appropriate remedies with OMV. Finally, OMV agreed. After the commitments were subjected to a market test, the Cartel Court imposed three structural remedies on OMV in April 2008.²¹

- The whole alternative supply chain from the railway discharging facility to the airfield has to be opened to all interested parties in a clear, transparent and foreseeable manner. As all these installations are imbedded into the refinery, a detailed technical annex for the conditions of use was elaborated and is integral part of the remedies.
- OMV has to disinvest its share of FSH; a trustee was mandated with the disposal.
- OMV has to prevent the information flow concerning the supply of competitors between its logistics units and its jet fuel sales unit.

53. A **separate private litigation case initiated by AUA** directly with the Cartel Court and dealing with a much broader range of alleged anti-competitive behaviour finally ended in 2010 with the withdrawal of the complaint by AUA. The reason was that a Court's expert's opinion came to the conclusion that due to the remedies mentioned above OMV did not any longer have a dominant position and therefore the base for the complaint was eliminated.

54. In addition to the investigations concerning jet fuel, the BWB also investigated a **possible price abuse of FSH**. Its hydrant installations constitute an essential facility as no other means exist to deliver the jet fuel into the airplane. It is therefore comparable to other essential parts of airport infrastructure. In the end the BWB decided not to file an application with the Cartel Court as future competition problems could not arise due to the introduction of a price regulation: By its investigations the BWB initiated a change in the law governing airport infrastructure and as of January 2008 hydrant installations became subject to (price) regulation. The BWB's extensive cost calculations could contribute to the regulator's (ie Ministry of Transport) tariff regulation.

²¹ For details see http://www.bwb.gv.at/BWB/Aktuell/vie_omv_04042008.htm

7. Others

7.1 Monitoring of ticket prices Vienna - Brussels

55. An amendment to the Austrian Cartel Act, introduced in 2013, provided for an additional responsibility of the BWB, namely the continuous monitoring of industries or products. In contrast to the competence for market studies, with monitoring the BWB is not vested with any investigative powers (e.g. the power of collecting data from enterprises). Rather, the monitoring exercise has to rely on published or otherwise accessible data.

56. In view of this substantial restriction, the scope for possible monitoring exercises is rather limited. The BWB chose to undertake a first test of this new responsibility with regard to airline ticket prices on the route Vienna - Brussels, ie an important route for business travelers. The underlying reasons are possible concerns resulting from the merger of Austrian Airlines with Lufthansa in 2009. The available statistical information stems from data of travel expenses of the public service for several destinations over three years. This clearly entails evident methodological and statistical challenges. With due regard to these limitations the data does so far not exclude the possibility of competitive concerns on the air traffic route Vienna - Brussels.

7.2 Competition clause in bilateral air service agreements

57. Airlines complain about different regulations in different regions of the world, preventing a level playing field. In first instance, potential subsidies provided to airlines in booming regions, eg United Arab Emirates, are considered unfair by airlines and have led to inquiries with the Austrian Competition Authority. The Austrian Competition Authority was for example consulted on the introduction of a "competition clause" in bilateral agreements between states. While - as far as the BWB is informed - a text is currently drafted on European level, the inclusion of this clause seems to be difficult in practice due to the refusal of the negotiating countries.