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AIRLINE COMPETITION

-- Note by Germany --

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

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1. Introduction

1. In Europe, Germany ranks second in terms of airport passenger throughput (after UK, followed by Spain).¹ Airports such as Frankfurt and Munich serve as international hubs and international airlines are based in Germany.

2. The Bundeskartellamt dealt with a number of cases in the airline sector which included mergers, cartels and abusive practices and was involved (as Chair) in the European Competition Authorities (ECA) Air Traffic Working Group set up in 2002 in order to improve co-operation between the authorities in their dealings with the airline industry and to enhance competition in this sector.²

3. This contribution provides an overview of the airline and aviation sector in Germany (2.), briefly discusses the current legal framework (3.) and highlights selected cases dealt with by the Bundeskartellamt (4.). The contribution ends with concluding remarks (5.).

2. The aviation sector in Germany

4. There was a significant transformation in the structure of the aviation sector in Germany and Europe due to deregulation and globalisation. Flag carriers were privatised, new airlines and new business concepts such as low cost carriers entered the market and successfully expanded their services. Airlines tried to respond to the challenges with mergers and acquisitions, intensified their co-operation and formed alliances. Today the aviation sector is characterised by overcapacity and privately owned European carriers face competition from state owned or heavily subsidized airlines.³

2.1 Air carriers

5. Currently, 145 air carriers are licensed by the Federal Aviation Office (Luftfahrt-Bundesamt)⁴. Deutsche Lufthansa (Lufthansa) and Air Berlin are the largest airlines in terms of number of passengers.

6. The formerly state-owned flag carrier Lufthansa was fully privatized in 1997. In 2013, Lufthansa carried approximately 104 million passengers to 274 destinations in more than 106 countries. Lufthansa's passenger airline group includes Germanwings, Swiss and Austrian Airlines.⁵

7. Air Berlin is Germany's second largest airline measured by the number of passengers. It transported 31.5 million passengers to 171 destinations in 2013.⁶ Air Berlin cooperates with Etihad

¹ Annual Analyses of the EU Air Transport Market 2012, p. 14, http://ec.europa.eu/transport/modes/air/internal_market/observatory_market/doc/annual-2012.pdf

² Bundeskartellamt Activity Report 2001/02 p. 189. Work products: ECA Report of the ECA Air Traffic Working Group, Mergers and alliances in civil aviation; Code sharing agreements in scheduled passenger air transport; Loyalty programmes in civil aviation. <http://ec.europa.eu/competition/publications/eca/>

³ Bundeskartellamt Activity Report 2011/12, p. 114

⁴ List of Air Carriers licensed by the Luftfahrt-Bundesamt (current Operating Licences), Version: April 30, 2014, http://www.lba.de/SharedDocs/Downloads/Formulare/B1/B11_Genehmigungen/Merkblaetter_Info/B1_List_LU.pdf?__blob=publicationFile

⁵ <http://www.lufthansagroup.com/en/company/history/1990s.html>; Lufthansa Annual Report 2013, p. 59.

⁶ <http://www.airberlin.com/en-DE/site/start.php>

Airways (Abu Dhabi) which in 2012 acquired 29.1%⁷ of the shares in Air Berlin. Since Etihad granted Air Berlin significant loans, the relationship between the two airlines is currently being discussed in respect of the requirements for operating European airlines, i.e. the airline has to be more than 50 percent owned and "effectively controlled" by an EU member state or EU citizens.⁸

8. Low cost concepts appeared in Germany more than 15 years ago and they significantly influenced the structure of demand and supply.⁹ Lufthansa and other airlines reacted with significant lower tariffs for intra-German flights and Lufthansa established Germanwings as its low cost carrier (LCC) in 2002.¹⁰ As observed by the ECA Air Traffic Working Group, there does not seem to be any clear-cut definition of what is meant by the term low cost carrier. They can be characterized by their cost structure and the typical quality of service ("no frills") but also by other factors like destinations flown, airports used, pricing policy, type of tickets and maybe also type of passenger.¹¹ Due to competitive pressure, traditional carriers have streamlined their offerings by applying elements used by the LCC.¹² The activities of LCC are not limited to regional airports.¹³ Based on the number of flights per week (July 2013) Air Berlin with its low budget segment is by far the biggest LCC in Germany (2,200) followed by Germanwings (1,192) and Ryanair (723).¹⁴

2.2 Consolidation and alliances

9. Following deregulation, several mergers in the airline sector took place and carriers sought alliances and co-operations. Air Canada, Lufthansa, SAS, Thai Airways International and United Airlines launched the Star Alliance network in 1997.¹⁵ The Bundeskartellamt initiated corresponding proceedings in July 1996 (with regard to Lufthansa, SAS and United Airlines). It closed the proceedings after the parties had proposed commitments to the European Commission in parallel proceedings.¹⁶ Air Berlin entered Oneworld in 2012 which expanded Air Berlin's route network by 70 destination airports.¹⁷

10. The Bundeskartellamt follows the development of alliances in the aviation sector because, as horizontal agreements between competitors, alliances are – in principle – captured by the ban on cartels defined in § 1 Act Against Restraints of Competition and Article 101 TFEU.¹⁸

⁷ Under German merger control law, the acquisition of at least 25% of the shares triggers a filing obligation given that certain turnover thresholds are met. The merger did not constitute an acquisition of control.

⁸ Air Service Regulation 1008/2008

⁹ Airport Concept of the Federal Government 2009 (Flughafenkonzept der Bundesregierung 2009), 3.1.2.1

¹⁰ In more detail: Bundeskartellamt Activity Report 2001/2002, p. 189

¹¹ Report of the ECA Air Traffic Working Group, Mergers and alliances in civil aviation, p. 13, recital 21, 22.

¹² Airport Concept of the Federal Government 2009, 3.1.2.1

¹³ Airport Concept of the Federal Government 2009, 3.1.2.1

¹⁴ www.dlr.de/dlr/presse/Portaldata/1/Resources/documents/2013/Low_Cost_Monitor_II_2013_final.pdf

¹⁵ http://www.staralliance.com/assets/doc/en/about/member-airlines/pdf/Star_Alliance_Chronological_May2012.pdf

¹⁶ See Commission notice concerning the alliance between Lufthansa, SAS and United Airlines (cases COMP/D-2/36.201, 36.076, 36.078)

¹⁷ Bundeskartellamt Activity Report 2011/12, p. 114

¹⁸ See on European level e.g. Case COMP/F-1/39.595 AC/CO/LH/UA (commitments from Star alliance members on transatlantic air transport passenger market).

2.3 Airports

11. Germany is a federal state with a number of areas of high population density leading to a network of airports with two hubs, Frankfurt (approximately 58 million passengers and 2.1 million t cargo in 2013) and Munich (39 million passengers and 300,000 t cargo).¹⁹ Further airports with more than 5 million passengers in 2013 were Berlin-Schönefeld and Tegel, Düsseldorf, Hamburg, Hannover, Köln/Bonn, and Stuttgart.

12. In Germany, airports are typically organised along the lines of private business. In many cases public authorities participate in the operating companies, e.g. the State of Hesse holds 31.37% of the shares in Fraport which operates Frankfurt airport; Stadtwerke Frankfurt am Main (Frankfurt's public utility) holds 20.03% (Lufthansa 8.46%).²⁰ The federal government has gradually relinquished its holdings in airports over the past years. At present it only has holdings in the airports of Munich (Land Bavaria 51%, Federal Republic 26%, City of Munich 23%)²¹, Berlin (Land Berlin 37%, Land Brandenburg 37%, Federal Republic 26%)²² and Köln/Bonn (Federal Republic 30.94%, Land North Rhine-Westphalia 30.94%, City of Cologne 31.12%, City of Bonn 6.06%)^{23, 24}.

3. Legal Framework

13. Germany is part of a single European aviation market established in the 1990s. The market was liberalised by means of three successive packages of measures adopted at EU level. The "Third Aviation Package"²⁵ was replaced by the Air Service Regulation 1008/2008.

14. A Community carrier cannot operate unless it has been granted an **operating licence**. The competent authority for the licensing and supervision of German commercial air carriers is the Luftfahrt-Bundesamt (Federal Aviation Office) which is directly assigned to the Federal Ministry of Transport and Digital Infrastructure.

15. Community air carriers have **access to intra-Community routes**, i.e. they are authorised to operate intra-Community air services and Member States cannot subject the operation of these services to any permit or authorization.

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https://www.destatis.de/DE/Publikationen/Thematisch/TransportVerkehr/Luftverkehr/LuftverkehrAusgewahlteFlugplaetze2080610137004.pdf?__blob=publicationFile

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<http://www.fraport.com/en/investor-relations/the-fraport-share-/basic-data-shareholder-structure.html>

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<http://www.munich-airport.de/de/company/facts/allg/index.jsp>

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<http://www.berlin-airport.de/en/company/about-us/organisation/ownership-structure/index.php>

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<http://www.koeln-bonn-airport.de/unternehmen/unternehmensfuehrung.html>

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Additional information including the Airport Concept of the Federal Government 2009 is available on the webpage of the Federal Ministry of Transport and Digital Infrastructure (Bundesministerium für Verkehr und digitale Infrastruktur). <http://www.bmvi.de/SharedDocs/DE/Artikel/LR/flughafen.html?nn=36054>; <http://www.bmvi.de/SharedDocs/DE/Anlage/VerkehrUndMobilitaet/Luft/flughafenkonzept-2009-der-bundesregierung.html?linkToOverview=js>

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"Third Aviation Package": Regulation No 2407/92 on licensing of air carriers, Regulation No 2408/92 on access for Community air carriers to intra-Community air routes, and Regulation No 2409/92 on passenger fares and air cargo rates.

16. Community air carriers can freely set **prices** for passengers and cargo, except in the case of a public service obligation²⁶.

17. **International aviation relations** between Member States and third countries have traditionally been governed by bilateral air service agreements. In its “**open skies**” **judgment** of 5 November 2002 the Court of Justice of the European Union found that the European Community has competence with respect to certain aspects of international air service agreements. The corresponding negotiations are now carried out in cooperation and coordination between the European Commission and the EU Member States.²⁷ To date nearly 1,000 bilateral air services agreements have been brought into legal conformity with EU law, representing 75% of all extra-EU passenger traffic.²⁸

18. The allocation of **slots**, i.e. the permission to use airport infrastructure necessary to operate an air service on a specific date and at a specific time for the purpose of landing or take-off, is covered by the Slot Regulation 95/93. If there is a significant shortfall in capacity at an airport, the corresponding Member State appoints an airport coordinator to ensure that the airport slots are allocated in an independent, neutral, non-discriminatory and transparent manner. The Slot Regulation defines so called grandfather rights according to which an air carrier will be entitled to a series of slots in a season (summer scheduling season and winter scheduling season) if the carrier has used the slots for at least 80% of the time during the previous season.²⁹

19. Regulation (EC) No 80/2009 established a code of conduct regarding the use of **computerised reservation systems**.

20. **Groundhandling services**, e.g. baggage handling, ramp handling, fuel and oil handling, freight and mail handling, are covered by the Directive 96/67/EC **on access to the groundhandling market at Community airports**.³⁰ The directive stipulates that at larger EU airports access to the market by providers of groundhandling services is free but that for certain categories of services the Member State may limit the number of providers to no fewer than two, one of which has to be independent of the airport or the dominant airline at that airport.

21. Directive 2009/12/EC covers the essential features of **airport charges** at larger airports. Airport charges include aircraft landing and take-off charges, charges for the processing of passengers and freight and other charges related to the use of airport infrastructure. In Germany, airport charges are set out in paragraph 19b of the German Civil Aviation Act (LuftVG) and are subject to approval. For example,

²⁶ In order to maintain appropriate scheduled air services on routes which are vital for the economic development of the region they serve, Member States may impose public service obligations on these routes, Article 16 Air Service Regulation.

²⁷ Regulation (EC) No 847/2004 on the negotiation and implementation of air service agreements between Member States and third countries

²⁸ Annual Analyses of the EU Air Transport Market 2012, p. 192; http://ec.europa.eu/transport/modes/air/internal_market/observatory_market/doc/annual-2012.pdf

²⁹ In December 2011 the European Commission adopted a package of measures containing three legislative proposals on slots, groundhandling and noise.

³⁰ Implemented by Verordnung über Bodenabfertigungsdienste auf Flugplätzen (Bodenabfertigungsdienst-Verordnung - BADV).

airport charges at Frankfurt Airport are approved by the Hessian Ministry of Economy, Energy, Transport and Regional Development as the responsible authority.³¹

4. Selected cases

22. The Bundeskartellamt initiated a number of proceedings that advocated an opening-up of the markets.

23. In 1997 it dealt with Lufthansa's Miles & More programme and concluded that it created excessively strong customer ties. The proceedings were closed by the Bundeskartellamt after Lufthansa opened up its system to the competitor that had initiated the proceedings.³²

24. In 2002 the Bundeskartellamt saw the pricing strategy of Lufthansa on domestic routes as an attempt to squeeze its new competitor Germania out of the market. The carrier Germania started operating scheduled flight services between Berlin and Frankfurt/Main in November 2001. Lufthansa significantly reduced its prices exclusively on this route by almost 60 per cent. The Bundeskartellamt prohibited Lufthansa from demanding a price on the Frankfurt-Berlin route below Germania's price and defined a minimum difference between Lufthansa's prices in relation to the price set by Germania that took into account services offered by Lufthansa which were not offered by Germania (catering and miles&more for frequent fliers) and additional advantages of flying with Lufthansa such as above all the three times higher frequency.³³

25. The following section highlights more recent decisions taken by the Bundeskartellamt.

4.1 *Exchange of competitively sensitive information via corporate client programme*

26. In December 2012, in a Bundeskartellamt proceeding, Deutsche Lufthansa undertook to remove certain clauses from its current and future corporate client contracts, which gave the company access to competitively sensitive information of rival companies. The Bundeskartellamt declared these commitments as binding.

27. For the calculation of special discounts and sales refunds (co-called incentive services) corporate clients had to transmit to Lufthansa all the sales data of flights which they had bought within a certain calculation period by means of a specific corporate credit card. This information also included flights which the client had booked with Lufthansa's competitors (data tracking). With the information acquired about the sales and discount conditions of its competitors, Lufthansa could have distorted competition on specific routes by means of short-term and targeted measures.

28. The proceeding was triggered by complaints from corporate clients of Lufthansa from across the German business community as well as the travel office of the German government.

³¹ Airport Charges, Charges for Central Ground Handling Infrastructure; Frankfurt Airport – valid as of January 1, 2014 http://www.fraport.com/content/fraport/en/misc/binaer/our-expertise/aviation-services/airport-charges-2014/jcr:content.file/entgelte_charges-2014.pdf

³² See Bundeskartellamt Activity Report 1997/98, p. 148)

³³ See Bundeskartellamt Activity Report 01/02, p. 190 (German) or press release dated 19 February 2002 (English) http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2002/19_02_2002_Lufthansa_Germania_eng.html; confirmed by Düsseldorf Higher Regional Court (Oberlandesgericht), 27 March 2002.

4.2 *Airline/airline mergers*

29. The Bundeskartellamt also deals with mergers in the aviation sector. However, mergers with a so-called “Community dimension” are examined under the EC Merger Regulation by the European Commission in Brussels which is typically the case if Lufthansa is involved, e.g. the takeover of Austrian Airlines by Lufthansa in August 2009 (COMP/M.5440 Lufthansa / Austrian Airlines), or the acquisition of British Midland by Lufthansa in May 2009 (COMP/M.5403 – Lufthansa / BMI).

Acquisition of TUIfly’s city-carrier business by Air Berlin

30. In September 2009 the Bundeskartellamt cleared the takeover by Air Berlin of TUIfly’s city-carrier business. TUIfly’s city-carrier route portfolio included aircraft capacity and staff and consisted of 117 routes to Austria, Egypt, Spain, France, United Kingdom, Greece, Croatia, Israel, Italy, Morocco, Portugal, Sweden, Tunisia and Turkey and seven routes within Germany. The destination focus was clearly Italy with 55 routes.

31. With regard to market definition, the Bundeskartellamt did not differentiate between operating models, e.g. LLC, as the models overlap and hybrid forms develop. Based on demand side considerations (passenger) the Bundeskartellamt distinguished between time-sensitive business travellers, non time-sensitive leisure travellers and tour operators. In a geographical respect the Bundeskartellamt applied the “point of origin/point of destination” (“O&D”) approach as a starting point complemented by an additional analysis of supply-side substitutability. In its competition assessment the Bundeskartellamt took into account additional factors such as the number of overlapping routes and their significance for the parties’ portfolios in respect of the destination area, slot availability at the departure and destination airports, passenger volume, network effects, and the position of competitors in respect of slots and hubs at the relevant airports etc.³⁴ The investigations revealed that there were only a few route overlaps and that Air Berlin had only transported a low number of passengers to some of the destinations concerned. In addition, there were sufficient competitors on the relevant routes or flying to the relevant destinations.

4.3 *Coordination of ticket prices*

32. In September 2010 the Bundeskartellamt imposed a fine of 1.2 million Euros on Condor, a subsidiary of Thomas Cook, for its involvement in an illegal agreement on the prices of flights from Germany to Turkey. A fine against the airline SunExpress, a joint venture of Deutsche Lufthansa AG and Turkish Airlines, which also participated in the agreement, was waived in accordance with the Bundeskartellamt’s Leniency Programme.

33. In the summer of 2009 the companies agreed, among others, that SunExpress would not offer flights from Germany to Turkey for less than € 99. The price of an air ticket was to be set at no more than € 10 below the price offered by Condor. The agreement covered routes simultaneously operated by the two companies.³⁵

³⁴ A case summary (German) and a non-confidential version of the decision (German) is available on the webpage of the Bundeskartellamt: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Fusionskontrolle/2009/B9-56-09.pdf?__blob=publicationFile&v=4; http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Fusionskontrolle/2009/B9-56-09.pdf?__blob=publicationFile&v=3

³⁵ A case summary (German version) is available on the web page of the Bundeskartellamt. http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2010/B12-14-09.pdf?__blob=publicationFile&v=4

5. Conclusion

34. Reforms of the legal framework and globalisation have fundamentally transformed the aviation sector, leading to lower prices and a wider choice for customers. The process was accompanied by the competition authorities and exemplifies the importance of international cooperation which was successfully established at an early stage not only on European Level but also e.g. by the OECD.³⁶

³⁶ OECD Roundtable Competition Policy and International Airport Services, 1997; Roundtable Airline Mergers and Alliances, 1999