

Aviation Advocacy

Introduction to Anti-Trust and Contracts

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Agenda

- Anti-Trust Issues
- The Reach of the Rules
- Impact on Contracts

Anti-Trust Issues

Anti-Trust Issues (1)

- Three main heads:
 - Fair trading law
 - Not strictly anti-trust but convenient to consider here
 - Collusion
 - Corporations cannot enter into agreements with their competitors to impact markets
 - Abuse of Market Power
 - A corporation with a substantial degree of market power cannot use that power to distort markets

Anti-Trust (2)

- Fair trading law
 - Unfair Contracts Terms Act (UK)
 - Unfair Terms in Consumer Contracts Regulations (EU)
 - Distance Selling Regulations (EU)
 - Misleading and deceptive conduct (Australia)
- Impacts
 - Consumer v commercial contracts
 - Standard terms (e.g. Conditions of Carriage)
 - Negotiation and drafting of bespoke contracts

Anti-Trust (3)

- Collusion
- Article 101 Treaty on the Functioning of the EU (TFEU)
 - It is illegal for companies to enter into agreements that restrict or distort competition
 - Price fixing
 - Market share arrangements
- Impacts both negotiations and drafting
 - Strict liability in most countries
 - Object or effect

Anti-Trust (4)

- Article 101 TFEU
 - "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market"

Anti-Trust (5)

- Collusion
 - Takes many forms
 - Agreement/Signalling/'Walk in Park'
 - Intent and effect rather than words
 - Many airline agreements seemingly caught
 - Tariff Agreements
 - Code-shares
 - Slots
 - Passenger/Cargo Agency
 - What to do about it?
 - Implications for contract negotiations

Anti-Trust (6)

- Abuse of Market Power
 - Article 102 TFEU
 - A corporation with a substantial degree of market power cannot take advantage of that power to hinder, lessen or restrict competition in that, or any other, market
- Implications for contract negotiations?

Anti-Trust (7)

- Article 102 TFEU:
 - "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."

Anti-Trust (8)

- Substantial degree of market power?
 - Situation if the case?
 - Define market
 - E.g. city pairs or airport
 - Is there dominance?
 - Market share analysis
 - Barriers to market entry (e.g. slot access)
 - Ability to act independently (pricing power)
 - Of itself problematic?
 - Situation when not the case?

Anti-Trust (9)

- Takes advantage of that power
 - What constitutes "abuse"?
 - Pricing – different types of abuse
 - Refusal to supply
 - Tying
 - Examples in Article 102
- Implications for drafting
 - Test objective and not subjective
 - Wording of contract only helps so far

Anti-Trust (10)

- To hinder, lessen or restrict competition
 - Definition?
 - Outcome driven
 - Drafting implications?

The Reach of the Rules

Reach of the Rules

- Extra-territoriality
 - The "Effects Doctrine"
 - Not just the US
- Discoverability
 - Wide powers of competition authorities
 - Dawn raids
 - No right to silence
 - What it means in court
 - Implications for airline contract staff
- Penalties

Implications

Implications

- Puts focus on
 - Intention
 - Drafting
 - Negotiations
- Identify when Articles 101 Or 102 (or their equivalent may be in issue
 - What is the intention?
 - What may be the effects?
- Specialist advice
- Clearance?
- Cannot later deny or walk away...

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