

# Introduction to Anti-Trust and Contracts

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# OVERVIEW

- I. Anti-Trust issues
- II. The Reach of the Rules
- III. Implications on Airlines
- IV. Implications on Contracts

# I. Anti-Trust Issues



- **Origin of the term ‘antitrust’ laws**
  - In late 19<sup>th</sup> century there were infamous business trusts that allowed a few companies to amalgamate all aspects of whole industries under one umbrella and thereby forcing out competitors through price-fixings and other anti-competitive behaviour
  
- **What are Antitrust / Competition Laws?**
  - Laws which seek to ensure a level playing field for competitors in a market economy
  - By regulating businesses to promote fair competition to the benefits of consumers

- Combination of domestic and international laws:
  - US:
    - Sherman Antitrust Act of 1890;
    - Federal Trade Commission Act of 1914;
    - Clayton Act of 1914
  - Turkey:
    - 1957 Rome Convention and Ankara Agreement;
    - Article 167 of the Turkish Constitution;
    - Act no. 4054 on Protection of Competition
  - EU:
    - Articles 101 & 102 of the Treaty on the Functioning of the European Union (TFEU)

## 1<sup>st</sup> Antitrust law in US: the Sherman Antitrust Act (1890)

- **Outlaws** “every contract, combination, or conspiracy in restraint of trade,” and any “monopolization, attempted monopolization, or conspiracy or combination to monopolize.”
- These laws do **not outlaw** monopolies, per se, but prohibit a monopoly that arises out of unfair business practices, such as price-fixing.



## Further US Antitrust Laws

- Federal Trade Commission Act:
  - Bans “unfair methods of competition” and “unfair or deceptive acts or practices.”
- Clayton Act
  - Prohibits mergers and acquisitions where the effect “may be substantially to lessen competition, or to tend to create a monopoly.”

## Turkey's Competition Law

- 1963 Ankara Agreement (the Association Agreement between Turkey and the EEC)
  - Turkey agreed to follow competitions principles set forth in the 1957 Treaty of Rome
- Article 167 of the Turkish Constitution
  - State must take “*measures to ensure and promote the sound and orderly functioning of the money, credit, capital, goods and services markets,*” and to prevent “*the formation, in practice or by agreement, of monopolies and cartels in the market.*”
- Act no. 4054 on the Protection of Competition
  - Prevents agreements, decisions and practices preventing, distorting or restricting competition in markets for goods and services, and the abuse of dominance by the undertakings dominant in the market

## EU Competition Law

- Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)
  - Article 101: prohibits all agreements between undertakings and concerted practices which may affect trade between Member States and which prevent, restrict or distort competition with the EU's internal market.
  - Article 102: prohibits the abuse of a dominant position within the internal market or a substantial part of it.

- **Types of anti-competitive behaviour**

- 1. Collusion**

- Corporations cannot enter into agreements with their competitors to impact markets

- 2. Abuse of Market Power**

- A corporation with a substantial degree of market power cannot use that power to distort markets

## 1. 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

- **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"*

- **Forms of collusion**
    - 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

## 2. 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?

- **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."*

- **‘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?

- **‘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

- **‘To hinder, lessen or restrict competition’**

- Definition?
- Outcome driven
- Drafting implications?



## II. The Reach of the Rules



- **Extra-territoriality**

- The "Effects Doctrine"

- Domestic competition laws applicable to:
      - Foreign firms and
      - Domestic firms outside the state's territory
    - When their behaviour or transactions produce an "effect" within the domestic territory
    - "nationality" of firms irrelevant
    - 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**

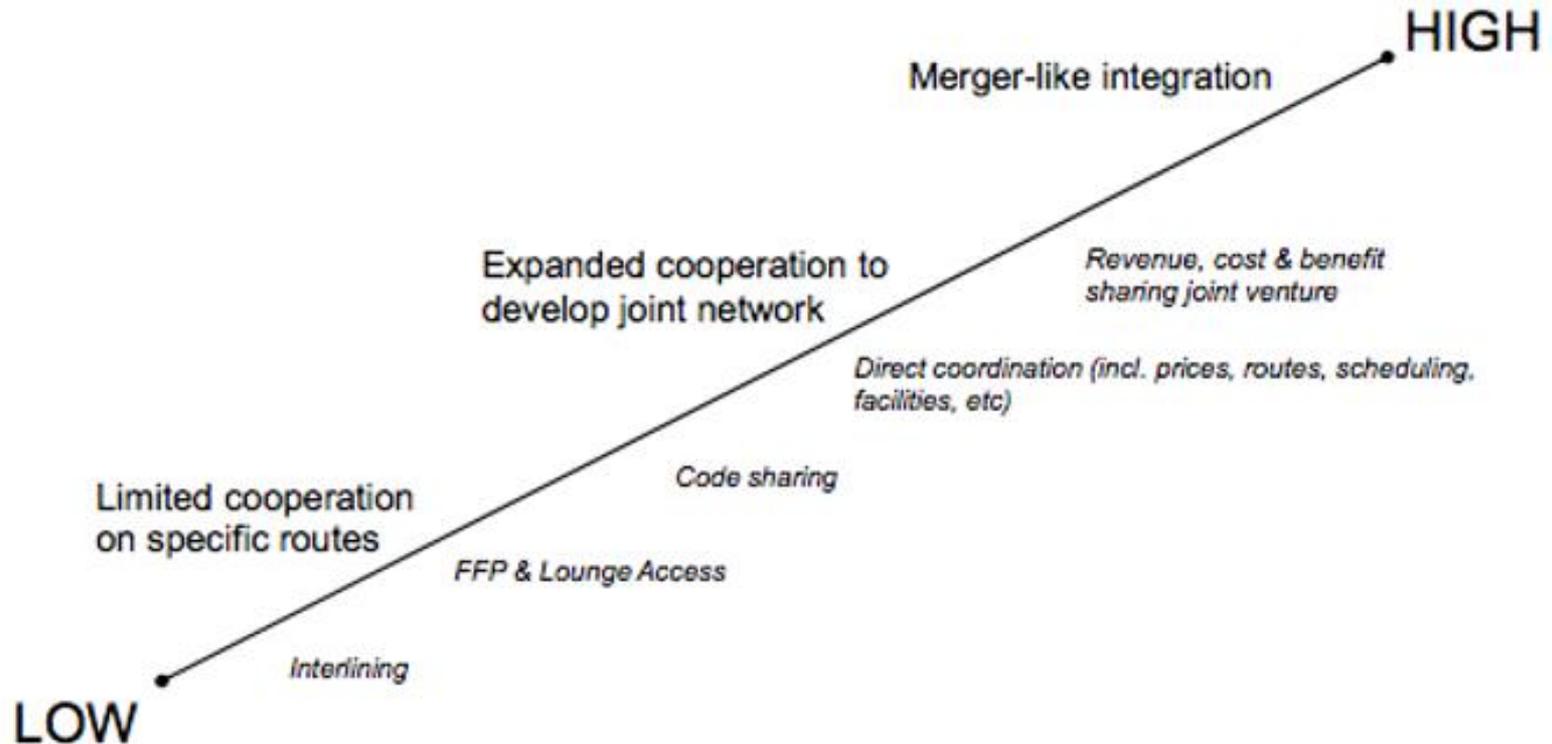
- Competition law violations carry heavy civil and criminal penalties. Eg. US:
  - treble (triple) monetary damages (ie: fines)
  - In some cases, imprisonment

### III. Implications on Airlines



- Airline cooperation, particularly cooperation within alliances, involves profit sharing, price fixing and other practices
  - Prima facie violations of antitrust and/or competition laws
  - Air carriers avoid civil and criminal penalties by seeking Antitrust Immunity (ATI) from prosecution
  - Antitrust regulators often agree to such grant of immunity because many of these activities are necessary to maintain a healthy air transport industry

## Degrees of Airline Cooperation



SOURCE: Figure 1, Report, "Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches" European Commission and US Department of Transportation (16 November 2010).

## Antitrust Immunity (ATI)

- Low levels of airline cooperation less risky for competition law violations
  - E.g.: Interline agreements, FFPs & reciprocal lounge access
- High levels of airline cooperation are very risky for competition law violations
  - Metal neutral JVs – highest level of cooperation → greater scrutiny by competition regulators & special ATI considerations
  - E.g.: Direct coordination of prices, routes, scheduling, ect.
  - E.g.: Revenue, cost and benefit sharing in joint ventures
- With merger-like integration, airlines require ATI (US) or regulatory approval by the EU Commission.

## IV. Implications on Contracts



- **Puts focus on**
  - Intention
  - Drafting
  - Negotiations
  
- **Identify when Articles 101 or 102 TFEU (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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